



THE  
**JERE BEASLEY REPORT**

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**A NATIONAL LAW FIRM LOCATED IN MONTGOMERY, ALABAMA**

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# I. CAPITOL OBSERVATIONS

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## **CASE SETTLED AGAINST FORD MOTOR COMPANY AND FIRESTONE**

Our firm just settled a lawsuit that had been filed against Ford Motor Company and Firestone Tire Company. One of our clients, John Means, was driving his 1997 Ford Explorer on I-65 going north from Greenville to Montgomery. The Explorer suffered a tread separation on the driver's side rear tire. When the Firestone tire detreaded, Mr. Means lost control of the Explorer and it rolled over five times. Mr. Means, April Powell, the front seat passenger, and Natasha Womack, one of the rear seat passengers, were severely injured and incurred substantial medical costs. Antoine Thagard, another rear seat passenger, was injured and eventually died from her injuries about one month after the accident. Mr. Means was airlifted to University Hospital, where he remained in intensive care for about a month with a traumatic brain injury. Ms. Womack suffered permanent memory loss and had to undergo extensive plastic surgery, including skin grafts, to repair the compound fractures she suffered to both legs. Ms. Powell underwent reconstructive surgery on her arm. All the plaintiffs are extremely grateful for the excellent medical care they received at Baptist Medical Center South in Montgomery and at University Hospital in Birmingham. Ms. Thagard's injuries were irreversible and her death couldn't have been prevented.

The evidence was clear that Mr. Means was traveling well within the posted speed limit and was operating the vehicle properly in every respect. Through discovery we learned that the 1997 Ford Explorer (UPN 105 code name) is susceptible to oversteer when there is a rear tire detread situation. The Explorer is basically uncontrollable when there is a detread for two reasons:

- \* First, when the tire detreads it has a tendency to pull the vehicle in the direction of the detread. The driver has to counter-steer, and when the tread comes off, the Explorer will suddenly go into an oversteer situation.
- \* The rear of the vehicle has a tendency to skate when a tire is detreading. Actually, Ford's own testing displayed the skate phenomena. Skate occurs when the rear end bounces up and down at a certain frequency. Ford internal testing found that when the skate phenomena appears, the vehicle will slide in one direction or the other without the necessity of moving the steering wheel.

Firestone commissioned its own study of the Explorer which confirmed the oversteer problem before the U.S. recall campaign. John Lampe, the CEO of Firestone, ordered that Firestone employees park their company-owned Explorers, which was most significant. The Firestone FR 480 tire, although not one of the tires recalled by Firestone, was the same size, had many of the same design features, and was manufactured in the same plant where the recalled tires were manufactured. In addition, the tire had undergone an extensive cost reduction program that resulted in design changes that made it much more susceptible to detread events. From its outward appearance, the tire looked to be in good shape at the time of the detread. The tire had plenty of tread, was properly inflated and was being properly used at the time.

This case points out graphically how defective products can cause serious injury or death to people without any warning. Defects such as the tire detread and the Explorer's handling capability defect are not discoverable or observable by the average person. The tragedy is that an accident like this can happen to anybody because of the defects. That's the reason the public has to rely on the manufacturers to design and test their products to provide safety

when the product is being used reasonably by folks like our clients in this case.

Greg Allen, Graham Esdale, and Ben Baker from our firm handled this most important case. Ted Bozeman, Russ Bozeman, John Gibbs, and Stuart Vance assisted with trial preparation, and Richard Hartley would have been active at trial had the case not settled. We were glad that we could work out a satisfactory settlement with both defendants. At the defendants' request the amount of the settlement is confidential.

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## **POLITICAL CLOUT WON'T HELP NOW**

We recently filed a lawsuit in George County, Mississippi, involving the tragic death of a 19-year old girl who was killed when a dump truck ran a stop sign and struck her vehicle. The suit is against AshBritt, Inc., and its driver. AshBritt is an environmental services firm out of Florida that is responsible for Hurricane Katrina cleanup along the Mississippi Gulf Coast. In our investigation of this case, we learned that AshBritt's political connections have prompted congressional investigators to look into the manner in which the clean-up contracts were awarded. AshBritt's contract was worth an initial \$500,000,000 and another \$500,000,000 if the Army Corp of Engineers triggers an option in the contract. The congressional investigation was brought about after it was discovered that AshBritt had a \$40,000 contract with a politically-connected lobbying firm. In addition to its previous political connections, AshBritt hired the former head of the Corp of Engineers as its lobbyist shortly before it was awarded the contract.

All of the above is said to point out how AshBritt came into this lucrative contract. You would expect a company operating under such a financially rewarding deal to at least have good equipment. But, that was not the case. The truck that ran the stop sign and killed our client's daughter, was a 25-year old truck, in terrible shape and riddled with numerous mechanical problems. Our investigation has revealed that the driver had made complaints about the brakes on the truck for several days before the accident. While AshBritt's website touts the "safety inspection" it performs on all deployed equipment, it is clear that the truck involved in our case couldn't pass an inspection. It will be interesting to see how AshBritt justifies allowing this hazardous piece of equipment to be on the highway after having accepted \$500,000,000 from the federal government. The family we represent lost their

daughter in a motor vehicle accident resulting from the wanton conduct of AshBritt in putting a vehicle on the road in poor condition and with faulty brakes. We believe that a jury will be incensed when they hear the evidence in this case. I don't believe AshBritt's political connection will be able to help the company in this case. The family we represent has suffered a terrible loss, and we will do our very best to see that justice is done in their case.

## **PHARMACEUTICAL COMPANIES FACE CLASS ACTION SUIT**

Johnson & Johnson, Bristol-Myers Squibb Co., AstraZeneca Plc, and Glaxo-SmithKline Plc are defendants in a class action lawsuit brought by consumers who say they were harmed by the way the companies charged for their drugs. A federal judge in Boston has certified a nationwide class action for people who paid even a small portion of the cost of the companies' medicines. The prices for the drugs were set using the Average Wholesale Price formula. The judge rejected a motion to include drugs made by Schering-Plough Corp. As we have previously reported, the government used average wholesale prices as reported by drug companies to set reimbursements from federal health programs. The drug makers artificially inflated the figures to consumers and third-party payers. As a result, the drug companies will have to repay hundreds of millions of dollars if they are found to have over-charged, which we believe will be the case. When announcing the class certification, the judge stated:

*I find there is fair and adequate representation for a class action suit for the four companies. In the case of (Schering-Plough), the representation is not adequate.*

Previously, the court denied class action status in August to a broader suit covering prescription drugs. But, the court is still considering other suits against dozens of drug makers, includ-

ing Pfizer Inc. and Abbott Laboratories, over the Average Wholesale Price formula. It should be noted that this recent decision only affects companies that make drugs that must be administered by physicians. The drug companies took advantage of the AWP pricing formula to inflate reimbursements from Medicare for administered drugs and procedures that physicians perform personally, such as chemotherapy. The drug manufacturers argued that groups representing patients, including the Congress of California Seniors and the states of Illinois, Kentucky, New Jersey, Wisconsin, Minnesota, Nevada and Montana, don't share enough characteristics to merit class action status. Obviously, the court disagreed and ruled to certify class status.

Last year, Medicare, the federal health plan for the elderly and disabled, started paying 106% of the average actual sales price of a drug, as reported by the drug companies. Audits conducted by the U.S. Department of Health and Human Services show that the new pricing formula is allowing Medicare to pay prices more in line with markets than AWP. Interestingly, Medicaid paid about \$31 billion for drugs in 2003, the most recent year for which data is available, four times more than in 1994.

Source: *Associated Press*

## **ALABAMA HASN'T DONE ITS JOB IN MINE INSPECTIONS**

It is quite evident that state government in Alabama has failed to make coal mine safety a top priority. No knowledgeable person can dispute that assessment. The real tragedy is that it doesn't appear that anybody in state government is overly concerned. Clearly, the coal mine tragedy in 2001 in Brookwood, Alabama, didn't get the attention of state officials because the changes needed to increase safety in the mines didn't take place. While West Virginia legislators were passing measures recently aimed at saving underground miners after 14 men died in two acci-

dents last month, Alabama officials were in court acknowledging they weren't doing an adequate job of policing the state's coal industry. They also admitted that oversight problems have only gotten worse since the 2001 disaster. The officials confirm that Alabama's underground mines - among the deepest and most dangerous in North America - aren't inspected enough by the state. That is difficult to understand, considering the explosions that killed the 13 miners at the Brookwood mine in 2001. The state officials who appeared in court in Bessemer blamed their failures on a lack of funding.

After the court hearing, Circuit Judge Dan King ordered the state to step up mine inspections. Judge King correctly found that Alabama regulators aren't properly inspecting coal mines, including the underground operations. Ruling in a lawsuit filed by the United Mine Workers of America against the State of Alabama, the Bessemer judge gave state mining officials 10 days from January 25<sup>th</sup> to conduct the inspections. As you may know, state law requires that each of the approximately 50 coal mines in Alabama be inspected once every 45 days. But the officials from the state agency responsible for the inspections said it has only three inspectors to check those mines in addition to about 500 more mineral mines and quarries statewide. Actually, there are currently only two inspectors and one inspector in training. The court order - which applies only in a region west of Birmingham - affects two large underground coal mines and about 12 surface mines.

Back in 2001, when the Brookwood tragedy occurred at the Jim Walter mine, Alabama had six mine inspectors. Funding cuts have since reduced that number to the three described above. There is no way that this understaffed effort can come anywhere close to overseeing 55 coal mines, much less the other pits, quarries and strip mines that are the state's responsibility. The Mining and Reclamation Division of the Alabama Department of Industrial Relations, which has the responsibility to

protect coal miners in our state, is not getting the job done. That can't be allowed to continue. It is significant that the drop in state inspectors corresponded with a cut in the annual budget for the state agency from \$691,000 in 2001 to \$499,000 for the current year. Alabama politicians have let mine safety lag despite having the 2001 disaster as a painful reminder of what can happen when things go wrong underground. Compare Alabama's inspecting capacity to Pennsylvania, which has 33 inspectors to inspect 75 underground mines. The U.S. Mine Safety and Health Administration is responsible for enforcing federal regulations. Alabama has a shared responsibility. Two layers of protection should be better than one from a safety perspective, but when neither is doing its job, the results will eventually be disastrous.

Methane buildup is a problem in many Alabama mines, some of which are more than 2,000 feet deep. Officials say the vast depth makes ventilation, transportation, and rescue operations more difficult than in shallower mines. In his order, Judge King asked Governor Riley and the Alabama Legislature "to ensure our workers a place to work that is as safe as we can make it." Interestingly, the Alabama Senate recently passed a resolution urging mining inspectors to conduct required reviews and enforce state laws, but lawmakers didn't approve the money needed to do the job. Following the judge's ruling, the governor's office announced that it recently provided an emergency appropriation of \$175,000 to hire two more inspectors. Judge King also ordered the State to provide him with copies of mine inspection reports and to give mining companies a timetable for fixing any problems that are found. He also ordered the State to study the use of communication devices, tracking devices, and additional emergency oxygen units for all underground coal miners. On February 4<sup>th</sup> state officials said they had complied with Judge King's order. But, recent developments

indicate that may not be quite accurate. In any event, their actions are not nearly enough. Our state officials must get the job done so that miners can be as safe as possible in Alabama mines. That is a responsibility all levels of government must take much more seriously. It's one that can no longer be ignored.

*Source: Associated Press*

### ***GAS RATES SHOULD BE RETURNED TO LAST YEAR'S LEVEL***

I was real glad to see Public Service Commissioner George Wallace Jr. stand up for Alabama consumers recently. He wants Alabama Gas Corp. and other regulated natural gas companies to reduce rates to the levels that were in place before Hurricane Katrina. As has been reported, gas prices for many Alabama residents have doubled or tripled since last year. Rates have been raised as much as 37% this winter and, in my opinion, that can't be justified. I totally agree with George and hope that he will be successful in this effort. Gas company officials have tried to defend the excessive prices they are charging customers, but most folks have difficulty accepting their story. In fact, Alabama Gas Corporation even made a small reduction in its rates.

The two other commissioners, Jim Sullivan and Jan Cook, should join in the request for a roll-back in rates. At least the Commission has asked its staff to study natural gas bills of Alabama residents. I am not sure why a study is required, however, because it is very clear that the gas companies are charging more than they should be allowed to charge. In any event, the commissioners said a hearing may be scheduled later depending on the results of the investigation. I firmly believe that the Public Service Commission (PSC) should order a return in gas rates to last year's levels. If you agree, let the commissioners know how you feel. It's most unfortunate that most Alabama citizens don't have any concept of how the internal operations of the PSC work.

Few people ever attend a Commission meeting, which isn't surprising. That means the PSC pretty much operates in the dark. In my opinion, contacting the elected commissioners is the only way to get any relief on utility rates. I encourage you to contact each of the commissioners and express your feelings on this important issue.

### **EXXONMOBIL SETS RECORD**

As has been widely reported by the media, ExxonMobil set a record for quarterly profits by any U.S. company with \$10.7 billion in profits during the fourth quarter of last year. The giant oil company benefited from extremely high oil prices, and easily beat Wall Street's liberal forecast for the company. While American citizens and businesses are paying excessively high prices for gasoline at the pump and with the overall economy in the U.S. not doing very well, it is shocking to see the oil companies raking in record profits and not being willing to share their good fortune. I believe that all of these companies - including ExxonMobil - should be willing to share their good times with consumers and the owners of small businesses. Instead, the companies continue to take advantage of a situation that allows them to prosper while their customers are really hurting.

We are still waiting for oral arguments to be set before the Alabama Supreme Court in the State's case against ExxonMobil. Hopefully, we will get a date for argument in the next few days given that the case has been fully briefed by both sides. As previously reported, we believe that the case is very strong and should be affirmed. The judgment, which was reduced at the trial court level to \$3.5 billion, is currently drawing interest at over \$1 million per day. You will recall that court-ordered mediation in the case failed and as a result a satisfactory settlement couldn't be reached. So now the case is in the hands of the Supreme Court. We understand that other states as well as individuals who

have dealt with the giant oil company on leases are watching this case very closely. As previously reported, a tremendous number of state Attorneys General have filed briefs supporting the State of Alabama's position in this most important case.

### **COMMISSIONER SPARKS STANDS UP FOR FARMERS**

Agriculture Commissioner Ron Sparks appeared before the Congressional Agriculture Committee at the farm bill hearing held at Auburn University last month. Ron discussed many of the issues concerning farmers in Alabama, such as the alarming decline in family farms in Alabama. Since the 1950s, the number of Alabama farms has dwindled from over 200,000 to about 45,000. Commissioner Sparks told the committee:

*I believe that the decrease in farms is due to a lack of profitability experienced by many farmers. We have to find ways to help them not only to stay in business, but also improve their business.*

Commissioner Sparks believes that creating a better environment for farmers to do business will entice younger generations to get involved in agriculture. Some of the suggestions made by the Commissioner were to create a safety net for farmers through subsidies, disaster relief programs, and low interest loans. I believe that subsidies are good and can be justified when they help keep farmers in business. Actually, subsidies that go to family farms are a good investment because they help keep the prices of our food and fiber low for Alabama consumers. In my opinion, government at both the federal and state levels should do everything possible to help farmers and especially those family farms that are still around. It is good to know that Ron Sparks is fighting for Alabama farmers.

### **THE MESS IN WASHINGTON MUST BE CLEANED UP**

We badly need to clean up Washington, D.C. and put an end to the scandals and influence-peddling that have become a way of life in our nation's capitol. In fact, it must be done. Obviously, it will take a bipartisan effort in the White House and in Congress to get the job done. For this effort to be successful, ordinary citizens in every state must get actively involved. To really clean things up there are some basic things that must be done. The following are just a few:

- Politicians must be made to be accountable to citizens and not to the powerful special interests.
- Special-interest money must be taken out of elections.
- Reasonable limits must be placed on spending by candidates in elections - which means imposing both giving and spending limitations.
- Lobbyists must be prohibited from fundraising for politicians.
- The influence of lobbyists in between elections must be controlled.
- Privately-funded travel by public officials should be prohibited. All gifts to office holders should be banned. The practice of special interests and lobbyists paying for lawmakers and their staff members to take lavish trips and giving them gifts must be stopped.
- There must be a halt to the revolving door that now exists between government and the private sector. Former government officials must be prohibited from becoming lobbyists for two years. Public officials must disclose negotiations for future employment while in office.
- An independent ethics watchdog must be created. The current system is clearly broken. An independent, non-partisan authority is needed to monitor compliance with the law and investigate allegations of wrongdoing.

All of us need to get involved with groups that are working to clean up the horrendous mess that exists in Washington. Government must be returned to the people, and you can be an important part of this process. Public Citizen, one of the groups that have taken action, has organized the Clean Up Washington Campaign. I encourage you to join with them. Their campaign, which is in the very early stages, is already under way. Based on its track record, I believe Public Citizen is a good group to join up with. Their interest is strictly the public's interest and that's a very rare commodity today in our nation's capitol. There are numerous reform proposals under consideration in Congress. In my opinion, only a strong grassroots lobbying effort can have any real effect. Members of Congress need to hear from folks back home and on a regular basis. The strong connection between lobbyists' money and our political leaders must be broken. Political influence can be restored, but only if enough folks get involved. Your participation can be an historic legacy. Support Public Citizen and help Clean Up Washington! You can contact Public Citizen by going to their website, [www.citizen.org](http://www.citizen.org).

## II. LEGISLATIVE HAPPENINGS

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### ***THE REGULAR SESSION HAS BEEN A DULL ONE – SO FAR***

Thus far there have been very few real battles during the current regular session. While that could be considered good news for all Alabama citizens, I would like to see the members of the House and Senate get down to business and tackle some of the real problems that have been hanging around the legislative chambers for a long time. Being in an election year, however, doesn't give Alabama citizens much hope of that

happening. The biggest news thus far is the fight over the education budget, and even that has been pretty low key. Perhaps by the time this issue is received, things will have picked up and there will be more to report in April. I hope it will be good news.

### ***NEW RULES ON LOBBYING IN TENNESSEE***

While Alabama legislators have pretty well ignored reform, the Tennessee Legislature has passed new ethics and lobbying rules. In response to an undercover FBI bribery investigation that caught four lawmakers red-handed, the legislation was passed in Tennessee last month. Governor Phil Bredesen, who had twice delayed his State of the State speech while lawmakers worked on the legislation, has now signed the bill into law. After the Legislature completed its task, the Tennessee Governor observed: "This is a big stone in the foundation of restoring the public's confidence." The new law creates an independent ethics commission, limits most wining and dining of lawmakers, forbids lobbyists from giving directly to candidates' campaigns, limits cash contributions to \$50, and requires more detailed and more frequent financial disclosures from candidates and elected officials. Some say the bill was too weak, but at least a bill was passed. That, in my opinion, is progress even though more could have been done.

Actually, Tennessee is only one of many states tightening regulations on the relationship between lawmakers, lobbyists, and special interests. An overhaul is also expected in Congress in response to the massive Jack Abramoff lobbying scandal. The investigation that led to the Tennessee Legislature taking action, called the Tennessee Waltz, also led to the indictment of two men whom the authorities said arranged the payments and two county officials. I am told that the investigation stunned the state's political establishment. It clearly was the reason that state ethics laws were made tougher. Previously, Ten-

nessee law allowed unlimited cash contributions from lobbyists, lavish gift giving, and spotty reporting from lawmakers and lobbyists. Does that sound like Alabama? After the arrests last May, two lawmakers resigned, and two sitting lawmakers are now awaiting trial. In the fall, Governor Bredesen called for a special legislative session devoted only to ethics. Under special session rules, the Legislature couldn't take up other issues until the ethics law was passed. While it took longer than expected, fortunately a bill was finally passed.

*Sources: New York Times and Associated Press*

### ***THE ALABAMA LEGISLATURE SHOULD ACT***

The Alabama Legislature should not let the regular session end without passing laws that would completely reform Alabama's election laws and regulate the activities of all lobbyists. A bill by Representative Jeff McLaughlin, which would prevent PAC-to-PAC transfers, passed the House and is now in the Senate. While that is a step in the right direction, it doesn't do enough. In any event, the Senate should pass the bill. The bill could be made much stronger in the Senate but that's not likely to happen. A reasonable limit on all political contributions - including those by PACs - should be the subject of legislation. Lobbyists should also have to report all spending on public officials. The Governor, Lt. Governor and Speaker of the House should put their power and influence behind reform in each of these areas and make sure something is done in this session. Without the support of the occupants of those offices, and especially that of the Governor, it is doubtful that reform will ever occur.

### ***NON-PARTISAN ELECTION OF ALL JUDGES IS NEEDED***

No judicial candidate should have to run for office as a Democrat or a Republican. It shouldn't matter what political party a judge belongs to because that has nothing to do with qualifications.

The job of a judge is to follow the law and rule fairly on matters that come before the court. In my opinion, all judicial elections should be non-partisan. Making that a reality would be a major step in the right direction and would help to let the public know that judges in Alabama are fair and impartial. The Democratic and Republican Parties in Alabama should join together on this issue and encourage the Legislature to pass a bill making non-partisan judicial elections a reality. If you agree with this concept, let your House members and Senators know how you feel. It's not too late for a bill to pass in this session. I am realistic enough to know, however, that success in an election year will be hard to achieve. At the same time, I also know that when the public demands something strong enough and long enough, it generally will eventually happen. If we leave decisions like this to the politicians - without public input - it will never happen. So, it really is up to the people of Alabama, on this issue. Let the politicians know how you feel.

### III. COURT WATCH

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#### **JUDICIAL CAMPAIGN CONDUCT OVERSIGHT COMMITTEE**

There will be a number of judicial races this year involving lots of very good candidates and some not-so-good. These races will be all the way from electing district court judges to electing the Chief Justice of the Alabama Supreme Court. Most Alabama citizens believe that judicial races should be run on a very high level. I certainly believe in that concept very strongly. The Alabama State Bar Task Force on Judicial Campaign Oversight has correctly determined the need for an oversight committee for the 2006 judicial elections. As a result, the Task Force created the 2006 Alabama Judicial Campaign Conduct Committee. This Committee is independent of both the Alabama State Bar and the Alabama court system, as it

should be. The Committee is a non-partisan group of concerned citizens formed to encourage all candidates for judicial office to conduct their campaigns in a manner consistent with the dignity and integrity of the judicial system and to maintain the highest personal and professional ethical standards during the campaigns. Candidate conduct that does not meet the highest ethical standards works to undermine public trust and confidence in the judiciary. We can't let that happen. The Committee intends to achieve its stated purpose by:

- asking candidates to pledge to conduct their campaigns in a manner consistent with a campaign agreement to be supplied to all candidates;
- serving as a non-partisan information resource to candidates and inviting dialogue with candidates and all interested groups regarding ethical standards that govern campaign conduct;
- encouraging aspirational standards for campaign activity;
- providing a non-partisan and confidential forum for the resolution of disputes between opposing candidates and by addressing issues raised by candidates regarding fundraising, campaign conduct, campaign advertising and literature;
- offering voter information on the core responsibilities of the judiciary and the nature of the judge's function; and
- offering information and comment to the press and the public about campaign conduct by candidates and advocacy groups.

The Committee, which does not endorse candidates, is composed of retired judges, lawyers and non-lawyers. Retired Circuit Judge William R. Gordon, who served for years in Montgomery County with distinction, is chairman of the Committee. I believe that, under Judge Gordon's leadership, this Committee can help to keep the campaigns on a high ethical level. It can help us take

some of the questionable campaign tactics out of judicial races that we have witnessed in past elections. Candidates for judicial office should conduct their campaigns on the highest levels possible, and the standards set for them must be very high. I sincerely hope that all candidates running for judicial office will voluntarily abide by the standards required of them. The oversight committee can help greatly to see that these standards are met. It is also my hope that the oversight committee will receive full support from people all over the state. If that happens, the concept of oversight will work. It is critically important that the concept works for the good of all Alabama citizens.

#### ***THE FRIVOLOUS LAWSUIT MYTH***

According to survey of federal judges the "frivolous lawsuit" myth is just that - a myth. About 85% of federal judges think "frivolous lawsuits" are, at best, a minor problem in the U.S. court system and are being adequately dealt with by existing rules. This comes from the results of a Federal Judicial Center study. The survey found that only 7% of the judges surveyed indicated that the problem of frivolous lawsuits is now larger than when they were first appointed to the bench. The results of the study were made public in Washington, D.C. John Rabiej, chief of the Rules-Committee Support Office of the Administrative Office of the U.S. Court System, said that the findings indicated such lawsuits were not perceived as a problem by federal judges. In a significant statement, Rabiej said:

*We have received no request to amend the rules for any perceived problem in Rule 11 the federal-court rule that deals with unnecessary lawsuits from the bench since 1993.*

The Federal Judicial Center was created in 1967 by Congress and is the education and research agency for the federal court system. The Center conducts training and education for judges

and other federal court employees and makes recommendations for federal court procedures, among other duties. The study, conducted in December, involved 400 randomly selected federal judges who were sent a questionnaire that asked for comments on the effect of Rule 11. Under the provisions of Rule 11, which was adopted in 1983, judges can sanction lawyers who file frivolous lawsuits or for that matter file any type pleadings that are considered frivolous in federal court. The severity of those sanctions is properly left to the discretion of judges. It has been recognized for years that the primary purpose of Rule 11 is to deter frivolous filings by lawyers for both plaintiffs and defendants. In my opinion, it has worked very well and has served its intended purpose.

Proponents of changing civil suit procedures - including President George Bush - have said "frivolous lawsuits" in state and federal courts are driving up the costs of insurance. That is simply not true, and the recent study certainly confirms it in the federal system. The judges, most of whom are Bush appointees, are in a very good position to know whether frivolous lawsuits are a problem. By statute, the Federal Judicial Center's board is chaired by the U.S. Supreme Court Chief Justice. Other board members include federal district and appellate court judges and the Administrative Director of the U.S. court system. The study was prompted by a bill in the U.S. House last year that sought to increase the punishment for filing lawsuits deemed to be frivolous. That bill, which was pushed by lobbyists, did not become law. Approximately 85% of the judges surveyed thought frivolous lawsuits in the federal court system were either:

- no problem (15%),
- a very small problem (38%)
- or a small problem (32%).

Only one percent of all federal judges surveyed thought frivolous lawsuits were a problem. In contrast, the survey

found 87% of the judges thought Rule 11 adequately dealt with lawyers who file frivolous lawsuits. For some reason, this information hasn't received a great deal of attention by the media. I believe that the public deserves to know about this study and its results. President Bush claimed in his State of the Union address that lawsuits are clogging the court system. This was simply not a truthful statement, and I am sure that somebody gave the President some bad information. According to the U.S. Justice Department, personal injury lawsuits have decreased by 79% since 1985. That certainly doesn't sound like a system that is clogged up with lawsuits.

#### ***EXXONMOBIL STILL HASN'T PAID ONE CENT ON THE VALDEZ JUDGMENT***

Some companies believe they are above the law, and I am convinced that ExxonMobil is near the top of that list. It's been nearly 17 years since the Exxon Valdez spilled 11 million gallons of crude oil along the Alaska coast in one of the country's worst environmental disasters. Most observers are shocked that a jury's \$5 billion judgment against the company - after 17 years - could still be tied up in the courts. ExxonMobil Corp.'s appeal of that judgment was heard for the third time recently in a San Francisco federal appeals court. As previously reported, the case stems from a 1994 decision by an Anchorage jury to award punitive damages to 34,000 fishermen and other Alaskans. The residents were harmed when the Valdez struck a charted reef and spilled crude oil along about 1,500 miles of coastline. The captain of the Valdez was drunk, and it was alleged and proven at trial that Exxon knew the man had a serious drinking problem. The jury found Exxon and the captain guilty of reckless conduct in the accident.

Exxon argues it should have to pay no more than \$25 million in punitive damages. The giant corporation, which reported record third-quarter earnings for any corporation of over \$10 billion,

claims it has spent more than \$3 billion to settle federal and state lawsuits and to clean up the Prince William Sound area. In two previous appeals, the U.S. Court of Appeals for the Ninth Circuit ordered the trial judge, U.S. District Judge H. Russel Holland of Anchorage, to reduce the judgment against Exxon, saying it was unconstitutionally excessive. Judge Holland begrudgingly complied in 2002, reducing the amount to \$4 billion. Exxon appealed, and Judge Holland was ordered to take another look at the decision. You will recall that Judge Holland called Exxon's actions "reprehensible," and set the figure at \$4.5 billion plus interest. Based on our experience with ExxonMobil, the company really believes it owns the U.S. court system and, as a result, is totally above the law. I hope things are being changed to where justice can prevail in litigation involving this giant oil company. Perhaps the result mentioned below should give us all some degree of hope.

Source: *Forbes News*

#### ***STATION OWNERS' SETTLEMENT WITH EXXON MOBIL IS APPROVED***

The ending of the long-running litigation involving ExxonMobil and thousands of station owners gives us some hope that there are still judges around who will buck the trends and require companies like ExxonMobil to follow the law. A federal judge has granted preliminary approval to a \$1.1 billion settlement between the company and station owners. The class action suit, filed in 1991, arises out of a dispute over Exxon's discount-for-cash program. Station owners said that under the program, which has since been discontinued, Exxon overcharged them between 1983 and 1994 an average 1.3 cents a gallon on 40 billion gallons of gasoline sold. Station owners were supposed to get a discount on wholesale gasoline prices to help offset a 3% service fee for credit card transactions, but they say Exxon stopped offering the

discount after six months.

The case was first tried in 1999, and that trial resulted in a hung jury and a mistrial. At the second trial in 2001, the jury found Exxon had breached a contractual obligation to offset credit fees with wholesale price reductions. Exxon appealed to the U.S. Court of Appeals for the Eleventh Circuit, which upheld the verdict. Exxon then sought review by the U.S. Supreme Court, which rejected the company's bid for a new trial. This was a complete victory for the station owners.

The class members will be mailed a notice scheduling a hearing date on April 5<sup>th</sup> for the court's final approval of the settlement. ExxonMobil will make the required payment of the money due to a court-appointed financial institution that will hold the funds as each claim is evaluated. If ExxonMobil will cheat the station owners, just think how it would treat a stranger. It's really good to see this company finally get what it deserves - even though it took several years for justice to finally be done - and the company's victims will get paid.

Source: *Houston Chronicle*

### **ANOTHER ATTACK ON THE COURT SYSTEM**

The Bush Administration is using federal rulemaking to limit the rights of consumers to seek damages under state laws governing faulty products. In that regard the Consumer Product Safety Commission (CPSC) is following in the footsteps of the Food and Drug Administration (FDA) and the National Highway Traffic Safety Administration (NHTSA). Last month, the FDA attempted to limit consumers' ability to recover damages for injuries from agency-approved drugs. Meanwhile, the NHTSA is seeking to give automakers similar legal immunity from lawsuits over defective roofs if their vehicles meet new roof-crush standards proposed by the agency. NHTSA is also proposing to limit consumer lawsuits in a rule that would address seat-belt requirements.

When the CPSC came out with the

final language on their mattress flammability rule last month, preemption of state common law claims was added to the preamble. This came after the notice-and-comment period had expired. The Consumer Federation of America, The Consumers Union, and other consumer groups are leading the fight against this latest move. The CPSC was scheduled to meet and vote on this rule on February 16<sup>th</sup>. The Commission is composed of three Commissioners - two Republicans and one Democrat. Unless this movement is checked, I expect that we will continue to see more preemption language coming from the federal regulatory agencies. The CPSC rule is just another attempt to shut the courthouse door to victims of corporate wrongdoing. Something that can't be achieved in Congress is being sought through regulatory agencies, which are created by law and don't have the statutory authority to do this sort of thing without the approval of Congress. Most people don't ever know about such things until after they happen - then it is sometimes too late to do anything about it.

### **JURY RETURNS VERDICT AGAINST LEAD PAINT MAKERS**

A Rhode Island jury returned a verdict in that state's landmark lawsuit against Sherwin-Williams Co., NL Industries, and Millennium Holdings, three former makers of lead paint. The jury found these defendants created a public nuisance that continues to poison children. The verdict means the companies that once made lead paint and pigment will be held responsible for cleanup and mitigation costs. Superior Court Judge Michael Silverstein will determine how much the companies will have to pay. The state argued that lead paint created a sweeping public nuisance that has poisoned tens of thousands of children since the early 1990s and contaminated hundreds of thousands of homes.

The sale of lead paint was banned in the United States in 1978 after studies

showed it can cause serious health problems in children. But in Rhode Island, which has an old housing stock, lead paint still exists in many homes. In 1999, Rhode Island became the first state to sue the lead paint industry. The first trial ended in 2002 with a hung jury. The jury in the latest trial began deliberating on February 13<sup>th</sup>, following more than three months of trial. The jurors found that one of the defendants, Atlantic Richfield Co., was not responsible. Medical doctors testified for the state and described how low levels of lead can be dangerous to a child and how lead-poisoned children can suffer behavioral disorders, gastrointestinal pain, brain damage, and even death. It was argued that the companies or their corporate predecessors continued to manufacture lead pigment for use in paint after they were aware of its potential dangers.

The state wants the companies to pay for a program that would include home inspections, lead paint removal or abatement, and public education. Last June, the state agreed to drop DuPont Co. from the lawsuit after that company agreed to pay several million dollars to the nonprofit group Children's Health Forum for lead paint remediation, public education, and compliance programs in Rhode Island. This was a very good result for a state that puts the welfare of children high on its list of priorities.

Source: *Associated Press*

### **HEALTHSOUTH SETTLES CLASS ACTION SUITS**

HealthSouth Corp. has agreed to a \$445 million settlement of the federal lawsuits resulting from the massive financial fraud that nearly put the rehabilitation chain out of business. The Birmingham-based company will pay \$215 million in common stock and warrants, and insurance companies will pay another \$230 million in cash under the global settlement. Investors involved in class action suits filed in federal court also will receive 25% of any funds the company eventually recovers in its

lawsuit against Richard Scrushy, Ernst & Young (the former audit firm) and UBS, (HealthSouth's former investment bank). At press time, a final version of the settlement agreement was being worked out. Some of the plaintiffs in the cases included the Illinois-based Central States Southeast, Southwest Area Pension Funds (which benefit Teamsters members), the Retirement Systems of Alabama, the New Mexico State Investment Council, and the Educational Retirement Board of New Mexico.

In 2004, HealthSouth agreed to pay the U.S. government \$325 million to settle numerous allegations that it defrauded Medicare and other government health programs. The company agreed last year to pay \$100 million over five years to settle a lawsuit filed by the Securities and Exchange Commission. That suit alleged an accounting fraud that eventually rose to about \$2.7 billion. HealthSouth also reached a \$25 million settlement in a class-action lawsuit over losses in its employee retirement fund, with insurers paying \$18 million and the company covering the rest.

## IV. THE NATIONAL SCENE

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### ***CORETTA SCOTT KING PRAISED FOR HELPING TO CHANGE THE COUNTRY***

The nation lost a great lady when Mrs. Coretta Scott King died last month. President Bush, leading the nation in celebrating the life of Mrs. King, praised the civil rights leader for enduring extraordinary pain and loss to give generations of people "a better, more welcoming country." President Bush, at the services held at the New Birth Missionary Baptist Church, said:

*We knew Mrs. King in all the seasons, and there was grace and beauty in every season. As a great movement of history took shape, her dignity was a daily rebuke to the pettiness and cruelty of segregation.*

The President noted that Mrs. King and the Rev. Martin Luther King Jr., her husband who was assassinated nearly 40 years ago, confronted vicious taunts, threatening phone calls, and even the bombing of their home because of their early work for equal rights for blacks. He noted that even after her husband's slaying and in the years since, Mrs. King and her family never gave up. The President acknowledged that the King children needed more than a safe home - they needed an America that upheld their equality and wrote their rights into law.

Few Americans would question that the effort led by Dr. King, and carried on by his widow, resulted in rights and privileges of citizenship being made available to all Americans. But, there is much yet to be done because far too much racism exists in this country.

The funeral was attended by four former presidents and a crowd estimated at more than ten thousand. Many distinguished speakers from around the world gave remarks in official tribute to Mrs. King. President Bush was received with warm applause by the persons in attendance. Former President Bill Clinton and his wife, Senator Hillary Rodham Clinton, accompanied President Bush on Air Force One to Georgia. Based on what I saw, it was quite evident that President Clinton was the man the crowd really wanted to hear. President Clinton was greeted with wild applause when he entered the church sanctuary and he received tremendous applause as he rose to speak. The former President recalled his vivid memories of how, less than a week after her husband was shot, Mrs. King and her children led the march that Dr. King was in Memphis to lead. "It was her cause, too, and she continued it and broadened it," President Clinton told the crowd.

It would be great if the praise and kind words poured out by all of the political figures at Mrs. King's funeral were sincere and would actually carry over into the actions of government at every level and especially in Washington. Our country has allowed the "racial

problem" to linger for all too long. It's time to put this problem to rest for the good of all Americans. I hope and pray that will happen and soon. We will all be better for it when that day finally comes.

### ***PORT SECURITY AT U.S. PORTS SHOULD BE UNDER U.S. CONTROL***

I never thought that the U.S. government would allow a foreign country - even one believed to be an ally - to control security at a U.S. seaport. President Bush now says he was unaware of the pending sale of shipping operations at six major U.S. seaports to a state-owned business in the United Arab Emirates until the deal already had been approved by his administration. This whole episode has triggered a major political backlash among both Republicans and Democrats. The President first said - when asked by leaders in the Senate and House whether the \$6.8 billion sale could raise risks of terrorism at American ports - that it was fine with him. In a forceful defense of his administration's earlier approval of the deal, he pledged to veto any bill Congress might approve to block the agreement involving the sale of a British company to the Arab firm. When faced by a rebellion from leaders of his own party, as well as from Democrats, about the deal that would put Dubai Ports in charge of major shipping operations in New York, New Jersey, Baltimore, New Orleans, Miami and Philadelphia, the White House shifted gears.

I am shocked over this entire matter. First, it is just plain stupid to allow any foreign country to have any control over port security and especially any part of security. If this is typical of how we are providing security in this country, we are in deep trouble. This sounds almost like something that FEMA would do. Finally, how in the world could this have happened without the President knowing about it? That may be the scariest part of the whole affair. Surely, the President of the United States is being briefed on national defense issues.

## **U.S. ROYALTY PLAN TO GIVE WINDFALL TO GIANT OIL COMPANIES**

When President Bush told the nation that Americans were “addicted” to oil, I had to agree. But then I started to think about what I had just heard and asked myself, what has this Administration done to “cure” the addiction? I have learned subsequently that the federal government is on the verge of one of the biggest giveaways of oil and gas in American history, worth an estimated \$7 billion over five years. New projections, buried in the Interior Department’s budget plan, anticipate that the government will let the oil companies pump about \$65 billion worth of oil and natural gas from federal territory over the next five years without paying any royalties to the government.

Based on the Administration’s own numbers, the government will give up more than \$7 billion in payments between now and 2011. The companies are expected to get the largesse, known as royalty relief, even though the Administration assumes that oil prices will remain above \$50 a barrel throughout that period. Thanks to the Bush Administration, oil companies will be able to take this windfall profit and not even have to lower gas prices. While the oil companies are getting billions in relief, American consumers and small business owners are paying exorbitant prices for oil and gas and literally are paying through the nose!

## **BUSH PR COSTS TAXPAYERS \$1.6 BILLION**

The Bush Administration spent at least \$1.6 billion on public relations and advertising campaigns over 30 months, according to a report released last month by the Government Accountability Office, the investigative arm of Congress. The report shows that government agencies are relying on outside consultants to help pitch their messages to the public, whether it’s to bolster public support for the war in Iraq, deter buying prescription drugs from Canada, or to push some other

federal program. It might be interesting to see who is getting these public relations contracts! The next question is why are they needed in the first place?

## **ELECTION OF THE NEW HOUSE MAJORITY LEADER IS AN AFFRONT TO THE AMERICAN PEOPLE**

The election of U.S. Rep. John Boehner (R-Ohio) to be the next House majority leader over Majority Whip Roy Blunt (R-Mo.), a Tom DeLay protégé, appears to be nothing more than business as usual in Congress. Public Citizen aptly calls it the selection of Tweedle Dum over Tweedle Dee. But, at least the rejection of Rep. Blunt shows that rank-and-file Republicans grudgingly recognize the corruption scandal that has shaken Washington to the core. They are also aware that this scandal could put their majority status at risk in this year’s elections. On the other hand, the elevation of Representative Boehner, himself a product and proponent of the systemic problem of cronyism and influence-peddling that afflicts our nation’s capitol, is not a sign that business as usual will end. Representative Boehner’s record for consideration doesn’t give the cause of reform much hope. He recently characterized House Speaker Dennis Hastert’s plan to ban privately funded travel as “childish” and dismissed the need for a ban on gifts from lobbyists to members of Congress. Boehner made this statement: “If some members’ vote can be bought for a \$20 lunch, they don’t need to be here.” Later, Rep. Boehner tried to back away from his characterization of the travel ban as “childish,” but not the sentiment underlying his remark. My mother told me years ago that you don’t solve a problem by bringing in a problem to do the solving. I believe that applies to the selection of Boehner.

During 2003 and 2004, Rep. Boehner’s political action committee collected nearly \$300,000 from private student lending companies and for-profit academic institutions. He has used his chairmanship of the Education

and the Workforce Committee to promote their pet causes - legislation that would make it more difficult to cut the fees on government student loans, which would cut into the private lenders’ market share, and legislation that would provide millions in subsidies to for-profit colleges and trade schools. (*Washington Post*, January 28, 2006) The Ohio Congressman has taken more than \$157,000 in free trips, placing him seventh among 638 current and former members of Congress, including senators, in the value of privately funded travel accepted between 2000 and 2005, according to American Radioworks. These included a \$4,869 trip to Scotland in 2000 and a \$9,050 trip to Rome in 2001, both of which were sponsored by the Ripon Educational Fund, a nonprofit group largely run by business lobbyists. Family members of the congressman traveled with him for free on both trips. An exceptional number - at least 24 - of former Boehner staff members have passed through the revolving door from government service to find work in the private sector as lobbyists or corporate public affairs specialists. (*The Hill*, February 1, 2006)

Interestingly, Rep. Boehner preceded the deposed Tom DeLay, who is still under indictment, as head of the “K Street Operation.” As you know, that was the Republicans’ efforts to coordinate policy and fundraising with well-heeled lobbyists. This effort has since been dubbed the “K Street Project.” Boehner lost the job to DeLay in 1998 after he was voted out as head of the Republican Conference. (*Baltimore Sun*, Dec. 21, 1998) You may recall that Rep. Boehner caught lots of flack for handing out checks to his colleagues from tobacco company PACs on the floor of Congress in 1995. Although not illegal, which probably would surprise most taxpayers, it certainly showed poor judgment and total arrogance on his part. Nevertheless, this action was consistent with Boehner’s role at the time as the party’s chief liaison with the K Street lobbying branch. (*New York*

*Times*, May 10, 1996) Elevating a leader of the current broken system to be majority leader is an affront to voters and a reflection of the mindset of the Republican Party. If the man's past is any guide, Rep. Boehner will now use this key position to undercut ethics and lobbying reforms in the House of Representatives. I watched the new majority leader on Meet the Press shortly after his election. He came across as a man who would carry on the DeLay policies without hesitation and with no remorse. I don't believe the voters will stand for this sort of thing.

Source: *Public Citizen*

### ***USG REACHES SETTLEMENT ON ASBESTOS CLAIMS***

The battle over how to fund asbestos liability continues to be fought in Congress. Over the past few weeks tons of millions of dollars have been spent on television advertising trying to sell the passage of legislation being pushed by the companies involved and the insurance industry. When building products company USG Corp. reached a \$4 billion settlement to resolve all current and future claims for asbestos-related injuries against the company, it seemed that the company was doing the right thing. The agreement paves the way for USG to come out of bankruptcy in the third quarter. As we know now, fibers from asbestos have been linked to cancer and other lung-scarring diseases. Companies knew this long before the information made its way to the public but continued to use asbestos. As a result, innocent workers were placed in jeopardy with no knowledge of the hazard. Tremendous numbers of workers became victims. There has been an ongoing debate over how to handle compensation for these workers who were victims. The claims trust for USG will be funded with \$900 million cash and a contingent note for \$3.05 billion. It is significant that the contingent note will be canceled if Congress passes the bill to create a national fund

for asbestos claims. The \$140 billion national fund would be funded by companies and insurers.

Public Citizen believes that the USG settlement, which will resolve all asbestos-related personal injury claims against the company, is not all good news. In vivid terms, the settlement agreement shows how the creation of a federal asbestos compensation fund is really a backdoor attempt to erase billions of dollars in corporate liability for asbestos exposure. Under terms of the plan, USG, the Chicago-based building materials company, has a vested interest in the compensation fund being created. The company will only have to pay the contingent portion of the settlement if a federal fund is not approved. If Congress is pressured into passing the legislation (S.852), USG's liability would be limited to the initial \$900 million. That's about 23 cents on the dollar compared to full liability under its own fund. Public Citizen President Joan Claybrook made this observation concerning this settlement:

*The USG plan makes plain that the federal trust fund is a corporate bailout in sheep's clothing. Under the guise of compensating victims for terrible diseases, like asbestosis and mesothelioma, Corporate America's real aim is to run away from billions in liability for knowingly exposing workers to a lethal toxin.*

USG is the second large company in recent weeks to unveil a bankruptcy plan that underscores how companies hit by asbestos claims will actually benefit greatly under the federal fund. On January 17<sup>th</sup>, McDermott International Inc. announced approval of a reorganization plan for its Babcock & Wilcox unit, which filed for bankruptcy in February 2000. Terms of that plan call for McDermott, a Louisiana energy services company, to pay \$350 million to a trust fund. Then, if the federal plan does not win approval by November 30<sup>th</sup>, the company will fund an additional \$600 million. But if the federal plan passes,

McDermott would pay only an additional \$25 million.

Supporters of the federal trust fund cite bankruptcies like those of USG and Babcock & Wilcox as an urgent demonstration of why the fund is so badly needed. The bankruptcies, they claim, are robbing the economy of billions of dollars and causing tens of thousands of job losses. But the USG situation spotlights the flaws in that alarmist rhetoric. Operating under bankruptcy court protection, USG has done extremely well financially. The company has produced results that would be the envy of most any business. In fact, business for USG is so strong that the company recently announced plans for a new factory in Pennsylvania. In USG's case, a Public Citizen examination reveals the following:

- Sales have hit record levels, growing 56% since 2001 when the company filed for bankruptcy, to reach \$5.14 billion in 2005.
  - Profits have soared by nearly 3,100%, from \$16 million in 2001 to \$510 million last year (excluding asbestos charges). That's a growth rate 45 times higher than overall U.S. corporate profits during the same period, according to federal data.
  - The company's stock price has risen more than 2,400%, from \$3.88 before the filing to \$97.82 after announcement of the plan. In the past three days alone, the value of the company in the stock market has grown by \$800 million.
  - While bankruptcy definitely helped USG and the other companies that used the bankruptcy courts, their workers whose lives were ruined by asbestos exposure were victimized for a second time.
- Frank Clemente, director of Public Citizen's Congress Watch division, who believes that the bankruptcy laws are being used to hurt victims, stated:

*Trust fund supporters have tried to exploit the stigma of 'bankruptcy' to muster support for the*

*flawed federal plan. But 'bankruptcy' typically doesn't mean 'out of business.' USG and other firms show that, far from being a disaster, bankruptcy can be a pretty savvy business move.*

While in bankruptcy, companies are shielded from creditors and normal obligations. For asbestos claims in particular, USG's filing halted all asbestos lawsuits against it, and the company ceased making payments and setting aside reserves for the compensation of victims. While in bankruptcy, USG has accumulated \$1.6 billion in cash and marketable securities. The company also expects that the announced agreement could generate another \$1.1 billion in tax refunds.

In McDermott's case, bankruptcy has likewise proven healthy - large annual losses have turned into significant yearly profits, and the company's stock price is up about 285% since its filing. Last year, subsidiaries of Halliburton Co. came out of bankruptcy protection, spurred in large part by asbestos cases, in great financial shape. That company has pronounced 2005 as the best year in the company's 86-year history. Early last year, Halliburton won approval of a trust fund for victims of asbestos and silica exposure, with most all of it for asbestos claims worth approximately \$4.75 billion. The company's stock has been on a steady climb ever since. Similarly, a 2003 study by Emory University professor George J. Benston found that seven major firms that filed for bankruptcy in the face of asbestos claims have done extremely well financially after their filings. The study looked at USG, Babcock & Wilcox, Owens Corning, Armstrong World Industries, Building Materials Corp. of America, W.R. Grace & Co., and Federal-Mogul Corp. The Benston study found that:

- Each of the companies remained viable and profitable.
- Total employment increased or did not significantly decline.

- All met their obligations to fund employee pensions.
- Based on capital expenditures made, all had bright prospects for the future.

The bankruptcy laws were never intended to be used in such a manner in my opinion. Dr. Benston, whose findings have since been confirmed by the recent results at USG and McDermott, wrote at the time:

*They are viable and likely to be increasingly successful companies that should generate funds to exit bankruptcy significantly stronger than when they went in.*

It appears that Dr. Benston was right on target. The companies did very well, asbestos victims' claims were put on hold, and millions were spent trying to convince Congress to set up a national asbestos trust fund.

Source: *Public Citizen*

### **GLOBAL WARMING IS A SERIOUS THREAT**

Senator John McCain (R-AZ) has co-sponsored bipartisan legislation in the U.S. Senate that will engage America in helping to solve the global warming problem. The bill, called the McCain-Lieberman Climate Stewardship Act, will reduce pollution. Clearly, that is the first step toward attacking a most serious problem. Senators McCain and Joseph Lieberman (D-CT) first introduced the legislation in 2003. I hope all members of the U.S. Senate will join with the sponsors of this bill and get it passed into law. In my opinion, the legislation is badly needed.

Global warming is a large and complex problem and one that has been minimized and ignored virtually by the Bush Administration. Instead of gearing up and helping to solve the problem, the Bush White House has allowed the giant oil companies to dictate its policy on global warming. A national cap on global warming pollution is badly needed in the opinion of

the overwhelming majority of scientific experts in the field. In my opinion, there is no more pressing environmental issue facing humanity today than global warming. Instead of working to solve the problem, we continue to pump increasing amounts of carbon dioxide and other heat-trapping global warming pollution into our atmosphere. This results in the warming of our planet at an accelerating rate. A growing library of scientific evidence indicates that a warmer world spells trouble for its people. Many respectable scientists believe that the tremendous increase in major storms and significant weather changes is related to global warming.

For example, we should pay attention to what is happening to the polar ice cap. According to NASA's latest calculations, the polar ice cap has shrunk by 250 million acres and is retreating at a rate of 9% per decade. Common sense should tell us that if we don't do something to slow that pace, the entire polar ice cap could well disappear altogether by the end of this century. It is unbelievable that any group of politicians could ignore this most serious problem. But, that is exactly what most of them have done. In a recent report by the Arctic Counsel, 300 scientists from eight countries - including the United States - all agreed that mankind-caused global warming is already having a disastrous impact on wildlife in the Arctic. What's happening there should be a warning to the rest of the world. If you want to learn more about global warming, you can go to the website of the Environmental Defense Network, a leading national non-profit group, [www.undoit.org](http://www.undoit.org).

### **SENATOR BLANCHE LINCOLN SPEAKS OUT AGAINST INTERNET PORNOGRAPHY**

Senator Blanche Lincoln (D-AR), a member of the Parents Television Council's advisory board, testified before the Senate Commerce Committee recently regarding the need to protect children from Internet pornog-

raphy. As you may recall, Senator Lincoln introduced S. 1507, The Internet Safety and Child Protection Trust Fund last year. The Senator's bill is intended to provide the necessary resources to help law enforcement and others combat sexual predators and criminal activity online. Because the subject is critically important in my opinion and the testimony so compelling, I encourage you to obtain a copy of Senator Lincoln's remarks made to the Committee. I hope Senator Lincoln can generate the bipartisan support needed in the Senate to get her bill passed. In any event, she should be commended for her strong stand for children. If you agree with her stand, contact your U.S. senators and ask them to support S.1507.

#### **FAMILY GUY – A TOP-RATED SHOW FOR TEENS – IS VERY BAD**

The Parents Television Council (PTC) has taken out after the Fox network for deliberately targeting impressionable teen viewers with its raunchy cartoon, *Family Guy*. In a recent web advertisement, Fox boasted that *Family Guy* is "Number One with teens." According to PTC, the content on this show is not appropriate for teens. Episodes this season have included scenes in which a teacher tries to show his high school class a homemade sex video showing him in women's lingerie, references to oral sex, scenes in which children discuss threesomes and prostitution, and other sexually graphic and indecent content. This sort of filth should not be allowed on any television program. What will it take to get the full attention of the public and prompt folks to get involved in an effort to clean up the television industry?

If you doubt that young children know about *Family Guy*, consider how it is advertised. Advertisements for the show have appeared on *The Simpsons*, which is the Number One show with children from ages two to eleven and Number Two with twelve to seventeen

year old children, according to Nielsen ratings in September 2005. The program is also advertised during afternoon football games and on a number of PG-rated shows, including the show *Bernie Mac*. L. Brent Bozell, president of the PTC, says:

*It is the height of irresponsibility for Fox to deliberately target this sleaze at young viewers. It's clear that Fox puts making a dollar from young viewers above any sense of responsibility or social conscience. This type of content is in questionable taste even for adults, but when Fox boasts about its success at marketing it to teens, they've clearly crossed the line. Before Fox brought it back, Family Guy was placed on the Cartoon Network's 'Adult Swim' for good reason - it's strictly adult content. Fox may claim that Family Guy is targeted to adults, but that's clearly not the case. We hope parents are aware that not every cartoon is safe for their teens. We will make sure the advertisers of the program are aware of the inflammatory content that's shown on Family Guy.*

Parents must get involved in this fight to protect our children. People who are concerned can't afford to sit on the sidelines and wait for somebody else to fight the battle. If you want to get more information, you can speak with a representative from the Parents Television Council. Please contact Kelly Oliver at (703) 683-5004, ext. 140.

#### **VIOLENT VIDEO GAMES MUST BE KEPT OUT OF THE HANDS OF CHILDREN**

In addition to the filth children are exposed to on television and in the movies, there is another most serious problem that affects children, and that involves video games. Three states, Illinois, Michigan, and California, in 2005 signed into law bills that would prohibit the sale of violent video games to children. Similar bills were recently intro-

duced in the Maryland and Indiana state legislatures. I am told that Florida and Missouri are also currently considering similar bans. I am hopeful that Alabama will soon join the ranks. Over the past year, the Parents Television Council (PTC) has intensified its efforts to increase public awareness of the impact violent video games have on children. Working with their 35 grassroots chapters across the country, the PTC has called on local city, county, and state lawmakers to make restricting the sale of violent video games to children a high priority. Violent video game legislation has been passed by some states. As noted above Michigan, Illinois, and California have passed new laws. Also federal legislation is being considered in Congress.

The industry's so-called self-solution is an abysmal failure, as studies repeatedly prove that small children can easily purchase adult-oriented games. In addition, medical research at Indiana University and Michigan State University shows that exposure to violent video games causes changes in a child's brain that are consistent with aggressive thoughts and actions. Millions of Americans recognize that this type of legislation would protect children from gaining access to violent video games. It's a measure that parents can wholeheartedly approve. The billion-dollar video game industry will oppose this type legislation for selfish financially-motivated reasons, but they are certainly not looking out for our children. The time has come to take a stand on this issue. Contact your local political leaders and also your members of Congress and ask them to get behind this effort to protect our children.

#### **MAKERS OF GRAND THEFT AUTO FACING LAWSUIT FOR HIDDEN PORNOGRAPHIC CONTENT**

A lawsuit has been filed against Rockstar Games and its parent company, Take-Two Interactive Software, Inc. for allegedly hiding pornographic content

in their popular video game *Grand Theft Auto: San Andreas*. The city attorney's office for Los Angeles filed suit against the company for "making misleading statements in marketing the game and engaging in unfair competition." *GTA: San Andreas* was the center of controversy last fall when it was discovered that a simple computer download allowed players to unlock the hidden pornographic content. Once the discovery was made, the Entertainment Software Ratings Board (ESRB) raised the rating from M - for mature audiences to AO - adults only. The ratings change and controversy caused several major retailers to pull the games from their shelves and prompted several states to introduce legislation that would prohibit the sale of mature-rated games to children. I hope this lawsuit will be successful.

## V. THE CORPORATE WORLD

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### ***CORPORATE FRAUD AND PUBLIC SCANDALS SHOULD BE DISCUSSED IN POLITICAL CAMPAIGNS***

I was totally shocked that corporate fraud and criminal activity by corporate bosses didn't become a hot political issue in the 2004 Presidential campaign. The issue was certainly available for the candidates well before the campaign heated up. Clearly, the issue never surfaced from either the Democratic candidate for president or the incumbent. John Kerry may have mentioned Enron and corporate crime, but if he did, I never heard about it. I am reasonably sure that President Bush never mentioned the issue at all. If you go back to the spring of 2002 - a few months after the Enron bankruptcy hit - a good number of corporate scandals were beginning to break. The names of the companies involved at that time were

Adelphia, Worldcom, Tyco, and Global Crossing. Several others joined this group, and corporate fraud and corruption started to make the nightly news. Nevertheless, the political campaigns ignored the issue.

The public perception was that the Republican Party is tied so closely to Corporate America - especially to the giant corporations - that it dodged this issue. On the contrary, the Democratic Party has always been seen as the party of the people, but that didn't seem to matter in this instance. In any event, corporate fraud and criminal activity was a total non-issue in the 2004 campaign. Many observers believe that the Bush Administration had been co-opted by Corporate America and by executives like Ken Lay. Others believe that the public had concluded that the government was already cracking down hard on corporate crime. As you know, in July 2002, Congress enacted the Sarbanes-Oxley Law, and the President issued an executive order creating the Corporate Fraud Task Force. That may have been seen by the political consultants as being enough, and as a result, corporate fraud and criminal activity never made the political parties' radar screens.

I am firmly convinced that the Democratic Party missed the boat in 2004. I suspect the real reason for the Party's inaction was that too many of the Democratic candidates had taken campaign donations from the very same folks who were financing the Republican campaigns. While the bulk of this money went to Republican candidates, apparently enough went to Democrats to keep a volatile issue totally out of the race. It will be interesting to see whether the current Washington scandals will make their way into this year's elections. If the Democrats don't seize this opportunity, it will be 2004 all over again. I - like most Americans - believe that the current scandals should be publicly debated, and what better place for that to occur than during the 2006 political campaigns.

### ***A MONUMENTAL CORPORATE FRAUD SCANDAL***

As we all know, the criminal trial of two former top executives of Enron is taking place in Houston, Texas. The trial appears, based on media accounts, to be progressing at a fairly rapid pace. The company is the symbol of corporate greed and wrongdoing and triggered one of the costliest U.S. bankruptcy reorganizations ever. The legacy of Enron is one that Corporate America will have to live with for years to come. The two men most responsible for this very sad and tragic episode are Ken Lay and Jeff Skilling. If anybody believes they didn't know what was going on at Enron, that person needs to be bored for the "hollow-horn," and most Texans won't need an explanation for that term. No corporation could be as corrupt as was Enron and the big bosses not know all about it.

In my opinion, the unprecedented crackdown on corporate crime by federal prosecutors and regulators would never have occurred had it not been for the Enron scandal and all of its repercussions. The scandals brought about the congressional passage in 2002 of the Sarbanes-Oxley Act, which as you know is the most sweeping anti-fraud legislation to ever come through Congress, and that was a good start. But, I must admit that the criminal trial of Lay and Skilling is something that I never thought would come to pass because of their political connections. I am glad I was wrong. This brings to a climax much of the very sad Enron saga. The roles of these two men in the massive fraud that became public in 2001 and that will go down in history as one of the worst corporate scandals ever was quite apparent. The hurt done by Enron's bosses will never be fully repaid to their victims. Enron's impact will be felt for years in a number of ways. Some of those are:

- **Lawsuits.** Investors suffered \$50 billion in total losses. There have

been some settlements, such as the \$7.1 billion settlement with Citigroup, JPMorgan Chase, and CIBC by investors headed up by The University of California, the lead plaintiff. Some 20,000 former employees and retirees in Enron's pension and 401K retirement plans that held Enron's stocks suffered over \$1 billion in losses. There was a settlement totaling \$482 million with Arthur Anderson and Enron on behalf of former employees.

- **The regulatory and corporate-governance arena.** Congress took action that was long overdue as a result of the scandal by passing Sarbanes-Oxley. I hope federal regulation will be much better in the years to come.
- **The corporate world.** Corporate America is now fussing about having to do what it should have done voluntarily. That is, it should have been truthful in its financial statements and in its dealing with shareholders and investors. The America people are entitled to trust and have faith in our economic system. When you cannot trust Corporate America, there can be no such trust or faith.
- **The energy-trading business.** Since Enron, dozens of industry traders have been charged with fraud, and many firms have done away with their trading units. The industry saw \$90 billion in debt reduced to "junk" status. The Federal Energy Regulatory Commission (FERC) has issued rules that I hope will make sure the Enron type scandal never occurs again. But, some believe that FERC rules and state laws must be made even stronger to stamp out fraudulent energy trading in the future.

I believe that if justice is done, Lay and Skilling will be convicted in their trial. To allow these men to escape criminal punishment is unthinkable. They deserve a fair trial, and based on what I have seen thus far, I am con-

vinced these former high-rollers are getting just that. I hope, the jury will do their job – and if the law and evidence supports it, find these two guilty as charged.

Source: *USA Today* and *Associated Press*

### ***AIG To Pay \$1.6 Billion In Settlement***

American International Group (AIG), the insurance giant, has reached a settlement with federal and state regulators that will require the company to pay \$1.6 billion to settle charges covering a wide range of regulatory issues. The New York Attorney General's office and the Securities and Exchange Commission (SEC) have been looking into violations at AIG that they say included improper accounting, bid-rigging, and skipped payments to state workers' compensation funds. The settlement, which has been widely anticipated, will close a chapter in the recent troubled history of AIG, which has been under scrutiny by the SEC for more than four years and by the New York Attorney General since early 2004. The settlement covers a range of issues that arose in the federal and state inquiries, from bid-rigging to finite insurance, a way of smoothing corporate earnings that the SEC began studying in 2001. The company still faces shareholder lawsuits which haven't been resolved.

The settlement involved the civil suit filed by the New York Attorney General and also settled a separate suit filed by the SEC alleging accounting fraud. This is a prime example of a corporation starting to cheat, continuing the fraud, and then finding it hard to stop its wrongdoing. Fortunately, the court system was available to regulators who acted aggressively to make AIG put a stop to its wrongdoing. This was a good result. I hope it will help send a clear message to those in Corporate America who might be tempted to commit fraud in the future.

### ***ONE ATTORNEY GENERAL FILES A SEPARATE SUIT***

Minnesota sued American International Group Inc. rather than accept a settlement that could have been worth \$1.2 million to that state. Attorney General Mike Hatch estimates Minnesota could be owed as much as \$10 million, so he elected to file a lawsuit rather than accept the settlement. The AIG settlement referred to in a previous section included \$344 million for states harmed by AIG's practices from 1986 to 1995 involving state workers' compensation funds. Apparently, General Hatch believes his state will come out much better in its own lawsuit. Insurers are supposed to pay a 2% state tax in Minnesota on the worker's compensation premiums they collect there. The lawsuit alleges that AIG underreported its Minnesota premiums. Apparently, even by opting out of the settlement, Minnesota will still get \$600,000 from the global settlement.

### ***McWANE FOUNDRY PLEADS GUILTY TO RIGGING POLLUTION TEST***

McWane Inc. will pay \$3 million to settle charges of falsifying air emissions reports at a cast-iron pipe foundry in Provo, Utah. This is the largest criminal fine levied in Utah for an environmental violation. The plea announcement involved a 2000 furnace emissions test used for two annual emissions reports filed by Pacific States Cast Iron Pipe Co., a subsidiary of McWane Inc., which is based in Birmingham, Alabama. An indictment accused the company of feeding pig iron instead of its usual supply of contaminated automobile scrap into the foundry to cover up pollution violations. The foundry casts water and sewer pipes, fire hydrants, and fittings. The company will remain under the scrutiny of probation for three years. The guilty plea was for submitting a false emissions test to Utah regulators. Charles Matlock, a former vice-president and general manager at

the foundry, also pleaded guilty in a federal court in Washington, D.C., to violating the Clean Air Act by manipulating an emission test. He will be sentenced on May 2<sup>nd</sup>.

This conviction was the fourth prosecutors have obtained against McWane in the last 12 months for environmental violations. In December, McWane was ordered to pay a \$5 million fine for discharging industrial waste. In the Provo case, McWane engaged in a concerted effort to rig state-required compliance tests. It then misrepresented repeatedly the level of pollution. EPA enforcement administrator Granta Y. Nakayama says the conviction sends a message that companies that “put public health and the environment at risk will be vigorously prosecuted.” That is certainly good news!

Source: *Associated Press*

#### **FOUR INDICTMENTS HANDED DOWN IN SHAM GENERAL RE AND AIG DEAL**

Our firm has handled a number of civil actions against Berkshire Hathaway's General Re insurance unit and American International Group (AIG). As a result, we have had access to a great deal of information relating to fraudulent activities by these companies. Recently, three former executives at General Re insurance unit and a former American International Group executive were indicted by a federal grand jury on fraud charges. The Indictments were returned by a grand jury in Alexandria, Virginia, charging the former executives with being part of a conspiracy to make AIG's finances appear better than they were. Those charged are: Ronald Ferguson, who was General Re's chief executive; Elizabeth Monrad, the former chief financial officer; Robert Graham, the company's former assistant general counsel; and Christian Milton, who ran AIG's reinsurance division. The indictments were first reported in the *Wall Street Journal* and were picked up by the *Associated Press*.

The indictments stem from Justice

Department and Securities and Exchange Commission investigations of a 5-year-old deal between the two companies, major players in the reinsurance industry, which provides insurance to insurers. Prosecutors have said that AIG had been concerned about insufficient reserves to cover potential losses and approached Gen Re to facilitate a deal that would increase its loss reserves on paper. Based on what we have learned in one of our civil cases, the deal had no substantive value and was designed strictly to cosmetically alter AIG's books. Gen Re received a \$5.2 million fee to arrange the sham transactions. You will recall that two former Gen Re executives, Richard Napier and John Houldsworth, pleaded guilty last year to their roles in the sham transaction. As part of a plea bargain, Houldsworth is now aiding the investigation.

Source: *Wall Street Journal* and *Associated Press*

#### **ENFORCEMENT ACTION FILED AGAINST FORMER SENIOR EXECUTIVES**

In a related matter, the Securities and Exchange Commission (SEC) has filed an enforcement action against five former senior executives of General Re Corporation and American International Group Inc. (AIG) for helping AIG mislead investors through the use of the fraudulent reinsurance transactions. Four of the former executives, Ronald Ferguson, Elizabeth Monrad, Robert Graham, and Christopher Garand, were with Gen Re, while the fifth, Christian Milton, was with AIG. The complaint, filed in federal court in Manhattan, alleges that the defendants and others aided and abetted AIG's violations of the antifraud and other provisions of the federal securities laws by helping AIG structure two sham reinsurance transactions that falsely increased AIG's loss reserves in the fourth quarter of 2000 and first quarter of 2001 by a total of \$500 million. The transactions were initiated by AIG to quell criticism by analysts concerning a reduction in the company's loss reserves in the third

quarter of 2000.

As we have said repeatedly, the fraudulent abuse of insurance and reinsurance to manipulate a public company's financial results is just plain wrong. The defendants in this instance knowingly helped AIG “achieve a specific, and false, accounting effect.” In its complaint the SEC alleges that Ferguson, Monrad, Graham, Garand, and others at Gen Re worked with Milton and others at AIG to fashion two sham reinsurance contracts between Cologne Re Dublin, a Gen Re subsidiary in Dublin, Ireland, and an AIG subsidiary.

The complaint charges that the defendants understood from the outset that they were structuring a sham transaction involving the creation of phony documents for the purpose of providing apparent support for false accounting entries AIG made on its books. AIG accounted for the sham transactions as if they were real reinsurance contracts that transferred risk from Gen Re to AIG, when all parties involved knew that was not true. Certainly, the key players at Gen Re and AIG knew exactly what was going on and intentionally committed a massive fraud. As a result of AIG's accounting treatment for these transactions, the company's financial results showed false increases in reserves that AIG touted in the company's quarterly earnings releases for the fourth quarter of 2000 and the first quarter of 2001. Without the phony loss reserves, AIG's financial results in both quarters would have shown further declines in its loss reserves. The key players at both General Re and AIG acted as if they could continue the fraud and never get caught. Fortunately, that didn't pan out as planned.

Source: *Associated Press*

#### **COMPANIES CONTINUE TO CHEAT THE FEDERAL GOVERNMENT**

I am shocked that corporations in this country continue to believe that cheating the federal government is fine and dandy. Their mindset appears to be

cheat, and if we get caught, pay a fine and we can still continue to do business. The following cases are just two examples:

- **Intrepid USA**

Intrepid U.S.A. has paid the United States \$8 million to resolve allegations that the company fraudulently over-billed three government health care programs — Medicare, Medicaid, and the military health care programs, TRICARE/CHAMPUS. The Justice Department and the United States Attorney's Office for the District of Minnesota were involved in bringing this about. The settlement resolves allegations that the Edina, Minnesota-based company's more than 150 home health agencies violated the False Claims Act between 1997 and 2004 by billing Medicare and TRICARE where services had not been provided by a qualified person, where Intrepid had failed to complete and maintain the necessary documentation to support its claims, or where the company had otherwise violated Medicare's regulations. Federal officials alleged Intrepid violated the False Claims Act in 2002 and 2003 by billing the Medicaid program in Minnesota for services that were never provided because the beneficiary was in fact hospitalized at the time he or she was supposedly receiving services in the home.

- **McKesson To Pay \$3 Million To Settle Fraud Charges**

McKesson Corp., a wholesale pharmaceutical distributor, has agreed to pay the United States \$3 million to settle claims that it defrauded the Department of Defense from October 1997 to December 2001. Federal officials alleged that the San Francisco-based corporation defrauded the United States by knowingly charging the Defense Department's medical treatment facilities more for pharmaceutical products than was allowable under its prime vendor contracts with the government.

These are just two examples – and each is relatively small in comparison to others that are much larger in the amounts that the government was cheated out of. This sort of thing must stop. If a good number of companies dealing with the government and government programs are committing outright fraud, the government is losing billions of dollars to the cheaters and taxpayers are the real losers. I hope cleaning up Washington will have the effect of also clamping down hard on the cheaters and their powerful lobbyists and friends in government. In any event, cheating the government at the expense of taxpayers must stop.

*Source: Corporate Crime Reporter*

## VI. CAMPAIGN FINANCE REFORM

### ***THE PRESIDENT'S SILENCE SPOKE VOLUMES***

I listened intently to President Bush's State of the Union address, waiting to hear him come out strongly for a complete reform of the federal election laws and especially the financing of campaigns. I even thought he would have to discuss the Abramoff scandal for obvious reasons. I felt that it would be impossible for the President to ignore the massive scandals that currently are the talk of the town in our nation's capitol. Unfortunately for the American people, the President virtually ignored both of these issues. If I remember correctly, I believe he said a commission would be appointed to study something. President Bush had a golden opportunity to put the vast power of his presidency behind a complete reform both of our election laws and the laws governing lobbyists in Washington. His silence was deafening!

### ***CONGRESS SHOULD TAKE APPROPRIATE ACTION ON ITS OWN***

In my opinion, the American people are fed up and are finally demanding

that Congress get down to it and clean up its act. Nothing less than a complete reform of the election laws and the laws controlling lobbyists will be accepted by the public in my opinion. A halt to the "revolving door" into the lobbying world used by members of the House and Senate and congressional staff should also be put in place. I hope there will be enough members of the House and Senate who will join together in a bipartisan effort to get the baldy-needed job done. If they fail to do so, I am convinced that incumbents who refuse to act will have difficulty explaining their refusal to the voters in November.

### ***THE LAST STRAW IN THE DELAY DEBACLE***

When Tom DeLay was appointed to the powerful House Appropriations Committee recently, it became apparent that the GOP leadership hadn't gotten the message that folks are sick and tired of the way things have been run in Congress. To pour more salt in the wounds, DeLay also was put on a subcommittee that actually oversees the Justice Department. To say that all of this – in view of DeLay's indictment and the growing Abramoff scandal – is shocking news is a gross understatement. This may well be the straw that breaks the back of the GOP stranglehold on Congress. They just don't get it – people don't want folks like DeLay in Congress and certainly don't want them running the show. Tom DeLay may ultimately be acquitted in his criminal trial, but that would not clear up all of the ethical problems that currently affect the politician, who likes to be referred to as the Hammer, in Congress. How he could be given these two choice appointments is beyond comprehension!

## VII. CONGRESSIONAL UPDATE

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### ***THE FEDERAL ASBESTOS LEGISLATION***

Do you wonder who is paying for the television advertising campaign - estimated to be costing millions - pushing S.852? This bill, being considered in the U.S. Senate, was supposed to help victims of asbestos exposure. But if passed, it will end up being more of just another special interest bailout. The legislation, S. 852, would bar victims from suing in court. Instead, victims would have to seek payments from a national trust funded by asbestos makers and companies that used asbestos. Under the plan, victims would see their damages capped - some would not even qualify for payments - while companies, including Fortune 500 firms, would see their asbestos liabilities cut by tens of billions of dollars. Many fiscal experts believe that the fund, as proposed, will itself be bankrupt before all of the claims are paid. If all of this doesn't appear to be fair, it's because it isn't!

The special interest groups, who are spending tens of millions of dollars in an effort to pass S.852, claim the courts are bogged down with asbestos injury lawsuits. To the contrary, state and federal courts are handling these cases adequately and are not buckling under any crushing caseload, a new report from Public Citizen shows. This finding undercuts one of the key arguments advanced by the supporters of the proposed \$140 billion federal asbestos compensation trust fund. Business and industry interests backing S.852 say a key reason it is urgently needed is that a flood of asbestos exposure lawsuits has overrun the nation's court systems, choking off access not only to deserving asbestos victims, but also to others with business before the court system. That simply isn't true.

Public Citizen has examined nation-

wide statistical data and conducted interviews with judges and lawyers from California, Florida, Georgia, Maryland, Mississippi, New York, Texas, and West Virginia - which are among states with the highest number of asbestos claims - and found no evidence to support the claim. The report provides a comprehensive examination of the effect of asbestos lawsuits on court dockets. Public Citizen President Joan Claybrook made this observation relating to S.852:

*This bill is not fair or just or supported by factual evidence. In fact, the courts are not paralyzed with asbestos cases. And the federal trust fund is, in reality, an industry plan to wipe out tens of billions of dollars in corporate liability under the guise of helping victims. This report documents that the bill's supporters are trumping up lies to sell their corporate bailout plan.*

Also, Ms. Claybrook said it's important to note that, even though the courts are satisfactorily handling the asbestos caseload, it doesn't mean the proposed federal trust fund is adequately funded. According to several studies, the trust fund is unlikely to have enough money because the number of claims will exceed official projections. According to Ms. Claybrook, it's important to understand the two concepts are very different. Highlights of the Public Citizen report include:

- In federal courts, which account for about 20% of asbestos cases, new federal filings have declined from 9,111 in 1998 to 1,471 in 2004, a drop of 84%, according to the Administrative Office of the U.S. Courts.
- The number of asbestos product liability trials in federal courts is down sharply in recent years, from 271 in 1991 to zero in several recent years, according to the U.S. Department of Justice's Bureau of Justice Statistics. Asbestos product liability trials

account for a tiny fraction of all federal tort trial terminations - one out of 1,000 (.1%) in 2002-03, down from four out of 1,000 (.4%) in 1996-97.

- In state courts, among tort cases disposed of by trial for 2001 in the nation's 75 largest counties (which together account for about 23% of the population), there were 31 asbestos trials - only .4% of an estimated total of 7,948 cases, according to the Bureau of Justice Statistics.
- Among major categories of state cases, asbestos product liability cases going to trial had the shortest median period for disposition in 2001, the latest period for which information is available, according to the Bureau of Justice Statistics. While disposition time for other case categories changed little from 1996, the median disposition time for asbestos trials fell by 80%, from 50 months to 10 months.
- The Manville Personal Injury Settlement Trust, a fund formed in 1988 to settle asbestos claims involving Johns-Manville Corp., and which is seen as a bellwether for claim activity, has seen filings fall sharply. From a peak of 101,200 new claims in 2003, filings fell by about 85% in 2004 to 14,600, before rebounding slightly in 2005 to 21,000.
- In states like New York, Georgia, Florida, California, and Texas, which have had a significant number of asbestos case filings, new filings are decreasing or caseloads are dwindling, and judges and attorneys report there is little difficulty moving asbestos cases through the system.

The bottom line is that asbestos cases are not strangling the courts. This is just another example of special interest groups misleading Congress and the public. Fortunately, Public Citizen's survey report reveals the misrepresentations. It is quite evident that the courts are quite capable of handling all

asbestos claims and that is clearly supported by Public Citizen's survey. The first significant vote on S.852 was a defeat for the forces led by Senate Majority Leader Bill Frist and the special interests pushing the bill. But, the matter will come back up for a vote soon. In my opinion, unless the bill is changed to protect victims, it should be defeated.

Source: *Public Citizen*

## VIII. PRODUCT LIABILITY UPDATE

### ***NHTSA Will Get A New Boss***

Nicole Nason is the Bush Administration's nominee to be the next head of the National Highway Traffic Safety Administration (NHTSA). Nason, a lawyer and the assistant secretary of the Department of Transportation for governmental affairs, will take over from Dr. Jeffrey Runge. Currently, Nason lobbies Congress on behalf of DOT on transportation issues. Dr. Runge, who in my opinion really tried to turn NHTSA around, left the regulatory agency last fall to go to another job. It was evident that Dr. Runge's days were numbered at NHTSA when he said he wouldn't put his children in an SUV if given the choice. Dr. Runge is now the chief medical officer at the Department of Homeland Security. I really hated to see him leave NHTSA. I really felt that the outspoken physician wanted NHTSA to do its job of making automobiles safer for the American people.

I am not sure about the new boss, but I hope that the appointment will turn out to be a good one. Ms. Nason has pledged to make the nation's highways and roads safer for families while tackling issues like vehicle rollovers and teenage crashes. Her pledge is to "reduce the toll of motor vehicle crashes on America's families." But, Joan Claybrook, who is a former NHTSA administrator, reminds us that Nason

was the Bush Administration's point person in opposing safety measures. In addition, Ms. Claybrook is concerned about Ms. Nason's level of experience on regulatory matters. While I am also concerned about the experience factor, the new director's safety record is what really concerns me. I have to wonder why the President didn't pick a person who had a good track record on safety to head up NHTSA. There are many such persons available who would have been great choices. One person who comes to mind is Brian O'Neil, the retiring Director of the Insurance Institute for Highway Safety. Who could argue with putting a man with his qualifications, experience, and dedication to auto safety in charge of NHTSA?

### ***Jury Awards \$29 Million In Ford And Firestone Suit***

On January 27<sup>th</sup>, a Texas jury returned a verdict of more than \$29 million against Ford Motor Co. and Firestone. The verdict was for a 22-year-old woman who was rendered a quadriplegic by an accident in her Mazda Navajo. The tire brand involved was the same that was involved in the highly publicized 2000 and 2001 safety recalls. The tire recalls came after at least 271 people died in accidents attributed to tire blowouts. This verdict in this case was returned against both Ford and Firestone.

Ford owns one-third of Japanese automaker Mazda Motor Corp. The court has ordered Ford to pay 85% of the \$29 million verdict, with Firestone to pay 15%. But, because of a settlement between Ford and Firestone, the tire maker will not have to pay any part of the judgment. In October, Ford reached a \$240 million settlement with Bridgestone Corp., maker of the Firestone tires. Ford, which claims that the accident was caused by driver error, made this statement: "The Mazda Navajo is a safe, reliable vehicle and not the cause of either the accident or Miss Munoz's injuries." Ford says it will appeal.

### ***The Nuts And Bolts Of Accident Reconstruction***

A key aspect of any personal injury or product liability case involving a vehicular accident is the reconstruction of that accident. Accident reconstruction is the ability to determine the path the vehicles traveled, the angle of the impact, the speeds involved, and the rotations of the vehicles. It is just what it sounds like - the ability to reconstruct what exactly happened in an accident. It is the foundation upon which most cases are built. It is especially important in a product liability case because the exact details of how the accident happened is what experts, such as an occupant kinematics expert and defect expert, rely upon in forming their opinions. For example, in order to determine how a passenger in a vehicle moved during an accident, the occupant kinematics expert must first know how the vehicles were impacted and how the vehicle moved, all of which come from the accident reconstructionist.

For the most part, accident reconstruction requires the retention of an expert. But, there are some basic steps anyone can take in looking at an accident that will provide a general idea about how the accident happened. The first and foremost step is to get a copy of the accident report as soon as possible. The accident report contains vital information that can lay the foundation for a determination as to whether a case exists. Although accident reports differ in each state (for example, some state's reports are more thorough than others), most reports will contain speed estimates, information on seat belt usage, a narrative from the investigating police officer as to how he believes the accident happened, and a determination who was at fault. The report will also contain eyewitness information and whether any accident scene photographs were taken. The accident report is the engine that drives the initial investigation into a case.

The next step to take is to secure the vehicle involved in the accident. The vehicle is the most critical piece of evi-

dence in reconstructing an accident. By inspecting the vehicle, you can get an idea of the angle of impact as well as, an estimate of the speeds involved, and determine whether there is any evidence on the seat belt to suggest the occupant was using it at the time of the accident. This is just to name a few of the many pieces of evidence the vehicle holds. Thus, it is vitally important to secure the vehicle. Typically, the accident report has information on where the vehicle is being stored and the insurance company involved. My suggestion would be to send a preservation letter to both the storage location and the insurance company. The preservation letter should explain that you are investigating the accident and that the vehicle is a key piece of evidence that should not be altered, amended, or destroyed in any way. It should also contain instructions for them to call upon receipt of your letter.

Another reason to preserve the vehicle as quickly as possible is that the vehicle probably contains an event data recorder, more commonly referred to as the black box. These black boxes were introduced in automobiles as a by-product of airbags. A variety of sensors collect information that is processed by the black box. The box ultimately decides whether to deploy the airbag in an accident. The black box is designed to retain portions of the data from the accident. Afterwards, the data can be downloaded. The type of information stored by these black boxes depends upon the vehicle module and the nature of the accident. Certain boxes store information on engine speed, vehicle speed, brake status, throttle position, and seat belt usage. The equipment to download the data from the black box is commercially available for certain model vehicles, including some General Motors and Ford vehicles. The black box data contain valuable information that can be useful to the reconstruction of the accident.

The next step is get to the accident scene as soon as possible and photograph it. The accident scene may contain skid marks, yaw marks, gouges,

divots, vehicle tracks, and the like, which are vital tools necessary for any reconstruction. Unfortunately, a lot of these pieces of evidence are lost over time. If the police did not take scene photographs, it is especially critical to document the accident scene as soon as possible after the accident, before vital physical evidence is lost. Of course, if the police did take photographs at the scene, it may not be as important to document the scene yourself. The great thing about the police photos is that the vehicles are typically shown in their final rest position and, for the most part, the photos attempt to document the path of travel of the vehicle. Experts love police photographs. It is amazing the technology that is available to experts. For example, using technology known as photogrammetry, the experts can measure objects from photographs. It's most important feature is the fact that objects can be measured without being touched. The technique is extremely useful to experts in situations where all the physical marks on the roadway are gone. The police photographs can be used, along with photogrammetry, to reconstruct the accident.

Finally, it is crucial to talk with the investigating police officer, as well as any eyewitnesses to the accident. The problem with eyewitness testimony is its reliability. There have been times when three witnesses will give three different versions of how a single accident occurred. Some witnesses try to be too helpful. They will tell you what they think they saw, not what actually happened. Or, they will hear a noise, look up, and see cars spinning around, then quickly theorize what must have happened. Then there is that time-lapse memory thing when, two years after the accident, they simply have forgotten the details of the accident. Yet, you cannot overlook the importance of getting either recorded or written statements from eyewitnesses as soon as possible after the accident. Although you do not want to completely rely upon the eyewitnesses, it certainly helps a case when, as you are putting the pieces

back together, some of the things the witnesses told you now make sense in the context of the accident reconstruction.

In conclusion, the above pieces of evidence form the foundation of any accident reconstruction. The information should be gathered as soon as possible after an accident occurs. Information is much more reliable the closer in time to the accident that it is collected. These items are the nuts and bolts of the field of accident reconstruction.

### ***ACTIVE HEAD RESTRAINT SYSTEM AND ANTI-SUBMARINING SEAT INTRODUCED***

Johnson Controls has introduced an active head restraint system and active anti-submarining ramp for automotive seating. The active head restraint is designed to reduce the risk of whiplash injuries in low-speed, rear-end collisions. The active anti-submarining ramp reduces injuries to an occupant's pelvis and legs in frontal crashes. Johnson Controls says that these new technologies will help its customers to optimize the safety performance of their vehicles. Both products can be integrated into existing seating systems. Charlie Baker, vice president and general manager, engineering - North America for Johnson Controls, stated:

*These seating technologies help address several injuries - whiplash and leg and pelvis injuries - in vehicle collisions. According to insurance industry data, whiplash injuries account for the most common type of auto insurance claim. In addition, frontal impacts are the most common type of automobile collision.*

Neck injuries with long-term impairment effects continue to be one of the most frequent accident injuries. The Johnson Controls active head restraint is designed to reduce the risk of whiplash in the event of rear impact. Johnson Controls is offering the active head restraint system in two configurations:

- One relies on an electrical signal from the vehicle crash sensors to trigger the activation of the active head restraint.
- The second design uses the force of the occupant on the seatback during the crash to trigger the head restraint.

Both of these have proven to be very effective in testing, with essentially zero resultant neck shear when tested to the International Insurance Whiplash Prevention Group's (IIWPG) test protocol. Both configurations are available for model year 2009 vehicles.

Leg and pelvis injuries occur when the front seat occupant's knees hit the instrument panel during front-end collisions or when the body slides under the belt. To reduce this "submarining" effect, Johnson Controls has developed a new active ramp, which is integrated into the seat pan area. During a front-end collision, the ramp rises quickly and the bar in the front section of the seat restrains the forward movement of the pelvis. If the occupant is seated in the correct position, the risk of impact to the knees from the instrument panel is reduced. The belt forces acting on the body are also reduced. It was reported that during the company's sled testing to simulate the European New Car Assessment Programme's (EuroNCAP) frontal impact test, forward displacement of the pelvis was reduced by more than 30% when the seat is equipped with the Active Anti-Submarining system. In addition, this greatly reduces the likelihood that during the EuroNCAP test the testing dummy's knees will strike the instrument panel. This patent-pending technology will be available for model year 2009 vehicles.

Johnson Controls has 136,000 employees in more than 1,000 locations serving customers in 125 countries. Founded in 1885, the company is headquartered in Milwaukee, Wisconsin. For additional information, on this company, you can visit [www.johnsoncontrols.com](http://www.johnsoncontrols.com).

### **15-PASSENGER VANS ARE HIGH-RIDING DEATH TRAPS**

Recently, my church was discussing the purchase of a large van for use by our senior citizens primarily. One well-intentioned lady asked the group whether a 15-passenger van might be the church's answer for transportation of the elderly. Several members spoke up and said collectively that they didn't believe those vans were safe. The group quickly agreed after hearing an explanation of how truly bad they are and decided to look at a bus instead. That was the right decision because there have been too many deaths and serious injuries to persons riding in 15-passenger vans and that's a proven fact. As we have pointed out repeatedly, these vans are among the most dangerous vehicles on the road today. At one time, the vans were very popular for transporting preschool, school-age, college, and church groups. Fortunately most people have learned that these vans are involved in rollover crashes more often than all other vehicles.

We are currently handling a tragic case in Mobile involving a Ford E350 van that was transporting mental health patients from a group home. This 15-passenger van was equipped with Firestone tires. A tire failed on the left rear, and the van predictably became uncontrollable and rolled over. Two deaths resulted from this rollover. The heads of the two passengers in the van who were killed went outside the window frame because there was no laminated glass, and the roof rail crushed their heads. These occupants were still sitting in their seats after the rollover and the van had to lifted off their heads. Discovery revealed that Ford repeatedly used laminated glass in the vans until the late 1970s and early 1980s, when they started using tempered glass. It is quite possible that the two passengers could have survived the rollover had laminated glass been placed in the rear windows by Ford. At least their changes would have greatly improved. This case is a classic example of a very poor design by Ford in several respects. We

represent one of the families who lost a loved one, and the Mobile firm of Cunningham, Bounds, Crowder, Brown & Breedlove represents the other family who suffered a like loss. Our firms are working together to get the two cases, which have been consolidated, ready for trial.

The National Highway Traffic Safety Administration (NHTSA) said last year that new research reinforced its existing concerns about 15-passenger vans. As a result, NHTSA reissued its consumer advisory for users of 15-passenger vans for the third time in the past four years. In the research report, related to improper tire maintenance on 15-passenger vans, the NHTSA study found that 74% of all 15-passenger vans had significantly misinflated tires. By contrast, 39% of passenger cars were found with significant inflation problems. NHTSA research has consistently shown that improperly inflated tires can change handling characteristics, increasing the prospect of a rollover crash in 15-passenger vans.

A major problem is that the 15-passenger van has a high center of gravity. With a high center of gravity, the reason for its rollover problems becomes most evident. That center shifts even higher and rearward as more people are put in the van. The rearward shift gives the van a propensity to fishtail, and the upward shift increases its likelihood of overturning. The combination of lateral slide of the rear tires - fishtailing - and the top-heavy design compound the risk of rollover. Dangerous stability problems, not noticeable to average drivers, become all too apparent in emergency steering situations. Swerving to avoid an obstacle or a sudden tire failure at highway speed can result in disaster. Without question, a van that is fishtailing is out of control. The more heavily loaded the van, the greater the gravity shift and the more likely it is to overturn. Once the van overturns, its occupants are exposed to even greater hazards than those of most vehicles.

Before NHTSA research had shown that 15-passenger vans have a rollover risk that increases dramatically as the

number of occupants increases from fewer than five to more than ten. In fact, 15-passenger vans with 10 or more occupants had a rollover rate in single vehicle crashes that is nearly three times the rate of those that were loaded with fewer than five occupants. Nearly 80% of those who died in 15-passenger van rollovers nationwide between 1990 and 2003 were not buckled up. Wearing safety belts dramatically increases the chances of survival during a rollover crash. In fatal, single-vehicle rollovers involving 15-passenger vans over the past decade, 91% of belted occupants survived. But, when the vans are crowded with passengers many simply don't use the belts.

The National Transportation Safety Board (NTSB) calculates that the vans overturn more than half the time they are involved in single-vehicle crashes, compared to 33% of the time for other vehicles. According to NHTSA, 81% of all fatalities in 15-passenger van crashes occur in single vehicle rollovers. If you have access to the Fatality Analysis Reporting System (FARS), you can get an idea from data how truly bad these vans are. You will find that:

- Fifteen-passenger vans were involved in 376 fatal rollover crashes in the 17 years from 1982 to 1999. Those crashes killed 581 - six of every 10 persons riding in the vans.
- The vans were involved in single-vehicle crashes more often than other vehicles: 280 of the 376 crashes involved only the van. That means three of every four vans that overturned did not collide with another vehicle.
- More than half of the 2,513 occupants in those single-vehicle rollovers were killed (432) or received incapacitating injuries (881).
- Even using safety restraints was no guarantee of safety for passengers: 39 of those killed and 159 of those seriously injured were wearing seat belts or were in a child safety seat.
- The death rate appears to be rising:

about half of the crashes (186) and well over half of the fatalities (299) occurred between 1993 and 1999.

The three manufacturers of 15-passenger vans marketed their vehicles for transporting children, the elderly, sports teams, and other groups. The ads and promotional materials were aimed directly at these groups. We mentioned above that when a van rolls over, occupants are more likely than in other vehicles to be killed or seriously injured. The reasons for that are:

- A lack of structural integrity that could protect the passenger compartment from collapse or intrusion.
- Inadequate crash padding that could protect passengers from being thrown against hard surfaces.
- Lack of laminated side windows that might "cushion" someone thrown against them rather than shatter and permit ejection.
- Lack of emergency exits and traffic-control safety features standard on regular school buses.

On November 4, 2002, NHTSA finally proposed establishing a new school bus category for safety regulation, the "multi-function school activity bus," defined as any school bus of 15,000 pounds or less sold for purposes other than transportation between home and school for students from kindergarten through Grade 12. It said it was doing so "to provide schools, day care centers and other institutions with a safer alternative to 15-passenger vans." Under the proposed NHTSA rules, such van-buses would be exempt from the traffic control requirements imposed on regular school buses, such as emergency signaling and "stop" arms to protect children boarding and leaving buses.

Technology that would make the vans safe has long been available and well known by the automobile manufacturers for years. NHTSA should require the 15-passenger vans to meet the following safety standards:

- The vans should be equipped with dual rear wheels;
- The vans should be wider and the height reduced;
- Adopt school bus structural standards;
- The vans should be equipped with laminated side windows;
- Provide emergency exits;
- Equip the van with safety signaling; and
- Drivers should be required to have a commercial drivers' license;

Unfortunately, from a safety perspective, little has changed since 1999. These vans are still on the highways of this country and are still causing deaths and injuries. Without nationwide regulation that truly addresses safe vehicle performance and occupant protection, the vans will continue to kill and maim innocent victims. NHTSA has prepared a flyer on 15-passenger van safety that is available on the 15-Passenger Van Advisory page at <http://nhtsa.gov/cars/problems/studies/15PassVans/15PassCustomAdvisory.htm>.

### ***GLASS IN WINDSHIELDS AND WINDOWS OF VEHICLES ARE PART OF THE SAFETY SYSTEM***

The Mobile case referred to above points out that window glass is an important part of a vehicle's safety system. Designed properly, the glass in motor vehicles should protect drivers and passengers, not cut them and cause them serious injury. Certainly, the glass shouldn't cause occupants of a vehicle to be ejected. Windows and windshields are part of the safety system for a vehicle and are necessary for the safe operation of the vehicle. They should help prevent the ejection of occupants in automobile collisions. Automobile manufacturers rely on glazing as a structural member of the vehicle. The glazing serves as a support for the roof and sides of the vehicle. Unfortunately, typical glazing in vehicles on the

road today doesn't actually afford these basic protections, despite the availability of tested and demonstrated solutions.

Automobile manufacturers continue to ignore these risks created by glazing in their vehicles, despite clear evidence that current motor vehicle glass causes injuries and blindness, does not adequately protect against ejection from the vehicle, and offers virtually no structural protection in a collision. Alternatives are ignored that could reduce these injuries substantially. The common perception is that most ejected vehicle occupants are thrown through the windshield. But, as statistics bear out, that isn't the case. As far back as the 1980s, internal studies by automobile manufacturers showed that almost 60% of driver and passenger ejections occurred through windows instead of through the windshield. These same studies recommended that impenetrable side glazing be incorporated as a countermeasure to prevent occupant ejection. Manufacturers refused to do that which their own engineers recommended. Federal regulations currently allow three types of glass for use in motor vehicles: laminated, tempered, and glass-plastic.

- **Laminated Glass.** Laminated glass is allowed in all vehicle windows but is used typically only in windshields. Laminated glass is about three times stronger than ordinary annealed glass. Although the glass still breaks the way ordinary plate glass does, the fragments adhere to the internal material, which keeps it from flying about the passenger compartment. The fractured glass is limited to a small area radiating outward in a star pattern from the initial break. The laminate therefore acts as a "safety net," absorbing energy from the contact while keeping the occupant inside the vehicle. This reduces the possibility of brain injury and ejection. The glazing adds to the vehicle's structure.
- **Tempered Glass.** This is plate glass that has been heat-tempered to

increase its strength. It is three to five times stronger than annealed glass. When it does break, it shatters, offering no protection against ejection from the vehicle. When tempered glass shatters and leaves the window open, the vehicle loses an element of the support of the roof and side structural support. The tempering process also affects the way the glass breaks. Tempered glass breaks from the inside out, which causes the "clustering" effect of the glass. These clusters can be several inches in diameter and have jagged edges that can cut an occupant.

- **Glass-Plastic Glazing.** Glass-plastic consists of either laminated or tempered glass with a clear "plastic" laminate on the side of the glass that faces the occupants. The inner-layer plastic not only protects against flying glass, it also holds the glass together. This helps prevent ejection and retains the structural support features afforded by the glazing.

Despite having decades of knowledge about the risks posed by its windshields and windows, the automobile industry continues to resist widespread use of safer glass in vehicles. NHTSA sets minimum standards, which automobile manufacturers are free to exceed. But most of the companies refuse to install safer windows in their vehicles. A look at the "Purpose" section of Federal Motor Vehicle Safety Standard 205 makes it clear that tempered glass does not meet the explicitly-stated purpose of the Standard. FMVSS 205 sets forth its intended purpose:

- to reduce injuries resulting from impact to glazing surfaces,
- to ensure a necessary degree of transparency in motor vehicle windows for driver visibility, and
- to minimize the possibility of occupants being thrown from the vehicle windows in collisions.

Meanwhile, the only pressure on manufacturers to use safer glass comes from

lawsuits against automakers when their vehicle glazing harms – rather than protects – people in crashes. It amazes me that most of the companies continue to put profits over safety and refuse to use the proper type of glass in their vehicles.

### ***FIRES ASSOCIATED WITH DEFECTIVE FUEL SYSTEMS***

Vehicle manufacturers have a duty to the public to design vehicles that will not create a fire hazard in survivable collisions. But, government safety standards only reduce the chance of fire in some types of crashes, and automotive manufacturers have failed to adopt their own standards to avoid such fires. Despite the fact that automotive manufacturers have long been aware of the risk of fires associated with defective fuel systems, the incidence of vehicle fires has continued to be a serious problem. Any fuel leak creates a very high danger of fire in the event of a collision. The three elements required to create a post-collision fire are fuel, oxygen, and an ignition source. Oxygen is readily available, and there are numerous ignition sources present during a collision. Thus, if a fuel leak occurs, the potential for a fire is substantial. There are several common fuel system defects that can cause fuel leaks which result in post-collision fires.

- **Fuel Tanks -** Defects in the design and placement of fuel tanks have been among the most widely publicized fuel system defects, including the Pinto cases and the General Motors "sidesaddle" trucks with fuel tanks located outside the frame rail. Fuel tank defects may involve the location of the tank on the vehicle, the placement of the tank near objects that can potentially puncture the tank, the material from which the tank is constructed, the actual construction of the tank including improper welds, and the failure to adequately shield the tank.
- **Fuel Lines -** Fuel-injected engines require fuel to travel through fuel

lines at high pressure. Because of the high pressures involved, even a small compromise in a fuel line can result in a large amount of fuel escaping from the fuel system. Failure in a line may be caused by the location or routing of the line. Failure in a line may also result from the use of inappropriate materials. The location and composition of the fuel lines are critical to the overall fuel system integrity of a vehicle.

- **Fuel Pump** - Most fuel-injected engines have electric fuel pumps. It is critical that these pumps shut off in the event of a collision. If a fuel pump does not shut off following a collision, the pump will continue to circulate gasoline through the fuel system, providing a constant source of fuel for any resulting fire. There are many different types of mechanisms that are used to shut off the fuel pump in the event of a collision. The type of mechanism used, and the location of that mechanism, may play a significant role in whether the fuel pump does, in fact, shut off following a collision.
- **Siphoning** - It is possible for fuel to siphon from a fuel tank after a collision, providing a continuing source of fuel for a vehicle fire. Siphoning is the flowing of fuel through a point of compromise in a fuel system due to gravity. Gas can siphon from the fuel system at a very high rate, providing a substantial amount of fuel for a vehicle fire. Although manufacturers have known of the danger of fuel siphoning for many years, and although anti-siphoning devices are inexpensive, anti-siphoning devices are not incorporated on many vehicles presently on the highway.

There are currently no government regulations regarding the placement, design, or materials used in fuel tanks or fuel systems. Neither are the post-crash functioning of fuel pumps, or prevention of fuel siphoning after a crash covered by a rule or regulation. Nonetheless, manufacturers have an

obligation to ensure vehicle occupants are not exposed to easily preventable risks of death and disfigurement from vehicle fires. There is no more violent death than burning to death in a vehicle. We should insist that NHTSA upgrade its standards that would help avoid fuel-fed fires after a collision.

### **GOVERNMENT INVESTIGATES FIRES IN DODGE DURANGO SUVs**

The government is investigating reports of fires starting underneath the driver's seat of some models of the Dodge Durango sport utility vehicle, according to documents released on February 6<sup>th</sup>. The inquiry involves nearly 16,000 Durango SUVs from the 2001-2003 model years. The National Highway Traffic Safety Administration (NHTSA) has received complaints of five vehicle fires starting underneath the driver's seat. The agency said three of the fires happened while the vehicle was parked with the ignition switch off. The vehicles are not equipped with power driver seat adjustments. Fortunately, there were no injuries associated with the reported fires. A Daimler-Chrysler AG spokesman says the automaker was in the initial stages of its inquiry and was working with NHTSA on the problem.

### **COMPACT CARS AND SUVs HAVE HIGHEST FATALITY RATES BY VEHICLE TYPE**

Compact cars, according to a report from the National Highway Traffic Safety Administration (NHTSA), have the highest fatality rate of all vehicles. NHTSA says compacts have a rate of slightly more than 17.75 deaths per 100,000 vehicles in 2004. Compact pickup trucks were second, with nearly 16.9 deaths per 100,000 vehicles. Pickup trucks and SUVs had rates of about 15 deaths. Large vans had the lowest rate: about 9 1/3 per 100,000 vehicles. The study of fatality data from 1997 to 2004 reaffirmed past studies that found small, light vehicles have higher death rates than bigger ones. But significantly, mid-size sport utility vehi-

cles had the highest death rate in rollover crashes. None of the findings from NHTSA's report should come as a surprise. But, it is important to put all of this in perspective.

Source: *Associated Press*

### **DESIGN CHANGES CUT DEATHS IN CARS HIT BY SUVs AND PICKUPS**

Design changes in sport-utility vehicles and pickups have reduced deaths in cars struck by the large vehicles. According to the report from the Insurance Institute for Highway Safety, things should get better. You will recall that automakers agreed in 2003 to improve the compatibility of vehicles amid concerns that SUVs or pickups dangerously ride up atop cars in crashes and threaten passenger compartments. The Institute's study is the first to examine death rates in cars involved in crashes with SUVs and pickups that comply with the agreement as compared with vehicles that do not yet meet the guidelines. Adrian Lund, president of the Institute, had this to say:

*It looks like these changes are going to reduce the risk to car occupants, but it's too early to say exactly how much.*

The study, by the Insurance Institute for Highway Safety, using data from the automobile industry and the federal government, found that in side-impact collisions the number of deaths fell by nearly half when automakers lowered SUVs by as little as half an inch or equipped them with hollow impact-absorbing bars below the front and rear bumpers. The changes are intended to reduce the frequency of SUVs and pickups sliding over cars' doorsills and bumpers and piercing deep into cars' passenger compartments.

Fifteen automakers, representing nearly all of the U.S market, agreed voluntarily in 2003 to improve compatibility between vehicles by September 2009. The changes involved redesigning the front end of SUVs and pickups to better match up with the bumpers of passenger cars and improving head

protection by installing side airbags. The study, first reported by the *New York Times*, found the following:

- The greatest benefit in design changes was when an SUV strikes the side of a car. In such a case, the risk of a fatality dropped by 47% to 48%.
- For side crashes involving pickups and cars, the death rate dropped by 1% to 9%.
- In front-end collisions involving SUVs and cars, researchers found car drivers wearing seat belts were 18% to 21% less likely to die in collisions with SUVs meeting the guidelines.
- For car drivers failing to wear a seat belt, the risk was reduced only by 2% to 3%, thereby showing the benefit of wearing safety belts.
- When a redesigned pickup struck a car in a head-on collision, the number of deaths of belted car drivers declined 9% to 19%.
- For unbelted car drivers hit by pickups without the changes in a head-on crash, the death rate was about the same.

The changes also reduced by a fifth the risk that an SUV would kill a belted car driver in a frontal collision. The same changes in pickups produced smaller, but still significant, safety gains. When federal vehicle fatality statistics are applied to the findings, they suggest that the safety standards could save 600 to 800 lives each year when fully in place in the United States. It would also save many lives overseas as well. Many SUVs and pickups have already been redesigned, and the study compared how these did in crashes compared with those that had not been redesigned.

Regulators and auto makers began paying attention to SUV collisions with cars in response to a 1997 series in the *New York Times*. Before then, regulators had done more than 2000 tests without ever crashing an SUV into a car, while automakers said that they did not look

at compatibility in crashes when designing vehicles. Sales of SUVs and pickups were booming, but automakers soon faced pressure from the National Highway Traffic Safety Administration, which threatened to impose mandatory regulations if the industry did not act. In a landmark agreement in 2003, 15 automakers from four nations agreed that by late 2009, all SUVs and pickups would either be lower to the ground or built with an energy-absorbing beam that fits under the front and rear bumpers. Adrian Lund, president of the Insurance Institute for Highway Safety, stated:

*They never needed to be that high off the ground; that was all the macho look that people wanted, or that the automakers thought people wanted. What we are seeing now is the automakers are bringing them back down.*

The study examined car driver death rates from 2001 to 2004 involving 2000-03 models of SUVs and pickups built with the new guidelines and without the changes. About six in 10 new models of SUVs and pickups now have the design changes, and experts expect it to take several years before older vehicles that lack the design are no longer abundant on the road.

Sources: *New York Times* and *Associated Press*

## IX. MASS TORTS UPDATE

### ***A SAD ENDING TO THE NEW ORLEANS TRIAL***

We lost the Irvin case, the first federal case to be tried, and it was a very tough loss. It was absolutely devastating for the family. They went through two trials - one in Houston and this one in New Orleans - and they deserved better. Regardless of the outcome, however, I would like for our readers to know a little bit more about Dicky Irvin, who

was a fine man, and who died much too young. Dicky was a hometown hero from St. Augustine, Florida, who played college football at the University of Richmond and went on to play professional football with the Montreal Alouettes in the Canadian Football League. After his football career was cut short by injuries, Dicky moved back to St. Augustine, Florida and started a family with his devoted wife, Evelyn. After listening to his four children tell about their father, one quickly realizes that he was a dedicated father and a devoted family man. Remaining very active in the local community, Dicky coached youth athletics, sponsored golf tournaments, and served as the announcer for the local high school team where his youngest daughter was a cheerleader.

On May 15, 2001, Dicky Irvin's life was cut short when this strong, healthy, fifty-three year old suffered a Vioxx heart attack that claimed his life. Dicky's son-in-law, an emergency room physician, who was completely unaware of any heart attack risk associated with Vioxx, had prescribed the drug for Dicky's back pain. Any other doctor in America would have prescribed Vioxx to Dicky at that point in time. Within 30 days after he began to take Vioxx, Dicky Irvin developed a blood clot in a key coronary artery that caused his fatal heart attack. At that time, Merck was publicly and loudly proclaiming that Vioxx was actually good for the heart. Three years and billions of dollars in sales later, Merck withdrew the drug from the market because of its heart attack risk. That was too late for Dicky and for tens of thousands more. It is estimated that the use of Vioxx has contributed to between 88,000 and 140,000 heart attacks and 44% of the time those heart attacks resulted in death. I suspect that is a conservative estimate because nobody suspected that Vioxx caused heart attacks and autopsies weren't always performed on men and women who suffered fatal heart attacks.

We are proud to have had the opportunity to represent Dicky's family. The

Irvin family courageously stood up to this pharmaceutical giant and demanded answers about this drug at a time when Merck was still falsely touting its heart safety. Their courage undoubtedly played a role in the drug's ultimate withdrawal. As a result, countless lives were saved because Vioxx was no longer available for use in this country. They are proud of their role in helping to get Vioxx off the market. The money was never their objective - they wanted to make Merck pay for what it had done and to alert the public to how weak the FDA actually is.

A New Orleans jury that heard our case and returned a verdict in favor of Merck did not hear the real story. Because of a ruling by the federal judge on the eve of trial, the jury never heard the opinions and firmly held convictions of two highly-qualified expert witnesses, a cardiologist and a pathologist, that Vioxx was a substantial contributing factor in Dicky Irvin's death. Losing is difficult, especially when you see the devastation in the faces of the Irvin family after the loss. This family stood up to Merck long before people recognized how truly bad Vioxx was. They stood up at a time when they were virtually standing alone and I can assure you that standing alone against Merck takes courage. Losing is very difficult, but we can take some solace in knowing we are fighting the good fight. We must and we will keep pressing on. We won't quit this battle because it's too important for families like the Irvin family who have suffered losses because of Vioxx.

Troy Rafferty, and Pete Kaufmann from the Levin, Papantonio firm out of Pensacola, Florida, helped try the case. It was an honor for our firm to be in the trenches with such excellent and dedicated lawyers. New Orleans lawyer Jerry Meunier's presence and able assistance with legal arguments and trial strategy were also invaluable. Andy Birchfield, who was our lead lawyer, did a truly outstanding job. He has worked tirelessly on this case for several years. Together, in my opinion, all of our lawyers put up a good fight even

though at trial we found out that we had both hands tied behind our backs. We not only had a post-Katrina jury in New Orleans, where a lawsuit is the last thing on minds of the few people left there, but we faced the exclusion of specific causation testimony of expert opinions on the eve of trial. The latter development was a hurdle that we simply couldn't overcome. This was especially troubling since our experts had passed the preliminary challenges on qualifications by the court. On the other hand, Merck's experts were allowed to testify on the specific causation issue and told the jury that Vioxx didn't cause Dicky's death. Then the jury was told, during closing arguments, that the plaintiffs' lawyers couldn't even find an expert to say that Vioxx contributed to cause the death.

Many members of the In Re Vioxx Litigation Plaintiff's Steering Committee and other firms contributed tremendous assistance to us and their help is truly appreciated. We believed going in that we could win this case on the law, the science, and the facts surrounding the death of Dicky Irvin. I still believe that it was a case with merit. One thing that we underestimated was Merck's tremendous public relations campaign. More will be said about that next month. In any event, we are advising our clients to file an appeal and I believe that will happen.

While we lost this first battle, we must continue to fight the war to hold powerful pharmaceutical companies accountable when they place profits and stock prices over the health and safety of patients. Dicky Irvin's family deserved better than what happened to them in New Orleans and quite frankly they should still have Dicky around today, and he would be - but for his taking Vioxx.

#### **MERCK AND COMPANY BIG SPENDERS ON VIOXX DEFENSE**

I believe the public would be surprised to learn that Merck and Company spent almost \$300 million

defending Vioxx lawsuits last year. You will recall that the company had set aside \$685 million to be used as a defense fund to pay lawyers and expert witnesses. But, none of the money was to be used to pay claims by Vioxx victims. Now Merck has added \$295 million to the defense fund. The total is now almost one billion dollars. Based on our experience, Merck and Company, like a lot of major corporations in the United States, believes that it is above the law and can't be held accountable for its actions.

The company is firmly convinced that it can buy its way out of all of its legal problems without having to compensate innocent folks who have been victimized by taking Vioxx. Because of its power and influence, the company is taking a hard line and says it will try all of the cases filed against it. When you consider that thus far only three cases have actually gone to trial, you may wonder where all of the \$295 million was spent since the companies say it was actually spent and now has to be replaced in the defense fund.

#### **MERCK PLAYS FAST AND LOOSE WITH THE TRUTH**

It is very clear that Merck and Co. doesn't mind stretching the truth and in some instances actually outright lying about Vioxx. The company has misled the FDA, the medical community, and the public about Vioxx for years. Actually, it really didn't come as a big surprise when we learned Merck had even misled the *New England Journal of Medicine* about clinical trials. It is most unfortunate that a giant drug company could play fast and loose with the truth and get away with it. It is even more disturbing that Merck will attempt to destroy any person who stands up to the company in the Vioxx fight. Our firm plans to continue with our representation of Vioxx victims. We will never quit and will do our very best to eventually bring justice to our clients. We never thought the Merck battles would be easy because we knew how

powerful and influential Merck is. But, I must admit that I never released how truly influential the giant drug company is and how far that influence reaches.

### ***EVEN MORE NEW VIOXX REVELATIONS***

*The New England Journal of Medicine* released internal Merck memos on February 22<sup>nd</sup> indicating that Merck knew more about cardiovascular problems caused by Vioxx than it revealed when it published the Vigor study of the drug in 2000. As previously published, the *Journal* editors published last December a strongly worded “expression of concern” stating that Merck left out relevant data about cardiovascular problems that occurred among patients taking Vioxx in the Vigor trial. The *NEJM* editors say they should have been told about the information Merck withheld. *NEJM* has now reaffirmed its position. The *Journal's* editors wrote:

*The information we have indicates that the VIGOR article...did not contain relevant safety data available to the [Merck] authors more than four months before publication.*

There is much more to what the *NEJM* editors wrote about Merck's conduct. It is clear that Merck withheld critically important information relating to its knowledge of the heart attack risks. This company will do anything in my opinion, and that's real scary.

### ***STATUS OF THE CELEBREX/BEXTRA MDL***

Many of you are aware that the drug Vioxx was pulled off the market about a year-and-a-half ago because of cardiovascular risks associated with taking the drug and because it was causing many people actually to have heart attacks and strokes. Two other drugs, Celebrex and Bextra, were approved for sale here in the United States and are in the same class of drugs as Vioxx. Both Celebrex and Bextra are manufactured by the largest pharmaceutical company in the world, Pfizer, Inc. After Vioxx was taken

off the market, Celebrex and Bextra came under close scrutiny because they are essentially the same type of drug. They were designed to relieve pain and inflammation by inhibiting the COX-2 enzyme that we all have in our blood.

The FDA met in April of 2005 and determined that Bextra should be taken off the market for the same reason as Vioxx - excessive cardiovascular risks - and also because it causes some people to have serious skin reactions. At the same time, the FDA determined that the drug Celebrex should receive a “black box” warning, which is the strongest warning that can be mandated by the FDA. As with Vioxx, litigation has begun around the country for injuries and deaths caused by taking Bextra and Celebrex. All of the litigation involving these drugs in federal court has now been transferred to a Multidistrict Litigation (MDL) proceeding in the Northern District Federal Court of California, which is in San Francisco. The judge who will be overseeing the Celebrex/Bextra MDL is U.S. District Judge Charles Breyer, who is the brother of U.S. Supreme Court Justice Stephen Breyer.

The Celebrex/Bextra MDL is in its beginning stages, but it appears that discovery will begin in this MDL in the spring of 2006. Judge Breyer has indicated that he would like to begin trials involving these drugs in early 2007. Our firm is heavily involved in this litigation and we are on the Plaintiff's Steering Committee for this MDL. Jerry Taylor, Paul Sizemore, and Navan Ward, with the help of other lawyers in the Mass Torts Section of our firm, are handling these cases. These three lawyers are on various committees that deal with the issues that will arise in this litigation. As with Vioxx, we expect to go to trial very soon on Celebrex and Bextra cases. Celebrex and Bextra are further examples of what happens when marketing gets ahead of science, resulting in some very bad outcomes for the people who took these drugs.

### ***FDA WARNS DEVICE MAKER OVER SAFETY***

Boston Scientific has received a harsh warning from federal health regulators on Thursday that cast doubt on the company's safety procedures. This was expected to delay the introduction of new products. The Federal Food and Drug Administration (FDA) said that Boston Scientific had repeatedly failed to advise the government of serious safety problems with its devices, as well as quality-control issues at factories. Officials said the problems affected every plant and every device made by Boston Scientific, whose best-selling product is the Taxus drug-coated stent that doctors use to keep coronary arteries propped open after blockages are removed. The FDA is not ordering product recalls as part of its move and placed no restrictions on the company's ability to sell its current devices. The agency's warning came in a faxed letter to Boston Scientific on January 25th. I am not sure what effect this will have on Boston Scientific. It would at least temporarily reduce the value of its offer for Guidant, which is to be paid partly in stock. Whenever the deal closes, Boston Scientific shares have to be trading at \$22.62 or more for Guidant shareholders to get the full \$27 billion sale price.

At its core, the FDA's complaint is that Boston Scientific has failed to collect, analyze, and report problems that patients and doctors had with the company's devices. That is a critical failure for a device company. In order to properly design a product, a manufacturer must understand what has occurred with the previous generation in order to make corrections both to design and manufacturing. This was only the third time since 1997 that the FDA had sent a “corporate warning letter” to a device company, officials said. Cordis, a unit of Johnson & Johnson, was the last company to receive such a letter. Nearly two years later, its problems have still not been resolved to the FDA's satisfaction and the company cannot introduce products. The FDA's letter said that further

actions the agency might take “include, but are not limited to, seizing your product inventory, obtaining a court injunction against further marketing of the product, or assessing civil money penalties.” The FDA’s concerns grew primarily from inspections of plants in Natick, Massachusetts; Spencer, Indiana; and Maple Grove, Minnesota, and because of the company’s failure to resolve problems inspectors had already pointed out.

Source: *Associated Press*

### **JUSTICE DEPARTMENT WANTS GUIDANT MALFUNCTIONS DOCUMENTS**

The Justice Department has ordered a lawyer who represents a client who sued Guidant Corp. to turn over documents indicating the company continued selling some of its heart defibrillator models after knowing the devices could malfunction. The subpoena, part of the federal government’s investigation into the company, requires a Corpus Christi, Texas lawyer to turn over certain handwritten notes and PowerPoint slides. The lawyer obtained these items from the company during his preparations for a product liability case in a Texas state court. The 10 pages requested include notes from Fred McCoy, president of Guidant’s cardiac rhythm management division, that show a decision was made to sell inventory the executive described as having sporadic “life-threatening” defects.

Currently, Bob Hilliard, the Texas lawyer, represents about 70 patients who are suing Guidant for providing them with faulty heart devices. The jury trial, which was scheduled to begin on February 20<sup>th</sup> in Corpus Christi, Texas, involves two patients with faulty defibrillators. It is the first of what could be several trials stemming from Guidant recalls over the last eight months. Since June, Guidant has recalled or issued safety advisories for about 88,000 defibrillators and more than 200,000 pacemakers. As previously reported, at least seven deaths have been linked to the faulty devices. The company faces

regulatory investigations as well as multiple lawsuits from the recalls. Analysts have predicted Guidant’s liability from all the lawsuits could reach as high as \$2 billion. The documents – part of 600,000 pages of Guidant records – were obtained by the lawyer through discovery in preparations for trial. He was to keep all of the records obtained from Guidant, including those not covered in the subpoena.

Source: *Associated Press*

### **MEDTRONIC CONTINUED SELLING FLAWED DEFIBRILLATORS**

Medtronic Inc., the leader in the \$10 billion-a-year market for heart rhythm devices, continued selling flawed cardiac defibrillators for two years after learning that some of them may suddenly quit working, according to company documents produced in a California lawsuit. After Medtronic recalled the devices last year, 19,000 people had to have surgery for a replacement. It appears that at least one of them died from post-surgical complications. Defibrillator patients are vulnerable to potentially fatal heartbeat irregularities, which the devices that cost \$20,000 detect and correct using electrical shocks. At least they are supposed to work that way, and unfortunately that has not always happened.

Medtronic told 87,000 patients in February 2005 that the defibrillators implanted in their chests might fail. According to company documents filed in the case pending in the federal court in San Jose, California, the Minneapolis-based company had discovered the flaw in January 2003 and started producing a redesigned product one year later. It is difficult to justify the FDA not taking action against Medtronic. Frankly, I don’t really believe the agency has done very much to protect the public in this area of its responsibility.

Source: *Bloomberg News*

### **CONTRACEPTIVE DIDN’T COME WITH BLOOD CLOT WARNING**

There have been seven product liability suits filed by women over the popular contraceptive Ortho Evra claiming the drug maker failed to warn them about the risk of developing blood clots. Each of the suits filed in U.S. District Court for the Southern District of Illinois seeks damages against defendants Ortho-McNeil Pharmaceuticals and its parent company, Johnson & Johnson. It is alleged that the “defendants failed to warn consumers and their health care providers that the Ortho Evra transdermal birth control patch is more likely to cause blood clots than oral contraceptives.” Unlike oral contraceptives, Ortho Evra is transdermal, which means continuous levels of the hormones estrogen and progesterin are delivered through the skin into the bloodstream.

Ortho Evra is marketed as the “first and only” once-a-week birth control skin patch. The plaintiffs also claim that records from the Food and Drug Administration (FDA) show that a high number of women using the patch reportedly suffered injury or death caused by blood clots compared to women using oral contraceptives. They claim, that while the drug maker asserts that the most frequent side effects leading to discontinuation include nausea or vomiting, application site reaction, breast symptoms, headaches and emotional liability, there is no mention of blood clots. According to the suit, the defendants’ own clinical studies showed a higher rate of venous thromboembolism in women on the patch compared to those using the pill, and concealed the extent of the side effects from the public, including the plaintiffs and their doctors.

The plaintiffs claim that, before their injuries, the defendants knew or should have known that using Ortho Evra created a higher risk of thromboembolism that was unreasonably dangerous to consumers. The plaintiffs also claim that if the defendants had been forthcoming to them and their doctors

about the adverse side effects, they would not have used the patch and would not have suffered their injuries. A new study shows that women using the Ortho Evra birth-control patch have double the risk of developing blood clots than those who take the pill. The FDA said the results are preliminary and do not require immediate action other than advising women to discuss the risk with their physicians.

### **ZICAM CLAIMS SETTLED BY COMPANY**

The Phoenix-based, Matrixx Initiatives, the manufacturer of Zicam Cold Remedy, has agreed to pay \$12 million to settle 340 lawsuits brought by consumers who claim the popular over-the-counter zinc nasal gel damaged or destroyed their sense of smell. The agreement was announced in late January. More than 10 million bottles of Zicam have been sold since it came to the market in 1999. About six months ago, Matrixx settled the only Zicam lawsuit, brought by a 42-year-old Los Angeles computer consultant, that has gone to trial. The amount of that settlement is confidential. Approximately 400 lawsuits have been filed against Zicam since 2003, some by users who say they lost their ability to smell and taste after using the product on only one occasion. Matrixx has denied the allegations, saying no study has linked the spray with loss of smell, which is also known as anosmia.

Under the terms of the settlement, 95% of the eligible plaintiffs must accept the Arizona settlement. The amount of the individual recovery for each plaintiff will be determined by medical tests. Plaintiffs who reject the settlement are free to pursue their lawsuits. The plaintiffs have alleged that Zicam destroyed delicate smell tissue when the drug's pump bottles drove the viscous gel into the top of the nose with propulsive force. Zinc is used to destroy smell in laboratory animals and can be toxic to the sense of smell in people. The company says that the spray gel, which package instructions

say is supposed to be used in the lower part of the nose, does not reach high enough to inflict damage.

Last fall Matrixx introduced a new "control tip sprayer" that prevents the spray gel from being forcefully expelled. Production of the old sprayer has been discontinued, but I understand those containers will be sold until supplies are exhausted. In recent months Matrixx has embarked on an expensive national advertising campaign featuring testimonials from consumers, including radio talk show host Rush Limbaugh. Officials at the Food and Drug Administration (FDA) say they have received adverse reports involving Zicam, but the agency hasn't disclosed the number of reports. Because Zicam contains zinc, which is generally recognized as safe, and because it is labeled as a homeopathic remedy, it is exempt from the regulations governing safety testing and manufacturing that apply to many drugs. As a result, Zicam is not an FDA-regulated product.

Since 2000, two case reports published in medical journals have reported anosmia after Zicam use. Some medical experts, who are not connected to the litigation mentioned above say that it has been known since 1938 that zinc can harm smell tissue in high enough doses. It is interesting to note that a year earlier, Canadian doctors had used a zinc nasal solution to kill the sense of smell in children as part of an ill-fated experiment to prevent polio.

*Source: Washington Post*

### **ANTIDEPRESSANTS MAY HARM INFANTS' LUNGS**

A recent report reveals that expectant mothers who took antidepressants such as Prozac late in their pregnancy were significantly more likely to give birth to an infant with a rare but serious breathing problem. The lung disorder, called persistent pulmonary hypertension, strikes 1 to 2 newborns in 1,000 on average, and can be fatal. The study found, in babies exposed to antidepressants during the last few months of

pregnancy, the rate was six times as high: 6 to 12 newborns in 1,000. As reported by *The New York Times*, on February 8<sup>th</sup>, Dr. Sandra L. Kweder, an official at the Food and Drug Administration (FDA), which was not involved in the research, said that the study results were "very worrisome." It was stated that the FDA plans to search its own database of adverse events for further evidence of risk. The regulatory agency will also consider whether to require manufacturers to make labeling changes and conduct postmarketing studies to clarify the risk.

The findings, published on February 9<sup>th</sup> in *The New England Journal of Medicine*, and reported in the *New York Times*, are the latest in a series of reports that highlight the tough choices that face millions of women with depression who are pregnant or plan to be. The FDA has warned that one popular depression drug, Paxil, from GlaxoSmithKline, may increase the risk of rare heart problems in newborns exposed to the medication in utero. Psychiatrists estimate that 10% to 15% of pregnant women suffer bouts of depression. It is said that at least 1 in 10 of those women take antidepressants. The antidepressants belong to a class of drugs that acts in the brain to prolong the action of a mood-related messenger chemical called serotonin. The drugs included Celexa, from Forest Laboratories; Zoloft, from Pfizer; Paxil; and Prozac, from Eli Lilly.

The *Times* article indicated that obstetricians, psychiatrists, and pediatricians agree pregnant women taking the antidepressant drugs should consult their doctors to decide how to proceed. Stopping antidepressant therapy can cause withdrawal effects as well as relapse, they say. I hope the new study will help to clarify the risks of specific drugs taken by women during pregnancy. Women must weigh the risks to their babies against the risk of their untreated depression. Obviously, this is not an easy choice for a woman to make, with serious risks accompanying either of the choices. It appears to me

that the FDA should take a more active role in checking further into this matter.

Source: *New York Times*

### **DEATHS CITED IN REPORTS ON STIMULANT DRUGS**

A 2004 report concerning stimulant drugs was finally made public last month. Twenty-five people died suddenly and 54 others suffered serious unexplained heart problems while taking stimulant drugs like Ritalin from 1999 through 2003, according to the report, which was sent to federal drug regulators. It is impossible to determine whether the deaths and injuries resulted from the drugs or from other factors, federal drug regulators wrote in the 2004 report, released publicly on February 8<sup>th</sup>. As you may know, stimulant drugs are among the most widely prescribed medicines in the world. While any suggestion that the drugs may cause serious health problems should cause great concern, most mental health experts apparently don't believe that the drugs are unreasonably dangerous.

It is significant that children accounted for 19 of the deaths noted in the 2004 report and also 26 of the serious heart problems. The report, using the abbreviation for attention-deficit hyperactivity disorder, stated: "The rare occurrence of pediatric sudden death during stimulant therapy of ADHD is an issue that warrants close monitoring." The report was discussed at an advisory committee for the Food and Drug Administration. It was recommended that research be done to determine whether the drugs are to blame for the deaths and heart problems. About 29 million prescriptions were written in 2004 for Ritalin, Adderall, and similar drugs to treat attention deficit disorder and hyperactivity. Most of these drugs were prescribed for children. It is significant that reports of 20 sudden deaths, 12 among children, prompted Canadian health officials to suspend sales last February of Adderall XR, a long-acting hyperactivity drug.

But, after studying the issue, Canadian authorities allowed the drug back on the market in August. Officials at the FDA have said there is little evidence that the drugs cause heart problems. They say that dozens of controlled trials over decades have failed to show any correlation between the drugs and serious heart problems. But, these trials may not have included enough patients or may not have lasted long enough to uncover small increases in heart risks. In any event, this appears to be a matter that should be looked into further and cleared up if at all possible.

The FDA report noted that the drugs tended to increase blood pressure and heart rates. High blood pressure has long been known to increase the risks of cardiovascular problems. The report concluded that doctors should carefully weigh whether to prescribe stimulants to children with pre-existing heart ailments. It was suggested further that the increasing use of stimulants among adults - among whom hypertension and heart problems are common - could result in a greater "burden" of heart problems. I would like to know why a 2004 report would not be released for public scrutiny for over two years. While there may be a legitimate reason, I haven't heard it so far.

Source: *New York Times*

### **ASTRAZENECA WITHDRAWS ANTICOAGULANT FROM MARKET**

Pharmaceutical maker AstraZeneca PLC has withdrawn its controversial anti-coagulant Exanta from the market because of links to liver injury. Currently, the drug is dispensed only in Europe. It failed to receive approval from the U.S. Food and Drug Administration (FDA) in late 2004 because of concerns about its effect on the liver. Further development of the drug was also terminated. The company's own clinical trials indicated "a potential risk of severe liver injury."

FDA reviewers said in 2004 that the company hadn't adequately addressed the risks of liver toxicity, heart attack, or

drug-induced bleeding associated with Exanta. AstraZeneca sold Exanta in Germany, Portugal, Sweden, Finland, Norway, Iceland, Austria, Denmark, France, Switzerland, Argentina, and Brazil. The company will withdraw all other regulatory applications in the U.S. and Europe.

Source: *Associated Press*

## **X. BUSINESS LITIGATION**

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### **FARMER'S SUIT ACCUSES SEED COMPANIES OF FIXING PRICES**

An Audubon County, Iowa, farmer has sued Pioneer Hi-Bred International Inc., claiming that the Des Moines-based crop seed company violated state antitrust laws since 1997 by conspiring with other major seed companies to fix prices for Roundup Ready soybean seeds. The lawsuit, which seeks class action status, was filed against Pioneer in Dallas County District Court. Roundup Ready soybean seeds are genetically engineered to withstand application of a popular herbicide that otherwise would kill soybean plants. Roundup Ready seeds last year were planted on 87% of U.S. soybean acreage.

Monsanto Co. developed the Roundup Ready gene and licensed access to it. Dozens of companies marketed the seed under their own labels. Pioneer and other competitors agreed on prices for Roundup Ready soybeans. It's alleged in the lawsuit that the companies "fixed, raised, maintained, or stabilized at artificial and supra-competitive levels" the prices farmers have been paying for Roundup Ready soybean seed since September 1, 1997. It's also claimed that the companies conspired to keep competitors of the Roundup Ready technology off the market. The lawsuit names Monsanto, Syngenta Seeds Inc., and Aventis Crop-Science USA as co-conspirators with Pioneer. Injunctive relief, compensatory

damages, and punitive damages are sought, as well as recovery of the money Pioneer has made "as a result of unjust enrichment."

### **JUDGE GIVES CLASS ACTION STATUS TO OIL-SPILL CASE**

A federal judge has certified a class action lawsuit filed against Murphy Oil Corp. over an oil spill in the aftermath of Hurricane Katrina. The court's decision applies to an area in St. Bernard Parish that is smaller than the area the plaintiffs said was damaged and larger than the area to which Murphy sought to limit the case. While the ruling didn't specify how many residences are in the class, the court reserved the right to expand or reduce the area, depending upon what is developed during discovery and further investigation. If a particular plaintiff was excluded from the class because of the restricted area and this was outside the class area, that person could still file a complaint. It was also pointed out by the court, however, that not every plaintiff in the area was automatically entitled to recovery.

The plaintiffs claimed the damaged area was more than six square miles and included at least 10,000 residences. But Murphy Oil, based in El Dorado, Arkansas, argued that only roughly one square mile and about 2,900 residences were affected by the crude oil spill from its refinery in Meraux. The refinery spilled about 1 million gallons of oil in the aftermath of Katrina. The suit claims Murphy was negligent. At a recent hearing, the company said it has paid more than \$50 million through its settlement program for about 1,800 residences, more than \$13 million for cleanup of public property, and more than \$4 million on private property work. It will be interesting to see how this Katrina-related case develops.

Source: *Associated Press*

### **BYRIDER SETTLES ATTORNEY GENERAL'S LAWSUIT FOR \$7.1 MILLION**

The Kentucky Attorney General has settled a lawsuit against a car dealership

in his state. The Attorney General had accused the dealership of selling shoddy cars and trucks at exorbitant prices. The dealer, J.D. Byrider, located in Louisville, Kentucky, agreed to pay \$7.1 million to settle the case. The settlement will provide \$500 in restitution to each of 14,400 people who bought vehicles at the dealership from January 1, 2000, through Dec. 31, 2004. The dealer's parent company, J.D. Byrider Systems Inc. of Carmel, Indiana, which has 123 stores in 28 states, will contribute an additional \$300,000 to the settlement. The parent company is also canceling the Louisville store's franchise and won't let it use the Byrider name in the future. The settlement - the largest ever with an automobile dealer in Kentucky - ends a lawsuit filed by the Attorney General in December 2004. The Courier-Journal had reported that the dealer sold high-mileage cars that often broke down, sometimes as customers were driving them home. The investigative reporting and subsequent stories brought the bad practices to light.

The lawsuit accused the dealer of violating the state Consumer Protection Act by falsely claiming vehicles had been inspected. It also accused Byrider and its finance company of forcing credit customers to buy life insurance and a \$1,095 service warranty, and then illegally including those charges in the amount financed - for which customers had to pay 24.9% interest. After payment of expenses, \$7.1 million will be divided among customers. Those who have paid off their vehicles will get a check for \$500. Those who are still paying off loans will receive a \$500 credit on their debts. The Attorney General will contact customers by mail. In order to be paid, customers will have to sign a release of all claims against Byrider. But, it should be noted that customers don't have to participate. If a customer believes he or she is entitled to more money, that customer can hire their own lawyer and file suit.

As part of the settlement, the local franchise agreed to inspect a specific list of items before selling vehicles and to ensure they meet standards set in the

settlement. The dealer must provide the inspection report to customers on request. The dealer has stopped selling credit life insurance and service contracts. But if the dealer resumes, it must post signs saying that the insurance is optional and that the dealer can't charge a deductible for repairs on defects that existed when the customer bought the car. This appears to be a good result for the people involved.

Source: *The Courier-Journal*

### **NORTEL NETWORKS SETTLES CASE**

Nortel Network has tentatively agreed to pay \$2.5 billion in cash and stock to settle shareholders' class action lawsuits. Under the settlement the telecommunications giant will pay \$575 million in cash and issue 629 million shares. The shareholders' settlement with the Ontario-based company will be the largest ever. The lawsuit arose out of the accounting scandal that erupted in 2004. This scandal led to the firing of the former CEO and other top executives. Nortel is still under investigation by the Securities and Exchange Commission, the U.S. Attorney's office in Dallas, Texas, and the Royal Canadian Mounted Police. The settlement will have to be approved by two U.S. district judges who are overseeing the lawsuits before it becomes final.

### **MERRILL LYNCH SETTLES RESEARCH SUITS**

Merrill Lynch & Co., the world's largest securities firm, will pay \$164 million to settle 23 investor lawsuits. This will end most of the litigation against the firm over whether it issued misleading research on Internet companies. Two class action lawsuits will remain active against Merrill Lynch. One of these is now before the U.S. Supreme Court. The cases that were settled had a rather checkered path through the courts. A number of the cases filed had actually been dismissed by a U.S. District Court Judge. Merrill Lynch says it will defend the two remaining cases.

Source: *Bloomberg*

# XI. INSURANCE AND FINANCE UPDATE

## ***INSURANCE REFORM PACKAGE INTRODUCED IN MICHIGAN***

Michigan Governor Jennifer Granholm is pushing a multi-bill insurance reform package in her state designed to reduce insurance rates. The governor appears to have support in the Michigan Legislature. The cornerstone of the legislative package includes proposals requiring a 20% cut in homeowners and automobile insurance rates and a proposal to ban the use of credit-based insurance scoring. In addition to the proposals that would roll back rates for automobile and homeowner coverage, the reform package would give the insurance commissioner broader powers to regulate. I wasn't surprised to learn that the National Association of Mutual Insurance Companies is opposing the package of bills.

## ***OVER CHARGING FOR TITLE INSURANCE***

A class action in Michigan involving more than 60,000 new-home buyers was recently tentatively settled for \$27.5 million. The lawsuit was filed by owners who claimed they were overcharged for title insurance. The tentatively approved settlement would provide \$300 to \$400 each to people who bought newly-built homes between December 1998 and July 2005, and purchased title insurance from either Chicago Title Insurance Co. of Missouri, Transnation Title Insurance Co. of Arizona, First American Title Insurance Co. of California, or Lawyer's Title Insurance Corp. of Virginia. The suit alleged that the companies gave huge discounts to home builders, who are required to buy owner's title insurance, and simultaneously raised the prices that 62,500 buyers paid for loan title policies. The suit alleged that this was a violation of the 1974 federal Real Estate Settlement Procedures Act. This is the

first time that the federal law has been used by consumers to obtain a class action settlement. Evidently, the practice had been widespread before the 1974 federal Real Estate Settlement Procedures Act was enacted and continued after the enactment.

Source: *Detroit Free Press*

## ***DOCTOR'S FAMILY WINS LAWSUIT AGAINST INSURANCE COMPANY***

The four children of Edsel Stewart, a McComb, Mississippi doctor, sued Prudential Insurance Co., Prudential Life Insurance Co., Pruco Life Insurance Co., agent James Bateman, and others in 2002. The family of the doctor says he died in 1999 firmly believing he had purchased a \$1 million life insurance policy. But, Prudential Insurance Co. said a policy never existed. The suit was based on the defendants not honoring the policy and refusing to pay the proceeds. After a trial, a Hinds County, Mississippi Circuit Court jury awarded \$36.4 in damages, which consisted of \$1.4 million in compensatory damages and \$35 million in punitive damages. After the verdict, one of the children, who is also a doctor, stated: "My father gave the insurance agent a check and signed papers. He said he had bought insurance." Dr. Stewart said shortly after his father gave the agent money for a policy, the elder Dr. Stewart had a stroke, lapsed into a coma, and died about seven weeks later at age 73.

## ***INSURANCE COMPANY REFUSES TO COVER NEEDED TREATMENT***

We have handled several lawsuits for clients whose health insurance companies refused to approve badly needed treatment that was clearly covered by their policy. Usually the decision to refuse to approve treatment was made by a non-professional with no medical training. The following cases are prime examples of how some health insurance companies have turned over critical health decisions to persons who aren't

qualified to make medical decisions. This is essentially true when health care management firms are involved and are making medical decisions. Some say they are practicing medicine without a license. After you read about the following cases, decide if you want a medical doctor or a bean-counter at an insurance company making your health decisions:

- Tracy Pierce was diagnosed with kidney cancer about two years ago. Despite being fully insured, every treatment his doctors sought for him was denied by his insurance provider, First-Health Coventry, which decided the treatments were either not a medical necessity or were experimental. Coventry is a subsidiary of First Health Group Corp. Tracy's doctors appealed several times trying to get the insurance company to approve the needed treatment. One appeal stated that Tracy Pierce would "die without care." Coventry dismissed each request and refused to approve treatment. Cancer ravaged Tracy's body, moving from his kidney to his lungs and then to his brain. For more than a week, even as he was dying, the insurance company denied Tracy oral morphine, which had been prescribed to reduce his pain. Finally, one day Tracy took a nap and never woke up. For his wife, Julie Pierce, it was 15 months of watching her husband die slowly, painfully, and helplessly, with no chance at lifesaving treatment. This is a prime example of an insurance company that badly needs to learn a lesson, and that is to treat their policyholders fairly and approve payment for treatments covered by their policies.
- Another case involved a young boy who suddenly developed a most serious illness. Last fall, 12-year-old Nathan Crabtree was an outgoing and apparently healthy child getting ready for a new school year. Then the little boy started feeling very sick over a period of several days. His father took Nathan to a doctor for some tests. The tests showed that Nathan had an

aggressive form of leukemia - one that needed immediate treatment. Nathan spent the next several months in the hospital at Children's Mercy Hospital. It was obvious to his doctors that he needed medical treatment that wasn't available at the local hospital. Nathan's doctors wrote to his insurance company, urging it to send the boy to the nation's foremost research hospital in Minnesota. Nathan's bags were packed, and he was ready to go. Then his father's insurance company, which was also Coventry, refused to pay for that care, calling it "experimental." Fortunately, Nathan's mother was able to get insurance through her job with another company. That company approved the treatment on the first request. Nathan Crabtree is now in Minnesota for treatment. This was a happy ending - no thanks to Coventry - and I hope Nathan will have a complete recovery.

Dr. William Soper, who is the Executive Director of Mid-America Medical Affiliates, got involved in each of the above mentioned cases. He stated: "It's purely economical. You never see an insurance company try to block an inexpensive test." Dr. Soper, who leads a group of doctors who filed a lawsuit last year against insurance providers, has been to Jefferson City to lobby legislators in Missouri for changes in the existing law. Dr. Soper believes that some insurance companies deny even routine treatments because insurance companies treat their patients as costs, not as clients. In this regard, he observed: "Some of these companies are just unethical the way they treat both subscribers and providers, doctors and hospitals." Dr. Soper, who looked into Nathan's case, observed: "I think they (the insurance company) expect or depend on people giving up after the first phone call."

Dr. Soper's group was so upset with insurance companies that it sued insurers alleging the companies actually block patient care. In discussing the

lawsuit, Dr. Soper stated: "We have patients who say, 'I want a complete physical,' and we'll look at their insurance coverage and we have to say, 'Sorry, but your plan doesn't cover a complete physical.'" For your information, Dr. Soper was one of about 2000 Missouri doctors who filed several class action lawsuits alleging that insurance providers engaged in extortion, fraud, and collusion. According to the lawsuit, insurance companies are conspiring together through elaborate schemes to make it difficult for patients to get needed care. The course of treatment for a patient is essentially decided by bean-counters at the insurance companies. The authority to care for that patient is taken away from doctors because the insurance companies repeatedly reject medical claims as not "medically necessary."

#### ***THE MANAGED CARE INDUSTRY***

The managed care industry has experienced tremendous growth since its beginnings as a California experiment, and now provides health care services to roughly 160 million people. It is generally acknowledged that over the past 10 years, the industry has substantially restrained medical inflation, reduced unnecessary tests and operations, and focused the nation's attention on preventive care. It is projected that the number of people who participate in managed care programs will continue to grow. Our experience has been that these programs, referred to as Healthcare Management Organizations or HMOs, come very close to practicing medicine without a license. The concept of saving money for an insurance company or business is good, but the abuses that come when doctors are taken out-of-the-loop can be disastrous. The two cases referred to above, and several others that our firm has handled, are good examples of abuse and the results.

*Source: Insurance Journal*

#### ***NEW YORK CHURCH SUES ITS INSURANCE COMPANY***

A Roman Catholic church in New York has sued the Travelers Casualty and Surety Co. charging breach of contract. The church is claiming the insurance carrier has improperly refused to pay \$1.22 million stolen by a priest. The Church of St. John the Martyr alleges that the losses resulted from thefts by Monsignor John Woolsey. After the losses were discovered, Woolsey was forced to resign as pastor and a Manhattan grand jury subsequently indicted him. Prosecutors charged that Woolsey funneled at least \$820,800 from the church into his personal bank accounts, including \$47,000 given to the church by parishioners. The stolen money was said to be used by Woolsey for country club expenses, designer watches, fancy clothes, and trips to Vermont, Florida, and Spain. They said he used a church checking account to pay nearly \$16,000 in personal credit card charges.

The investigation of Woolsey began in 2004 after a civil lawsuit was filed charging that he used undue influence to get an 88-year-old parishioner to sign over at least \$490,000 in cash and stock to him before she died. The church lawsuit says it bought a Travelers Crime Plus policy to protect the church against employee theft. The policy insured the church against losses of money, securities, and other property that resulted from employee dishonesty in amounts up to \$5 million, with a \$100,000 deductible. The lawsuit was filed in Manhattan's state Supreme Court.

The church says in March 2004 it discovered a loss of \$1.32 million "as a result of the dishonesty, theft, conversion and/or fraud" on behalf of its then-employee and pastor. The church says the loss was covered by the Crime Plus policy, and on June 8, 2004, it filed a claim for that amount minus the deductible. The church charges Travelers "has breached its contract of insurance for its refusal to pay the claim." An Archdiocese of New York spokesman

said the church and Travelers have been in negotiations for months over payment of the claim, and the church filed the suit because the statute of limitations would have lapsed. Woolsey pleaded not guilty to charges of grand larceny, tax evasion, and falsifying business records. He denied taking funds from the parish and interestingly had strong support from numerous parishioners. It is a sad commentary on our society when pastors are stealing and churches have to file suit to collect what appears to be a legitimate insurance claim.

#### ***JURY SIDES WITH RANCHER AND INSURANCE COMPANY IN MONTANA TRACTOR CASE***

Coming from a farming background, a recent case was especially interesting to me. A jury has ruled that an international farm machinery company must pay a rancher and his insurance company nearly \$120,000 over a tractor that caught fire and burned nearly seven dozen acres of a hay field. The jury ruled in favor of the rancher and Nationwide Insurance. It was claimed that a hydraulic fuel leak and electrical problems led to the August 2001 fire that destroyed a New Holland tractor and haybine. The jury ruled that New Holland North America Inc. must reimburse Nationwide \$78,591, the amount it paid the rancher for the ruined tractor, and pay the rancher separately \$40,000 for his other losses. The farmer suffered additional losses, such as the \$250 deductible that he had to pay, \$570 for fencing that burned up, and the loss of the use of the tractor for five months, during which time he needed a tractor for feeding cattle and moving hay.

Source: *National Law Journal*

#### ***INSURER SUES FORMER MEDIA EXECUTIVE TO RECOVER THEFT CLAIM PAYMENTS***

An insurance company has sued a former executive of the New York Daily News and U.S. News and World Report to recover nearly \$600,000 the carrier

paid to reimburse the publications for his alleged thefts. Federal Insurance Co. says in the lawsuit filed in Manhattan's state Supreme Court that Frank Schilero, former vice-president for information and technology at both publications, stole the money from them between September 2000 and February 2004. During that period, according to court papers, Schilero took kickbacks from a vendor of both publications after allowing the vendor to submit invoices for work that was not done and that contained overcharges. It is alleged that he also renewed contracts with that vendor although the two publications received lower bids for the contracts from others. Schilero left the company in February 2004. Federal Insurance, under the terms of an insurance policy it had written, paid the Daily News and U.S. News \$572,800 for the claimed losses. The insurance company is now trying to get back from Schilero the money it paid out. Apparently, no criminal complaint or charges were ever filed against him.

Source: *The Insurance Journal*

#### ***LENDING COMPANIES KNOW HOW LIKELY YOU ARE TO FILE BANKRUPTCY***

It should come as no surprise that many lending institutions want to gather as much information as possible about your personal spending habits before approving you for credit. What you may not have known is that a lot of this information is used to see how likely you are to file bankruptcy should you become overwhelmed by your monthly bills and obligations. Presently, the big credit agencies will not report this "bankruptcy score" to a consumer if they request it. The credit agencies only provide consumers with their "credit score." Similarly, the credit bureaus will not release the method concerning exactly how they calculate a consumer's bankruptcy score, or how they can improve that score. Although some industry insiders say there is a legitimate purpose for having a bankruptcy score, many critics claim that this is just another way the credit bureaus make

money - by selling this information to lending companies. Many lending companies use this information to figure out just how much credit they can extend to you before you financially break. As you know, lending companies make profit when you are paying them interest on the money they let you borrow. When you stop paying interest and start paying back the principal amount of the loan, the lending companies are no longer making a profit.

One technique lending companies have long used is to give a consumer more credit than he or she really needed, hoping that the consumer would become overextended to the point where he or she can only make the minimum payment. But, lending companies do not want consumers to become overextended to the point to where they will file for bankruptcy protection. Now armed with the information concerning a consumer's "bankruptcy risk," the lending company will more accurately know just how far they can push the consumer into financial debt. Given this information, it is also no coincidence that the powerful lending industry has, just recently, successfully lobbied Congress into passing laws that make it harder for consumer to file for bankruptcy protection. Unfortunately, consumers are getting trapped in an economic vise grip that may well lead to the collapse of the middle class as we know it. Just like a credit score, a consumer should be allowed to see his or her "bankruptcy score" so that he or she can try to take steps to prevent themselves from getting so close to the brink of financial ruin. Disclosure of this type of information is a step toward protecting the middle class, a push toward financial independence for a consumer, and a way to a better economy for all of us.

## XII. PREMISES LIABILITY UPDATE

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### ***LAWSUIT FILED AFTER TEXAS STUDENT DIES FROM ALCOHOL POISONING***

The family of an 18-year-old University of Texas student who died of alcohol poisoning during a party at his off-campus fraternity, has sued the fraternity and its members in a Houston, Texas court. The parents of the student filed the lawsuit in Harris County State District Court on January 26<sup>th</sup> against Lambda Phi Epsilon National Fraternity Inc. and the Zeta chapter of the fraternity in Austin. Also named are several individual members of the Zeta chapter. The suit claims that not only did fraternity members encourage the student to drink large amounts of alcohol at the December party, which lasted for two days, but they neglected to offer him medical assistance when he apparently was unconscious after drinking the alcoholic beverages. A Texas Alcoholic Beverage Commission official recently said the autopsy results showed that the student had a blood alcohol level of 0.50, which is about six times the state's legal blood alcohol limit of 0.08 to drive a car. The family hopes its case calls attention to illegal drinking on campuses and prevents other families from losing loved ones because fraternities encourage heavy drinking.

The student is alleged to have attended a party to welcome new members at the fraternity house west of campus on December 9<sup>th</sup>. The suit claims other members and fraternity officers encouraged the new members to drink as much alcohol as possible. When the student passed out, they scrawled on him with markers, perhaps signing their names on him and then apparently left him. The student was found dead in the fraternity house on December 10<sup>th</sup>. The writing on his body was removed during funeral preparations. The Texas Alcoholic Beverage Commission, the Travis County District

Attorney's Office, and the Austin police are investigating the death. The University of Texas banned the Asian-American-interest fraternity from campus for six years after an investigation by the dean of students' office in December found evidence of hazing the night this student died. The investigation revealed that new members were expected to consume large amounts of liquor while being presented as active members. I have to wonder if it isn't time to put a halt to hazing by fraternities on college campuses. I believe that it is!

### ***CHEMICAL MIX IS SAID TO HAVE CAUSED PLANT EXPLOSION***

The cause of a powerful explosion in late January at the Excel Apparel plant in El Paso, Texas, was a chemical reaction that started in the mixing container of a dry powder blender. The finding was based on the fire marshal's investigation, which "revealed that a chemical reaction within the blender caused it to explode, projecting metal fragments through the roof." The findings say further that "the fragments severed electrical power lines, which in turn ignited dust that was suspended in the air from the initial blast, resulting in the second, much-greater dust explosion." The blast, which caused \$750,000 in damage, sent four people to a hospital, including three firefighters. More than 70 firefighters responded to the explosion with 25 fire units. Excel manufactures denim products. The Occupational Safety and Health Administration is currently investigating the incident. It was most fortunate that more employees weren't seriously injured or killed. In fact, that was a major miracle.

Source: *El Paso Times*

### ***APARTMENT OWNER LIABLE IN SEXUAL ASSAULT CASE***

A Tarrant County, Texas, jury has sent a strong message to apartment owners, and that is, "don't hire criminals who may endanger residents!" The jury

returned a \$4.85 million verdict against an apartment complex owner in favor of a mother who sued after her 4-year-old daughter was sexually molested by a 26-year-old maintenance worker in 2001. The case involved the negligent hiring practices of the owner. This wasn't the first time that a worker at that complex was accused of sexually assaulting a resident. A woman was raped by another maintenance worker in 1998. The employee who committed the assault in the child's case had a criminal record. An initial background check run on the 26-year-old employee by the apartment management revealed two counts of shoplifting in 1999. Although the record didn't include any crimes of violence, it does tell us that a criminal record of any kind should be a red flag when hiring employees who will have access to apartments in a complex.

## XIII. WORKPLACE HAZARDS

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### ***NATIONAL SAFETY COUNCIL REPORT***

Safety in the workplace should always be a top priority for employers, employees, and government. It is a responsibility that while shared, must start with the employers. While there have been gains in lowering workplace death rates - down 17% since 1992 - that has been undone by the rate of fatalities occurring off the job, up 14% in that same period. And while there have been gains in workplace safety, there are still too many accidents on the job. According to 2004 National Safety Council statistics, twice as many workers - or 6.8 million - were seriously injured while off the job than were injured while working. And of the 49,000 injury-related deaths in 2004 involving workers, roughly 90% occurred while employees were off the job. Accidents that involve employees - but which are unrelated to the workplace - are also a

big problem.

In 2004, the cost of employee injuries - both on and off the job - was more than \$330 billion. Nearly 60% - or \$200 billion - was for injuries to employees who were off the job. According to the Agency for Healthcare Research and Quality, more is spent by private health insurance on medical care associated with trauma and poisoning for people of working age than for any other health condition, including cancer, heart conditions, mental disorders or upper respiratory conditions, and asthma. In addition, off-the-job injuries accounted for employers losing 165 million days of production time, compared with 80 million lost work-days as a result of workplace injuries. Increasingly, businesses are recognizing the value of keeping their employees safe at all times both on and off the job. In a recent National Safety Council survey of 1,300 companies of varying sizes, the impact of off-the-job safety training has begun to be felt at businesses that have implemented programs. Of those companies that have implemented off-the-job programs, 58% reported reductions in injuries occurring outside of work. In addition, research presented at the 17th World Congress on Safety and Health at Work last fall found that for every dollar businesses spend on safety, a \$3 to \$6 savings is felt by employers. That appears to be a good investment.

Source: *Insurance Journal*

#### **EMPLOYERS MUST LIST INJURY AND ILLNESS SUMMARIES**

Employers must now post a summary of the total number of job-related injuries and illnesses that occurred last year. The summary required to be filed must list the total number of job-related injuries and illnesses that occurred in 2005 and that were logged on the OSHA 300 form. Employment information about annual average number of employees and total hours worked during the calendar year is also required. This data will be used in calculating incidence rates. Companies

with no recordable injuries or illnesses in 2005 must still post the form with zeros shown on the total line. All establishment summaries must be certified by a company executive. The form is to be displayed in a common area where notices to employees are usually posted. Employers must make a copy of the summary available to employees who move from worksite to worksite, such as construction workers, and employees who do not report to any fixed establishment on a regular basis.

Employers with 10 or fewer employees and employers in certain industry groups are normally exempt from federal OSHA injury and illness record-keeping and posting requirements. Exempted employers may still be selected by the Labor Department's Bureau of Labor Statistics to participate in an annual statistical survey. All employers covered by OSHA need to comply with safety and health standards, and must report all fatal accidents or the hospitalization of three or more employees verbally within eight hours to the nearest OSHA office. A complete list of exempt industries in the retail, services, finance, and real estate sectors is posted on OSHA's website, which is [www.osha.gov](http://www.osha.gov). Copies of the OSHA Forms 300, 300A and 301 are available on the OSHA Recordkeeping Web page in either Adobe PDF or Microsoft Excel Spreadsheet format.

Source: *Insurance Journal*

#### **FORMER POPCORN WORKER SETTLES CASE**

A former popcorn factory worker has settled a lawsuit blaming his lung disease on fumes from a butter flavoring used in a microwave variety. Terms of the out-of-court settlement are confidential. This settlement ends the company's appeal of a \$20 million jury verdict awarded to the worker and his wife. The agreement was reached with International Flavors & Fragrances Inc. and its subsidiary, Bush Boake Allen Inc. This 34-year-old worker was among 30 current or former workers at a Jasper popcorn factory who sued the compa-

nies, claiming they suffered lung damage because they breathed fumes from the butter flavoring used to make microwave popcorn.

Jasper Popcorn Co. and Glistler-Mary Lee Corp., which bought the popcorn factory in 1999, were not defendants in the lawsuits. The lawsuits allege that the manufacturers knew, or should have known, that the chemical diacetyl was hazardous and should have informed employees of the danger. As reported, most of the cases have been settled out of court for undisclosed amounts. Verdicts in three cases remain under appeal by the companies.

Source: *Associated Press*

#### **CRIMINAL INVESTIGATION OF THE BP BLAST COMMENCES**

Almost a year has passed since the March 23<sup>rd</sup> explosion at BP's Texas City refinery. I understand that Federal Bureau of Investigation (FBI) agents and criminal investigators from the Environmental Protection Agency (EPA) have started to look into whether criminal wrongdoing on the part of the company or its managers could have caused the blast. The FBI agents, EPA criminal investigators, and an assistant U.S. Attorney from Houston are handling the case. Both OSHA and the U.S. Chemical Safety and Hazard Investigation Board previously reported that known flaws in equipment, failure to follow safety guidelines, and inadequate training contributed to the 15 deaths and more than 170 injuries in the blast.

I understand that U.S. government attorneys will probably file a civil lawsuit this year against BP for massive releases of toxic pollution that occurred around the time of the explosion. In September, the Texas Commission on Environmental Quality (TCEQ) referred two air pollution violations to the Environmental Protection Agency for enforcement, according to John Sadlier, director of the Enforcement Division at TCEQ. The Department of Justice is expected to aggressively pursue those matters as part of a larger civil investiga-

tion by the EPA. It is reported that the EPA will take a hard line with BP and push for a record-setting fine.

The EPA has confirmed that the BP matter is “under enforcement review.” The TCEQ released two notices of alleged violations that are part of the EPA’s review. One refers to a storage tank damaged in the blast, which resulted in the release of 2,524 pounds of cancer-causing benzene for a full 28 days following the blast. The second citation refers to the huge release of chemicals from a blowdown stack that occurred as a result of the overfilling and overheating of another unit at the refinery. That spewing of toxics lasted for 164 hours and 40 minutes, and during that time, at least 30,000 pounds of pollutants were released, according to the notices. Even though the civil and criminal investigations will likely include Clean Air Act violations and explore the role of BP managers, the two inquiries are separate and involve different lawyers and different investigators.

Source: *The Houston Chronicle*

### ***PREVENTING FALLS OF WORKERS***

We currently represent a man who worked for a company that installed communication satellites. Our client was contracted to install a communication satellite in a truck terminal in North Alabama. Our client and his co-worker had never installed a satellite dish on top of a structure, but instead had always installed the dishes on the side of the building. Because this structure had a metal roof with skylights, the satellite dish was to be placed through the middle of the metal roof at the trucking terminal. Our client had never been on this structure before. The roof and skylight had been exposed to weather elements so long that the skylight could not be distinguished from the roof. While pulling cable from the ground up a pipe through the roof, our client backed up and stepped through a fiberglass skylight panel. He fell approximately 20 feet and was severely

injured.

In researching skylight falls, we were shocked at the vast amount of information concerning persons who had fallen from roofs or elevated places. The National Institute for Occupational Safety and Health (NIOSH) performs investigations in this area. NIOSH suggests that employers, workers, building owners, skylight designers, and skylight manufacturers may not fully recognize or appreciate the serious fall hazards associated with working with skylights, roofs, and floor openings. As a result, skylights, roofs, and floor openings are often left unguarded or uncovered. Workers are assigned to work around these areas without appropriate fall prevention measures having been put in place.

Occupational fatalities caused by falls are a serious public health problem throughout the United States. The data we collected indicate that falls are one of the leading causes of traumatic injury and death in the workplace accounting for 800 deaths in 2001. During that same year, nearly 300,000 workers sustained injuries involving days away from work as a result of falls. While most of the injuries occurred in construction, a good number of injuries occur in other industries such as manufacturing, retail trade, and services.

During the 1980s the NIOSH attempted to prevent work-related falls by targeting falls from elevation through an in-depth investigation called Fatality Assessment and Control Evaluation Program. This program was to identify factors that contributed to work-related fatalities and provide recommendations for preventing such events in the future. NIOSH identified unguarded skylights and roof openings as fall hazards, and offered strategies for fall prevention. OSHA has developed standards to prevent workers in general industry and in construction from falling through skylights, roofs, and floor openings. The OSHA general industry standard, which is found at 29CFR 1910.23(a)(4), requires that “every skylight floor opening and hole shall be guarded by

standard skylight screen or fixed standard railing on all exposed sides.”

Generally, there are two methods of protecting skylights or roof or floor openings. If a skylight screen is used as a safety precaution, it is required to withstand a load of at least 200 lbs. on any one area of the screen. If a fixed rail is used instead of a screen, OSHA requires that a standard rail consists of a top rail, an intermediate rail and post, and shall have a vertical height of at least 42 inches above the opening. Our research in this area makes it clear that employers, building owners, and workers may not fully appreciate or recognize the seriousness of fall hazards associated with working near unguarded skylights and roofs and floor openings. Clearly, more attention by employers and building owners should be paid to the problem. Persons working in and around such hazards on buildings must be protected.

Source: Bureau Of Labor Statistics

### ***SUNOCO EMPLOYEE AWARDED \$9 MILLION AFTER REFINERY FALL***

A Pennsylvania jury has awarded a Sunoco laborer \$9 million in damages for injuries suffered when he fell from a ladder at the company’s south Philadelphia refinery. The 35-year-old employee fell in October 2002 while climbing down a ladder between catwalks, injuring his head, back, and shoulder in the fall. The case could have been settled for \$3 million. But the only offer Sunoco ever made was a mere \$25,000. The employee’s injuries included herniated disks. The main factual dispute in the case was whether a safety cage was in place on the ladder when the accident occurred. Sunoco plans to appeal.

### ***OSHA CITES ALABAMA CONTRACTOR FOLLOWING FATALITY AT WORKSITE***

The U.S. Labor Department’s Occupational Safety and Health Administration (OSHA) has cited Titan Electric following the investigation of an August 2005 fatal accident in Auburn, Alabama. The

worker was killed when he fell 40 feet from a concrete pole while working at Duck Samford Park where he was adjusting electrical lights. OSHA's investigation reportedly determined that safety equipment was available on site, but was not being used. The agency is proposing penalties totaling \$52,750. Ken Atha, OSHA's Mobile area director, says:

*Falls are a leading cause of worker fatalities in the Southeast, and this tragic accident could have been prevented if the worker had been wearing fall protection equipment.*

OSHA issued one willful citation to the company, with a proposed penalty of \$49,000, for failing to require an employee to wear fall protection equipment. The agency issues a willful citation when an employer has shown an intentional disregard of, or plain indifference to, the requirements of the Occupational Safety and Health Act and requirements. The company also received six serious citations, with proposed penalties totaling \$3,750, for hazards including failure to place ladders on stable, level surfaces; failure to ensure that the tops of ladders were supported; provide employees with fall protection training; and failure to properly store acetylene gas cylinders to prevent unexpected flow of highly flammable liquid acetone. Serious citations are issued when there is substantial probability that death or serious physical harm could result and the employer knew, or should have known, of the hazard. The Dora, Alabama-based company has the right to contest the citations and proposed penalties before the independent Occupational Safety and Health Review Commission.

#### **OSHA PROPOSES \$332,000 IN FINES AT BIRMINGHAM FOUNDRY**

The federal government has proposed \$332,700 in fines for McWane Cast Iron Pipe for 38 safety and health hazards cited at the company's Birmingham

plant. The Occupational Safety and Health Administration (OSHA) proposed fining McWane \$242,700 for 10 repeat citations for exposing workers to silica above permissible levels, unguarded machinery, and electrical hazards. OSHA proposed \$90,000 in fines for 28 citations for exposing workers to improperly operated forklifts, inadequate lockout-tagout procedures, and a front-end loader that had been modified contrary to the manufacturer's recommendation.

## **XIV. TRANSPORTATION**

### **REPORT ON CRASHES OF AIR AMBULANCES**

Air ambulance crashes killed 54 people over a three-year period, most of them pilots, paramedics, and nurses, according to a special study by the National Transportation Safety Board. The report concluded that pilots were not good at analyzing risks and that the rules are too lax for flights that are not carrying a patient or a donated organ. Helicopters and planes used as ambulances fly under airline-type rules when carrying a patient or organs. But if they are on their way to a pickup, the pilots fly under rules that apply to private planes. Those rules don't limit how many hours a pilot can work, and allow flights in worse weather. Three-quarters of the accidents occurred under those rules.

Investigators also supported a formal program of "flight risk evaluation," in which the pilot and possibly a second expert would dispassionately score each mission, based on weather conditions, time of day, and other factors. Thirteen of the 55 accidents might not have occurred if such evaluations had been done, according to the report. While the number of crashes is up, including nine more crashes killing eight people since the end of the study, the rate of accidents is uncertain because of difficulties in determining the number of flights. According to the Federal Aviation Administration (FAA),

there are about 650 emergency medical service helicopters. But, an industry group estimates there are more than 750. According to investigators, there were no accidents among "public use" aircraft, including those flown by police and fire departments. Government agencies tend to have dispatchers trained to obtain weather data and discuss conditions with the pilot, investigators report. The report indicates that professional dispatching might have eliminated 11 of the 55 crashes.

The safety board investigators said accidents could also be reduced by use of night-vision equipment and terrain warning systems. An FAA spokeswoman says that the technology was not well-suited to helicopters because they sounded false alarms frequently at low altitudes, which is where helicopters often fly. A spokesman for the industry, Thomas P. Judge, a paramedic in Maine and the previous president of the Association of Air Medical Services, told the *New York Times* that risk management programs would be helpful, but that applying airline rules to all flights would not. For example, Mr. Judge says that the airline rules require that the pilot receive a weather report on the destination before departure from a source approved by the FAA. It was noted that the destination might turn out to be an isolated area for which no weather report was available. In any event, it is quite apparent that better regulation of the private air ambulances is badly needed.

Source: *New York Times*

### **LAWSUIT FILED IN CRASH OF PLANE SENT FOR FORMER PRESIDENT BUSH**

A lawsuit has been filed against the operator of a corporate jet sent to pick up former President George H.W. Bush by the family of a flight attendant killed when the plane crashed. The wrongful death lawsuit charges that the pilots were inexperienced with the model of jet that wrecked in November 2004. Defendants named in the lawsuit were the charter operator, Business Jet Ser-

vices Ltd. of Dallas; the plane's owner, The Jet Place Inc.; and the estates of the two pilots.

According to the lawsuit, the jet was to pick up the former president in Houston and fly him to Ecuador for \$39,000. On the way from Dallas to Houston, the 1984 Gulfstream jet hit a 153-foot light pole and crashed along a road more than three miles short of the runway, killing both pilots and the flight attendant. The lawsuit charged that the pilots failed to monitor their altitude and distance from Hobby Airport and tuned to the wrong navigation frequency. Lawyers for Dunn's family said the chief pilot had only flown the plane one hour in the previous six months. The second pilot had flown it for the first time a month before the crash and wasn't formally trained in using the navigation system.

Source: *Associated Press*

### ***AN EVENT DATA RECORDER MAY BE IN YOUR CAR***

The Event Data Recorder (EDR), a feature quickly becoming standard on most all cars, is most helpful to accident investigators. The recorder, a four-inch-square metal box, is currently installed in most recent GM vehicles and select 2000 and later Ford vehicles. I believe the EDRs are now installed in about 70% of all new car models. In some ways the boxes are similar to data recorders used on airplanes and trains. The car's recorder springs into action as part of the airbag system. Originally designed to improve airbag performance, based on the severity of the collision, the EDR can tell traffic accident investigators about the car's speed, engine RPMs, how far the accelerator pedal was pressed, whether the brakes were applied, whether the driver's seat belt was buckled, and what warning lights were on. All of this is developed about five to ten seconds before impact. When an airbag deployment collision accident occurs, the data are recorded onto a computer chip. The data can be

retrieved and are presented in a report.

The data downloaded from the EDR will usually contain 6 to 8 pages of information. A second impact can be recorded in the secondary, or non-deployment, file depending upon the circumstances of the collisions and the time interval between them. An airbag deployment is not actually required for information to be recorded. There are circumstances where an airbag deployment command would be issued, but the algorithm used to order the deployment determines a deployment is not warranted. An example would be where a driver was out of position before deployment is ordered. This is referred to as a "deployment level" event. Data may be recorded for "non-deployment" events. This can include rollover, sideswipe, and side impact accidents. It is also possible that no data will be recovered from a data recorder. One situation where this might occur would be a catastrophic loss of electrical power during the collision. In that situation, the entire power reserve in the airbag control module capacitor is used to deploy the airbags. As a result, there is none left for the recorder and no data are stored even though the airbags deployed.

Source: *Insurance Journal*

### ***SEA-DOO MAKERS SETTLE LAWSUITS***

One of the world's largest watercraft manufacturers has settled a 1999 Juno Beach, Florida, accident. The settlement was reached between the mother of a 12-year-old child and Bombardier Inc., the makers of Sea-Doo. Terms of the settlement were confidential. In her lawsuit, the mother had been seeking damages for the child's death. The child died of head injuries in August of 1999 after she lost control of the Sea-Doo she was riding and collided with a dock. The family blamed Bombardier for the child's death, claiming the company should have posted age warnings on its watercraft, alerting young riders of potential risks. The Sea-Doo had no

such warnings.

### ***FAMILY OF CRASH VICTIMS FILE LAWSUIT***

Relatives of a grandmother and two children who were killed in a motor vehicle crash have filed an alcohol-related lawsuit in a Maryland state court. Defendants are the man who plowed into the family's parked car, the shuttle company that employed the driver, and the rental agency that leased the company its vans. The two children, ages 4 and 7, and their grandmother died in May 2004, when a speeding shuttle van driven by a man whose blood-alcohol level was nearly double the legal limit hit their car. The van's driver, who was fleeing the scene of another accident when he crashed into the vehicle involved in this suit, pleaded guilty in November 2004 to three counts of motor vehicle manslaughter and was sentenced to 12 years in prison.

The lawsuit, filed in Baltimore Circuit Court by the family, names as defendants the owner of the now-defunct Baltimore Shuttle company that employed the driver and Enterprise Leasing of Baltimore, which had a standing contract with Baltimore. The driver had been drinking for about six hours on the day of the crash. At the time of impact, the drunk driver was driving about 80 mph. The force of the impact by the 2-ton van nearly sheared the victim's car, a Kia, in half. Baltimore is described in the lawsuit as a small company that leased its shuttle vans from Enterprise. It is claimed that Enterprise "had a duty to ensure that it was leasing its vehicles to responsible people." Had they checked, it is alleged, Enterprise should have known that the driver "was not a responsible driver." His record should have been required by Enterprise because the shuttle company and its insurance carrier would have had it.

In 2004, 16,694 people were killed in the U.S. and 500,000 more were injured in alcohol-related motor vehicle crashes. That means a human being was killed every half-hour, every day of the

year. We cannot accept the fact that almost 17,000 Americans will be killed and another half-million injured in alcohol-related crashes every year. In related data, it's interesting and sad to note that advertising expenditures in this country for beer, wine, and liquor total \$1.9 billion. Young people view about 20,000 commercials a year, and over 2,000 of those are promoting beer and wine. Drunk driving and alcohol-related vehicle crashes take a heavy toll in the U.S. There will be tragic consequences such as that described in the lawsuit referred to above.

### ***A REPORT ON MEDIAN BARRIERS AND A DRUNK DRIVING ACCIDENT***

The National Transportation Safety Board (NTSB) has determined that alcohol impairment caused a driver to lose control of his vehicle in a Linden, New Jersey traffic accident. The Board noted in its report that had a median barrier been present at the accident site, the vehicle likely would not have crossed into oncoming traffic, killing six people. But, if alcohol had not been involved the secondary barrier issue wouldn't be present. NTSB Acting Chairman Mark Rosenker says: "Accidents like this are why eliminating hard core drinking and driving is on our Most Wanted list." The 2003 accident occurred at about 2:00 in the morning when an off-duty police officer driving a Mercedes CLK320 lost control of his vehicle, mounted and crossed a six-inch-high raised curb, and entered the north-bound lanes, where he collided with a Ford Taurus occupied by a driver and four passengers. All five occupants in the Taurus and the Mercedes driver were killed in the crash. The investigation determined that during the evening leading up to the accident, the Mercedes driver stopped at a local bar, attended a softball game where beer was present, and then returned to the local bar for more drinking. Toxicology tests on the Mercedes driver reported a blood alcohol concentration of .326%. As you may know, that level is very close to causing death.

Contributing to the severity of the

crash was the lack of a median barrier at the accident site. Guidelines provided by the American Association of State Highway Transportation Officials (AASHTO) suggest that raised curb medians, like the six-inch-high median at the site, are best used on low-speed urban arterial roadways. The guidelines further note that on high-speed roads, striking a raised curb median can cause a vehicle to trip, overturn, or become airborne. Current median barrier guidelines are inadequate for determining when to install a median barrier at sites like the accident site involved here. Traffic surveys on the highway where this incident occurred showed that the median nighttime traffic speed was 62 miles per hour. The NTSB recommended that the Federal Highway Administration and AASHTO work together to establish criteria for determining when to install median barriers on high-speed, high-volume roadways regardless of access type. This case is mentioned for two reasons: one to emphasize once again the tragic consequences of drinking and driving; and also to note the need to install adequate median barriers, which can help save lives on our highways.

Source: *The Insurance Journal*

### ***A FLORIDA JURY RETURNS A VERDICT IN DEATH CASE***

A Miami-Dade County, Florida, jury has awarded \$10 million to an Ontario widow and her seven children in a wrongful death lawsuit filed six years ago against Certified Engines Unlimited, Inc., an engine repair firm. At the conclusion of the six-day trial, the jury ruled against Certified Engines and found it guilty of negligence in failing to properly inspect, service, and repair the aircraft involved in the crash. The jurors also found that the company failed to warn the pilot and owner of any defects about which the firm should have known. The plaintiff's husband had run a commercial air charter service ferrying workers and equipment into the gold mines of Guyana. He was killed in

August 1998, when the engine on his Cessna U206 aircraft failed, causing the plane to crash in a Guyanese jungle. Previously, the pilot had sent parts of his engine to Certified Engines, a well-known repair station for repairs.

It was claimed that mechanics had accidentally overheated the engine, cracking two of its six cylinders - and the trying to cover that up by replacing several engine parts without disclosing what they had done. Federal aviation regulations require a complete description of any work performed on a plane. Certified Engines kept the engine for at least three years. Experts who testified at trial traced fractures found on the failed engine back in time, like rings on a tree trunk, dating the source of the damage to the time when the engine was still in Certified's possession. Certified, in turn, argued that it would never have kept an engine for as long as the plaintiff claimed, but that a 1998 tornado had destroyed business records that might have proved it had in fact returned the engine at an earlier date. The jury, which included a one-time airplane mechanic for Pan Am, didn't buy that argument. As the result of a "high-low" agreement made before the case went to trial, the award will be reduced to \$4 million and there can be no appeal.

Source: *Miami Herald*

## **XV. ARBITRATION UPDATE**

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### ***ARBITRATION CAN BE GOOD AND IT CAN ALSO BE VERY BAD***

There are situations where arbitration actually can be good - when the opposing parties to a legal dispute are on an equal economic footing. In such instances, binding arbitration can be good for the parties. It is pretty interesting to note, however, that when one powerful corporation has a legal dispute involving huge sums of money with another large company, the victim usually wants a judge and jury to hear

the claim. That has always amazed me, especially since the Federal Arbitration Act was passed years ago for that type of dispute. In any event, large corporations with legal disputes should use binding arbitration to resolve their issues. I recommend that course of action.

When consumers and a large, powerful corporation have a legal dispute, however, mandatory, binding, arbitration has no place - that is, unless the parties voluntarily agree to accept arbitration after a dispute arises. The economic power of a corporation should never be allowed to force a consumer to agree to arbitration before a dispute arises. An arbitration clause that is required in a consumer contract of any kind in advance of a dispute should never be allowed by a court. In cases involving a consumer whose claim is against a large corporation, arbitration is very bad and that's a proven fact. The economic power of a large corporation will rule the day in every instance where a consumer's dispute is put in arbitration. That's why arbitration was never intended to be used in a consumer's dispute. I have never understood how any court could have extended the application of the Federal Arbitration Act to consumer disputes.

## XVI. NURSING HOME UPDATE

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### ***NURSING HOME TO PAY \$2.5 MILLION TO SETTLE FALSE CLAIMS LAWSUIT***

The owners and operators of a Lawrenceville, Georgia nursing home have agreed to pay \$2.5 million to resolve numerous allegations of federal False Claims Act violations for billing for services that either were not provided or were worthless to the nursing home residents. The nursing home, Life Care Center of Lawrenceville (Lawrenceville), is operated by Life Care Centers of America, Inc. (LCCA), a chain with 240 nursing homes in 28 states. The nursing home did not admit liability or wrong-

doing in the settlement.

The lawsuit was filed in November of 2002 by five whistle-blowers who were family members of residents at the nursing home. The lawsuit claimed that when Lawrenceville accepts Medicare payments, it has a duty to "provide reasonable and necessary nursing services and medical treatment to the patients" as required by state and federal law. The whistle-blowers' complaint alleged a systematic failure by Lawrenceville to provide appropriate nursing care to its residents and that such failure resulted in the premature deaths of several residents. The complaint further alleged that the failure of care was the result of severe understaffing, inadequate staff training, high staff turnover, an ineffective medical director, poor nursing documentation, and insufficient budgetary allowances. According to the lawsuit, "the defendants have billed and received payments from Medicare and Medicaid for services that they failed to deliver."

Under the settlement agreement, the United States and the State of Georgia have agreed to dismiss the lawsuit in exchange for a total payment of \$2.5 million, with the United States receiving \$1,092,000 for damages sustained by the Medicare program and \$604,800 for the federal share of the damages sustained by the Medicaid program. The State of Georgia is receiving \$403,200 for the damages sustained by the State of Georgia in connection with its funding of the Medicaid program. The relators, three private citizens who originally filed the qui tam action and who remain parties to this case, will receive a total of \$400,000 for their efforts pursuant to the False Claims Act. In addition, LCCA and Lawrenceville have agreed to enter into a Corporate Integrity Agreement (CIA), which requires Lawrenceville to continue to implement certain policies and procedures put in place to ensure compliance with applicable statutes and regulations governing patient care. The CIA also provides for the appointment of an independent monitor who will oversee operations at Lawrenceville for up to

five years.

This good result was the culmination of several branches of government working together. The investigation was handled by the United States Attorney's Office for the Northern District of Georgia; the Civil Division of the United States Department of Justice; the United States Department of Health and Human Services, Office of Inspector General; and the State of Georgia's Attorney General's Office.

## XVII. HEALTHCARE ISSUES

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### ***PRIMARY CARE CAN'T BE ALLOWED TO COLLAPSE***

Healthcare in this country must be both "good" and "available." Keeping our healthcare system "healthy" in the U.S. must be a top priority. Primary care - the basic medical care that people get when they visit their doctors for routine physicals and minor problems - is an important part of the system. It could fall apart in the United States without immediate reforms, according to the American College of Physicians (ACP). In a report, ACP says:

*Primary care is on the verge of collapse. Very few young physicians are going into primary care and those already in practice are under such stress that they are looking for an exit strategy.*

The report indicates that dropping incomes, coupled with difficulties in juggling patients, soaring bills, and policies from insurers that encourage rushed office visits, are a part of the problem. These all mean that more primary care doctors are retiring than are graduating from medical school, according to the ACP report. That's not good news for people in the U.S. who require medical care and treatment. ACP's proposed solution calls on federal policymakers to approve new ways of paying doctors that would put primary

care doctors in charge of organizing a patient's care. It would also give patients more responsibility for monitoring their own health and scheduling regular visits. Doctors in this country have long complained that reimbursement policies of both Medicare and private insurers reward a "just-in-time" approach, instead of preventive care that would save money and keep patients healthier. Bob Doherty, senior vice-president for the ACP, observed:

*Medicare will pay tens of thousands of dollars ... for a limb amputation on a diabetic patient, but virtually nothing to the primary care physician for keeping the patient's diabetes under control.*

The ACP plan called for innovations such as using e-mail to consult on minor and routine matters, freeing up expensive office visit time for when it is needed. Doctors would be compensated for an e-mail consultation. The proposals include incentives for doctors to work more efficiently and to provide better care, Dr. C. Anderson Hedberg, the president of ACP, says: "ACP proposals would provide patients with access to care that is coordinated by their own personal physician." Our national leaders must take this health issue seriously and address the problem. We can't afford to lose doctors in this area of practice. These doctors are an essential part of our healthcare system and are generally considered the first line of defense in the system.

### **GENERIC DRUGS ARE BEING HELD UP BY THE FDA**

With the large drug companies charging unreasonably high prices for their branded drugs, it makes sense for generics to be used when possible. The federal government should be pushing generics at every opportunity. In fact, the use of low-cost generic drugs has been embraced over the past few years as a way to rein in skyrocketing health

care costs. With that in mind, it seems rather odd that the Food and Drug Administration (FDA) has a backlog of more than 800 applications to bring new generic products to the market. That number represents an all-time high. As a result, experts say fewer generic drugs will be available to consumers in the years ahead than the industry is ready and able to provide. I was shocked to learn that the FDA told Congress the office that reviews new generics needs no additional money and that the agency has no plans to hire more reviewers. Not only was this quite a shock, it makes absolutely no sense. I suspect the giant drug companies, which sell their brand medicines under patent protection, may be involved in this matter. I understand that a record number of applications for generics are expected this year by the FDA. That means an even larger backlog - because apparently there won't be any staff increases in 2006 - and that is difficult to understand.

Because the low cost of generics has broad benefits for the public, Congress should be willing to pay for additional staffing at the FDA. Because the Bush Administration has not asked for more money, it tells me that the big drug companies are being favored. I don't believe the fact that the FDA has a backlog on generic applications is just a coincidence. The powerful drug companies that are branded can stop competition by clogging up the system at the FDA as generics go through the regulatory process. It makes absolutely no sense to flatline or cut funding at the FDA. I believe it's essential for the FDA to speed up the approval of new generics without sacrificing safety. We can't allow the giant drug companies to continue to call all of the shots at the FDA.

*Source: The Washington Post*

### **SERIOUS RISKS ARE FOUND IN HEART DRUG**

Trasylol, a widely used heart-surgery medicine made by Bayer AG that is standard treatment in many hospitals, has

been found to carry serious health risks, according to a new study. The drug is used to stem blood loss in patients undergoing heart-bypass surgery. Approved in the U.S. in 1993, the drug is given to about a quarter of the one million people world wide who undergo bypass surgery each year, the study's author estimates. Recently, Bayer has aggressively marketed the drug and funded research to expand its use to joint and spine surgeries. In the first nine months of this year, Trasylol - whose chemical name is aprotinin - was Bayer's fastest-growing drug, with world wide sales of just less than \$200 million during that period. Bayer says 150,000 patients received the drug last year in the U.S.

The study of 4,374 patients, published in the New England Journal of Medicine, found patients taking Trasylol were at an increased risk of kidney failure, heart attacks, and strokes, compared with patients taking alternative drugs or no drugs at all. The authors estimate that using the alternative drugs, which are generics unrelated to Trasylol, would prevent kidney failure in 11,050 patients a year world-wide, saving \$1 billion in the cost of dialysis. They also claim the use of cheaper alternatives would result in direct savings of \$250 million a year. The study, sponsored by the Ischemia Research and Education Foundation, is significant because it was conducted without drug-industry funding at 69 medical centers, including many of the top U.S. hospitals. It raises safety concerns that weren't flagged in company-sponsored research over the course of more than a decade of clinical use. The foundation, located in San Bruno, California, is a nonprofit foundation known for studying heart attacks and strokes.

This new trial compared Trasylol to two generic drugs, aminocaproic acid and tranexamic acid, which are also used to control blood loss. The study found that 8% of the 1,295 patients receiving Trasylol suffered kidney dysfunction or required dialysis, which was twice the rate of the 1,705 patients

receiving the generic drugs. About 29% of the Trasyolol patients suffered a stroke or heart-related complication, compared with about 21% of the patients taking the generic drugs and 19% getting no drugs.

As we have learned, the clinical trials required to win FDA approval of a new drug are quite often too small to detect potentially rare and dangerous side effects. Once a drug is on the market, however, there is no real incentive for pharmaceutical companies to aggressively work to discover previously undetected side effects or to compare their products with competing therapies. These companies are most interested in expanding the market for the drug by finding new uses. The FDA has done a very poor job of regulating the drug industry, and the agency's regulation is especially weak once a drug is approved and put on the market. I hope Congress will break the stranglehold the industry presently enjoys and will require the FDA to do its job.

Source: *New York Times*

### **CVS PROBE FINDS PRESCRIPTION ERRORS**

A state investigation of CVS pharmacies in Massachusetts confirmed dozens of prescription errors since 2002, including one that sent a 4-year-old girl to the hospital. Other problems identified during onsite inspections included look-alike medications being stocked next to each other, improperly labeled inventory, and a poor ratio of pharmacists to support personnel. Fortunately, none of the 62 verified errors or other problems were fatal. Under an agreement between CVS and the Massachusetts State Board of Pharmacy, the nonprofit Institute of Safe Medication Practices will monitor the 309 Massachusetts CVS stores with pharmacies for two years and could then recommend improvements.

The Board of Pharmacy began investigating CVS pharmacies in Massachusetts in June after receiving dozens of consumer complaints. The problems occurred since 2002, and CVS stores

filled about 85 million prescriptions in Massachusetts during the period of time involved. One case involved a 4-year-old Brockton girl who was hospitalized and hooked up to a heart monitor after her mother was given the wrong medication by a CVS pharmacist in July. The child was supposed to be taking Clonidine for her hyperactive behavior, but received another man's prescription for Flecainide, which is used to treat irregular heartbeats. CVS said it will implement new safeguards including signs and consumer handouts on avoiding prescription mistakes. CVS is one of the largest pharmacy chains in the nation, with more than 5,400 retail and pharmacy stores in 37 states and Washington D.C. I hope the experience in Massachusetts isn't an indication of a nationwide problem.

Source: *Associated Press*

## **XVIII. ENVIRONMENTAL CONCERNS**

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### **DUPONT AGREES TO PHASE OUT PFOA**

The Environmental Protection Agency (EPA) has requested that eight chemical makers voluntarily stop the use of a chemical used in the production of Teflon and other non-stick products. DuPont Company says that it will comply with that request. The EPA has asked the companies to gradually reduce the use of perfluorooctanoic acid (PFOA), which is used to manufacture several products including non-stick cookware, waterproofing products, and some fast food containers. Studies have linked PFOA to cancer in animals. As expected, DuPont maintains that its cookware and other consumer products made using PFOA are safe for consumers. But, an EPA advisory group now says that most of its members agree that the main chemical under review - PFOA - is a likely cancer causing agent. Further study was recommended by the committee.

DuPont is the only U.S. producer of

PFOA. China is also a major producer of the substance. The other seven companies buy the substance from DuPont and a couple of non-U.S. chemical companies. By focusing on these eight companies, the EPA would eliminate more than three-quarters of the use of PFOA globally. That would leave China as the largest remaining producer of PFOA. The EPA has asked the eight companies to reduce their use of PFOA by 95% in 2010 and to eliminate it by 2015. I am not sure exactly what the EPA will do now that the advisory group has issued its report. The other companies include 3M/Dyneon Company, Paris-based Arkema Inc., Japan's AGC Chemicals/Asahi Glass, Switzerland's Ciba Specialty Chemicals Holding, Inc., Switzerland-based Clariant Corp., Japan's Daikin Industries Ltd., and Italy's Solvay Solexig.

You will recall that recently the EPA imposed a \$10.25 million fine on DuPont, the largest civil penalty in EPA's history. This was part of a settlement of charges that the company hid information on PFOA. DuPont's most serious violation appeared to be that it failed to report that it knew in 1991 that a mother had transferred PFOA residues in her body to her fetus during her pregnancy. As a part of the settlement, DuPont announced it would reduce its emissions of the substance by 98%, and it said recently that it has already reached the 94% mark. DuPont still faces legal issues surrounding PFOA. A U.S. federal grand jury has subpoenaed documents from the company regarding the substance.

A group of scientific advisers to the EPA voted unanimously last month to approve a recommendation that PFOA should be considered a likely human carcinogen. The approval of the EPA's Science Advisory Board is conditioned on minor clarifications being made to a draft report, but no major changes will be made to the panel's findings. The revisions called for by the board include clarifying the scope of dissent among members of the advisory board panel that reviewed the EPA's draft risk assessment of the chemical. Board members also agreed the report should clarify that the panel's findings shouldn't be

considered the last word on the chemical, but should be updated as additional data become available.

Source: *Wall Street Journal* and *Associated Press*

### **BOEING SETTLES RADIATION CONTAMINATION CASE**

The Boeing Company has agreed to pay some thirty million dollars to settle claims by approximately 100 residents of the Santa Susana Field Lab near Los Angeles where radioactive and toxic contamination of the nuclear research site had made them sick. The lawsuit had been in court for 8 years. The suit had alleged that toxic and radioactive contamination released from the field lab during the 1950s through the 1990s caused cancers, as well as thyroid and autoimmune disorders, in residents who lived near the hill top lab, which was on the western edge of the San Fernando Valley. This settlement will end the legal battle between the parties.

### **THE STATE OF DELAWARE'S CLAIM MAY GROW**

A local Delaware River group and residents from both sides of the waterway are asking to be a part of the State of Pennsylvania's claim against PPL Corp. for the massive fly ash spill during 2005 at the company's power plant. The Delaware Riverside Conservancy Inc. and approximately a dozen riverfront property owners are requesting that they be allowed to intervene in the lawsuit filed by the Pennsylvania Department of Environmental Protection in 2005 against PPL. They want to be able to file a class action suit on behalf of those affected by the spill. The state suit alleged numerous violations of environmental and dam safety laws. In filings, the river group and residents allege that the spill has "caused overwhelming damage and destruction to numerous property owners and recreational users of the Delaware River" and has put the ecological make-up of the river watershed at risk. They claim that the spill has also seriously affected property values of riverfront land, and limited the property owners' use of the

river.

Reportedly, about 100 million gallons of water containing an estimated 85,000 cubic yards of ash leaked from a lined 40-acre basin at the PPL plant starting in August 2005. Apparently, the failure of a wooden stop log system designed to regulate the flow of clear water from the top of the impoundment area caused the problem. Fly ash, a byproduct of coal combustion, settled at the basin's bottom. The leak was finally stopped, but not before ash slurry had coated land near the basin and spilled into the nearby creek and Delaware River. PPL has said that the wooden stop logs were improperly fabricated and led to structural weakness that resulted in the failure. At the time of the leak, apparently there were no back-up measures in place. Now there are safeguards such as shutoff valves in the basin discharge pipe. The newly-filed complaint has asked for an immediate shutdown of the coal-fired units at the plant and for a residential well testing and remediation program for all persons affected. PPL claims that previous testing so far has shown no spill impact on residential wells, and a company consultant has said a study shows no short-term biological damage to the river echo system. Long-term studies are underway and the state has yet to issue a final report on the issue.

### **COMPANY SETTLES UPSTATE POLLUTION CASE**

Schlumberger Technology Corp., the company that owns the Pickens County site where a capacitor manufacturing plant once stood, will pay a nearly \$12 million fine for pollution, according to the U.S. Justice Department. South Carolina and Georgia joined the federal government in the settlement. The plant was identified as a federal Superfund site after it released PCBs into the creek - a tributary of the Twelve Mile River and Lake Hartwell - from 1955 until 1977 while owned by Sangamo-Weston. The current owner assumed the liabilities of Sangamo-Weston. PCBs, or polychlorinated biphenyls, have been known to cause cancer in laboratory

animals and have been linked to some human cancers, liver toxicity, and a variety of other health effects.

The company will spend an additional \$8 million to \$10 million to purchase and remove two hydroelectric dams on the creek and conduct steam restoration activities. In November, the Environmental Protection Agency called for more monitoring of the Superfund cleanup underway at the site, hoping to reduce contamination in Town Creek. The Justice Department says that the initial \$11.8 million will be used to enhance fisheries at Lake Hartwell and Twelve Mile Creek and improve the fish habitat within the Twelve Mile Creek corridor. Schlumberger must also pay \$530,000 to reimburse natural resources agencies for costs in assessing natural resource damages.

Source: *Associated Press*

### **PG&E TO PAY \$295 MILLION TO SETTLE WATER CONTAMINATION SUITS**

The movie "Erin Brockovich," which was released over six years ago, is still being shown on cable TV channels. It still has a story that needs to be told. Now, after nearly a decade, Pacific Gas and Electric Co. has agreed to pay \$295 million to settle a series of lawsuits alleging the utility sickened hundreds of people by contaminating the water in three California counties. The settlement, affecting about 1,100 people, moves PG&E closer to resolving all of the remaining claims against the company. The movie referred to above was based on the true story of a woman whose legal crusade ended with PG&E agreeing to a \$333 million settlement, which at that time was a record for a case of that sort. But, about 100 to 150 people from that era still hadn't settled their claims. The recent settlement involves lawsuits filed in 1996. The complaints in those cases allege PG&E's operations exposed neighboring homes to water contaminated with hexavalent chromium, a known carcinogen, from the late 1960s through the mid-1980s.

The presence of chromium in the water wells was first hidden from the

public and then disputed by PG&E when the lawsuits were filed. A trial in this case was to start up in a Los Angeles Superior Court on April 24<sup>th</sup>. It is said that the trial would have been a public relations nightmare for San Francisco-based PG&E had it gone forward. It was predicted that the jury's verdict would have been very large, perhaps higher than the \$295 million settlement. As you may know, PG&E fought hard to derail the chromium lawsuits a few years ago. Shortly after filing for Chapter 11 protection in 2001, PG&E unsuccessfully tried to persuade a judge to move the suits from the state courts to a San Francisco federal court. It was believed at the time that PG&E was trying to use its bankruptcy case to stonewall the claims of hundreds of suffering people. Fortunately, this matter is now settled after a long legal battle, and that's good news.

Sources: *Mercury News* and *Associated Press*

### **JURY RULES AGAINST DOW CHEMICAL AND ROCKWELL**

A federal jury has recommended that Dow Chemical Co. and the former Rockwell International Corp. pay \$553.9 million to thousands of property owners who said their land was contaminated by plutonium from the former Rocky Flats nuclear weapons plant. The jury, in a lawsuit filed in 1990 on behalf of 13,000 people, concluded the two companies damaged private property around the site through negligence that caused "class members to be exposed to plutonium and (placed) them at some increased risk of health problems." The jury in U.S. District Court in Denver also said the damage from the radioactive material may never go away. The verdict called for punitive damages of \$110.8 million against Dow Chemical and \$89.4 million against Rockwell. The jury also found the companies must pay some \$352 million in actual damages. The final award may be less because of limits in state and federal law, but could still reach \$352 million after a U.S. District Judge reviews the verdict.

The trial lasted for four months, and the jury deliberations in the class action lawsuit took 18 days. The suit claimed the plant contaminated neighboring land, lowering property values. The now-defunct site made plutonium triggers for nuclear warheads for decades before it was closed in 1989. Much of the 6,240-acre site will be transformed into a wildlife refuge. A contractor declared a 10-year, \$7 billion cleanup project complete last year. Milwaukee-based Rockwell, now known as Rockwell Automation, and Midland, Michigan-based Dow Chemical operated the plant at separate times under contract with the government. The lawsuit claimed they intentionally mishandled radioactive waste and then tried to cover it up.

In 1992, Rockwell pleaded guilty of and agreed to pay an \$18.5 million fine for water quality and other violations at Rocky Flats. Rockwell admitted that it stored hazardous waste without a permit, it stored the wastes in containers that leaked, and its actions caused hazardous waste to wind up in reservoirs that supplied drinking water to nearby cities. The settlement culminated a lengthy investigation dubbed "Operation Desert Glow" in which FBI agents secretly monitored the discharge of pollutants into streams and the burning of hazardous waste at Rocky Flats. Federal agents charged in an affidavit unsealed after a June 6, 1989, raid that Rockwell and Energy Department officials were aware of environmental violations and sought to conceal them. This is a good ending for a very long and drawn out case. It is difficult to understand how some in Corporate America can do such bad things and then try to cover them up with no concern or regard for innocent people who are their victims.

Source: *Associated Press*

## **XIX. TOBACCO LITIGATION UPDATE**

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### **OREGON VERDICT AGAINST PHILIP MORRIS AFFIRMED**

The Oregon Supreme Court has affirmed a punitive damage jury verdict against cigarette maker Philip Morris USA Inc. in a lawsuit filed by the widow of a smoker. Philip Morris, a unit of Altria Group Inc., will seek review of the case by the U.S. Supreme Court. That court had previously set aside the damage award. The company claims that the award is "grossly excessive," and says the award conflicts with a 2003 Supreme Court decision involving State Farm Mutual Automobile Insurance Co. The suit was brought on behalf of the family of the smoker who died of cancer. In 1999, a jury had awarded \$821,000 in compensatory damages, which was reduced under state law to \$521,000.

The trial court reduced the punitive-damage award to \$32 million, but the Oregon Court of Appeals reinstated the original \$79.5-million punitive award in June 2002. In 2003, the U.S. Supreme Court directed the Oregon appeals court to reconsider the case in view of the State Farm decision. The appeals court again found in favor of the widow. The Oregon Supreme Court has once again affirmed that ruling, saying Philip Morris and other companies had engaged in a decades-long scheme to deceive smokers even when all of the companies knew cigarettes were dangerous. The Oregon Supreme Court said in the opinion:

*Under such extreme and outrageous circumstances, we conclude that the jury's \$79.5-million punitive-damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards.*

The case will now go to the U.S.

Supreme Court for further review. It will be interesting to see how the Court treats the punitive damages issue based on the Oregon court's rationale.

Sources: *Los Angeles Times* and *Reuters News*

### **SECOND-HAND SMOKE CLASSIFIED AS A TOXIC RISK**

A California environmental agency has voted to classify tobacco smoke as a "toxic air contaminant." This is a first-in-the-nation move that I hope will strengthen state regulations on cigarette smoke. The designation by California's Air Resources Board on January 26<sup>th</sup> starts a process that could lead to further smoking bans in a state that has often led the nation in health and ecological regulation. John Froines, chairman of the Air Resources Board Scientific Review Panel, says:

*I think there is no question that this puts California way ahead. To actually have the major air pollution agency in the state of California to list ETS (environmental tobacco smoke) as a toxic air contaminant is going to have immense impact, we think, in terms of public education around other states. It will clearly lead to regulatory changes within the state.*

The panel's 2005 study found that about 16% of all Californians smoked, but 56% of adults and 64% of adolescents were exposed to second-hand smoke. California's Office of Environmental Health Hazard Assessment estimates that as many as 5,500 non-smoking Californians die annually of heart disease related to second-hand smoke. They estimate further that as many as 1,100 die from second-hand smoke lung cancer cases. Scientific studies in recent years have warned about the health impact from second-hand smoke and linked the smoke to a wide array of ailments, including heart disease, lung cancer and other respiratory ailments, and breast cancer. The study found that "because the diseases are common and ETS exposure is fre-

quent and widespread, the overall impact can be quite large."

Source: *Reuters News*

## XX. THE CONSUMER CORNER

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### **AMERIPRISE LOSES DATA ON 230,000 CUSTOMERS AND ADVISERS**

Ameriprise Financial, the investment advisory unit spun off from American Express last year, has admitted that lists with the personal information of about 230,000 customers and financial advisers were potentially exposed to fraud. The breach apparently occurred in late December after a company laptop was stolen from an employee's car. The laptop contained lists of reassigned customer accounts that were being stored unencrypted on a computer in violation of Ameriprise's rules. The information on the laptop included the names and Social Security numbers of more than 70,000 current and former financial advisers and the names and internal account numbers of about 158,000 customers. The data were being stored in separate lists, but it's possible that there could be some overlap between the two. This sort of thing is becoming all too common. It is a most serious problem and one that must be addressed by Congress.

### **CHOICEPOINT TO PAY \$15 MILLION OVER DATA BREACH**

ChoicePoint Inc. will pay \$15 million to settle charges that it failed to protect consumers' personal information, according to the Federal Trade Commission (FTC). This is the largest civil penalty over data security in the agency's history. In addition to a \$10 million fine, ChoicePoint will also create a \$5 million fund to help consumers who became victims of identity theft after the data warehouse sold information on 163,000 consumers to an alleged crime ring. FTC chairman

Deborah Platt Majoras says: "This is an important victory for consumers and an opportunity for ChoicePoint to get data security right." Last February, ChoicePoint revealed that criminals had stolen personal information on over 145,000 consumers, a number that later rose slightly. The incident touched off a flurry of data loss disclosures from a wide variety of corporations and other organizations. In all, there were some 25 major disclosures, with information on 52 million individuals exposed, according to The Privacy Rights Clearinghouse, which keeps a running tally. These are the first fines connected to any of these security breaches.

The ChoicePoint disclosure was significant, not only for its scale, but for the light it shed on the growing data broker industry. ChoicePoint is a giant in the field, amassing databases of background information on virtually every U.S. citizen, including Social Security numbers and credit reports. The Alpharetta, Georgia-based company then sells such personal information to government agencies and private companies. The FTC's complaint against ChoicePoint paints a picture of a firm that was selling data to anybody who wanted them, even after obvious signs of trouble. It was alleged in the complaint that law enforcement agencies began to warn ChoicePoint of fraudulent activity as far back as 2001. ChoicePoint continued to sell data to companies with expired business licenses, with canceled telephones, and after employees signaled them out as suspicious. The firm even continued to supply credit reports to the crime ring after the fake accounts it had set up were suspended by ChoicePoint for non-payment, according to the complaint. All of this was made public for the first time at a news conference in Washington in late January.

Eight hundred consumers had become victims of identity theft as a result of the ChoicePoint data breach. The fine sends a strong message to America's companies. ChoicePoint violated the Fair Credit Reporting Act by giving consumer credit information to

people who not only didn't have a "permissible purpose" for the information, but also should never be allowed access to confidential information. ChoicePoint failed to properly verify the identity of customers when requesting consumer information, even after the firm received subpoenas from law enforcement about unauthorized activity. That is inexcusable and such an occurrence has to be stopped in the future. Since the ChoicePoint incident, dozens of companies have revealed similar security lapses to consumers. Researcher Larry Ponemon of the Ponemon Institute says about 1 in 9 adult U.S. citizens has received a letter indicating their data have been put at risk by a company. Congress must take all required steps to fix a most serious problem. The federal government must prosecute any person or company that has committed a criminal offense. Civil actions must be filed when the criminal laws don't apply.

Source: *Associated Press*

### ***A CREDIT CARD BLUNDER BY A MAJOR NEWSPAPER***

The Boston Globe accidentally delivered hundreds of thousands of subscribers' credit card numbers with its newspapers. The Massachusetts Attorney General is now investigating to see whether any laws were broken. Local legislators have seized on the blunder to drum up support for initiatives aimed at better protecting consumers from identity theft. Richard Gilman, the Globe's publisher, apologized to subscribers after 215,000 credit card numbers were printed on the back of paper used to wrap newspaper bundles distributed to newspaper retailers in central Massachusetts. In less than a week, more than 48,800 subscribers had telephoned the newspaper, forcing its managers to pull employees from other departments to answer the phones, according to a report on its website.

### ***FDA REPORT CITES LAX TESTING AT PET FOOD COMPANY***

Diamond Pet Foods, the maker of contaminated dog food that resulted in the deaths of dozens of dogs, has now acknowledged that its Gaston, South Carolina, plant failed to follow procedures for testing the product. That admission came as a federal report showed that Diamond failed to record some test results and relied on inaccurate test results in other cases. Since the results were not recorded, corn tainted with aflatoxin slipped through at the plant. The company says the testing oversights will not happen again. But, that's too late for the owners of the dogs that died.

### ***THE CENTER FOR ENVIRONMENTAL HEALTH DOES GOOD WORK***

The Center for Environmental Health, a California public-interest group, has been trying to get rid of lead in products made for children. I hope the group is having success. In January, the Center announced a settlement with 71 major retailers -including Target, Kmart, Macy's, Nordstroms, Claires, Sears, Toys R Us, and Disney -that will result in the reformulation of children's jewelry to reduce lead to trace amounts. The settlement does not include the nation's largest retailer, Wal-Mart, and it's only binding in California. But the Center said it expects most, if not all, of the companies, to adopt the lead standards nationally.

The settlement comes after the Center tested hundreds of pieces of children's jewelry over the past few years. More than a third of the pieces tested were found to contain dangerous amounts of lead. The group found lead levels in the vinyl cords ranging from 1,400 to 20,000 parts per million (ppm) and lead levels in a coating on one child's bracelet tested at over 165,000 ppm. The settlement limits metal components in and coatings on children's jewelry to less than 600 ppm of lead, while plastic components can

contain no more than 200 ppm.

Nationally, the U.S. Consumer Product Safety Commission has recalled more than 155 million pieces of children's jewelry in the past two and a half years. A year ago, the agency issued an interim enforcement notice saying it would investigate, and possibly take action against, any jewelry if any piece contained more than 600 ppm of lead. The environmental group also has been pressing to get rid of soft vinyl lunchboxes after its tests found unacceptable levels of lead in several of them. The group has filed lawsuits against several manufacturers to halt sales, and also pressed state and federal government officials for some action.

Source: *Washington Post*

## **XXI. RECALLS UPDATE**

### ***VOLVO RECALLS 42,000 TRUCKS IN NORTH AMERICA***

Swedish bus and truck maker AB Volvo has recalled 42,000 trucks in North America because of defective inlet pipes that could cause fires in the engine compartment. The recall, concerning Volvo's VN and VHD models, comes after what the company said was "a number of cases of heat damage" in engine compartments as a result of inlet pipes that could crack or break. Volvo says only two cases of fires had been reported and no one was injured in those incidents. But, if these pipes are not repaired or replaced, components in the engine compartments may be exposed to hot exhaust gases, which could lead to a fire. Clearly, the risk of fire leading to injury is apparent. Volvo Trucks North America will replace any damaged parts and also install a heat shield on all trucks. It should be noted that the Swedish truckmaker is unrelated to the automaker Volvo, which is part of Ford Motor Co.

## **FORD TRUCK RECALL IS UNDERWAY**

Ford has another recall underway. More than 200,000 2006 F-150 and Lincoln Mark LT trucks, which may have a faulty warning light for the anti-lock brake system, are in the recall. The National Highway Traffic Safety Administration says it's a software error. Owners should contact their Ford dealership to get it fixed.

## **COOPER TIRES RECALLED**

Nearly 300,000 Cooper tires are being recalled. The concern is that the 14 models of Cooper tires either have slow leaks or cracks in the sidewalls. Thus far no injuries have been reported. Cooper Tires makes 40 million tires a year. Twelve models are being recalled because of slow leaks. Two other models are being called back because of sidewall cracking.

The problems with the tires can be hazardous. Cracked tires can separate and lose air suddenly and cause a driver to lose control. I understand that 183,000 of the recalled tires were made in Albany at the Cooper Tire Plant between February 2004 and January 2005. Those tires are being recalled because of a slow leak that may have been caused by a contaminant in the upper sidewall. It's the largest recall of tires from this plant since it opened 15 years ago. There are 104,000 tires made at other Cooper plants that are being recalled because of sidewall cracking. The tires were made between November 2004 and July 2005. The recalled tires are:

- \* Cooper Discoverer S/T
- \* Dean Mud Terrain Radial
- \* SXT Durango Radial
- \* XTR Mastercraft Courser
- \* C/T Dick Cepek Radial
- \* FCII Mesa C/T
- \* Pro Comp Xtreme A/T
- \* Tempra Trailcutter Radial RT

- \* Dean Alpha 365 A/S
- \* Mastercraft A/S
- \* Starfire Flight-line IV
- \* Trendsetter SE Cooper
- \* Zeon 2XS
- \* Mastercraft Avenger ZHP

## **HALF-MILLION BABY TEETHERS RECALLED**

The First Years Inc., a Massachusetts company, has recalled 500,000 liquid-filled baby teethers distributed in the United States and Canada because of a possible bacterial contamination that could cause serious illness. Six styles of teethers may be contaminated with the *Pseudomonas aeruginosa* or the *Pseudomonas putida* bacteria in the liquid. If the teether is punctured and the liquid ingested, the bacteria can cause serious illness in children. Thus far, no illnesses have been reported, according to the company. The FDA cautioned consumers "that *Pseudomonas aeruginosa* is a bacteria that can cause serious illness, particularly in people with compromised immune systems and in infants who are still developing their immunity, as well as children who are born with immune deficiencies."

Three of the products affected feature popular cartoon characters. The Disney Days of Hunny Soft Cool Ring Teether, bearing style number Y1447, and the Disney Soft Cool Ring Teether, bearing style number Y1470 or Y1490, feature Winnie the Pooh characters. The Sesame Beginnings Chill and Chew Teether, style number Y3095, features Sesame Street characters. The other teethers recalled are The First Years Cool Animal Teether (style number Y1473) and The First Years Floating Friends Teether (style number Y1474). These feature fish and other animal graphics. Major retailers, including grocery, drug, and specialty stores, sold the product nationwide and in Canada from July 2005 through January 2006. For more information, call the company at 866-

725-4407 or visit <http://www.the-firstyears.com> or <http://www.fda.gov>. First Years, based in Stoughton, Mass., is a subsidiary of RC2 Corp.

## **DEATH OF BABY BOY LEADS TO NATIONWIDE CRIB RECALL**

After the death of a 19-month-old baby in Myrtle Creek, Oregon, the U.S. Consumer Product Safety Commission (CPSC) and Simplicity Inc., of Reading Pennsylvania, are renewing the search for recalled Aspen 3 in 1 Cribs with Graco logos. The child, who died on January 6, 2006 after two of the mattress support slats came out of his recalled crib, became entrapped between the mattress and the footboard of the crib and suffocated. CPSC and Simplicity Inc. announced the recall of about 104,000 Aspen 3 in 1 Cribs on December 21, 2005. The recall was conducted because the screws on the wooden mattress supports can come loose, allowing a portion of the mattress to fall. This poses a suffocation hazard to young children who can slide down and become entrapped between the unsupported mattress and end of the crib. Before the report of this death, Simplicity Inc. received 14 reports of the mattress supports coming loose, including eight reports of entrapment. Five injuries were reported including scratches and bruises to the face and head, a strained neck, and a report of a child turning blue.

Although the Graco logo appears on these products, the cribs were manufactured by Simplicity Inc. Consumers should contact only Simplicity about this recall. The recalled cribs are made of wood and have wooden mattress supports. Only cribs with wooden mattress supports and with model number 8740KCW SC and serial number 2803 SC (made the 28th week of 2003) to 1605 SC (made the 16th week of 2005) are included in this recall. The model and serial number are printed on the envelope attached to the mattress support. The recalled cribs were sold in department and children's product

stores from August 2003 through May 2005 for about \$130. To receive a free repair kit or for more information, contact Simplicity Inc. at (800) 784-1982 anytime, or visit the website at [www.simplicityforchildren.com](http://www.simplicityforchildren.com).

## XXII. FIRM ACTIVITIES

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### *EMPLOYEE SPOTLIGHTS*

#### *KENDALL DUNSON*

Kendall Dunson was recently elected to serve on the Board of Directors of the Montgomery County Bar Association. Along with his service on the MCBA Board, Kendall is the current President of the Capital City Bar Association and President-elect of the Alabama Lawyers Association. He is a graduate of the University of Alabama Law School and is licensed to practice in Alabama and Georgia. Kendall was named a shareholder in the firm in 2003. Before coming to work with the firm, Kendall worked for a very good defense firm for two-and-a-half years in its Litigation section. At Beasley, Allen, Kendall's practice includes cases involving product liability, general personal injury, workers compensation, and accidents involving defective industrial machinery.

In addition to a busy law practice and heavy leadership involvement in legal organizations, Kendall is active in numerous community organizations. Recently, he worked on a task force charged with reconfiguring Alabama's method of rendering legal services to the state's underprivileged. Kendall was a charter member of the 100 Black Men of Birmingham and recently concluded a two-year term on the board of Cornerstone Community Foundation. He regularly takes time from the busy practice of law to speak to high school and grade school students about the law, college, and life in general. Kendall regularly attends First Baptist Church in Montgomery. He is an outstanding lawyer

and is a valuable member of the firm.

#### *SHERRI MARKOS*

Sherri Markos, who has been with our firm for four years, works in our Accounting Department. She serves as Accountant II and handles disbursement of settlement funds to clients. Sherri also has a variety of responsibilities that are essential to the firm. Sherri is married to Andy Markos and they have two children. Summer is 15 and Christian is 6. Andy owns his own business, Country Heating & Air, which is located in their hometown of Eclectic. Sherri enjoys hunting, fishing, sewing, shopping, but most of all, spending time with family. She is a most valuable employee and does excellent work for the firm.

#### *SANDY JACOBS*

Sandy Jacobs, who has been with the firm for two years now, presently holds an administrative position. One of her responsibilities is to maintain the mailing database for the distribution of The Jere Beasley Report. The publication currently reaches at least 35,000 people each month. We suspect that more persons may actually read the Report based on communications we receive each month. So we expect a good number of people have access to the Report who aren't on the mailing list. The responsibility of making sure the mailing list is updated and accurate is pretty time consuming and is very important. Sandy previously worked in the Toxic Torts section as a clerical assistant and has also handled record retention prior to moving to her current job. Sandy is from Bluff Springs, which is located in Pike County, Alabama. Her parents, along with one of her brothers, own two small businesses in Troy. Upon graduation from high school, Sandy attended Troy State University and then transferred to Enterprise State Jr. College to enroll in the school's paralegal program. Sandy has placed her studies on hold for awhile, but has hopes of finishing her paralegal degree in the future. Sandy does a very good

job for the firm.

#### *THE BEASLEY ALLEN INFORMATION TECHNOLOGIES DEPARTMENT*

Our firm is fortunate to have our own full-time, on-site Information Technologies Department to support our network. Our IT Department is currently staffed with ten professionals, each possessing various levels of training and experience in the field. Many of these employees have successfully passed rigorous industry certification exams, such as Microsoft Certified Systems Engineer, Cisco Certified Network Associate, Network+ and A+.

All of our data and communications are secure behind our network security system, including firewalls and a network intrusion detection system. These are designed to keep hackers and unauthorized users from accessing confidential client information. Our web department helps our clients and the public stay abreast of the many areas of litigation that our firm is involved in by maintaining our website, as well as many other sites specifically related to cases that we are investigating or working on. Currently, we have approximately 20 sites published on the web, which can be found on the home page of this site. I encourage you to visit our website, [www.beasleyallen.com](http://www.beasleyallen.com).

#### *THE FIRM'S GRAPHICS DEPARTMENT*

Our in-house Graphics Department develops graphical presentations to be used in the courtroom. These graphical presentations allow our lawyers to give the judge and jury a complete picture of the case being tried. In this day and age of technology, it is necessary to bring technology into the courtroom to assist in the presentation of our clients' cases. Time and time again, jurors and judges have praised the presentations developed by our Graphics Department and have told us that the presentations greatly helped them understand our cases. These many technological advancements allow the firm to stay in the forefront of multi-media and case-management.

## XXIII. SPECIAL RECOGNITION

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### ***THE FELLOWSHIP OF CHRISTIAN ATHLETES DOES VALUABLE WORK***

The Fellowship of Christian Athletes does an outstanding job of reaching young people throughout the country. Their mission is to see the world impacted for Jesus Christ through the influence of athletes and coaches. Since 1954, the FCA has challenged coaches and players at all levels of competition to impact the world, and in my opinion they have done a very good job. In 2005, the FCA directly reached about 1.5 million athletes and coaches. I am very familiar with the FCA's work in Alabama. In my opinion, they have done a tremendous job here too. The FCA has done a great deal at the local level around the country. Some of these things are:

- \* They conducted 15,921 outreach events, impacting 1,166,075 lives;
- \* They certified 5,533 school campuses, reaching 276,650 students, athletes and coaches;
- \* They conducted 139 summer sports camps of "inspiration and perspiration" with 27,954 participants;
- \* Staffing was increased to 698 people in 298 local offices.

My long-time friend, John Gibbons, heads up the FCA in Alabama. John and his staff do an outstanding job of reaching student-athletes and coaches. Rev. Chette Williams, who is also a very good friend, heads up the FCA chapter at Auburn University. Chette, a godly man and former Auburn football player, has a tremendous influence on the student-

athletes at Auburn. Other schools, both in the SEC and in other conferences, have followed Auburn's lead and now have chaplains who are affiliated with the FCA. In my opinion, it has been a good thing for all of the schools. If you want some more information concerning their work, the FCA's website is [www.fca.org](http://www.fca.org).

### ***RESPONSES FROM READERS***

Each month we always get responses to things discussed that month in the Report. I find, on occasion, that some of our readers don't agree with me on every issue discussed and that's good. On occasion I am corrected on something that I had been clearly wrong about. As a matter of interest, we received a great deal of good responses from our readers last month on the race car and the Cutting Horse Association that we currently sponsor. In fact, the positive responses have been more on these two items than anything else we have written about recently. It appears that a good number of folks who read the report like stock car racing and horses. I take that to be a pretty good sign that we have good folks reading what we send out each month.

## XXIV. SOME PARTING WORDS

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Several people have told me that they have a hard time getting started each day. Others say that they often have difficulty dealing with unexpected problems and issues that come up during their day. Some have asked what would be a good way to start each day. I am going to suggest that starting any day

with prayer is always good. The following is a suggested prayer that I keep on my desk. It's good to pray this prayer at any time, but it's really great for getting a "jump start" on your day.

*I begin this day with you, God - You are my loving Father, and I place all my love and confidence in You. Nothing can disturb me when I trust You. I know that You love me and sustain me in all things, under all circumstances. I lean on your mighty power to help me. I rest in your love that bids me not be troubled about anything. With You all things are possible. With you I can do all things. I trust Your wisdom to guide me this day. I trust Your life to renew me and strengthen me. You are my help in every need. You are my Shepherd and I shall not want for any good thing. You are my supply, and I trust You to fulfill my needs. You are my comfort - You work through me to accomplish Your good purposes. And I trust Your perfect will for me. Whatever I need to do today I shall do it calmly, trusting Your spirit within me to guide me to success. Your light makes my way plain. You love opens doors for me. My heart is at peace, for I trust You, God.*

I sincerely hope that a prayer of this sort will help you as you deal with life's many problems. I know that prayer has become important in my life and in the lives of my family. In my opinion, there is no substitute for it. Try it if you haven't - and I believe you will agree. While it doesn't mean you won't have any bad days or any problems, it does mean that you will have the best possible help available to help you work through your problems.

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or contact us about this publication,  
please visit our Website: [www.BeasleyAllen.com](http://www.BeasleyAllen.com)***