



THE
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

AN ELECTION RECAP

I believe that just about everybody in Alabama is mighty glad that the most expensive primary election cycle in state history is finally over. The candidates started their campaigns this year earlier than ever and never let up. Unfortunately, it appears that the voters never seemed to hook on to most of the messages put out by the candidates or their campaigns. As we all know, the turnout for both primaries was very poor. When you consider that almost 70% of the eligible voters didn't bother to even come to the polls, it's time for those of us who want government to work to figure out why. I have to believe it's simply that most folks don't trust politicians and feel like it doesn't help a bit for them to vote. But, that type attitude is the very reason the big money groups can control elections.

All citizens should not only **vote**, but should also get **involved** in politics. That's the only way the system will work. When citizens sit on the sideline don't get involved and not even take the time to vote, it plays right into the hands of the special interests who have millions to spend. I hope things will improve for the general election. Even if it doesn't, at least we can say that Alabama is now considered to be a two-party state—even though I believe most voters are really independents—for what that's worth. In any event, I will take a brief look back at the primaries, discuss some of the results and then give my thoughts about the general election.

THE DEMOCRATIC PRIMARY

There were a few surprises in the Democratic primary, one being the close race in the contest between John Tyson and Larry Darby. Frankly, I don't have a clue as to why this one was

close. I have read the speculation in some of the newspapers, but don't necessarily agree with any of it. All of the other races went pretty much as I expected they would. Obviously, the amount of money spent in the Democratic primary by the candidates was minuscule compared to the tremendous amount spent by the Republicans. Lucy Baxley, who handily defeated Don Siegelman, and Jim Folsom, who was unopposed in the primary, could make things interesting in the Fall, but it's too early to make any real assessment as to how well these two will work together.

THE REPUBLICAN PRIMARY

The outcome in the governor's race in the Republican primary clearly says that Bob Riley has put any perceived problems that he has had during his first term behind him. Clearly, his win over Judge Roy Moore exceeded what most poll numbers were showing and by any standard the margin of victory was quite impressive. It's pretty obvious that the Riley campaign was well planned, extremely well financed, and carried out by the candidate and his campaign staff members without any apparent glitches. If there were any problems, they were very few in number. Even with a very light voter turn-out, this has to be a very big win for Bob Riley.

As expected the race between Luther Strange, George Wallace Jr., and Mo Brooks resulted in a run-off. A light turnout in the run-off between Luther and George is to be expected on July 18th and I am really not sure who that favors. I suspect it will boil down to Luther's **money** versus the Wallace **name**. A very good and heavily financed television campaign by Luther brought the lawyer-lobbyist from a distant third in the early polls to a point where he almost won without a run-off. Interestingly, George has received the official endorsement of the two candidates who didn't make the run-off. Mo Brooks, who ran a fairly strong third, threw his support to George and that

could have some effect if the word gets out. Hilbun Adams also said he felt that George was the best candidate. But, history tells us, however, that endorsements by losing candidates usually don't amount to very much in the overall scheme of things. Nevertheless, you would rather have them than not I suppose.

There will be a few more run-offs in the Republican primary, but none of them will generate any real interest in my opinion. The Perry Hooper—John Amari race for the Public Service Commission could be the exception. At this

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junction, it appears that Perry has a much broader base of support. I believe that one of the best and most qualified candidates to have run for the PSC in recent years was Jack Hornady, a retired PSC employee, who ran a strong third in the race. Jack, a long-time employee at the Commission, is well-respected by all who have dealt with him over the years. If Jack had been able to raise any real money for his campaign, he would most likely be in the run-off. Jack endorsed Amari and that will make this race fairly close. I believe that Perry's family name will be a tremendous asset to him and it could pull him through.

One of the run-offs involves two very good candidates. The race for the criminal court of appeals will pit Clay Crenshaw, an experienced and well-respected assistant Attorney General, and Sam Welch, a veteran circuit judge from Monroe County. I have known Clay for a number of years and have been in Judge Welch's court. It's too bad one of them has to lose. Another judicial race pits Judge Phillip Wood from Autauga County against Terri W. Thomas for place three on the civil court of appeals.

The question in all of the run-offs is simply who will vote? I predict the smallest turn-out in the history of Alabama run-offs. It will be virtually impossible to get the voters out to the polls in the few state races left in the primary run-offs. In counties where there are contested Republican races on the local level, that will help some.

THE GENERAL ELECTION

It will be interesting to see what develops between now and November in the camps of the various candidates. There has been very little mention of the general election by people I talk with since the primary vote on June 6th, which isn't too surprising. Frankly, I believe that Alabama voters were really turned off by the negative campaigns in a number of races and especially in the race for Chief Justice of the Supreme Court in the Republican primary. You

would have expected a court race to be run on a very high plane and especially one for Chief Justice, but this one was carried out in a most undignified manner. In fact, this race was very close to being run from the gutter. How this will affect the general election remains to be seen.

Even though the first post-primary poll that was done showed Bob Riley with 53% and Lucy Baxley with only 25%, I believe it is too early to put much stock in a poll. Nevertheless, I was greatly surprised to see that 22% of those polled said they were now undecided. Regardless of what this poll shows, I believe that each party will have strong candidates at the top of the ticket and I have to believe the races for Governor and Lt. Governor could wind up being fairly close. The race for Attorney General should spark some interest with the voters even though the Democratic candidate was clearly stung by his very close race in the primary. I predict that there will be lots of split-ticket voting which may shock the party leaders who are predicting straight-ticket voting.

One thing is pretty clear—there won't be any Bush coattails in Alabama for Republican candidates this time. While the President still has fairly strong support in Alabama, I don't believe the local party leaders will want to remind voters of all the problems that the President has in Washington. I really believe that most Alabamians will wait until after Labor Day to start thinking about politics and the general election. That is certainly my intention. More folks are worried about the lack of rain at this point rather than about the state of politics in our state.

VOTERS SHOULD DEMAND CHANGES IN OUR SYSTEM

There was one good result—but clearly one that was unintended—from the recently completed primary elections. The tremendous cost of the primaries is the best evidence that we badly need campaign finance reform in

Alabama. When one candidate for the Alabama Supreme Court can spend, or have spent for his campaign, or have spent on his behalf, what has been estimated at over \$4 million and with nobody being able to tell where a good deal of the money really came from, there is an apparent problem. Without a doubt, the system of controlling campaign spending is broken and needs fixing. It's now time to do something about the weak laws that control our elections. In most cases—it's not the candidate who is the problem—instead, it's a badly broken system. Folks should insist that the next Governor and Legislature make campaign finance reform a top priority for the 2007 regular session. Stopping the wild spending in all races—and especially in judicial races—must be very high on their list. Unfortunately, we still have a general election facing us this year and unless something happens, it will be the most expensive ever.

WE CAN STILL HAVE REFORM NOW

The candidates who will be on the ballot in the general election for a statewide race, however, can do what the Legislature has failed to do, and that is about reform of a badly broken system. These candidates can self-impose strong campaign finance reform requirements for the general election. I believe Alabama citizens would respond to such a progressive move and would turn out in great numbers to vote in November. Candidates for state-wide office—including judicial candidates—can start by:

- Refusing to accept contributions in excess of \$1,000 from any source;
- Asking outside groups such as ATA to stay out of Alabama with all their money;
- Refusing to accept PAC money in any amount; and
- Agreeing to limit the total amount that can be spent by their campaign to \$2 million.

I hope the leaders of the two political parties will take the lead in this effort. If they can't see the need for campaign finance reform now, they have been on another planet. Alabama citizens are ready for real reform in my opinion. If you agree, let Joe Turnham and Twinkle Address Cavanaugh, the leaders of the Democratic and Republican parties respectively, know how you feel and ask them to support this type reform. If you have a better plan, you should suggest it to Joe and Twinkle, and get them on board.

DUPONT SUED IN NEW JERSEY OVER CONTAMINATED DRINKING WATER

Recently, our firm, along with cooperating co-counsel from Ohio, West Virginia, and New Jersey, filed a most significant lawsuit against DuPont on behalf of clients who seek to represent a class of persons whose drinking water has been contaminated with perfluorinated chemicals (PFCs) released from a DuPont facility in Deepwater, New Jersey. Over the past few years, the U. S. Environmental Protection Agency and several international and state public health agencies have focused considerable attention on the subject of contamination from perfluorinated chemicals. These man-made chemicals do not occur naturally in the environment and once released, do not breakdown in water, soil, air, or the human body. PFCs, such as PFOA or perfluorooctanoic acid, are processing aids used in the manufacturing of fluoropolymers, which have a wide variety of product applications, including non-stick Teflon cookware. These chemicals can also be a by-product in the manufacturing of fluorotelomers used in surface protection products such as stain-resistant textiles and grease-resistant food wrapping.

Our lawsuit, which was filed in the U. S. District Court for the New Jersey District, alleges that DuPont has known for years that its PFC wastes have been released into the air from operations and activities at its Deepwater plant and have contaminated the groundwater underneath the plant as well. This con-

taminated groundwater has made its way into the drinking water supplies used by nearby residents. In a 2003 report, DuPont found that PFOA, in particular, was being released into the Delaware River at concentrations as high as 194 ppb and had been detected in a water intake designated as a drinking water source by New Jersey Environmental Regulators at a concentration of .089 ppb. Similar concentrations have been found in recent tests of water wells that supply public drinking water to the towns in which our plaintiffs live.

This lawsuit is very similar to an earlier case that was brought against DuPont by a class of Ohio and West Virginia residents who alleged that their water supplies had been contaminated with PFOA from another DuPont plant in Parkersburg, West Virginia. In 2004, DuPont agreed to pay as much as \$343 million dollars to settle the claims of the class. The company agreed to spend up to \$70 million dollars for medical evaluations for approximately 80,000 people who drank water contaminated with this chemical. DuPont also agreed to provide six local utilities with new water treatment equipment and fund an independent study to determine whether PFOA is affecting the health of exposed persons. Eventually, DuPont could be forced to spend the remaining \$235 million on a program to monitor the health of residents exposed to the chemical.

Unfortunately, DuPont has failed to undertake similar efforts to protect the New Jersey citizens who live near the facility involved in our case. Thus far, DuPont has not offered to clean up the public or private water supplies near their Deepwater plant that have been contaminated with PFC pollution. Neither has DuPont provided medical treatment for exposed residents. I hope the filing of this lawsuit will force DuPont to provide these New Jersey residents with the relief they deserve. Rhon Jones and David Byrne from our Toxic Torts Section will be handling the case for our firm along with Stuart J. Lieberman and Shari M. Blecher of the Lieberman & Blecher, P.C. firm, in Princeton, New Jersey.

HAWAII SUES BIG PHARMA

We have filed another lawsuit in the expanding litigation against companies in the drug industry whom we contend cheated a number of state governments. There are currently 21 states that have filed these suits, commonly referred to as "Average Wholesale Price" ("AWP") lawsuits, against companies that fraudulently inflated prices on drugs sold to the states. The last state to file was Hawaii. We are pleased to announce that Hawaii Attorney General Mark Bennett has hired our law firm to represent his state against some forty-four pharmaceutical companies that engaged in wrongfully inflating prices on drugs sold to that state's Medicaid plan and state employee health plan. Our firm is working on this case in conjunction with the Minor Barnhill law firm out of Chicago, Illinois. We jointly filed the lawsuit on April 27th in Honolulu County, Hawaii. Hawaii, like all of the other states, has suffered tremendous losses as a result of the drug companies' wrongful conduct.

There are now some twenty-two Attorneys General throughout the country (Alabama, Hawaii, Mississippi, Wisconsin, Illinois, Texas, Counties in New York, the City of New York, California, Arkansas, Arizona, Connecticut, Montana, Nevada, Massachusetts, Florida, Washington, Minnesota, Missouri, Ohio, Pennsylvania, and West Virginia), who have demonstrated great courage in standing up to the pharmaceutical industry and delivering the message that the industry must pay for their sins. Cheating taxpayers can't be tolerated wherever the fraudulent conduct takes place or who the cheaters are. It has been said that more money is stolen in this country with a **pen** than with a **gun**!

In addition to representing Alabama, Mississippi, and Hawaii, we are also working closely with the other states, as well as New York City and the New York Counties, on discovery efforts against the various defendants. We were able to start our discovery early in the Alabama case, one of the first lawsuits filed, and

that has helped in the suits filed later on. It is a privilege to be working with all of these states on this important litigation against the powerful drug industry. This industry has gotten away with this overpricing scheme for far too long. The wrongful conduct, which we certainly believe was intentional, has cost the states billions of dollars at the expense of their taxpaying citizens. We will update our readers as these cases continue to be developed.

OTHER DRUG COMPANY CASES TO BE FILED

It's quite obvious that a tremendous number of states suffered great losses as a result of the activities by the drug companies that has collectively cost the taxpayers in those states billions of dollars. As stated, a good number of states have already filed suit to recoup their losses. Others will follow soon. We are currently working with Attorneys General in several other states and are preparing to file additional cases for those states. We will report further on those developments, but only after the suits are filed.

DRUNK DRIVING CONTINUES TO BE A MOST SERIOUS CRIME

Despite all of the efforts to combat the problem, drunk driving continues to be a most serious problem in this country. Drunk driving offenders still maim and kill all too often, and in many cases they only get a slap on the wrist when caught. It's significant that one-third of all people arrested for DUI are repeat offenders. According to numerous studies, drunk drivers who are repeat offenders are the most persistent and deadly safety threats on our nation's roadways. In my opinion, the prosecutors must go after drunk drivers in an aggressive manner, and the courts must enforce the existing laws relating to drunk drivers in a very tough manner. In all states where the laws are weak, the legislative bodies must make them much tougher. We must do whatever it takes to get the drunk drivers off of our highways.

As you know, the national organization Mothers Against Drunk Drivers (MADD) has been fighting to get drunk driving off the highways for some 25 years. In my opinion, MADD has been largely responsible for making the public aware of the problem. Recently, I received an account of a tragic story from MADD that describes how drunk drivers can literally destroy families.

Bill and Kay O'Hara had one of those relationships that most people only dream about. Before he left the house one Friday, Bill read the love note Kay had left him and wrote one for her to read when she woke up. It would be his last message to her. It was 5:38 in the morning! A 29-year-old man with a blood alcohol level several times the illegal limit crashed into Bill's van, throwing the van 50 feet through the air. Bill was killed instantly. The man who killed Bill had three DUI convictions!

"There's no excuse for a second DUI in my book," Kay says. She believes that the sentencing for a first DUI should be strong enough that a driver would never again get behind the wheel after drinking. The man who killed Kay O'Hara's husband, Bill, and left their six children (Seth, Luke, Hannah, Sarah, Abby, and Ethan) fatherless was finally held accountable for his actions. Sadly, it took a tragic, needless death for the repeat offender to be sentenced to 15 years in prison. But Kay O'Hara has been sentenced to life—a life without her beloved husband and father to her children. It's an outrage that such a wonderful life was ended because someone already convicted of drunk driving decided to drink and drive again.

All too often, we have seen similar situations in our practice to that described above where lives are lost and families are shattered. It should be quite apparent to everybody with walking around

sense that drinking and driving don't mix and never will. Unfortunately, some of our citizens never seem to get that message. If educational efforts can't get the job done, that leaves the job of protecting the public from drunks on the road to the criminal justice system. That's why the court system must be kept alive and available to do its job.

ALABAMA ENVIRONMENTALIST KEEPS HIS POSITION FOR NOW

A Montgomery County judge threw out a lawsuit that sought to remove Birmingham environmental advocate Pat Byington from the Alabama Environmental Management Commission. Circuit Judge Johnny Hardwick rejected claims that Byington wasn't qualified for the ecologist's seat on the Commission. The judge also refused to accept the claim that Byington had violated conflict of interest rules with his outside environmental work. As you know, the Environmental Management Commission oversees the Alabama Department of Environmental Management. Byington was appointed to the ecologist's seat on the commission in 2001. My friend Barry Ragsdale, a very good lawyer from Birmingham, represented Byington and did an outstanding job.

In October 2004, Byington and three other commissioners voted to fire ADEM Director Jim Warr, who had strong support from some in the business and timber industries. Apparently, that upset some folks. In December 2004 the suit was filed challenging Byington's appointment. In my opinion, it is critically important to have a person on the Commission who has no ties to the industries that are regulated by ADEM. Pat Byington holds a degree in environmental studies from the University of Alabama and is an environmental consultant and publisher of the Bama Environmental News. He is serving in a commission seat that state law sets aside for an ecologist or biologist with a degree from an accredited university. Without any doubt, this man is highly qualified and I believe deserves to be on

the Commission. Unfortunately, his term ends in September. I hope that Governor Riley will do what's best for Alabama and appoint Byington to a second term.

SUPREME COURT REJECTS WATER APPEAL BY ALABAMA AND FLORIDA

The U.S. Supreme Court has rejected an appeal from Alabama and Florida in the dispute with Georgia over water distribution. The two states had appealed a September 2005 ruling by the U.S. Court of Appeals for the Eleventh Circuit that affected the three states. As you may recall, the appeals court decision allowed the Atlanta area to use more water from Lake Lanier and the Chattahoochee River than earlier orders allowed. The Eleventh Circuit ruling reversed earlier decisions by an Alabama federal district court, which blocked Atlanta from getting additional water.

Alabama and Florida have tried to prevent the Atlanta area from taking more water because the ruling could allow Atlanta to take up to 50% more water from the lake and river, or 537 million gallons of water a day. If metro Atlanta takes more water, Alabama could become less desirable for industry. The three states, which share the Chattahoochee River, have been fighting over the river since 1990. I understand that Alabama will continue the fight, which I believe is the right thing to do. There are currently other lawsuits pending dealing with the water issue that will have to be decided. But, it's too bad that the political leaders in the three states can't work this matter out. After all, we are neighbors who have more in common than we have differences between us.

Source: Associated Press

GREAT NEWS FOR THOMAS GOODE JONES SCHOOL OF LAW

The American Bar Association has granted provisional approval for accreditation to Thomas Goode Jones School of Law. Students at the School of Law

will now be entitled to take the bar examination and practice in every state in the union. This is great news and is a major step forward in the life of the law school. It's a recognition of the quality of the program of education at Jones. Lawyers from the school are already making substantial contributions to the bench and bar in Alabama and other states. Some of the best lawyers in Alabama graduated from this school, which has a grand and storied tradition.

The American Bar Association gives a provisionally approved law school two to five years to bring its legal education program into full compliance with the standards. A new law school must be provisionally approved before it can be reviewed for full approval. Lots of folks have worked hard to make this well-deserved recognition a reality. Special thanks must go to former Dean Wendell Mitchell and the current Dean Charles Nelson for this momentous accomplishment. Wendell worked long and hard to make accreditation a reality. Dean Nelson came in and made it his top priority and he really got the job done. Incidentally, Dean Nelson is doing an outstanding job at Jones in all areas and we are most fortunate to have him in charge. I predict even greater things for the Capital City-based law school in years to come.

TOP COURT WON'T BLOCK PART OF DRUG PROGRAM

The U.S. Supreme Court has refused to block part of the highly controversial Medicare prescription drug program. This is seen as a defeat for states that will now get **stuck** with the bill as I had predicted. The High Court justices declined without comment to temporarily stop part of the controversial law that added a prescription drug benefit to Medicare. States were contesting a requirement that they pay the federal government for some expenses. As you may know, the 2003 law went into effect January 1st. About 43 million people are eligible for the benefit. The State of Alabama and all other states will

have to fork over large sums to the federal government under the new law I am told.

Texas, Kentucky, Maine, Missouri and New Jersey called on the U.S. Supreme Court justices to step in, while the court decides whether to hear their challenge to a funding part of the law. Ten other states, Alaska, Arizona, Connecticut, Kansas, Mississippi, New Hampshire, Ohio, Oklahoma, South Carolina and Vermont, also filed briefs with the court claiming the program threatens state independence. As you may know, while state lawsuits against the federal government can be filed directly with the Supreme Court, they can also begin in the lower federal courts. The High Court in this case, said the fight belonged in a lower court.

The contested part of the law involves a provision which requires states to pay the federal government part of the money they are expected to save because they no longer must pay for drugs for people enrolled in both Medicare and Medicaid. People who previously were covered by state Medicaid programs are now part of the new program. However, most people still don't understand the program which is much more costly than anybody predicted it would be. The only certain thing about the program is that the **big winners** will be the drug companies, the insurance industry and the pharmacy benefit managers who incidentally will get filthy rich as a result. All American should be shocked when they learn that the drug companies have raised their prices greatly since the new drug plan went into effect. But this shouldn't be too surprising since they **wrote** the law along with the insurance industry.

Source: Associated Press

II. THE NATIONAL SCENE

THE ENRON CRIMINALS WILL NOW GET THEIR DUE

As has been widely reported, the high-profile corporate corruption case against former Enron chiefs Ken Lay and Jeffrey Skilling resulted in guilty verdicts against both men. Obviously, both Lay and Skilling were clearly guilty. Among their criminal acts, Lay and Skilling lied to investors to cover up financial problems at Enron. The company collapsed into U.S. bankruptcy in December 2001 after the revelation that the company had hidden billions of dollars in debt in off-balance-sheet partnerships and inflated its profits, putting thousands of employees out of work and wiping out billions of dollars in retirement pensions.

The lesson that must be learned from the Enron debacle is that not even the most powerful men and women in Corporate America are above the law. Lay and Skilling are prime examples of what can happen when those who run large corporations let greed, arrogance, and the influence they have over politicians combine to cloud their thinking and eventually lead them to the point where they treat corporate assets as being their own personal property. History tells us that lying and cheating by corporate bosses like what we have seen at Enron will soon lead to outright stealing. In this case it led to a complete looting of a powerful company.

There have been over 20 individuals indicted for their involvement in the Enron scandal. Of those, at least 10 have either been convicted or pleaded guilty to criminal acts. As you know, there were also a number of banks that allegedly were in cahoots with Enron. The status of charges against these banks is set out below:

- **Citigroup**—Enron shareholders had argued that Citigroup helped Enron to set up offshore companies and shady partnerships to exaggerate the energy

trader's cash flow. In June 2005, In June, Citigroup agreed to pay \$2 billion to resolve investors' claims that it helped hide losses at Enron Corp.

- **J.P. Morgan Chase**—Enron shareholders had argued that Morgan Chase helped Enron to set up offshore companies and shady partnerships to exaggerate the energy trader's cash flow. In June 2005, J.P. Morgan Chase agreed to pay \$2.2 billion to resolve investors' claims that it helped hide losses at Enron Corp.
- **Canadian Imperial Bank of Commerce**—Enron shareholders had argued that CIBC helped Enron to set up offshore companies and shady partnerships to exaggerate the energy trader's cash flow. In August 2005, Canadian Imperial Bank of Commerce has agreed to pay \$2.4 billion to resolve investors' claims that it helped hide losses at Enron Corp.

It is believed by some observers that more people could be indicted before the book is closed on Enron. I am not sure that the public realizes—even after all of the convictions and guilty pleas—just how bad and widespread the web of corruption at Enron really was. Some say a few politicians should still have good reason to be concerned. Regardless of what happens, however, there has to be a lesson for corporate bosses from this sad chapter in the history of Corporate America. That lesson is simply that **crime doesn't pay!**

THE PRICE FOR BAD BEHAVIOR

Even though the result was expected, the convictions of Ken Lay and Jeffrey Skilling have gotten a great deal of media attention. Some in the media are even saying that these men, who are now labeled as common criminals, were victims of bad legal representation. In my opinion, that's utter nonsense. These men broke the law and did so in an arrogant manner. They obviously believed that they were immune from any type of criminal investigation because of their strong political connec-

tions or that they simply were so smart they would never be caught. We should never forget that, in addition to the long list of Enron criminals, there also have been a number of other corporate executives who behaved very badly and who will pay the price for their misconduct. The following are just a few of the most notorious offenders:

- Tyco's Dennis Kozlowski was sentenced to 8-25 years in prison for literally looting his company by committing multiple acts of fraud;
- Worldcom's Bernard Ebbers was responsible for the largest corporate fraud in U.S. history and received 25 years in prison; and
- Adelphia's John Rigas was convicted of fraud and conspiracy and was sentenced to 15 years.

There are many others who could be listed with this unsavory group. While it's good to see the criminal justice system working, it's important not to forget that thousands of innocent men and women were badly hurt by the massive criminal acts of these people. The civil justice system is being used in efforts to recoup to the extent possible the massive losses suffered as a result of the criminal activities of men like Lay and Skilling. There were a great number of lawyers, accountants, bankers, and others who became entangled in the web of corruption and who have their own legal problems as a result. My mama told me when I was a small boy in Clayton that "if you lie down with a bunch of dogs who have fleas, you will always get up scratching!"

DON'T MESS WITH THE WHITE HOUSE AGENDA

There is an organization, the Republican Party-aligned Institute on Religion and Democracy (IRD), which has been a tremendous protector of the Bush White House and its agenda. The IRD sent out a press release recently attacking Jim Winkler, general secretary of the United Methodist Board of Church and

Society. Winkler was attacked for a speech that he gave in March of this year critical of President Bush. IRD spokesman Mark Tooley, who also is a writer for conservative activist David Horowitz's website, claimed that Winkler confuses "partisan politics with the Gospel." It is significant that the IRD press release attacking Winkler was sent out by John Lomperis, a well-connected 2004 Bush campaign worker. As you may know, while Lomperis routinely sends out attack pieces against Christians who don't conform to the IRD's own **partisan political agenda**, he never discloses his own partisan political activities. It's also highly significant that the IRD is funded by some of the largest and most influential financial backers of President Bush.

Tooley, a former CIA employee, has called United Methodist bishops—because they are opposed to the Iraq war—both anti-American and unpatriotic. Without a doubt, the goal of the IRD surely appears to be silencing Christian voices considered to be critical of the political policies advanced by the Bush Administration. Their tactics include making personal attacks against church leaders simply because they don't agree with the president. The IRD has proven time and time again that they will say or do just about anything to advance the right-wing Republican agenda. Some say they will even misrepresent the teachings of Jesus on issues of war, peace, justice, and the environment if it furthers their agenda.

THE PUBLIC HAS A RIGHT TO BE OUTRAGED OVER CORPORATE PAY PACKAGES

Congress has been dancing around with an issue that has a tremendous number of corporate shareholders, as well as the public generally, up in arms. That issue relates to executive pay packages and perks. This congressional activity actually comes at a time when revelations of excess pay and perks for some in Corporate America have already come to light. It will be very interesting to see what our lawmakers do—if any-

thing—relating to this matter. In my opinion, Congress should definitely give shareholders a greater say over executive compensation with reasonable limitations. The House Financial Services Committee started hearings in late May and accompanying the hearings were the usual **political news releases**. As predicted, there was the usual **partisan approach** to the hearings. Frankly, I doubt seriously that anything of consequence will result from these hearings. Nevertheless, it should be quite apparent to all that there is a need for some type of reform of a broken system.

Americans hear reports almost daily of **excessive** pay and perks for executives while the companies they are supposed to be **working for** are having **financial woes, laying off employees, or failing to meet billions of dollars in pension obligations** for workers' retirement. The huge gap between executives' salaries and the pay of rank-and-file employees continues to widen. It was ironic that the congressional hearings referred to above started on the very same day that a federal jury in Houston convicted Kenneth Lay and Jeffrey Skilling of conspiracy and securities fraud in one of the biggest business scandals in U.S. history. Unfortunately, Enron, a company that became a notorious symbol of corporate greed, is symbolic of what is wrong in all too many corporations in this country. To put it in simple terms, they are run by greedy executives who seem to have little concern for their employees or shareholders.

The number of public companies involved in federal investigations concerning the timing of stock option grants to their executives continues to grow. Currently, more than a dozen companies have received inquiries from federal prosecutors in New York and the Securities and Exchange Commission (SEC) seeking details on how they grant stock options. The companies — the largest so far being UnitedHealth Group Inc. — are being examined to determine whether they boosted executives' payoff from stock options by backdating the grants to coincide with a point

where corresponding stock prices had dropped to lows.

During the congressional hearings, the lawmakers took a close look at Lee Raymond, the recently retired chairman of Exxon Mobil Corp., who did very well financially during his tenure with the giant oil company. This is the man who received a package of over \$400 million, including salary, bonus, stock options, and a \$1 million per year consulting deal from his company. Raymond's compensation works out to more than \$144,000 a day. Consumers, who are already hurting financially, pay over \$3 a gallon for his company's gasoline. It's pretty easy to figure out why shareholders in his company are also outraged by Raymond's pay package.

In January the SEC proposed the biggest changes since 1992 in rules governing disclosure of executive compensation. The rule changes would require companies to disclose far more details about their executives' pay packages and perks. In my opinion, working men and women—regardless of what section of the country they live in, or which political party they tend to favor—won't tolerate the Raymond-type excesses in Corporate America much longer.

Unfortunately, I don't believe Congress will do very much about the problem. An example of how some in Corporate America feel about shareholder concerns is the recent annual meeting of Home Depot, Inc. which is based in Atlanta. Home Depot's chief executive, Bob Nardelli, was facing an uproar among shareholders over his pay package and here's how he handled his problem. Nardelli has received \$123.7 million in compensation, excluding stock option grants, since taking over as CEO in December 2000. The company's stock price had dropped 9% over that period on a split-adjusted basis. The shareholders wanted some answers and expected to have a chance to question the board members who approved Nardelli's pay and perks. At the company's annual meeting, in response, the board members simply didn't show up.

Source: *Associated Press*

SOME SAY EXXONMOBIL COULD BE LABELED A CORPORATE VILLAIN

If you had to pick one company in America as the ultimate corporate villain on issues that affect ordinary citizens, some say you might be hard-pressed to find a better candidate than ExxonMobil. At a time when most folks are mad as hornets over soaring gasoline prices, ExxonMobil is making money hand over fist and is doing so at an increasing rate. In fact, this giant corporation is actually making more money than any other oil company in the world. As a result, they are doing quite well financially at a time when ordinary folks are really suffering from a fiscal or economic perspective. While the top officers and some of the ExxonMobil stockholders have to be very happy over the current state of affairs, just about everyone else these days is mighty upset with this powerful company. Not all of the shareholders are pleased, however, because of other factors, which will be discussed below.

There are a number of reasons for folks to be unhappy with the giant oil company—the first obviously being the outrageous cost of gasoline, as well as being the pay packages and perks for top company officials, the utter disregard the company has for the court system, and the company's position on global warming. In fact, environmentalists have a legitimate right to be upset with ExxonMobil for a variety of reasons:

- the company's willingness to spend millions of dollars to refute the significance or even the existence of global warming, and the role of energy companies in exacerbating it;
- its extraordinary lobbying to open up the Arctic National Wildlife Refuge in Alaska to oil and gas exploration; and
- its continuing refusal to make good on its full compensation payments to the victims of the 1988 Exxon Valdez oil spill in Prince William Sound in Alaska.

Watchdogs of good corporate gover-

nance have been raising eyebrows for years at the compensation collected by ExxonMobil's top officers. Lee Raymond, its recently retired CEO, has been a particular object of public scrutiny for some time. Last November, Raymond testified before Congress that America's soaring gasoline prices were caused by "global supply and demand" and promised that ExxonMobil was itself feeling the pain being felt by consumers. You may remember when Raymond said during the hearing: "We're all in this together." That's what he told members of Congress and at the time most of us assumed he was referring to U.S. citizens and not just to their political friends. It should be noted that the statement was made before it became known that ExxonMobil had made a record-breaking \$36 billion in profits in 2005, a 40 per cent increase over the previous year.

ExxonMobil has repeatedly shown that it is very much on the wrong side of environmental issues. Eric Goldstein, a lawyer with the Natural Resources Defense Council, a leading environmental lobbying group, made this observation:

ExxonMobil has gone out of its way time and again to distinguish itself from its competitors as the most anti-environmental oil company.

I understand that ExxonMobil has financed about 40 organizations dedicated to derailing the efforts to slow down global warming, starting in the late 1980s. Mr. Raymond himself has twice served as chairman of the climate change-denying group, Global Climate Coalition. Even the federal government—in spite of the fact that the Bush Administration has denied that global warming is even a serious problem—has found evidence that ExxonMobil has contributed directly to the increased cost of energy. Interestingly, the Government Accountability Office recently found that Exxon's 1999 merger with Mobil alone added four to five cents to the price of a gallon of gasoline.

One way to figure out how good or bad the folks are who run a large corporation is to simply to look and see how they treat their own employees. ExxonMobil is now under attack by lawmakers and shareholders as a result of the company's failure to cover a \$3.9 billion shortfall in its pension fund. When companies like this are providing their CEO's with tremendous benefits and all sorts of perks, it is tragic that they would refuse to fund pension plans properly for their own employees. Having been on the opposite side of the table with this giant oil company in a few lawsuits, I am not at all surprised. Incidentally, they currently owe the State of Alabama about \$4 billion in as clear a case of corporate fraud as you will ever see and the company still refuses to pay!

FCC COMPLAINTS INCREASE SIX-FOLD IN FIRST QUARTER OF 2006

Indecency and profanity complaints filed with the FCC against radio and television broadcasters rose dramatically in the beginning of 2006 to 275,131. This is up sharply from the 44,109 filed in the last quarter of 2005. The primary source of the complaints appears to be an episode of NBC's Las Vegas, which generated at least 134,000 complaints in February. The marked increase in FCC complaints could prove extremely costly for broadcasters. After a tremendous phone-call campaign sponsored by the Parents Television Council and a few other family organizations, the U.S. Senate and House of Representatives approved the legislation that substantially increases the fines broadcasters would pay for breaking decency laws. That legislation calls for a maximum \$325,000 fine—ten times the current \$32,500 maximum penalty—per violation. President Bush, who apparently had not pushed the legislation, did sign the bill into law. Frankly, he had no choice.

The American public has a means by which to speak out against those who violate the broadcast decency laws. We

should all remember that members of the public — not the broadcasters or the television networks — own the airwaves. If you believe the law has been broken with the airing of indecent material between 6:00 a.m. and 10:00 p.m., you have the right — and really the obligation — to bring public scrutiny on those who have violated the law. You can use the links found under the Take Action heading in the left menu column on the PTC home page, www.parentstv.org, to let your voice be heard.

Hopefully, the new law referred to above will cause the bosses in the television industry to clean up their programming and advertising. The FCC should crack down hard on **indecent** broadcasts and make the industry totally **accountable** for their actions. I give the Parents Television Council credit for this victory. Without their involvement, the public would never even know that the bill was in Congress. When the public got involved in the fight, the politicians listened. Passage of the bill over opposition by powerful lobbyists representing the industry is proof that “ordinary” folks can have influence in politics.

Source: Parent's Television Council

GOOGLE SUED OVER CHILD PORNOGRAPHY CLAIM

A New York state lawmaker has sued Google, Inc. in what appears to be a most interesting but disturbing lawsuit. It is claimed the search engine leader has profited from illegal child pornography. The lawsuit alleges that Google has paid links to websites containing pornography involving minors. The complaint, filed in a New York state court, alleges that the case is about a multi-billion company that promotes and profits from child pornography. A Google spokesman has denied the allegations and contends that the company takes steps to prevent access to child pornography. I hope that is absolutely correct. With child pornography being such a serious problem in this country,

no company should promote this industry—directly or indirectly—regardless of how profitable it might be. Because of the serious charges made in this lawsuit, it will be watched closely.

TAKE-TWO AND THE FTC REACH A SETTLEMENT OVER VIDEO GAME

The maker of the controversial video game Grand Theft Auto: San Andreas has agreed to settle a Federal Trade Commission complaint alleging that players could view sexual content hidden in the game. While the settlement carries no fines or admission of wrongdoing, the agreement was seen by some observers as a warning to video game companies that future incidents would meet a harsher response from regulators. Under the agreement, New York-based Take-Two Interactive Software Inc. and its subsidiary Rockstar Games pledge increased vigilance in reviewing and marketing future releases. The companies could face fines up to \$11,000 for each game sold that violates the agreement. The Commission will vote whether to finalize the agreement following a 30-day period of public comment ending July 10th. I hope this industry will get the message and clean up its act even though the settlement on its faces seem pretty weak.

Source: *Wall Street Journal*

PRESIDENT BUSH SELECTS NEW HEAD OF NHTSA

Nicole R. Nason, who appears to be just another Washington insider, has been sworn in as the new chief of the National Highway Traffic Safety Administration (NHTSA). The 35-year-old lawyer had been Assistant Secretary of Transportation for Governmental Affairs since July 2003, overseeing all relations with Congress. Before that job, Ms. Nason had worked at the U.S. Customs Service and as communications director for former Republican Representative Porter Goss. Early in her career, she worked at Metropolitan Life Insurance Company as a lobbyist.

I sincerely hope that the new boss at NHTSA will be able to do the job required of her. Frankly, other than what's set out above, I know very little about the new director. I had hoped that President Bush would appoint a strong consumer advocate with no ties to the automobile industry to head up NHTSA. While that didn't happen, we should all give the new director an opportunity to be an effective regulator of the automobile industry and a protector of the American public. She will have a chance to prove herself worthy of this appointment in short order because a number of important safety issues are now on NHTSA's plate.

CONGRESS FINALIZES LARGEST SUPPLEMENTAL APPROPRIATION IN HISTORY

The federal government is spending money at an alarming rate, and unfortunately, there doesn't appear to be any end in sight. Most folks who have to live within their means on a very tight budget know it's pretty easy to figure out why. Simply put, the federal government is spending much more each year than they have coming into the government's coffers. Where I live, they call that deficit spending. The thing that amazes me is that some ultra-conservative Republicans endorse this sort of thing and say it's good for the economy. They are more interested in tax cuts for the rich than they are the plight of the average American taxpayer. Most can't admit that our President is the biggest spender and borrower of any president in our country's history.

The federal government's budget planning is sort of a joke. Instead of following the plan set out in the original budget, there are ways to get around that budget. The primary mechanism for circumventing the federal budget is known as “supplemental appropriations.” The purpose of “supplementals” is supposed to be to finance unforeseen emergencies. In Alabama we have a “rainy day” fund to cover such emergencies. But the federal government is not only burdened with borrowing for

unanticipated costs, it has been regularly setting itself up to do a great deal of additional borrowing for expenses that could have easily been forecast when the president sent his initial request for spending to the Congress. For example, House and Senate conferees came to final agreement last month on a \$94.5 billion appropriation to be added to the almost \$900 billion in discretionary spending already appropriated for the current fiscal year. It has gone virtually unnoticed that this was the largest single supplemental in the history of this country. Fifty billion dollars in additional supplemental spending had already been put into the fiscal 2006 defense appropriation bill.

Unfortunately, what has happened to this year's budget is not unique. Last year, President Bush signed \$160 billion in "emergency" supplemental spending measures; the year before, emergency appropriation measures funded outside the planned budget totaled \$118 billion. According to the Congressional Budget Office, supplemental appropriation spending has amounted to \$577 billion since fiscal 2001 when this President took office. That is an average of \$96 billion a year. I'm sure some of you are asking: How does that compare with supplemental "emergency" spending during the previous six fiscal years? From the beginning of fiscal year 1995 to the end of fiscal year 2000, all supplementals (net of rescissions) totaled \$21 billion. That was an average annual level of less than \$4 billion a year, or about one-twenty-fifth the annual level during the Bush Administration. There is no way to justify the Bush Administration budget policies that include large tax cuts for the rich. That is poor fiscal policy when you consider we are fighting a very costly war in Iraq, as well as a global war on terrorism. Add to that the costs of storms such as Katrina. Clearly, it's time for somebody who has good common sense and who understands real "family values"—a person who has to live on a budget—to get involved in the White House and bring our government's spending under control.

ARMOR CAUSING HUMVEES TO ROLL OVER

Americans are greatly concerned over the war in Iraq and are especially concerned over the welfare of our troops. There have been charges that our troops were not being adequately supplied and equipped, and that caused a great deal of concern. Another serious problem has now been raised. Thousands of pounds of armor added to military Humvees, intended to protect U.S. troops, have made the vehicles more likely to roll over, killing and injuring soldiers in Iraq, according to a newspaper report. Scott Badenoch, a former Delphi Corp. vehicle dynamics expert, made this assessment in an interview with the Daytona Daily News: I believe the up-armorings has caused more deaths than it has saved.

Since the start of the war, it has been reported that Congress and the Army have spent tens of millions of dollars on armor for the Humvee fleet in Iraq. This was necessary in my opinion because of the nature of this war. To its credit, that armor—much of it installed on the M1114 Humvee built at the Armor Holdings Inc. plant north of Cincinnati, Ohio—has shielded soldiers from harm. But serious accidents involving the M1114 have increased as the war has progressed. It was stated by the Daily News that an analysis of the Army's ground accident database, which includes records from March 2003 through November 2005, found that 60 of the 85 soldiers who died in Humvee accidents in Iraq—or 70%—were killed when their vehicles rolled. Of the 337 injuries, 149 occurred in rollovers.

Badenoch, who is working with the military to design a lighter-armored vehicle to replace the Humvee, says: "The whole thing is a formula for disaster." Army spokesman John Boyce Jr. told *The Associated Press* that the military takes the issue seriously and continues to provide soldiers with added training on the armored Humvee. The Army also has made safety upgrades to the vehicle, including improved seat restraint belts and a fire suppression system for the crew, he said. Currently, there are more

than 25,300 armored Humvees in Iraq and Afghanistan. When Humvees do roll over, the most vulnerable passenger is the gunner, who operates the weapon mounted in the vehicle's top. Gunners were killed in at least 27 of the 93 fatal Humvee accidents since 2001. Clearly, there appears to be a high number of deaths resulting from vehicle roll-overs. I hope that problem can be resolved and soon.

Source: *Associated Press* and *Daytona Daily News*

III. COURT WATCH

FEDERAL MAGISTRATE JUDGES IN ALABAMA ANNOUNCE THEIR RESIGNATIONS

I was saddened to learn recently that two federal magistrate judges in my hometown of Montgomery were planning to resign. My first thoughts were that the system would suffer as a result. In any event, on June 2nd U.S. Magistrate Judges Vanzetta Penn McPherson and Delores R. Boyd announced their plans to step down in the near future. All of the lawyers who practice in the Middle District had to be shocked as I was and greatly disappointed over their announcement. These two women have truly been outstanding judges in every respect. Personally, I had hoped that each of them would have been given the opportunity to go on to higher level judicial positions. Unfortunately, that apparently wasn't to be and that's a shame, because these two women would be great appellate judges in the federal system.

Chief U.S. District Judge Mark Fuller called the resignations "a great loss" and said that the resignations of the two women would "be deeply felt by the court." I totally agree with Judge Fuller's assessment and believe all of the judges in the Middle District of Alabama who have worked with these two judges share those feelings. I have the highest regard for Judge McPherson and Judge Boyd. Each had enjoyed an outstanding career as a lawyer before being

appointed to their positions as Magistrate Judges and each has served extremely well in that capacity. Finding replacements for the two jurists with equal qualifications won't be easy.

It is troubling that judges of their caliber find it necessary to leave their positions prematurely for whatever reason. Having known each of these judges, both professionally and personally, for years I have to believe that they simply have had a calling to some new and challenging endeavor. Regardless, the real losers as a result of their leaving the bench will be the people of Alabama. These two judges will be sorely missed!

ALABAMA'S SUPREME COURT JUSTICE PRIMARY CAMPAIGN WASN'T PRETTY

We have just experienced a campaign for Chief Justice of the Alabama Supreme Court in the Republican primary that will go down in history as one of the **ugliest** and **most costly** in our history. Remember, this was just a primary race and not the final vote for this most important position on the court. A trio of public interest watchdog organizations has expressed grave concern that voters in Alabama were exposed to one of the most divisive and unseemly high court campaigns ever seen in American politics. I am not sure that I can go that far, but I can say it was certainly an ugly campaign. Many political observers who I have talked with agree with that assessment. In fact, some say they were shocked by how **low-down** and **dirty** the race became.

As you know, Alabama's primary election featured five contested elections for the state Supreme Court, all on the Republican ticket. There were no contested races in the Democratic primary. Based on an analysis of advertising, websites, campaign finance disclosure records, and media accounts, the watchdog groups expressed concern that the state's **contentious gubernatorial politics** had actually "hijacked the Supreme Court campaign" and "could undermine the Court's ability to be impartial and

enjoy public confidence." Judicial races at every level—and certainly one for the top position on the Supreme Court—should be run at the highest level possible. I tend to believe that it's the **Karl Rove influence** that was brought to judicial elections in our state that is responsible for all of the negative advertising and dirty tricks in judicial races. The Democrats have to share some of the blame as the result of introducing the "skunk ad" to Alabama politics. That was a prime example of an outsider running an Alabama campaign.

Much of the real mud-slinging in the current race came from a secretive group called the American Taxpayers Alliance (ATA). Bert Brandenburg, executive director of Justice at Stake, a Washington-based nonpartisan group that tracks judicial politics, observed:

Americans want courts to be fair and impartial, and not blow in the political winds. Judicial campaigns based on raw ideology give short shrift to qualifications, experience and judicial philosophy.

It's become quite clear that big money and sound-bite advertising have become defining elements in many judicial campaigns across the country. The 2006 Alabama Republican primary kept pace on both fronts, according to the public interest groups. Initial data collected by the Institute on Money in State Politics of Helena, Montana, an organization that tracks spending in judicial races, indicates that candidates for the Alabama Supreme Court had raised more than \$1.6 million at one point. That figure is a conservative estimate of fundraising through June 6th, because it didn't include the disclosure reports filed about ten days before the election nor did it count large sums of money spent after that date. It nonetheless shows a dramatic jump from the same point in 2004, when 13 candidates reported raising \$869,335. My best guess is that the Nabors campaign alone—combined with the efforts of ATA—spent well in excess of \$3 million. I suspect the Parker campaign

spent over \$500,000. Again, remember this spending was in a primary election. The public has a right to know where all of this money is coming from and why.

Alabama is getting a very bad reputation for costly judicial races. Since 1993, candidates for the Alabama Supreme Court have raised more than \$42.6 million, exceeding the costs of high court campaigns in any other state, including Texas and Ohio, where the judicial races have been very mean, rough, and very expensive. Edwin Bender, executive director of the Institute on Money in State Politics, says:

The increasing role money plays in state judicial races can potentially create the appearance of impropriety.

In addition to the question of big money, there has been a great deal of concern over judicial candidates taking positions on issues that will ultimately be before the courts. Although it is politically expedient to take this approach, it has no place in judicial races. Deborah Goldberg, director of the Democracy Program at the Brennan Center for Justice, says:

The fairness and impartiality of the Alabama courts can be called into question when candidates so blatantly stake out positions prior to hearing the facts and the law of each case.

According to Public Citizen, the American Taxpayers' Alliance (ATA) "has made a practice of stirring controversy by broadcasting attack ads while refusing to disclose its funding sources." In recent years, special interest groups—including the ATA—have pumped in hundreds of millions of dollars mostly for television advertising to elect or defeat particular judicial candidates in states across the country. As mentioned above, \$42.9 million was spent by candidates in Alabama. This doesn't include, as I understand it, the millions shipped in from out-of-state by groups such as ATA.

The Brennan Center, the Institute on

Money in State Politics, and the Justice at Stake Campaigns are regular collaborators in tracking the influence of big money, television advertising, and special interest groups in America's state judicial election campaigns. Their semi-annual report, *The New Politics of Judicial Elections*, has compiled data and analysis over the last three election cycles. Periodic updates from the groups will be issued throughout the 2006 election campaign.

WHO IS THIS SECRETIVE ORGANIZATION THAT IS INVOLVED IN ALABAMA SUPREME COURT RACES?

I doubt seriously if more than a handful of folks in Alabama have ever heard of the American Taxpayers Alliance (ATA). If you happened to have seen some of the ads paid for by ATA, however, I'm sure you are wondering who in the world this group is. ATA, which is a national organization, has very close ties to big business. This isn't ATA's first rodeo around the U.S. and it wasn't the first time ATA has been heavily involved in our court races in Alabama. ATA has actually shown a great deal of interest in judicial races in Alabama in the past. This secretive group has been notorious for involving itself in other state elections, and doing so without reporting its contributions or contributors to the Federal Election Commission (FEC) or to state disclosure commissions. Interestingly, neither the FEC nor the Secretary of State of Alabama has any disclosure records pertaining to the ATA. In 2004, the group spent nearly \$700,000 on judicial election ads in Alabama, according to the Brennan Center for Justice at New York University School of Law. This year that figure will be small in comparison to what has been funneled into our state from ATA with more certain to follow in the months ahead.

The Washington, D.C.-based ATA is registered as a 501(c)(4) organization. Its stated purpose is to "protect American taxpayers from new and onerous financial obligations" and to "harness taxpayer anger at unwise fiscal decisions by gov-

ernment leaders," according to the organization's 2004 IRS Form 990. This group, which operates in secret well under the disclosure radar, spends the bulk of its financial resources on political campaign advertising around the country. Public Citizen President Joan Claybrook, who is most knowledgeable on the subject, observed:

The ATA is engaging in a cynical manipulation of the democratic process. This national organization, which historically has been heavily backed by large corporations, is trying to stack the deck of the Alabama Supreme Court to further its anti-consumer agenda.

The ATA is headed by Scott Reed, a long-time Republican operative. Interestingly, Reed began his career in conservative politics at Pat Robertson's Christian Coalition and was the campaign manager for Bob Dole's 1996 presidential bid. Reid was appointed executive director of the Republican National Committee in 1993. In 2001, ATA was one of the primary stealth organizations involved in attacking California Governor Gray Davis over the California energy crisis, turning \$1.8 million in contributions from Texas-based Reliant Energy Corp. and North Carolina-based Duke Energy into powerfully negative campaign ads.

According to the Alabama Secretary of State's office, any organization that is running election ads in Alabama must register with the state or the FEC. You won't be surprised to learn that the ATA has done neither. Despite the organization's history of involvement in political campaigns and concealment of its financial supporters, in 2002, the ATA included a list of contributors on the IRS Form 990 that the group provided to Public Citizen. The form revealed that the U.S. Chamber of Commerce, a group with a history of interfering in state judicial elections, gave the group \$2.5 million that year, representing 38% of the ATA's 2002 budget. The ATA ran electioneering ads that year in Illinois, Missouri, and Florida. It would be most interesting to get some answers from

ATA before the general election to some basic questions:

- Why does ATA have such an interest in Alabama court races?
- Where is ATA getting all of its money?
- What companies located outside Alabama have such an interest in Alabama's courts?
- Why won't ATA disclose its donors?
- Could ExxonMobil—which has a \$3.5 billion verdict on appeal to the Alabama Supreme Court drawing interest at more than one million dollars per day—be one of its secret donors?
- Why won't ATA follow Alabama law and register in Alabama?

I believe Alabama citizens would want all of these questions answered. Certainly, they are entitled to this information. Unfortunately, there is no current provision in Alabama law that requires ATA to answer any of them. Last year, the Campaign Disclosure Project ranked Alabama 47th in the country in terms of campaign disclosure laws. Frankly, I am surprised that any state could be ranked lower because our laws in Alabama are so weak as to be totally worthless. Ms. Claybrook had this to say concerning the current state of affairs in Alabama relating to our election laws:

State lawmakers should strengthen Alabama's disclosure laws, which are among the weakest in the country. The ATA has a history of getting money from big energy companies and the U.S. Chamber of Commerce. The citizens of Alabama should question why those interests are trying to determine the outcome of this election.

Regardless of which judicial candidates our Alabama readers may have supported in the recent primary, or who they plan to support in the general election, I believe each of them will agree that we must take judicial politics out of the gutter. All of the candidates for a judicial office in the general election

should pledge to run their campaigns on a very high level. I would like to see their pledge include a promise not to take any PAC funds, to rebuke groups like ATA, and to limit their spending. In fact, the Democratic and Republican parties should take the lead and require their candidates to take such a pledge.

Source: Public Citizen

U.S. SUPREME COURT UPHOLDS MARINE CONTRACTOR WIDOW'S RIGHT TO SUE

In a ruling that has implications for thousands of maritime workers across the country, the U.S. Supreme Court has upheld a New York widow's right to sue employer Lockheed Martin for the wrongful death of her husband in a December 2000 Cayuga Lake drowning accident. The court denied Lockheed Martin's petition for a writ of certiorari. The government contractor contended that the widow was barred from bringing a lawsuit for damages. The widow's negligence claim is now cleared by the Supreme Court to proceed in a New York federal court.

On December 20, 2000, a test engineer employed by Lockheed Martin Naval Electronic & Surveillance Systems for 15 years, suffered a fatal accident on a work boat returning him to shore on upstate New York's Cayuga Lake. He was conducting underwater tests of Lockheed transducers (a component required for sonar equipment used by the U.S. Navy) on Lockheed's floating work platform on Cayuga Lake when he fell into lake while untying the boat. Rescue efforts failed and the engineer drowned.

At issue was whether a federal statute, the Longshore Harbor Workers Compensation Act (LHWCA), and previous Supreme Court decisions, which provide substantial benefits to employees who are injured while working on or about navigable waters of the United States, applied to the engineer, who was not a typical longshoreman. The Act and these prior rulings also provide employees the right to sue their employers for damages when they are injured as a

result of the negligent operation of the employer's vessel.

An Administrative Law Judge initially denied benefits under the LHWCA to the widow. The Benefits Review Board of the U.S. Department of Labor reversed the ALJ's decision and found coverage. Lockheed Martin challenged that ruling in the U.S. Court of Appeals for the Second Circuit. On June 24, 2005, that court affirmed the BRB's finding of coverage under the LHWCA. The Supreme Court's decision has broad and positive implications for men and women engaged in maritime employment and are injured.

Source: *The Insurance Journal*

APPEALS COURT ALLOWS CHILD TO SUE OVER ABORTION

The Alabama Court of Civil Appeals has ruled that a Birmingham abortion clinic can be sued over an **unsuccessful abortion** that a woman blames for **damaging** her child's health. The court reversed a lower court ruling that had blocked a lawsuit filed by a woman on behalf of herself and her child. In a decision released on May 26th, the appeals court said the woman can sue Planned Parenthood of Alabama on behalf of her child.

The case involved a woman who went to Planned Parenthood's abortion clinic in Birmingham. The abortion procedure was unsuccessful in ending her pregnancy. She then blamed the unsuccessful abortion for resulting in her daughter being born with injuries that included a hole in her heart and an inverted tube leading from her lungs to her heart, "causing her body not to be able to receive enough oxygen." Summary judgment was issued by the trial judge in favor of the abortion clinic. The appeals court agreed with him that the mother couldn't sue on her own behalf, but the five judges said she can sue on behalf of her child. Judge Glenn Murdock, who recently won his primary race for a spot on the Alabama Supreme Court, wrote for the court:

Neither the United States Supreme Court nor the Supreme Court of Alabama has ever ruled that a medical provider, or for that matter a mother, can engage, with some blanket of constitutional protection, in negligent or reckless conduct that deforms or injures a child so long as the deformity or injury is inflicted on the child before it leaves the womb.

The Supreme Court has authority to deflect a case and send it down to the Civil Court of Appeals. But, the court normally won't transfer a case in that manner that presents a "novel legal question" and especially one that has "significant statewide impact." This case seems to have at least one—if not both—of these factors. It's sort of weird that the high court would have deferred this specific case to the lower appellate court. Nevertheless, that's exactly what happened.

Source: *Associated Press*

JURY FINDS FOR A WOMAN WHOSE BABY WAS BORN PREMATURELY AFTER CAR CRASH

A jury in Denver, Colorado, recently awarded \$101,500 to a woman who gave birth to a premature baby following an automobile accident. Arguments by an insurance company that the baby, who lived just over an hour, wasn't legally a person were rejected by the court and jury. Shantal Gonzales was 5 months pregnant when she delivered her son by Caesarean section after the crash that occurred in June. Ms. Gonzales was hurt while riding in a car when it was hit by a speeding pickup truck in a hit-and-run accident. She filed suit against the driver's insurance company, Columbia, Missouri-based Shelter Insurance Co., seeking compensation for her son's death. The company claimed that it had no legal duty to pay because the baby was a non-viable fetus. The driver of the car in which Ms. Gonzales was riding in was at fault for turning in front of the pickup truck. Apparently, there had been no court rulings in Colorado

on the issue before this case. Courts in several states have ruled, however, that, once a baby is born, he or she is considered a person, regardless of his or her viability.

Source: *The Insurance Journal*

SUPREME COURT WILL HEAR CASE ON HIGH PUNITIVE DAMAGES

The issue of punitive damages will again be before the U.S. Supreme Court. The High Court will hear an Oregon tobacco case dealing with the issue of punitive damages. The Court agreed to review a \$79.5 million verdict against Philip Morris USA for the death of an Oregon smoker. The case will be on the Court's docket for the fall. The Philip Morris dispute is the Court's first punitive-damages case since *State Farm v. Campbell*, decided in 2003. Since that decision came out, lower state and federal courts have varied widely in their interpretations of the decision. It was my belief that each case would be decided on its own merit—which certainly makes sense legally—because the Supreme Court didn't put out a hard and fast formula for courts to follow.

IV. LEGISLATIVE HAPPENINGS

STATE OF ALABAMA OUT TO REDUCE HIGHWAY FATALITIES

The Alabama Department of Public Safety (DPS) will seek tougher laws targeting speed and impaired driving—the two top killers on Alabama highways in 2005—in the next legislative session. Their effort will be designed “to slow people down and increase the penalties for DUI,” according to Col. Mike Coppage, who heads up the Department. Highway deaths fell 1.7% in 2005—to 1,134 from 1,154 in 2004—according to statistics released by the DPS. It should be noted that Alabama ranked higher than the average of 10

states in the southeast for the number of deaths on rural roads per capita. Here's how the causes of highway deaths in Alabama broke down:

- Speed was responsible for 166 of those deaths;
- DUI was the cause for 145;
- driver not in control was listed as the cause for 136, and failure to yield for 134.

Those comprised 51% of the total deaths on Alabama highway. I agree with Col. Coppage when he says “the number of deaths are down, but not down far enough.” The proposals the Department plans to take to the Legislature will include higher fines for speeding and DUI.

The legislative package proposed by the troopers will include:

- Adding the crime of aggravated DUI for people with a blood alcohol content of .15. But, the current standard of .08 for DUI would remain.
- Aggravated DUI also would apply to people who drink and drive and injure others.
- A fourth DUI conviction would result in loss of license for life.
- Creating safety zones on highways to reduce reckless driving. The zones would be selected by state and county officials through public complaints. Safety zones would be designated by signs. A \$100 fine would be added to the normal fine for a moving violation in those zones.
- Make it a crime for an adult to leave a child 8 or younger in a parked vehicle.
- Increase penalties for a parent who furnishes alcohol to a minor who is involved in a wreck.

I hope the legislators will support this package of bills in its entirety. State government has an obligation to do whatever is necessary to make our highways safer for all Alabama citizens. It's good to

see the Department of Public Safety taking the lead by proposing this legislation. If you agree with the troopers, mention it to your Senators and House members and ask them to support the package.

Source: *Birmingham News*

V. THE CORPORATE WORLD

FIVE PERCENT OF CORPORATE REVENUES LOST ANNUALLY TO FRAUD

Corporations lose an estimated five percent of annual revenues to fraud, each year according to a report by the Association of Certified Fraud Examiners. That's \$652 billion lost annually, despite an increased emphasis on anti-fraud controls and recent legislation to combat fraud. The fraud statistics are detailed in the 2006 ACFE Report to the Nation on Occupational Fraud and Abuse. The results are based on a survey of 1,134 Certified Fraud Examiners in the U.S. The frauds surveyed in the report fall into one of three major categories: asset misappropriation, corruption, or fraudulent statements. We have learned in our work that some of the bosses in Corporate America on too many occasions have been guilty of virtually looting their companies and in the process committing massive frauds against a combination of their own shareholders—those they do business with—and the state and federal governments. Research in the report reveals:

- Asset misappropriation was by far the most common type of occupation fraud, occurring in 91.5% of all reported cases, with a median loss of \$150,000. Asset misappropriation refers to any scheme involving the theft or misuse of an organization's assets, such as fraudulent invoicing, payroll fraud, or skimming revenues
- Corruption occurred in 30.8% of all reported cases, with a median loss of

\$538,000. Corruption refers to any scheme in which a person uses his or her influence in a business transaction to obtain an unauthorized benefit contrary to their duty to their employer, such as accepting or paying a bribe or engaging in a business transaction where there is a undisclosed conflict of interest.

- Fraudulent statements were the least-reported incidents of fraud at 10.6%, yet were the most costly, with a median loss of \$2 million. Fraudulent statements involve falsification of an organization's financial statements to make it appear more profitable, such as booking fictitious sales or recording expenses in the wrong period.

Survey results show that the greatest percentage of fraud cases were detected as a result of tips. The research shows that more fraud cases were discovered by accident than by audits, internal controls, or police notification. According to the report, fraud was detected in the reported cases by the sources set out below:

- Tips from employees, customers, vendors or anonymous: 34.2%
- By Accident: 25.4%
- Internal Audit: 20.2%
- Internal Controls: 19.2%
- External Audit: 12%
- By Law Enforcement: 3.8%

As you read the balance of this section, you might keep this part in mind. It is shocking when you consider how in the past corporate bosses in the country were well-respected and were generally good citizens.

Source: *Corporate Crime Reporter*

U.S. AGENCIES WORK HARD TO BAR LAWSUITS

When you read almost daily of all the corruption and scandals that take place in Corporate America, you have to wonder why anybody would want to

attack our court system. Nevertheless there are some amongst us who do and who are totally dedicated to their cause. As previously reported, those powerful forces behind the movement to destroy the American jury system are attempting to use federal regulatory agencies to do their dirty work. To accomplish their purpose, they are getting these federal agencies to draft preemptions barring state lawsuits, and then to put them in the preambles of agency rules and regulations. The preemptions of state laws have now been written into the preambles of:

- the Food and Drug Administration's new drug-labeling rule;
- the Consumer Product Safety Commission's mattress-flammability rule; and
- a pending National Highway Traffic Safety Administration regulation on motor vehicle roof-crush standards.

It must be remembered that the preambles are **introductory opinions** that **do not have the force of law**. It's obvious that by adding the preemptions, however, federal agencies are attempting an end-run around Congress. Things that could never get through Congress are now being put into federal regulatory rules and regulations with a hope that some court will say that is permissible and apply preemption to claims in lawsuits. It has become quite obvious that federal preemption is the main thrust of the Bush Administration's tort reform agenda. Ira Rheingold, general counsel to the National Association of Consumer Advocates in Washington, observed that preemption is one of the quiet ways that banks and other industries are trying to insulate themselves from consumer tort claims. The American public would never tolerate this, but unfortunately few folks ever know about what's going on.

FALSE CLAIMS ACT LAWSUIT AGAINST ABBOTT LABS

The Justice Department has intervened in a False Claims Act lawsuit that

had been filed by Florida-based local home-infusion company, Ven-A-Care of the Florida Keys Inc. against Abbott Laboratories Inc. Federal officials say that as far back as January 1991, Abbott's Hospital Products Division reported drug prices that were more than 10 times the actual sales prices on many of the drugs it manufactures. Medicare and Medicaid have reimbursed Abbott's customers in excess of \$175 million for the drugs which are now the subject of the False Claims Act lawsuit.

As we have previously reported, the difference between the inflated government reimbursement rates and the actual price paid by healthcare providers for a drug is referred to as the "spread." The larger the spread on a drug, the larger the profit or return on investment for the provider. According to the federal officials, Abbott used artificially inflated spreads to market, promote, and sell the drugs to existing and potential customers. The federal government's investigation began after the filing of the civil suit brought by Ven-A-Care. Since our firm is currently representing several states in litigation against the drug companies, we were very much interested in this case. We will monitor its progress closely.

Source: *Corporate Crime Reporter*

KICKBACK SUIT SETTLED BY TENET HEALTHCARE CORP.

Tenet Healthcare Corp. has settled what is referred to as a "kickbacks lawsuit" and will pay a \$21 million fine. Tenet will also close or sell a San Diego hospital accused of making kickbacks to doctors for referring patients. The settlement with federal prosecutors will allow Tenet to avoid a third criminal trial and civil liability over allegations surrounding the Alvarado Hospital Medical Center. Two previous trials had ended in hung juries. Federal prosecutors in San Diego accused Alvarado and its former chief executive of making excessive relocation payments to doctors who based their practices at the hospital from 1992 to 2003. It was

alleged that the hospitals disguised the payments to doctors as office improvements and overhead. Under the settlement agreement, Tenet must sell or close Alvarado to prevent the hospital from being excluded from federal health care programs.

STOCK OPTION CRIMINAL INVESTIGATION OPENED

Federal prosecutors in New York have launched criminal probes of at least five U.S. companies—including United-Health Group Inc., Caremark Rx Inc., SafeNet Inc., Converse and Affiliated Computer Services Inc.—in a widening probe of stock option fraud. Federal prosecutors and securities regulators are investigating whether the effective dates on some options granted to executives at those companies were deliberately and improperly changed—a practice known as backdating—securing extra pay for executives regardless of the stock’s performance. Backdating would undermine the incentive purpose of the option grant and could violate a host of securities laws.

A March 18th page-one article in the *Wall Street Journal* examined options-granting patterns at six companies, including Converse, ACS, and United-Health. The article listed a number of highly favorable grants to the top executives of each company, and concluded the odds of the grant pattern having occurred by chance were highly remote.

Source: *The Wall Street Journal*

BIOTECH FIRM AND ITS FOUNDER HAVE BEEN INDICTED

A biotech company based in Dublin and its founder were recently indicted by a federal grand jury, accused of defrauding hundreds of research institutions and throwing their work into question by falsifying purity reports. SynPep Corp. and Chi Yang face 13 counts of mail fraud and making false statements. SynPep’s website lists Yang as the company’s president. SynPep makes peptides, which are linear chains

of amino acids — the building blocks of proteins. Biotech companies, public and private research institutions, and pharmaceutical and agrochemical companies routinely bought SynPep’s peptides for use in research on cancer and AIDS, among other things. That research may now be called into question. U.S. Attorney Kevin Ryan, who is involved in the case, made this observation concerning the indictments:

Research institutions and others rely on the integrity of biotech companies to provide accurate specifications of their products.

The indictment says SynPep employees, directed by Yang, manipulated purity graphs for at least five years, added potentially impure or crude product to peptides, and misrepresented the time of the testing or the identity of the product that was tested and ultimately sent to customers. Some of the fraud involved “peak shaving,” a technique in which a peptide’s purity levels are altered on a chromatogram to make the peptide appear more pure, according to the indictment. SynPep workers would allegedly “cut and paste” over impurities indicated on the chromatogram. Each mail-fraud count is punishable by as much as 20 years in prison and a fine of \$250,000 plus restitution. Each false-statement count is punishable by as much as five years and \$250,000 plus restitution.

SEVEN NATIONAL CENTURY EXECUTIVES INDICTED

Seven former executives of National Century Financial Enterprises have been indicted for their role in a nearly \$3 billion fraud at the failed health-care finance company. The bankruptcy of National Century, which securitized medical accounts receivable that it had purchased from medical providers, also forced 275 health-care providers to file for bankruptcy protection, according to a Securities and Exchange Commission (SEC) civil complaint filed last December against four of the executives. The

60-count indictment, brought by the U.S. Attorney’s Office for the Southern District of Ohio, includes charges of conspiracy, securities fraud, wire fraud, mail fraud, and money laundering. The individuals are accused of lying about how investors’ funds would be used, diverting the funds, hiding the shortfall by moving money back and forth between subsidiaries’ bank accounts, and falsifying reports and records to cover up the scheme. Here is how U.S. Attorney Gregory Lockhart described what happened:

An exhaustive investigation by the FBI, IRS, Postal Inspectors, and Immigration and Customs Enforcement agents found evidence that the company executives bilked investors by building a financial house of cards with deception, sleight-of-hand financing, and accounting misdeeds.

The former executives named in the indictment include the chief executive officer, a vice chairman, the chief operating officer, the director of securitizations, the chief financial officer, the vice-president in charge of client development, and the vice-president of securitizations. Some of these individuals also face SEC civil charges. Each of the money laundering and money laundering conspiracy counts carries a maximum sentence of 20 years in prison and a fine of \$500,000. The fraud and other conspiracy counts each carry a maximum between 5 and 20 years and a fine of \$250,000. Prosecutors are also seeking the forfeiture of about \$2 billion in assets.

COMPANIES SHOULD HAVE TO KEEP WEB USAGE RECORDS

The U.S. Justice Department has asked Internet companies to keep records on the Web-surfing activities of their customers as an aid to law enforcement. If the companies fail to comply voluntarily, the government may propose legislation to force them to do so. Robert S. Mueller III, the director of the Federal Bureau of

Investigation, and U.S. Attorney General Alberto R. Gonzales offered a general proposal on record-keeping to a group of senior executives from Internet companies. A meeting was held by the two officials that included representatives from America Online, Microsoft, Google, Verizon, and Comcast.

The Justice Department is not asking the Internet companies to give it data about users, but rather to retain information that could be subpoenaed through existing laws and procedures. It appears that the government is interested in records that would allow them to identify which individuals visited certain websites and possibly conducted searches using certain terms. The Justice Department also wants the Internet companies to retain records about whom their users exchange e-mail with, but not the contents of e-mail messages.

The Justice Department intends to use the records to combat the serious problem of child pornography, in terrorism investigations, and in investigating other crimes like intellectual property theft and fraud. I can see no reason why the records shouldn't be used for general law enforcement purposes. Data retention is an open-ended obligation to retain all information on all customers for all purposes.

Source: *New York Times*

HOSPITAL CHAIN TO PAY \$265 MILLION TO SETTLE WHISTLEBLOWER SUITS

Saint Barnabas Corp., a New Jersey hospital chain, will pay \$265 million to settle a pair of whistleblower lawsuits. The allegations were that it had systematically inflated charges to Medicare patients in order to obtain enhanced reimbursements. The massive settlement by the largest health care system in New Jersey and second largest employer in the state may be the first in a series other to come. Numerous other hospitals are apparently facing similar accusations and they will have great difficulty in defending their practices.

In the suits, brought by whistleblowers, it was claimed that Saint Barnabas was abusing a Medicare provision that

provides for supplemental payments for unusually expensive cases, referred to as "outliers." Justice Department lawyers reported that between October 1995 and August 2003, the nine hospitals operated by West Orange, New Jersey-based Saint Barnabas "purposefully inflated charges for inpatient and outpatient care to make these cases appear more costly than they actually were." As you may already know, whistleblower lawsuits, also known as qui tam actions, allege claims under the False Claims Act. Initially, such cases are filed under seal and immediately referred to the local U.S. Attorney in order to give the Justice Department the option of pursuing the case.

Health care providers should never intentionally overcharge the Medicare program, but it appears the practice is widespread. Saint Barnabas entered into a "corporate integrity agreement" in which it promised to take a series of steps to ensure compliance with Medicare regulations and policies in the future. The suit had been filed in U.S. District Court in Philadelphia on behalf of two whistleblowers. A similar suit was filed in U.S. District Court in New Jersey on behalf of a third person.

These suits, filed in November 2002, sparked a massive federal investigation involving both the Philadelphia and New Jersey U.S. Attorney's offices; the Justice Department's Civil Division in Washington, D.C.; the FBI; the Department of Health and Human Services' Office of Inspector General; the Centers for Medicare and Medicaid Services; and the U.S. Postal inspectors. It should be noted that whistleblowers are responsible for uncovering a great deal of fraud committed against the federal government. For years, until people started using the False Claims Act, much of this fraud went unreported. Now some powerful lobby groups are trying to stop whistleblower lawsuits. Hopefully, they will fail.

Source: *The Legal Intelligencer*

AUSTRIAN BANK PAYS \$675 MILLION IN REFCO PROBE

An Austrian bank will pay at least

\$675 million to settle claims that it helped Refco and its former CEO, Phillip Bennett, hide more than \$1 billion in debt from investors and creditors in the past five years. The settlement was part of a non-prosecution agreement between federal prosecutors and the Bank für Arbeit und Wirtschaft (Bawag), headquartered in Vienna. This came about six months after the former CEO of a financial services firm was indicted on charges of fraud. Refco is now in Chapter 11 bankruptcy.

Phillip Bennett, the former CEO of Refco, helped the company disguise hundreds of millions of dollars in client losses in the late 1990s by shifting those losses off the books to entities he controlled. The SEC accused Bawag of helping Bennett hide the losses from investors and creditors. By disguising the losses, Refco was able to go public last August. But seven weeks after the IPO, Refco's management disclosed the losses, causing the stock price to fall sharply and eventually result in a bankruptcy filing. Bennett was indicted in November. Incidentally, that was the same month Bawag ousted its CEO, Johann Zwettler. Interestingly, the wrongdoing that led to the settlement took place just seven weeks from IPO to DOA.

FORMER BUCA CEO TO PAY \$565,000 TO SETTLE CHARGES

The former chief executive of Buca Inc., a restaurant company, has agreed to pay more than \$565,000 to settle civil charges against him. The U.S. Securities and Exchange Commission, among other things, alleged that former Chairman, President and CEO Joseph Micatrotto had Buca buy an Italian villa in his name. The SEC filed securities fraud charges against Micatrotto, as well as the former Chief Financial Officer and the former Controller, related to the receipt of about \$1 million in undisclosed compensation, participation in undisclosed related party transactions, and financial statement fraud from 2000 to 2004. While the amount involved isn't that large—as compared to some

others—this is another example of a corporate culture that allowed men like this to loot the company and engage in a financial fraud. The breach of the trust placed in corporate officers by shareholders simply cannot be tolerated.

Source: Reuters

UNITED TECHNOLOGIES SETTLES PRATT & WHITNEY DISPUTE

You probably are wondering when all of the corporate fraud related to business transactions and government contracts will ever end. Another example is where United Technologies Corp will pay \$283 million to settle litigation relating to Pratt & Whitney's cost accounting for engine parts on commercial engine collaboration programs from 1984 through 2004. United Technologies is the parent company of Pratt & Whitney.

Source: Forbes News Service

CATHOLIC HEALTHCARE WEST SETTLES BILLING LAWSUIT

Hospital group Catholic Healthcare West has agreed to reimburse as many as 800,000 uninsured patients for excessive charges to settle a class-action price-gouging lawsuit. The suit claimed the San Francisco-based health care provider, which has 40 hospitals in California, Nevada and Arizona routinely charged uninsured patients up to five times the amount paid by private insurers and government programs for the same services. The overcharges were said to be in the hundreds of millions of dollars. The settlement, which covers overcharges since 2001, also allows patients to be compensated in medical care.

There are lots of cases pending in courts around the country where hospital groups are accused of charging uninsured patients their maximum rates. The hospitals charged no other patients the maximum. Private insurers and government insurance programs negotiated lower rates for large groups of people that were unavailable to the uninsured. Catholic Healthcare altered its billing

methods in 2004 and agreed as part of the settlement never to overcharge the uninsured population again.

Source: Associated Press

VI. CONGRESSIONAL UPDATE

THE HAMMER HANGS IT UP AND SOME SAY GOOD RIDDANCE

Tom DeLay, who refers to himself as "the Hammer," has now officially resigned from his seat in Congress. This man is a prime example of what has gone wrong in Washington. It would seem that his leaving would be welcomed by both Republicans and Democrats. But, DeLay says that he will remain a power in national politics and says he has no regrets for anything he has done. That's sort of weird since his influence in Congress has resulted in a corruption of the system during his tenure. "The Hammer" has been largely responsible for "tarnishing" what in years past had been thought to be a pretty good system. This man's ambition combined with corporate millions allowed him to virtually hijack American democracy and turn it over to the likes of the **giant oil and drug industries**. The irony of this take-over is that DeLay doesn't appear to be very smart. He was just an instrument of Corporate America who was heavily financed and who did their bidding. We don't need folks like DeLay in Congress or in any part of the American political system!

Based on my reliable sources in Washington, the criminal conviction of a former White House aide last month has really gotten the attention of the White House. The conviction of David Safarian for lying to federal investigators about his ties to another criminal—Jack Abramoff—should concern a number of high-placed individuals. It is said that the corruption scandal that involved Abramoff and others forced DeLay to resign from Congress. It will be most

interesting to see if the justice Department will continue with indictments and prosecutions of any who are guilty of a crime.

A CORPORATE BAILOUT WILL MEAN NO JUSTICE FOR ASBESTOS VICTIMS

Senator Arlen Specter (R-PA) just introduced a new bill, S. 3274 in the U.S. Senate. It is just a modified version of one that failed to pass in February because it violated the budget law. This bill would ban all asbestos lawsuits and would substitute an administrative system that would compensate only certain individuals who were exposed to asbestos for a substantial period of time while on the job. Senator Specter's proposed "solution" is a way to deny access to justice and the protections of the courts to thousands of sick people, and must be stopped. Among other things this bill would:

- Force disease sufferers who qualified for compensation to surmount huge evidentiary and administrative hurdles,
- Result in insufficient awards in court,
- Remove current asbestos cases about to be resolved,
- Cause delays in settlements,
- Create a huge unnecessary bureaucracy,
- Protect corporations from paying out billions of dollars for which they should be liable, and increase their profits from negligent behavior,
- Increase the burden on the taxpayers who would have to pick up the tab for medical bills, lost wages, care for families of injured breadwinners, and other services, and
- Give no compensation or recourse to asbestos sufferers not injured on the job.

You, your family, your friends, or your colleagues could be exposed to asbestos and yet be blocked from recovering

compensation for the illness it causes if the newly-introduced bailout bill is passed. Asbestos causes incurable respiratory diseases and cancers that can take 20 to 30 years to develop. It has not been banned and continues to be widely used in thousands of commercial products, including brake pads, ironing board covers, hair dryers and joint compound. The EPA estimates that 30 million houses, schools, and commercial buildings still contain asbestos insulation.

U.S. SENATE REFUSES TO RAISE MINIMUM WAGE

The U.S. Senate has refused to raise the minimum wage even though there hasn't been an increase in almost ten years. The vote in the Republican-controlled Senate last month was 52-46. Few members of the Senate can really relate to a person who has to live and support a family on the current minimum wage pay scale. While some in the Senate are too busy taking care of the needs of giant corporations like ExxonMobil, Merck & Co., and until recently Enron and protecting their interests, they really don't have time to be concerned for people at the lower end of the economic ladder. Hopefully, that will change in November.

VII. PRODUCT LIABILITY UPDATE

FEWER PRODUCT LIABILITY LAWSUITS BEING FILED

After peaking in 2004, the number of total federal products liability lawsuits filed in the U.S. declined by 14% last year. It appears there will be a decline of an additional 16% this year. The data, compiled with information gathered from the LexisNexis Market Intelligence database, was released by LexisNexis U.S. The data shows a gradual rise in federal lawsuits filed under NOS 365 (Nature of Suit 365), which is the desig-

nation for personal injury-products liability claims, began in 2001, when just over 5,000 NOS 365 filings were made. That number grew to more than 13,000 cases filed in 2002, rose to 17,000 in 2003 and then rose to nearly 28,000 lawsuits in 2004. A slight decline took place in 2005, when the number of products liability filings declined to less than 24,000. The year-to-date lawsuits filed in 2006 are on pace for less than 20,000 product liability cases to be filed this year. You can read the entire LexisNexis report by going to www.lexisnexis.com/marketintelligence/productliterature.asp.

BLIND SPOTS CREATE PROBLEMS FOR DRIVERS

When we think of vehicle blind spots we generally think of children. That's because every year children are seriously injured and killed when they are hit by a vehicle backing out of a driveway. But a child is more likely to be backed over by a minivan or truck than by a car, according to a University of Utah study. In the first report of its kind, University researchers found children are 2.4 times more likely to be struck by a van and 53% more likely to be hit by a truck than by a car. The study, conducted by the University's Intermountain Injury Control Center, also found children hit by high-profile vehicles, such as trucks, SUVs, or minivans, are more likely to require hospitalization, surgery, and treatment in an intensive care unit than children backed over by cars. Previous reports had suggested high-profile vehicles produce a large blind spot behind them, but no studies in the United States have attempted to document the rate of injury by type of vehicle. The findings of this study appeared in the June 2006 issue of *Pediatric Emergency Care*. The research also found Utah children are more likely to be backed over in residential driveways than children in other states. That's because of the popularity of 'family-type' SUVs, minivans and pickup trucks in Utah.

I will take a look at the blind spot safety issue at this juncture on a broader plane. When it comes to safety, what you can't see in your mirrors or your vehicle is often just as important as what you can see. There are areas to the side, the front and rear of your vehicle that are not visible in your mirrors. These areas are called **blind spots**. Many new cars now have a driver's door mirror split in such a way that it shows more of the blind spot than normal. Small "blind spot mirrors" are available and do the same job and can be very useful in many situations. However, it's not a good idea to totally rely on the blind spot mirrors because they don't give one-hundred percent coverage and are often unreliable in wet weather when the view can be obscured by water. When driving there are several areas where blind spots can be a problem.

- **Front and rear of vehicles**—most vans and SUVs have a blind spot in the front and the rear of these vehicles. These vehicles produce a sizeable blind spot for a driver. A vehicle walk around is recommended before driving off. There are remote videos or sensors in some of the new vehicles that can indicate an obstacle in the rear and front blind spots.
- **Pillars**—construction of a car does leave pillars, which are often wide enough to produce a sizeable blind spot. A driver's head movement and extra checks can eliminate such problems.
- When driving around **large commercial trucks**, you should be aware that there are blind spots that can prevent the driver of the truck from seeing another driver to his rear or on either side of his trailer. Unlike cars, trucks have deep blind spots (referred to as a "no zone") directly behind them. Truck drivers cannot see a car in the area directly behind them and a driver's view of traffic flow is greatly reduced. Trucks also have larger blind spots on both sides of their vehicles than passenger vehicles. When driving in these "no zones" for any length of

time, a truck driver can't see you. If a truck driver needs to change lanes quickly for any reason, a serious collision can occur with the vehicle in this "no zone." Also, most trucks require more turning area when negotiating turns, especially right-hand turns.

- **Mirrors**—the use of mirrors is critical to safe driving but can leave blind spots. By adjusting the mirror and looking over your shoulder, you can reduce or eliminate this problem. When driving next to other vehicles drivers need to make sure they are not driving in a blind spot.

Research has shown that blind spots behind SUVs or minivans can extend as much as fifty feet behind the vehicle. The Center for Disease Control and Prevention reported 2,800 people were treated in emergency rooms from July of 2000 through June of 2001 because of back over incidents. The reduced rearward visibility is caused by the design of tall profiles of SUVs, pickups and vans. The top edge of the tailgate and lift gates of these vehicles typically sit high as do the vehicles themselves. The National Highway Traffic Safety Administration Agency is not currently mandating reverse park assistance systems that are now offered as after-market systems. Nor has NHTSA been interested in adding outside warning signals (beeps) to every vehicle as it backs up.

Some car manufacturers are offering new technology that can reduce blind spots. High-end models like Cadillac's, Nissans and BMWs are coming with front parking sensors that warn you if there is an object ahead and also have cameras that give you a 360 degree view around your car. Presently, these features are optional and not mandatory. Due to the number of cars, trucks, SUVs, and commercial vehicles being driven today, the opportunity for vehicle crashes to occur in blind spots will continue until NHTSA mandates the placing of sensors or video cameras as standard equipment on vehicles. Of course, the

automakers could do this without being forced to do so. The main thing that drivers should realize at this time is that blind spots can be very hazardous.

A DANGEROUS RV TIRE—THE GOODYEAR 159—HAS CAUSED PROBLEMS

Our firm has handled numerous cases against tire manufacturers when their tires failed causing accidents and injuries. As you may know, one of the most serious types of failure of a steel belted radial tire is a de-tread and/or belt separation. Because of the stress concentrations and subsequent high internal temperatures at the edge of the belt, this area is particularly sensitive to manufacturing, design and material problems. One tire we have learned has experienced problems with de-tread due to manufacturing and design defects is the Goodyear G159 steel belted radial tire. The G159 is actually a heavy truck tire made specifically by Goodyear for recreational vehicles. Several manufacturers, including Fleetwood and Monaco, have equipped their larger or class A recreational vehicles with the Goodyear 159 tire. These RV manufacturers selected the Goodyear 159 tire for use on their RVs based on Goodyear's rating of the G159 and its recommendation that this tire was appropriate for these larger recreational vehicles.

Recreational vehicles are very popular in the U.S. for use during vacations. They are also a fan favorite in this part of the country during the football season. Tragically, several families' vacations have turned into virtual nightmares when a Goodyear 159 failed, experiencing a tread separation, which caused an RV to lose control and crash. Our firm currently represents two families who have owned RVs equipped with these Goodyear tires whose vacations were cut short and lives forever changed because of these defective and dangerous tires.

The problem with the G159 is that its design and manufacturing process are inadequate for the expected loads on

these big RVs. The G159s that we have examined have exhibited some of the worst failures we have seen. The design and manufacturing problems have led to tire tread and outer belt separations of G159 tires in all parts of the country. Our cases against Goodyear are still in the discovery phase. Goodyear, despite repeated request and motions filed with the different Courts, refuses to produce any documents or witnesses without having the Courts enter a "Secrecy Order" so that the problems with their tire can be kept confidential. Because Goodyear has not provided any discovery to date, in our cases, we still don't know the full extent of the design and manufacturing problems which are causing the G159 failures. However, we have learned that at least one RV manufacturer, Fleetwood, has recalled some of their RVs which were equipped with the G159 tires after learning of the problems with the tire. As a part of the Fleetwood recall, it is replacing the G159 on its affected RVs with Michelin tires.

We have also learned that another RV manufacturer, Monaco, has initiated, along with Goodyear, a tire "Customer Satisfaction Change Over" program where it, along with Goodyear, has offered to replace the Goodyear 159 tires on some of their RVs with larger and stronger Goodyear tires. While Goodyear maintains that the tire change over was due to customer abuse of the G159, the change over program, or silent recall, at least acknowledges that the G159 tires are not safe for these big RVs. In addition, we have learned that there have been numerous customer complaints to NHTSA relating to these tires. Several owners of RVs have had their G159 tires fail and have been more fortunate than others to escape injury.

What we don't know is how many other claims have been filed against Goodyear. We also don't know how many RVs are currently being operated with G159 tires. What we do know is that several of the larger RVs are no longer being built as equipped with the G159. However, until Goodyear or the

RV manufacturers institute a program to replace the G159 with safer tires, RV users will remain at risk. If you want more information relating to the Goodyear tire problems, contact Rick Morrison who practices in our Products Liability Section.

SAFETY FOCUS SHIFTS TO STABILITY CONTROL

New research suggests stability-control systems that work properly would save about 10,000 lives a year if they were on all vehicles, making the technology's life-saving potential second only to seat belts. A recent report by the Insurance Institute for Highway Safety (IIHS) urges automakers to step up installation of stability control, which uses brakes and engine power to keep cars from veering off course. As you know, the Institute is a well-respected safety research group funded by insurers. Currently, stability control is typically standard equipment only on SUVs, which have a greater risk of rollover, and luxury cars where pricing may not be an issue. As a stand-alone option, it costs \$300 to \$800, but when it's part of an option package, the cost can be more than \$2,000. Stability control is standard equipment on 40% of 2006 models and optional on 15% of those models. Up to 25% of vehicles sold by Chevrolet, Dodge and Ford brands have stability control available, according to IIHS. Susan Ferguson, IIHS senior vice-president for research, observed:

People who buy cars should have the benefit of this technology every bit as much as if they buy SUVs.

There is a very good reason why NHTSA should require the automobile makers to make this technology available as standard equipment. The Institute estimates that if all vehicles had stability control, the risk of fatal single-vehicle crashes would be reduced by 56% and the overall risk of single-vehicle crashes would be cut by 40%. The Institute's last stability-control

study, which was done in 2004, estimated that 7,000 fatalities could be prevented if all vehicles had the feature. The new study found stability control is more effective than originally believed in reducing multi-vehicle crashes, which could be cut by a third. Congress gave the NHTSA an October deadline to propose a rule that would require and set standards for stability control. It will be interesting to see who has more influence with NHTSA—the Congress or the automobile industry—in this safety debate.

Source: *USA Today*

A NEEDED CHANGE IN DESIGN

There is some good news to report relating to highway safety. A large number of sport utility vehicles and pickups, redesigned to reduce the threat they pose in collisions with smaller cars, are now being made available to the public. Simply put, the changes to sport utilities and pickups are being made to prevent them from running over smaller vehicles in a crash. A recent study showed that the modifications sharply reduced the number of deaths of people in cars struck by these vehicles. More and more people in this country are buying smaller cars to save money on gas. As a result, the danger of collisions between mismatched vehicles increased accordingly.

The new standards require automakers to lower by half an inch to several inches the height at which their vehicles' front ends hit other vehicles. This can be done by adding a hollow steel bar below and behind the bumper. It also can be accomplished by adjusting the entire frame of the vehicle so that it rides lower to the ground. Bumpers play little role in crashes at speeds of more than 5 or 10 miles an hour, crumpling almost instantly, so automakers have had to make bigger changes in vehicle designs. Automakers claimed that 2006 was the soonest they could incorporate the new standards into many vehicles. Most models that met the guidelines before this year were built low enough

to the ground from the outset. All of the companies should design their vehicles to meet the new standards.

NTSA is still studying whether regulations might be needed. The agency has to know that allowing the industry to regulate itself on a safety problem that costs more than 1,000 lives a year simply won't work. For 2006 models, all minivans sold in the United States meet the guidelines. But no full-size, four-wheel-drive pickups from any manufacturer do so. Vehicles that comply with the new guidelines have front ends low enough to strike the bumper or doorsill of a smaller car rather than hitting the car at a higher point and crushing the passenger compartment. Automakers also have the option of installing energy-absorbing beams or brackets under a vehicle to achieve the same goal. The necessary changes for vehicles that fall short of the standards are scheduled to be made as part of upcoming redesigns.

A study earlier this year by the Insurance Institute for Highway Safety found that fatalities in side-impact collisions were cut in half when carmakers lowered sport utilities by as little as half an inch or installed bars underneath. Drivers wearing a seat belt when their car was struck head-on by a light truck that met the new standards were 18 to 21% less likely to die, researchers found. Collisions between an SUV, pickup, or minivan and a car kill more people than car-to-car collisions, statistics show. When all types of crashes are considered, occupants of sport utilities and pickups actually have a higher death rate than car occupants. This is mainly because sport utilities and pickups are more likely to roll over when they strike another vehicle, a curb or a guard rail, or if they miss a turn or swerve. Studies also have shown that rear-end crashes involving a large and a small vehicle often cause thousands of dollars in damage, even at slow speeds.

Even after all new vehicles comply with the standards, older models with higher front ends will remain on the road for years. Some automakers are

making additional changes to lessen the danger from those vehicles. Because the standards are not mandatory and not widely publicized, Joan Claybrook, President of Public Citizen, worries that manufacturers will quietly abandon them at some point. Based on our experience with the industry, her concerns are certainly justified. I believe the standards have to come from government and must be mandatory.

Source: *New York Times*

VIII. MASS TORTS UPDATE

JURY SELECTED IN ANOTHER VIOXX TRIAL IN NEW JERSEY

The Vioxx trial against Merck & Co., in New Jersey should be getting pretty close to a verdict. Soon after her heart attack in January 2004, longtime Vioxx user Elaine Doherty underwent a double bypass surgery. The 68-year-old, an arthritic grandmother of seven, babysits her daughter's two school-age children, whose father was killed in the World Trade Center attacks. Ms. Doherty sued Merck, alleging that Vioxx caused her heart attack, leaving her with permanent heart muscle damage. A jury was selected for her case on June 2nd, and the trial began the following week. The trial has moved along at a fairly good pace. From all accounts, it has gone well.

This is the seventh Vioxx case to go to trial against Merck thus far. It will be the first trial since new Vioxx research results, recently disclosed by Merck, revealed that the company lied about how quickly the drug could cause harm. These disclosures have further undermined the already tarnished credibility of Merck. The trial also is the first involving a female Vioxx user. Even with these new revelations of the truth about the dangers of Vioxx, Merck continues to deny victims just compensation while spending millions in defense

costs. It will be interesting to see how the case winds up.

CALIFORNIA VIOXX TRIAL STARTS UP

The first Vioxx trials in California were set to begin on June 21st. Originally, two cases were to be tried at the same time in Los Angeles, as was recently done in New Jersey. Thus far over 1,800 cases have been filed in California and Steering Committees there have been consolidating the cases for the past year. The California suit is among more than 10,500 cases filed nationwide since September of 2004, when Merck removed Vioxx from the market. Recently, Los Angeles Superior Court Judge Victoria Chaney trimmed the list of potential trial cases to only those involving victims of myocardial infarction.

Just before jury selection in the two cases set in Los Angeles referred to above, one of the cases was continued, leaving the other to go to trial. A jury was selected and the trial is expected to last at least six weeks. Paul Sizemore from our firm will help try this California case along with the Girardi Keese firm in Los Angeles and the Brandi Law Firm in San Francisco. As you may recall, Paul has been very active in the Vioxx litigation and believes they have a very good case to try in Los Angeles. Hopefully, it will go well.

MERCK'S 18-MONTH MYTH IS NOW TOTALLY DEFLATED

Merck & Co. has been playing fast and loose with the truth for years relating to its testing and marketing of Vioxx. Finally, in an admission that undermines its core defense in Vioxx-related lawsuits, Merck has finally decided to tell the truth. Merck now says it **erred** when it reported in early 2005 that a crucial statistical test showed that Vioxx caused heart problems **only** after 18 months of continuous use. Merck admits now—after lying for months to the media and even in courts—that a statistical analysis test does not support Merck's 18-month

theory about Vioxx. Merck's admission, when considered along with the results of other clinical trials of the drug and studies tracking real-world Vioxx use, supports critics' longstanding contentions that Vioxx causes heart problems **quickly**. Dr. Alastair J. J. Wood, a drug safety expert at Vanderbilt University, correctly observed, "There never was any evidence for the 18-month story."

Merck's cadre of witnesses has been telling courts and juries for months that there was an 18-month use requirement. Clearly, the 18-month issue is crucial for the 20 million Americans who took Vioxx. Taking Vioxx has caused thousands of folks to have heart attacks and strokes. An official with the FDA puts the number at about 40,000. Merck has used the 18-month theory as a defense since Vioxx was withdrawn from the market in September 2004. In defending the lawsuits, Merck, which knew it was scientifically wrong, has consistently taken the position that Vioxx can cause heart problems **only** if it is used **continuously** for more than 18 months. Merck has based the 18-month theory largely on data from the APPROVe study, in which the company tracked 2,600 patients in a test to see whether Vioxx could prevent colon polyps. The media was hoodwinked into buying the myth, and I am told that even they now realize it was all a **big lie!**

In the study, twice as many patients taking Vioxx suffered heart attacks or strokes as those taking a placebo. When it reported the APPROVe results in *The New England Journal of Medicine* early last year, Merck said that it had performed a statistical test to examine whether Vioxx's risk changed over time. According to Merck, that test found with almost total certainty that the drug had significantly higher risk than placebo only after the 18-month **benchmark**—but no extra risk **before** that time. Now Merck said it had made a **mistake** in reporting that result last year. In reality, the test that the company said it had used to check the results is proof that Vioxx causes heart attacks both

before and after the 18-month benchmark is reached.

Dr. Steven E. Nissen, the interim chairman of cardiovascular medicine at the Cleveland Clinic, says the mistake Merck now admits is just another example of Merck's **mishandling** data to make Vioxx **seem safer**. In this regard, Dr. Nissen says:

They're acknowledging that they misrepresented the APPROVe data, when they reported that there was a statistically significant difference between the first and the second 18 months. There is no biologically plausible reason to expect an 18-month delay. I never thought it made any sense.

Families who have been hurt by Merck's lying about Vioxx have a right to be outraged. The federal government should now do a thorough investigation of Merck's conduct and take appropriate action. Because I have little confidence that the FDA will take any real action because of Merck's power and influence, it will be up to judges and juries to get to the bottom of all of this.

FOSAMAX WILL MOST LIKELY BE MERCK'S NEXT BIG PROBLEM

As we indicated in last month's Report, litigation is rapidly increasing involving Fosamax, which is another Merck drug. Lawsuits are being filed nationwide by people who have suffered osteonecrosis of the jaw as a result of taking this drug. As you know, millions of women have taken Fosamax as a preventative for osteoporosis. The drug is an even larger seller than Vioxx, with 2005 sales totaling \$3.2 billion. There is no known cure for the disease, and it is said to be extremely painful. The tremendous number of people on the drug and the devastating nature of the injuries make this a potentially catastrophic and widespread problem. Jerry Taylor and Chad Cook, who practice in the Mass Torts Section of our firm, are presently investigating numerous Fosamax cases on behalf of individuals across the country. We expect to

file a significant number of these cases in the next few weeks.

KAISER SUED IN TRANSPLANT CASE

Two Kaiser Permanente patients and the widow of a third have filed suit against the giant HMO. These were the first in what could be a good number of cases arising from problems in Kaiser's kidney transplant program. One plaintiff said her husband died last year after Kaiser "fumbled his paperwork," effectively removing him from consideration for a kidney. A second plaintiff said she had become progressively sicker as the HMO "repeatedly and inexplicably delayed her transplant." The third plaintiff said his "own Kaiser doctor advised him on three occasions to travel to the Philippines to get a kidney, rather than waiting for the HMO to come through."

All told, it appears that a good number of people—perhaps as many as 10,000—have been wronged. The Kaiser patients may never get their day in court. Just as the HMO requires its members to receive their care at Kaiser facilities in nearly all cases, it mandates that disputes be resolved in **binding arbitration**, which, as you know, is an anti-consumer measure designed to protect wrongdoers.

According to *The Los Angeles Times*, in mid-2004 Kaiser forced up to 1,500 patients to move to its start-up program from the University of California San Francisco and University of California Davis, which had previously cared for them under contract with Kaiser. Twice as many patients died on the waiting list as received kidneys last year at Kaiser's new center in San Francisco. In contrast, the statewide pattern in California for transplant centers was the reverse: More than twice as many people got kidneys as died. Hundreds of patients were not properly transferred from their old programs to Kaiser's, leaving them in limbo with little hope of receiving a new kidney.

The lawsuit was filed a day after the California Department of Managed Health Care announced that it would be

more actively involved in oversight of the Kaiser program, because of concerns about the way patients were treated. As part of an agreement with the agency, Kaiser reports that it will pay for transplants at UC-San Francisco and UC-Davis for patients dissatisfied with the care at the HMO's transplant center.

If in fact Kaiser unreasonably denied patients benefits to which the patients were entitled, Kaiser breached the implied covenant of good faith and fair dealing and acted in bad faith. It appears that Kaiser calculated, understood, and chose to proceed with a course of conduct that they knew would cause harm to patients. This sort of conduct can't be tolerated. If the allegations in the lawsuit prove to be correct, Kaiser should be dealt with harshly because of the critical nature of the healthcare needs involved.

Source: *Los Angeles Times*

OUR CELEBREX TRIAL IN ALABAMA WAS CONTINUED

We had been scheduled to try the first Celebrex case against Pfizer Inc. in Alabama, but it was continued by agreement of all parties. From our perspective, we felt that more time was needed to gather critically important information about the drug. U.S. District Judge Charles Breyer, the federal judge overseeing the Celebrex multi district litigation (MDL) proceeding in San Francisco, where Pfizer faces more than 1,500 lawsuits over its Celebrex and Bextra painkillers, had requested the delay. The trial, to be held in Barbour County, Alabama, will likely be rescheduled for early next year. A schedule for cases in federal and state courts is being worked out by lawyers for both plaintiffs and Pfizer. I don't believe there will be 11,500 cases as in the Vioxx litigation, but there could easily be as many as 5,000 Celebrex cases filed before it's over. One of our lawyers in the Mass Tort section, Paul Sizemore, says that the MDL is progressing in a most satisfactory manner. Paul, a member of the

steering committee of plaintiffs' lawyers involved in the MDL, believes the discovery aspect is especially going well thus far.

MIRAPEX IS SAID TO CAUSE COMPULSIVE GAMBLING

According to a study by Mayo Clinic doctors released in July 2005, the drug Mirapex may cause compulsive gambling addictions. The Mayo study builds upon earlier research that suggested a link between dopamine agonist drugs, such as Mirapex, and a range of compulsive behaviors, such as compulsive gambling. For example, a study published in 2003 by researchers at the Muhammad Ali Parkinson Research Center at the Barrow Neurological Institute in Arizona found increased pathological gambling in those being treated with high-dose dopamine agonist therapy, and in particular with Mirapex. The lead author of the Mayo Clinic study has explained that when a patient develops the Mirapex side effects of compulsive behaviors, but then stops using Mirapex, the results are very dramatic. It is described as being "like a light switch being turned off when they stopped the drug."

Mirapex, which is also known as pramipexole, is prescribed to treat symptoms of Parkinson's disease and other movement disorders like Restless Legs Syndrome. It is also being studied for the treatment of fibromyalgia. As a dopamine agonist, Mirapex stimulates nerves in the brain which are normally stimulated by dopamine, a brain chemical that helps control motor functions and movement. The areas of the brain and the dopamine receptors that Mirapex stimulates, particularly within the brain's mesolimbic pathway, are the areas associated with addictive behaviors. Mirapex is manufactured and distributed by Boehringer Ingelheim Pharmaceuticals, a company headquartered in Germany, and by Pfizer Pharmaceuticals, headquartered in New York. Mirapex is the most commonly prescribed drug in its class. We are currently handling lawsuits for persons

who have been adversely affected in the manner described by the Mayo Clinic study. The compulsive behavior has caused our clients to have a total change in important life choices and has caused them tremendous economic losses as well as emotional damages.

METABOLIFE SETTLEMENTS REACHED

The former Metabolife International Inc. has reached agreements to settle the first 21 of hundreds of injury and death lawsuits over its once best-selling ephedra-based dietary supplement. About \$4.7 million of the San Diego-based company's insurance coverage would pay the claims if the settlement is approved by a U.S. Bankruptcy Court judge. Once a leading seller of herbal weight control and energy-boosting products, Metabolife filed for bankruptcy protection in July 2005 in the face of mounting suits over Metabolife 356. As you know, Ephedra, the primary ingredient, is an herb linked to dozens of heart attacks and 155 deaths.

About 400 suits were filed before the court-imposed January cut-off. Metabolife stopped selling the supplement in December 2003. Metabolife—now known as MII Liquidation Inc.—sold its remaining products to another company last November for \$12 million and is attempting to pay off creditors, including victims who filed lawsuits in addition to the insurance coverage. A hearing on the first group of settlements has been set for June 28th. The court also could approve an out-of-court procedure for settling claims for payments of less than \$350,000. Mediation between the parties is still going on and it's possible that more settlements will be reached.

Source: Los Angeles Times

FIRST TRIAL IN NATIONALLY CONSOLIDATED WELDING CASES IS UNDERWAY

The first welding fumes trial, one among the thousands of cases that were consolidated in U.S. District Court in Cleveland in 2003, is underway before

Judge Kathleen M. O'Malley. The trial started last month, with the trial projected to last about three weeks. Defendants in the case are Lincoln Electric Holdings Inc., Hobart Bros. Co., TDY Industries Inc., and the ESAB Group. The outcome of this trial may help set a national precedent for thousands of other cases in which workers allege manganese exposure from welding has led to Parkinson's disease. As you may know, manganese is a chemical element found in the fumes from burning welding rods.

The plaintiff in this case, Ernesto G. Solis, filed his lawsuit four years ago in Texas and he contends that from 1973 to 2001 he was exposed to toxic manganese fumes from welding. The lawsuit alleges that manganese in more than trace amounts can damage the human nervous system and limit a person's ability to think, talk, and move. To coordinate the pretrial process of thousands of similar cases, they were consolidated in an MDL, or multidistrict litigation proceeding, in Judge O'Malley's court in Cleveland. There are at least 3,800 consolidated cases pending. Some of those may end up in other courts, after the first few are tried to give lawyers and parties on both sides guidance. Welding fumes are an ongoing public health concern among workers in construction and manufacturing. There are thousands of welders being exposed to welding fumes, and there will likely be more cases filed.

Another case nearly became the first to go to trial in September before Judge O'Malley. But that case was settled for a confidential amount shortly before jury selection began. Charles Ruth, of Lucedale, Mississippi, had been a welder at Ingalls Shipyard, in Pascagoula, Mississippi, and began having various physical problems. He is said to have suffered shakes, and balance and speech problems. Because of the settlement, a jury didn't get the opportunity to decide whether welding fumes were linked to Mr. Ruth's problems. The jury in the Solis case will now get that opportunity. A key witness in the case for the plaintiff was Dr. Edward Baker, a University of

North Carolina professor and Director for the North Carolina Institute for Public Health. Dr. Baker testified that extensive research has linked manganese fumes from welding rods to neurological disorders.

Source: *Associated Press*

GUIDANT NEVER MAILED ITS WARNING LETTER TO DOCTORS

Last year, as executives of the Guidant Corporation defended their decision not to tell doctors about significant heart device defects, they claimed that doing so could have exposed patients to risks from unnecessary device replacement. But newly released company records now show that Guidant actually drafted a detailed document last year that disclosed those hazards to doctors. In that proposed "Dear Doctor" letter, dated January 2005, Guidant stated that two company models had an electrical flaw. It also told doctors in the letter that the company had pulled back all units not yet implanted into patients. Unfortunately, that letter was never mailed. Heart patients apparently kept getting those devices, advanced defibrillators known as the Contak Renewal and Contak Renewal 2, in spite of what Guidant knew about the dangers.

Since last fall, the Department of Justice and the Food and Drug Administration have been conducting an inquiry into Guidant's handling of safety issues affecting several defibrillators now recalled, including those models. The proposed "Dear Doctor" letter and other company records released last month by a Texas state judge suggest that the legal and financial consequences from that inquiry could be significant for Guidant and Boston Scientific, which completed its acquisition of Guidant in April.

Source: *The New York Times*

IX. BUSINESS LITIGATION

BUSINESSES FILE LOTS OF LAWSUITS

It shouldn't come as a real big surprise to court-watchers that a good percentage of the lawsuits filed in the U.S. are filed by businesses which have been victimized in some manner. Even the very large corporations seem to like the courts when they are victims of wrongdoing. But, this is not the story that the tort-reformers have been putting out for years to the news media. I have learned a few things concerning litigation over the years and one of them is that business owners who have been injured and damaged don't mind filing a lawsuit and there's nothing wrong with that. I will mention a below some of the more current lawsuits filed by businesses. Of course, these are only a few of the many that have been filed.

JURY AWARDS \$125 MILLION TO OSI SYSTEMS

A federal jury awarded \$125 million in damages to OSI Systems Inc., a California maker of airport security-detection systems, in a case filed against L-3 Communications Inc. OSI claimed it was caused to lose substantial business after the September 11, 2001, terrorist attacks. The jury in U.S. District Court in Manhattan awarded \$33 million in compensatory damages and \$92.6 million in punitive damages, finding that L-3 Communications engaged in malice, oppression or intentional fraud as the two companies sought to acquire a third company, Perkin Elmer Security Detection Systems.

The verdict came after a 3 1/2 week trial in which witnesses disputed what occurred after Perkin Elmer insisted that it only wanted to deal with one buyer, even though both companies had agreed to acquire it together. It was proved by OSI that L-3 Communications did not deliver on its promise to buy the

assets of Perkin Elmer for both companies and give OSI all the rights as if OSI's name was on the contract. It was very important for OSI to acquire the Perkin Elmer business.

Because the matter involved post-9/11 security issues, it was critically important for OSI to have gotten the machines in the middle of the post-9/11 rush to put machines into the airports. It was described as an "opportunity of a lifetime" for OSI. L-3 Communications claimed in defense that it put up all the money and took all the risks in the purchase of Perkin Elmer and acted properly. The company denied that it committed fraud and claimed that it did negotiate in good faith. OSI, based in Hawthorne, California, describes itself as a diversified global developer, manufacturer, and seller of security systems.

TIME WARNER SETTLES BUSINESS FRAUD LAWSUIT

Time Warner Inc., its AOL subsidiary, and other defendants have agreed to pay \$23 million to settle a lawsuit that alleged the companies misled investors about their financial health and caused four state public investment funds to lose at least \$100 million. The lawsuit focused on the companies' statements before, during, and after their \$106 billion merger in January 2001 that combined the huge online service AOL and the world's largest media company. The lawsuit was filed in 2004 in a state court in Philadelphia on behalf of the Public School Employees' Retirement System, the State Employees' Retirement System, the Tobacco Settlement Investment Board, and the State Workers' Insurance Fund.

Among other things, the lawsuit alleged that Time Warner executives inflated revenue figures for AOL's online business by millions of dollars after the sharp rise in Internet stocks had peaked in 2000 and Time Warner's stock price was dropping. The suit also named "related parties" that include accounting firm Ernst & Young and investment banks Morgan Stanley, Citigroup Global

Markets Inc., Banc of America Securities, and J.P. Morgan Chase & Co. After the January 2001 merger, the company's stock traded as high as \$58.51 before falling below \$9. This is another example of a major U.S. corporation misleading its investors.

Source: Associated Press

CHIP MAKERS SETTLE PRICE-FIXING LAWSUIT

Three makers of computer memory chips have agreed to pay a total of \$161 million to settle a class action accusing them of conspiring to fix prices. The lawsuit was filed on behalf of companies and individuals who bought dynamic random access memory chips. The settlement will break down like this: Hynix Semiconductor Inc. will pay \$73 million; Samsung Electronics Co., \$67 million; and Infineon Technologies A.G., \$20.8 million. The three companies have also pleaded guilty to felony price-fixing charges brought by the Justice Department's Antitrust Division. In total the companies will have paid a total of \$731 million in fines. Victims of the price-fixing included Dell Inc., Compaq Computer Corp., Hewlett-Packard Co., Apple Computer Inc., International Business Machines Corp., and Gateway Inc.

Source: National Law Journal

SEARS SETTLES CREDIT CARD FALSE CLAIM LAWSUIT

Sears Holding Corp. has settled a lawsuit brought by shareholders relating to its credit card business. Under the terms of the settlement, the company will have to pay \$215 million to shareholders. It was alleged that the company had hidden from shareholders a significant weakness in the company's credit card business. While the settlement must have court approval to be final, the company expects to pay \$85 million after insurance proceeds are exhausted. Shareholders who purchased stock between October 24, 2001, and October 14, 2002 had filed a number of lawsuits against the company, alleging that it had overstated the value of its credit card

business and understated risks and delinquency rates. When the company revealed the true state of the credit card business in October 2002, Sears' shares fell almost 32%.

Source: National Law Journal

AIRLINE SETTLES AIR CANADA SUIT

WestJet Airlines will pay 15.5 million Canadian dollars (14 million in U.S. dollars) to settle accusations that it spied on an internal website of Air Canada, its larger rival. The settlement, which came with an apology, brought to an end two years of litigation between Canada's two largest carriers. In spring 2004, Air Canada sued WestJet for logging on more than 240,000 times to an internal website that contained passenger-load data. WestJet, a discount carrier, then sued Air Canada for, among other things, hiring private investigators who dressed as garbage collectors to retrieve documents from the home of a former executive. WestJet's Internet viewing was said to be "both unethical and unacceptable." WestJet accepted full responsibility for its actions. Interestingly, as a part of the settlement WestJet included a statement that said it "sincerely regrets having engaged in this practice."

Under the terms of the settlement, WestJet will pay Air Canada, a unit of ACE Holdings, 5.5 million Canadian dollars (4.97 million in U.S. dollars) to cover its legal and investigation costs. WestJet will also give 10 million Canadian dollars to children's charities to be chosen by Air Canada. The password-protected Air Canada website that was the setting for the spying accusations is used by employees to check seat availability before booking personal flights. In its lawsuit, Air Canada claimed that the data on the site could also be used by WestJet to adjust its schedules and fares for specific routes based on Air Canada's performance.

The password came from a financial analyst at WestJet who had legitimate access because a previous job at a carrier acquired by Air Canada still gave

him some travel rights. Sometime in 2003, the analyst gave the password to Mark Hill, a founder of WestJet who was the company's vice-president for strategic planning at the time. Based partly on electronic reconstructions of shredded papers taken from Mr. Hill's household trash, Air Canada said he had regularly logged onto the website over 10 months and created a software program to collect data. In a court filing, Air Canada called the process "corporate espionage on a massive scale." Even though WestJet maintained that Mr. Hill was acting on his own, he resigned from WestJet in 2004 because of his involvement in the affair. The airline has now acknowledged that the spying "was undertaken with the knowledge and direction of the highest management levels of WestJet and was not halted until discovered by Air Canada." This is the sort of thing that you would expect to see in the movies, but not in the business world. Isn't that true?

Source: New York Times

H&R BLOCK IS BACK IN THE COURTS

The latest in a series of lawsuits over **H&R Block Inc.**'s financial products alleges that the company's corporate culture "was conducive to serious and systematic ethical and legal violations." Unlike most of the other shareholder lawsuits against the company, however, this lawsuit is a **shareholder derivative action**. These are lawsuits brought by shareholders on behalf of the corporation over allegedly improper management. Also, unlike previous actions, the case focuses not on one financial product, but on a number of financial and retirement products that have triggered regulatory and private lawsuits against Block in recent years. The complaint in the latest case alleges:

Block time and again has abused its relationship of trust with its clients, often in violation of the law, by steering its customers into unsuitable, fraudulently marketed and poorly performing tax and retirement products.

The lawsuit, which was filed in a Kansas City federal court by **Momentum Partners** of New York, an investment group, names as defendants all the members of Block's board of directors. The suit charges that the defendants turned a blind eye to the company's allegedly illegal acts and failed to "put a stop to the creation of new and different schemes which harm the Company's customers and, ultimately, its public shareholders." In effect it's being said "the board has been asleep at the switch," and as a result hasn't met their legal responsibilities.

A second lawsuit, containing virtually identical allegations, was filed by the pension fund of **Iron Workers Local 16**. Like Momentum Partners, the pension fund is a Block shareholder. The Iron Workers suit names the same directors as defendants. In addition to Mark A. Ernst, chairman and chief executive of Block, and Thomas M. Bloch, a former president and chief executive of the company, the rest of the board reads like a "Who's Who" of Corporate America. Each of these lawsuits accuses the directors of dereliction in failing to halt a variety of products and practices that have triggered fines and settlements, and that "impaired Block's profitability and depressed its stock price." Products and practices cited by the lawsuit include:

- Block's refund anticipation loan program;
- The company's "Peace of Mind" tax and audit insurance;
- Block's Express IRAs;
- Block's sale of Enron Corp. securities; and
- Its mutual fund market timing practices.

The lawsuits point to more than a dozen settlements, regulatory actions, fines, and investigations that have been triggered by Block's products and practices since 2001. The suits charge that Block's board "failed to act to guard the Company from such mismanagement

and unethical and illegal practices." As you may know, in a shareholder derivative action of this sort, the claims technically belong to the company—even if the company refuses to bring the action itself—and any damages recovered go back to the company.

Source: *Kansas City Star*

X. INSURANCE AND FINANCE UPDATE

ALABAMA INSURANCE COMMISSIONER BARS LAWYERS FROM MEDIATION HEARINGS

I read a bulletin sent out by the Alabama Insurance Commissioner recently relating to mediation of claims arising out of storms such as Katrina. Having been involved in a number of insurance claims for clients who had experienced great difficulty getting their insurance companies to pay legitimate claims, I read this bulletin with great interest. I had expected our Insurance Department to be much more sensitive to the needs of policyholders. With the projections for the hurricane season calling for a record number of storms, one aspect of the memorandum should concern policyholders who have claims under their policies.

On May 17th, Walter Bell, who serves as Alabama's Commissioner of Insurance, issued this bulletin relating to insurance claims arising out of hurricanes and other disasters. A mediation process had been created under a prior insurance department regulation which became effective on December 31, 2005. That regulation covered disputed claims arising out of Hurricanes Ivan and Katrina as well as all future claims relating to disaster damages.

The department's regulation sets up a procedure to allow for mediation of disputed claims with the mediator having to be a Department of Insurance lawyer. While the mediation established under the regulation could result in significant delay in getting a valid claim paid,

which generally favors the insurance company involved, that's not the worst part of the bulletin. It appears that a claim will have to go through the mediation if his or her insurance company requests it. I was shocked to see that one of the provisions of the bulletin prohibits a claimant from having a lawyer present during the mediation. This would definitely favor insurance companies and is not fair to claimants for obvious reasons. Claimants are generally not familiar with the laws relating to insurance claims and should be able to have a lawyer assist them in handling claims if they feel they need help.

On the other hand, the insurance companies, which can have their adjusters present at mediation hearings, deal with claims on a daily basis. I find it impossible to understand why Commissioner Bell felt it necessary to ban lawyers. I don't believe consumers will tolerate this sort of thing once they find out about it. If you agree that policyholders should be able to have a lawyer to assist them during mediation you can contact Commissioner Bell at P. O. Box 303351, Montgomery, AL 36130-3351 and let him know how you feel. You might also let Governor Riley know what is going on in the Insurance Department.

EVEN DOCTORS HAVE TROUBLE WITH INSURANCE COMPANIES

I am told by some of my friends in the medical community that many doctors routinely have difficulty getting health insurance companies to pay legitimate claims promptly. Apparently, this is a problem many doctors encounter as they struggle to balance the rising cost of providing patient care with what they see as a reluctance by some powerful insurers to pay promptly. Recently, Athenahealth, a claims-processing company, issued a report that was critical of how claims are being handled. Some of the nation's seven biggest health insurers don't pay their bills timely—and some not at all—according to the results of a survey which has been

released. This survey provides the most comprehensive look yet at the state of accounts payable versus accounts receivable in the nation's health care system.

Tardiness or refusal to pay what doctors consider legitimate medical claims may add as much as 15 to 20% in overhead costs for doctors, forcing them to pursue those claims or pass along the costs to other patients. Weighing all the factors in the survey, Athenahealth gave Humana the top overall ranking, closely followed by the federal Medicare program. The federal insurer for military families, Champus/Tricare, was in sixth place, with the commercial insurer Well-Point ranked last.

The survey, an analysis of more than five million line items from health insurance claims submitted in the last three months of 2005, sheds light on the challenges that doctors and their patients face in getting their bills paid. Dr. William F. Jessee, a pediatrician who is president of the Medical Group Management Association, a trade group of 20,000 office managers for about half the nation's doctors, observed:

We all pay that cost. It winds up getting passed on to consumers and employers who purchase health insurance.

How is it, as our country is facing growing health care costs, that the commercial insurers responsible for paying much of the bill tend to be highly profitable and have stocks that are performing well? Could it be that tight-fisted approaches to paying bills could be part of the answer? I hope the data from the survey will provide some answers. The results of the survey are to be posted for public on a new website, www.athenaPayerView.com, which will be revised every three months. Physicians Practice, a trade magazine owned by MediQ, a health care publishing company, is also reporting on the Athenahealth results. Herb Kuhn, director of the federal Center for Medicare Management, a division of the Centers for Medicare and Medicaid Services, said

he hoped the survey would prompt commercial insurers to speed their payments to doctors by putting public pressure on them.

Athenahealth's 7,000 physician clients in 31 states represent about 2% of the nation's 450,000 active doctors, according to Eric Brown, a research director at Forrester Research. The company says its customers are mainly small practices with one or two doctors but some have as many as 400 doctors. Some of their clients include doctors in cities, suburbs, and small towns. Doctors in a number of states said they welcomed the Athenahealth report, which also compared dozens of regional insurers around the country. At the very least, I hope the publicity from the study will at least encourage insurers to improve their payment practices. Doctors and their staff personnel need to be talking to and treating patients rather than spending valuable time arguing with insurance companies over the payment of claims submitted for payment.

Source: *New York Times*

ALLSTATE SETTLES TEXAS INSURANCE SCORING AND DISCRIMINATION LAWSUIT

Allstate Insurance Co. has reached a settlement with the plaintiffs in a class action lawsuit involving credit scoring that has been preliminarily approved by United States District Judge Fred Biery. The case, filed in 2001 in U.S. District Court for the Western District of Texas, San Antonio Division, was brought by seven individual Allstate customers. They sought to represent a nationwide class of African-American and Hispanic individuals who were issued automobile and/or homeowners insurance policies by Allstate-affiliated companies. The plaintiffs claim that they were discriminated against in violation of federal civil rights laws, including the Fair Housing Act, by allegedly being charged higher premiums based on Allstate's use of information from their credit reports. Under the settlement terms, Allstate said it will take the following actions under the terms of the settlement:

- Allstate will roll-out a new insurance scoring algorithm.
- In states where Allstate uses information from credit reports to rate policies, Allstate will provide its customers with the opportunity to have an insurance policy priced using its new insurance scoring algorithm.
- Allstate will make its new insurance scoring algorithm publicly available.
- Allstate will deliver a comprehensive credit education program to class members, which provides valuable information, including the many different types of business transactions in which information from credit reports is used today and how class members can improve their credit position.
- Allstate will adopt an appeals program under which all customers who experience extraordinary events that negatively impact their credit history information can potentially obtain premium reductions.
- Allstate will increase the substantial percentage of its national media spend devoted to targeted multicultural marketing in its continued efforts to make the widest range of consumers aware of its insurance products.
- Class members will be entitled to apply for a one-time monetary payment. Eligibility for this payment will be determined based on a comparison of the insurance scoring group assigned to his or her Allstate policy and the insurance scoring group assigned under the insurance scoring algorithm that will be implemented pursuant to this settlement.

This is a definite setback for all insurance companies that use credit scoring to help determine prices. This is a practice that is clearly wrong. In the Allstate case, black and Hispanic customers were discriminated against by being charged higher premiums based on their financial histories. It's unknown

exactly how many of its customers will be eligible for the settlement. Potential class members will have to take steps to join a settlement program and, among other criteria, will have to have been an Allstate customer. Insurers' use of credit scoring has long come under attack by consumer advocates. Allstate's minority customers will be significantly benefited by this change.

Source: *Insurance Journal*

THE SHREDDING OF RECORDS BY STATE FARM LOOKS BAD

An employee currently employed by State Farm Insurance Co. has verified that the insurance company has been shredding records relating to claims arising out of Hurricane Katrina. It appears that State Farm has been shredding records weekly at the Biloxi Catastrophe Office and on various schedules at other south Mississippi offices since Hurricane Katrina hit. This verification comes from Shred-It, the company that does the work, and that's not good news for State Farm policyholders. State Farm claims that the records were shredded for very good reasons and that it wants to keep customer information out of the wrong hands.

The State Farm employee, based in Biloxi, told the Sun Herald that at least one shredded document was an engineering report that went missing after Mississippi Attorney General Jim Hood subpoenaed records of this sort from State Farm for use in a grand jury investigation. The Attorney General says that he also had subpoenaed that specific report and others for his lawsuit against State Farm. He says his office is trying to determine whether insurance companies are using falsified engineering reports to blame tidal surge for property damage and thus deny claims.

The Biloxi employee who told about the shredding is a current claims representative on the State Farm Catastrophe Team. The employee first learned, while working on a policyholder file, that an original engineering report had been destroyed. He was told by a co-employee that the engineering report in

question had been shredded. Apparently, this was after State Farm had been subpoenaed by Attorney General Hood to produce all the engineer reports for the grand jury. Even if State Farm is somehow able to justify shredding documents, I have to say that it sure doesn't sound right under the circumstances.

JUDGE RULES STATE FARM POLICY EXCLUSIONS UNENFORCEABLE

As reported previously, a couple whose home in Long Beach, Mississippi, was damaged by Katrina sued State Farm for denying their claim. They claimed that the wording of their policy's "flood exclusions" was ambiguous and thus couldn't be enforced. In a ruling, U.S. District Judge L.T. Senter Jr. says that State Farm cannot rely on "ambiguous" language in a clause that is used to introduce what is excluded from coverage in its policies. The judge did agree with State Farm that tidal surge alone is not covered. But, Judge Senter said a policy clause that purports to deny coverage when wind acts in any sequence with an excluded event, such as tidal surge, to cause damage is ambiguous. State Farm contends the hurricane itself, the winds and rain, constitute a weather condition that would completely relieve the company of liability for damage. In response, Judge Senter said he found "the policy is ambiguous and its weather exclusion therefore unenforceable in the context of losses attributable to wind and rain that occur during a hurricane."

J. Robert Hunter, former Texas insurance commissioner, who is currently director of insurance for the Consumer Federation of America, made this observation:

When the damage is very clearly caused purely by flood, State Farm will win. But if there is wind damage or rain damage before flood damage, then State Farm may have to pay quite a bit. The decision means the plaintiffs' case still has legs, at least for the part of the damage that can be attributable to wind.

Significantly, Judge Senter ruled that the question of how much damage to the couple's home was caused by wind and water is a fact that must be decided at trial by a jury. The case will be tried in federal court in Gulfport, Mississippi. The court's opinion reads in part:

But it is my opinion, upon a thorough review of the terms of the State Farm policy, that the damage attributable to wind and rain will be covered, regardless of whether an inflow of water caused additional damage that would be excluded from coverage.

The lawsuit, filed in November, is one involving the hotly contested debate over whether Gulf Coast homes were destroyed by Katrina's wind or tidal water. This ruling clearly appears to strengthen the argument of State Farm claimants on the Gulf Coast that their policies covered damage caused by Katrina's winds even if their property was later slammed by the storm's tidal surge. The court order is judicial recognition that if destructive winds preceded destructive waters, the destructive waters become irrelevant. This order is most important because in April, in a similar case involving Allstate Insurance Co., Judge Senter ruled Allstate's policy exclusions were enforceable. In that case he said Allstate's exclusions were "drawn quite broadly, and they have the clear purpose of excluding damage caused by inundation from coverage."

STATE FARM REFUSES TO FOLLOW APPRAISAL REQUIREMENTS IN MISSISSIPPI

State Farm Fire and Casualty Co. refuses to engage in the appraisal process in Mississippi to resolve Hurricane Katrina claims, even though its own policy mandates appraisal on demand when the amount of an insured loss is in dispute. Instead, records show, the company is urging policyholders to settle disputes through a mediation program sponsored by the Mississippi Department of Insurance and funded by

insurers.

It's very clear that the emergency regulation that created mediation does not restrict a policyholder's right to opt for appraisal instead. State Farm is not using appraisal as a remedy for disputes with its policyholders. Instead State Farm is using mediation, which is controlled by the company. The insurance company controls the final settlement offer in mediation.

A professional mediator has no authority to tell an insurance company how much money it owes a policyholder, instead serving as an impartial facilitator during negotiations. In appraisal, an appointed umpire can side with either party, resulting in a decision that is final and binding. Appraisal can be used only when a settlement is in dispute. It would not apply in cases where coverage has been denied. Because policyholders are often unfamiliar with the terms of their policies, many are unaware the appraisal process exists.

NEWS RELATING TO OTHER KATRINA LAWSUITS

As you know, hundreds of insurance claim lawsuits related to the dispute over covered wind versus water damage are now pending in state and federal courts. Recently, more than 240 Gulf Coast homeowners filed a joint lawsuit against Nationwide Mutual Insurance Co. for refusing to cover property damage from Hurricane Katrina. The federal suit, the latest in a series of similar suits filed against several insurance companies, contends that Nationwide routinely denied policyholders' claims without investigating whether Katrina's wind or water was responsible for damage. Instead, the suit alleges, Nationwide denied many claims on the basis of a "one-size-fits-all" engineering report that blamed all of the damage on "storm surge," or wind-driven water. The insurer's policies cover wind damage but damage from storm surge is excluded from coverage.

\$13 MILLION AWARDED IN TORNADO DAMAGE SUIT

An Oklahoma couple was awarded nearly \$13 million recently by a jury in a class action lawsuit against State Farm Fire & Casualty Co. The jury found that State Farm intentionally underpaid claims from families whose homes were damaged by tornadoes seven years ago. The couple was among 71 policyholders who sued the insurance company. The jury in Grady County, Oklahoma, awarded the couple in this trial \$9.9 million in punitive damages and \$3 million in actual damages. Based on this award, it is projected that the entire class of plaintiffs deserves nearly \$280 million in punitive damages. There will be trial dates set for the remaining class members.

In February 2003, a judge certified the class as all policyholders whose structural damage claims after the tornadoes were adjusted or denied by State Farm while using the opinion of Haag Engineering Co. The lawsuit alleged in July 2001 that the insurance company "engaged in a wrongful scheme to delay, deny or underpay claims ... by repeatedly and unilaterally engaging the services of Haag Engineering Co. to inspect brick and other structural damage to policyholders' homes." State Farm knew that Haag was "predetermined" to dispute losses claimed by policyholders, the lawsuit alleged. State Farm claims that it "fairly and properly" handled the claims of its Oklahoma policyholders and says it will appeal. The Oklahoma verdict could have ramifications for hundreds of Gulf Coast policyholders who have sued State Farm over claims on homes damaged by Hurricane Katrina.

INSURANCE AGENT WINS DISABILITY SUIT

It appears that even employees of insurance companies have trouble getting their claims paid. You might be interested to know that a Boston, Massachusetts, jury awarded \$1.3 million recently to a veteran insurance agent with bi-polar disorder who claimed he

was fired because of his disability. The federal court jury in Boston ordered Liberty Mutual to pay \$500,000 for emotional distress, \$439,315 for lost wages, and \$416,664 for lost pension and retirement benefits to the agent. The 60-year-old man had worked at the company for 37 years and apparently had a good record.

CAR DEALERS WANT IMMUNITY

Automobile dealers are trying to get state consumer fraud laws passed to immunize dealers from suits in several states. Critics say this is a coordinated effort to limit the ability of private lawyers and attorneys general to hold the dealers accountable for their wrongdoing. Proposed law changes in Virginia, Florida, and Ohio would, among other things, limit damages that consumers can seek against dealers and require pre-suit notice that makes it tougher to litigate. Ira Rheingold, General Counsel for the National Association of Consumer Advocates in Washington, correctly observed that industry lobbyists disguise legislation as consumer protection laws and then sell it to state legislators as tort and class action reform.

There have been efforts in a number of states to give automobile dealers immunity from lawsuits. The following are a few examples:

- The Virginia legislation was recently withdrawn at the last minute by its sponsor, state Senator Thomas K. Norment Jr., a lawyer and automobile dealer. Had it passed, the bill would have immunized auto dealers from consumer fraud lawsuits. Senator Norment withdrew the bill after it was opposed by the National Association of Consumer Advocates, the Southern Christian Leadership Conference and Carmax Inc., the country's largest used car retailer, among others.
- A Florida law, recently passed, will bar suits against dealerships for statutory damages in class actions.

- Ohio automobile dealers currently are trying to convince a state legislative conference committee to attach a controversial provision to a pending predatory lending bill limiting the damages that consumers could seek against dealers,

It is believed that industry groups in other states are watching the legislation pending in Florida and Ohio to see whether they are going to get away with it. Consumer groups will try to get the word out to the public so people can contact their local legislators.

Source: *The National Law Journal*

AFRICAN AMERICAN AND HISPANIC HOME BUYERS PAY HIGHER INTEREST RATES ON MORTGAGES

African-American and Hispanic home buyers pay higher interest rates than whites with similar credit ratings, according to a new study from the Center for Responsible Lending. The lenders in the fast-growing market for subprime mortgages claim they charge more because African-Americans and Hispanics have shakier credit histories, which makes lending to them riskier. But, the study shows that explanation is simply wrong. Debby Gruenstein Bocian, a researcher at the Center for Responsible Lending, says:

When we compare the borrowers with the same risk characteristics, African Americans and Latinos were still more likely to get higher-rate loans.

In the most extensive study of its kind, CRL found that African-Americans and Latinos are almost a third more likely to get a high-priced loan than white borrowers with the same credit scores. Racial disparities in mortgage lending have been studied and debated for decades, with the focus shifting in recent years from the practice of denying mortgages in certain minority neighborhoods, or redlining, and a lack of loans for minorities to the pitfalls of the subprime industry. As many as one

in five home loans are now subprime, totaling more than \$500 billion a year.

In response to earlier studies in racial disparities, the mortgage industry has argued that the varied financial backgrounds of the borrowers and a tendency for minority buyers to offer low down payments were mainly responsible. The authors of the new report said they had, for the first time, taken credit scores and down payments into account, leaving an unexplained racial difference. At press time, a House subcommittee was discussing whether to pass a weak bill favored by the industry or strong protections pushed by consumer groups that would stop predatory lending practices like this in the subprime mortgage market. It's in the market where folks with blemished credit borrow. It's also where most mortgage abuses occur and that's most unfortunate.

Source: Center for Responsible Lending and *The New York Times*

ERIN BROCKOVICH TAKES ROLE AS PLAINTIFF IN MEDICARE SUITS

Erin Brockovich recently filed several Medicare fraud lawsuits in California. The onetime legal assistant, whose environmental crusade against a morally corrupt utility company, inspired the hit movie "Erin Brockovich" starring Julia Roberts, filed the seven lawsuits against several California hospitals and convalescent homes. The suits allege the facilities pocketed millions of taxpayer dollars while covering up their own mistakes. The lawsuits allege that health-care companies are charging Medicare (the federally funded health plan for seniors) to treat illnesses they helped cause by medical error or neglect. Specific allegations of wrongdoing aren't alleged, but instead the lawsuits seek to find evidence of such treatments. The goal is for Medicare to be reimbursed.

Brockovich is suing on behalf of the United States under the False Claims Act, which as you know allows citizens to bring grievances in the government's

name. The defendants in the California lawsuits include Adventist Health, Country Villa Service Corp., Catholic Healthcare West, Kindred Healthcare Inc., Longwood Management Corp. and Mariner Health Care Inc. The allegations focus on reports by the federal government that medical errors increase costs for Medicare. For example, if a hospital operates on a wrong body part, Medicare may end up paying for it as well as the surgery required for the correct body part. Medicare may also foot the bill if a patient becomes dehydrated or contracts an infection in the hospital or convalescent home. Federal health officials estimate that medical errors may account for more than \$9 billion in healthcare costs annually. These officials say they are pushing for quality control measures to curb such expenses.

Source: *LA Times*

FEDERAL LAWSUIT SEEKS PAYMENT FROM HOSPITALS FOR MISTAKES

Another lawsuit of a similar nature has been filed seeking recovery of large sums allegedly billed to the federal Medicare program to correct mistakes made by hospitals. The lawsuit alleges Plano, Texas-based Triad Hospitals billed Medicare for mistakes its hospitals caused that harmed patients. The suit was filed under the federal law that allows a private citizen to sue on behalf of Medicare. Three insurance companies and a company that operates hospitals in Arkansas were named as defendants in the complaint. I predict there will be more lawsuits of this sort filed involving other corporations that have cheated the federal government. Insurance companies shouldn't be allowed to get off the hook for paying for mistakes with the government subsidizing it. Taxpayers are the losers when this sort of thing happens.

WAL-MART GOES AFTER AIG AND HARTFORD IN COURT

As the result of a successful appeal, Wal-Mart Stores Inc. will now be able to

pursue its **fraud claim** against AIG Life Insurance Co. and Hartford Life Insurance Co. The giant retailer says it suffered more than \$100 million of losses as a result of **sham** insurance policies issued by the defendants. The Delaware Supreme Court, in a decision released on June 6th, reversed a Delaware Chancery Court ruling that dismissed Wal-Mart's lawsuit. The case involves allegations that the insurers sold Wal-Mart policies it knew were flawed, without disclosing that the flaws jeopardized tax deductions that the world's largest retailer hoped to take. From 1993 to 1995, Wal-Mart bought corporate-owned life insurance, or COLI, policies for about 350,000 employees. In the court's order, Justice Carolyn Berger wrote:

The complaint adequately pleads that (the defendants sold) a product that was an economic sham designed to create enormous tax deductions. They did so knowing that their product was flawed, and without disclosing that those flaws jeopardized the favorable tax treatment that formed the basis of the deal.

According to the Supreme Court's decision, a 1996 federal law eliminated most future tax benefits from COLI plans. Soon thereafter, the Internal Revenue Service moved to disallow tax deductions for older plans, including Wal-Mart's. This resulted in a substantial tax liability when Wal-Mart settled with the IRS in 2002. Wal-Mart filed suit in 2002. I am amazed that Wal-Mart, which I always thought in the past had considered all lawsuits to be "frivolous" and "a nuisance" to defend, would actually file a lawsuit in a court of law. I am even more amazed that the giant corporation would base its claim on **fraud** by other members of Corporate America. I just remembered, however, that Corporate America believes **tort reform** is for others and not for companies like Wal-Mart. AIG Life, a unit of New York-based American International Group Inc. and Hartford Life, a unit of Hartford Finan-

cial Services Group Inc., have learned that Wal-Mart doesn't like fraud when it happens to them. I don't know which of these parties is correct or who is at fault in this case. But I do know that a court of law is the best place to settle disputes—even when businesses are the victim.

OXYCONTIN MAKER SETTLES WITH INSURER

Purdue Pharma has settled a civil lawsuit with its insurer over costs stemming from hundreds of lawsuits involving the painkiller OxyContin. Steadfast Insurance Co., a unit of Zurich Insurance Co. of Switzerland, sued Stamford-based drug maker Purdue Pharma in 2001 over the legal costs it had occurred. The amount of the settlement is confidential. It was reported that Purdue Pharma had been involved in more than 400 lawsuits to date that were resolved. There are some 1,380 OxyContin lawsuits still pending in state and federal courts around the country. In this lawsuit, Steadfast and Purdue officials disputed who had the right to hire the lawyers who defended the cases against its insured. Steadfast objected to fees paid to lawyers hired by Purdue Pharma without its consent. As you may know, Purdue Pharma, a privately held company, has been sued repeatedly for its marketing of OxyContin.

Source: *Insurance Journal*

XI. PREMISES LIABILITY UPDATE

LAWSUIT OVER FATAL GAS EXPLOSION SETTLED

A civil lawsuit arising out of a 1996 natural gas explosion in Illinois was settled recently for \$5 million. A mother and son were killed and her son's fiancé was injured in the explosion that leveled the woman's home in Downers Grove, which is a small unincorporated community. The settlement was allo-

cated between the defendants to be paid as follows: \$2.53 million against Professional Plumbing, \$2.25 million against Smykal & Associates, \$175,000 against Nicor Gas, and \$50,000 against West Chicago Komfort. The lawsuit claimed negligence in the construction of the home, as well as in the installation of the gas line and appliances.

Source: *Chicago Tribune*

FAMILY WINS WRONGFUL DEATH LAWSUIT AGAINST KNOX COLLEGE

A jury returned a \$1.05 million verdict in the wrongful death lawsuit filed on behalf of a college student attending Knox College in Galesburg, Illinois. A male classmate beat the female student so savagely back in 1998, that the murder weapon — a brick—actually broke in two. The perpetrator entered a plea of guilty, but mentally ill, in his criminal murder case. He was sentenced to 60 years in prison in 1999.

After the criminal case was over, the victim's family filed a civil lawsuit against the college, maintaining school officials had failed to provide a safe environment for the victim. It was alleged that poor lighting in the dormitory stairwell where she was killed and inadequate security on campus put the College at fault. The jury agreed with the plaintiff's contentions and returned a verdict for \$1.05 million against the college. The college may appeal the verdict.

Source: *Chicago Sun Times*

VIRGINIA RETIREMENT HOME FIRE RESULTS IN DEATHS

A fire at a retirement home complex in Virginia resulted in the deaths of two women. Eleven other residents were injured, with several of those having suffered life-threatening injuries. The fire was the third fatal blaze in that building in 28 years. One woman died there in 2001 and two others in 1978. The building has alarm systems, but no water sprinklers. The water sprinklers weren't required because of a grandfather

clause. At press time the cause of the fire hadn't been determined. The blaze began in an apartment on the fifth floor of the nine-story building and quickly spread to the apartment above. All of the more than 200 residents of the building were evacuated. It took about three hours to bring the blaze under control, officials said. About 200 firefighters and emergency services workers were sent to the scene. Buildings of this nature should be required to be equipped with a good sprinkler system. Even when government entities don't require them, the owners should care enough about the safety of occupants to have them installed.

Source: Associated Press

FAMILY REACHES SETTLEMENT IN RABIES CASE

The estate of an Arkansas man who died from rabies has reached a settlement in a lawsuit against Pinnacle Realty Management Co., the owner of the apartments where the man lived. William Beed Jr. died in 2004, but at the time doctors didn't know he had rabies. His organs were then donated to three other persons who were awaiting transplants. Tragically, these three people have since died. It was contended that bats at the apartment complex where Beed lived were the source of the rabies. The settlement with the defendant, most of which was confidential, awards monthly payments to Beed's baby girl, plus other monetary compensation.

Beed was 20 years old when he died of a brain hemorrhage. His lungs, liver, and kidneys were donated to four patients in Dallas and Alabama. Three recipients, including two Texans who received his kidneys and an Oklahoman who received his liver, died of rabies. The patient in Alabama died from complications during surgery. As stated above, the Beed family sued Pinnacle Realty, the parent company of The Willows apartment complex, where Beed lived. The settlement was approved by a U.S. District Judge.

Source: Associated Press

FAMILY OF BOY WHO DIED AT EPCOT FILES SUIT

The family of a 4-year-old Pennsylvania boy, who died after riding Epcot's "Mission: Space," has filed a wrongful death lawsuit in a Florida state court against Walt Disney World. The child died after riding "Mission: Space" in June of last year. An autopsy determined that he died of an irregular heartbeat linked to an abnormal thickening of the heart muscle that can throw heart contractions out of coordination. People with that condition are at risk for sudden death throughout their lives, especially in physically or emotionally stressful situations. The victim's family alleges that Disney failed to properly warn the public of hazards associated with the ride. They also allege that Disney World should not have allowed such a small boy on the ride, and should have done more to assist after the child became unconscious after riding.

As you may recall, there have been other problems relating to this ride at Disney World. A 49-year-old woman from Germany became ill and died in April after riding the attraction. A medical examiner's report said she died from bleeding of the brain and had severe, long-standing high blood pressure. "Mission: Space" simulates a trip to Mars and spins riders in a centrifuge that subjects them to twice the normal force of gravity. The ride is so intense that some riders have been taken to hospitals with chest pain. The ride now has signs warning people with heart, back, and neck problems not to ride. Epcot also now offers a tamer version of the ride that does not include centrifugal force.

Source: Associated Press

HOME ORDERED TO PAY \$1.1 MILLION TO SON OF ELDERLY RAPE VICTIM

A personal care home located Pennsylvania has been ordered by a federal court to pay \$1.1 million to the son of an elderly woman who was raped in the facility. Daniel K. Statham was convicted

and is serving time for raping an 87-year-old Alzheimer's patient at the Country Living Personal Care Home in Nicholson, Pennsylvania, on February 27, 2002. The woman died in May. The facility was said to be negligent for accepting the sex offender as a resident. Before moving into the home, Statham had been declared a sexually violent predator under the state's Megan's Law. Upon his release from prison, probation officials were directed to place Statham in a halfway house in Scranton. Reportedly, when they couldn't find a facility to accept him, the owner of the Country Living home was then contacted and Statham was accepted as a resident.

The suit, filed in the U.S. Middle District Court of Pennsylvania in 2004, said the facility failed to protect residents from Statham. In a blistering opinion, U.S. Magistrate Thomas M. Blewitt blasted the defendants for allowing unrestricted access in the nursing home to a man known to be a violent sexual predator and for failing to notify the proper authorities after the rape occurred. In his opinion, the judge wrote: "We find the defendants' conduct utterly reprehensible." Interestingly, the case led to the firing of the county's chief of probation in April 2002. Officials from his office were accused of failing to notify Wyoming County probation officials of Statham's criminal background.

Source: Associated Press

XII. WORKPLACE HAZARDS

VERIZON COMMUNICATIONS SETTLES PREGNANCY DISCRIMINATION CASE

Verizon Communications Inc. will pay almost \$49 million to 12,326 current and former female employees as part of a landmark class action lawsuit alleging pregnancy discrimination. The U.S. Equal Employment Opportunity Commission

(EEOC) reached a settlement in 2002 against Verizon predecessors Nynex Corp. and Bell Atlantic Corp. But the total amount of the settlement was not made public until June 5th of this year, when the EEOC completed its projections of how much would be paid in future benefits. This is the largest pregnancy discrimination settlement in EEOC history. It covers women in 13 states and the District. Nynex and Bell Atlantic were accused of violating federal law by denying women pension and other benefit accruals when they spent time on pregnancy or maternity leave.

Verizon has paid more than \$25.3 million in compensation so far. The EEOC told a U.S. District Court in New York that it projected that an additional \$23.6 million would be paid in future benefits. It has taken several years to calculate which women were denied benefits when on leave. Many of the people don't work for the company now.

The suit alleged that the predecessor companies violated the Civil Rights Act of 1964, the Pregnancy Discrimination Act of 1978, and the Equal Pay Act of 1963 by denying women service credits for leaves of absence taken between July 1965 and April 1979. The companies also denied pension credits for child-care leaves of absence until December 1983. Pregnancy discrimination claims filed with the EEOC rose by 31% from 1992 to 2005, to 4,449 from 3,385. Elizabeth Grossman, regional attorney with the EEOC in New York, says:

There really remain tremendous issues concerning pregnancy discrimination in the workplace. More and more women are continuing to go forward to assert their rights in a way past generations were not. Some employers are getting educated and changing practices, but many are not.

The EEOC was joined in filing the class action lawsuit against the phone companies by the International Brotherhood of Electrical Workers and the Communications Workers of America, unions representing Verizon workers. Christopher M. Shelton, a CWA vice-

president, said in a statement:

This case represents an important victory for working women who should not have had to sacrifice their pension benefits because they had children.

It's quite obvious that employees have to follow the law concerning pregnancy discrimination. When they fail to do so, the consequences can be most serious.

CITIGROUP UNIT TO SETTLE OVERTIME CLAIMS

Citigroup's Smith Barney brokerage unit has agreed to pay \$98 million to settle claims on behalf of thousands of current and former brokers that they are owed overtime pay and other reimbursements. The proposed settlement is the latest and largest by securities firms that claim brokers are exempt from state and federal overtime laws because they are salaried, administrative employees. Brokers' draw on commissions, a monthly loan most receive, qualifies as a salary. It's rather interesting that the securities industry would make the argument that brokers are salaried employees, because it portrays them as "trusted financial advisors," not mere administrators.

The primary argument for the plaintiffs was that brokers are not salaried, but instead receive incentive-based compensation, such as commissions, that is tied to sales. They also countered the brokerage firms' claims that the Fair Labor Standards Act exempts salespeople from overtime because the exemption applies only to store sales, not trades of securities. The preliminary settlement was reached, but it must have final approval by a federal district court in San Francisco. It affects about 11,000 full-time equivalent employees at Smith Barney, which translates to many more individuals who worked as far back as six years from the final settlement date. Citigroup's proposed nationwide settlement is higher than others reached to date because of the number of employees affected and because of its national breadth.

In February, the UBS Wealth Management unit of UBS AG agreed to pay \$89 million in a nationwide settlement to financial advisors who sued for overtime pay and to recover charges assessed by the firm for sales assistants, computers, and trading errors. Last year Morgan Stanley agreed to pay \$42.5 million and Merrill Lynch & Co. acceded to pay \$37 million to settle claims involving only California brokers. Additional claims against the firms are pending in Connecticut, New York, and New Jersey. The number of people eligible for compensation from the settlements, and the amounts they can receive, depend on statutes of limitations in individual states and court approvals of the settlement formulas.

There will most likely be similar lawsuits brought against other large brokerages. Wall Street firms, meanwhile, are working to revamp their compensation schemes to retail brokers. I understand that brokerage firms don't want to give brokers **fiduciary control** over client assets because it would expose them to greater liability and to additional regulation as investment advisors.

Source: Associated Press

A REPORT ON LISTERIA LAWSUIT SETTLEMENTS

Two poultry companies involved in a deadly 2002 listeria outbreak have agreed to pay a combined \$3 million to a Pennsylvania woman who gave birth prematurely to a child with disabilities. A settlement was reached after opening statements in her civil action started in a federal court in Philadelphia. J.L. Foods agreed to pay \$1.75 million and Pilgrim's Pride agreed to pay \$1.25 million to the woman. Most of the money in the settlement will go toward the care of the woman's son who was born in August 2002 at the height of the outbreak. The child now suffers from a variety of developmental problems. The woman ate turkey several times a week during her pregnancy. After eating the turkey for a number of weeks, she became ill and went into labor about a month early.

In another listeria case, J.L. Foods settled a wrongful death case involving a 90-year-old doctor who became ill from the bacteria and died a few months later. Several other cases remain pending in Pennsylvania and New Jersey over the listeria outbreak, which killed 8 people, caused more than 50 to become sick, and led to one of the largest meat recalls in U.S. history. The two companies involved have reached confidential settlements with several other plaintiffs. As you may know, listeria hits hardest among the elderly, pregnant women, and those with compromised immune systems.

STRONGER REGULATION NEEDED

Bad welding, a dangerous mixture of gases, and a lax safety culture, was said to have caused the violent explosion that occurred at the Marcus Oil and Chemical plant in Houston, Texas, in December 2004. A report was released on June 6th by the U.S. Chemical Safety and Hazard Investigation Board. The board's lead investigator said the company "fostered a lack of awareness about the hazardous nature of its own operations." Like a number of states, Texas doesn't have laws governing pressure vessels. Interestingly, while the City of Houston does have rules, they pertain only to new vessels, not repaired or modified ones. The safety board is recommending changes to personnel training and operations at Marcus Oil. The safety board is also calling on the city of Houston to adopt new safety regulations governing the construction and modification of pressure vessels like the one involved in the explosion. These vessels are industrial storage containers that hold pressurized liquids or gases.

The blast at the polyethylene wax processing facility shattered windows at nearby businesses and sparked a three-alarm blaze that firefighters battled for seven hours. Fortunately, no one died in the explosion, and there were no serious injuries. Marcus Oil refines polyethylene wax, which is used in textiles, adhesives, and polishes. It uses pressur-

ized tanks filled with nitrogen gas to help push molten wax through its refining system. But Marcus Oil workers were also feeding air, which contains highly flammable oxygen, into one tank at a rate far beyond the level recommended by the American Society of Mechanical Engineers, according to the safety board's report. Poor welding on the tanks allowed one of them to rupture and ignite when the pressure of the gas inside was increased. The resulting blast blew the end off a vessel, hurling the 50-foot, 50,000-pound tank into another company's warehouse 150 feet away. According to the report:

- Operators pressured the nitrogen gas tanks with 18% oxygen instead of the intended concentration of 8%.
- A welded patch on the vessel was fused through only 25% of the tank's thickness, creating an unstable structure.
- The bad patch blew off the tank, allowing compressed air, hydrocarbon vapors, and hot liquid wax to pour out.
- The faulty metal patch sparked when it hit the concrete pavement, igniting the wax and vapors.
- The abnormally high oxygen content inside the tank allowed the flame to flash back into the vessel, blowing it up.

In addition to not using a qualified welder or proper welding procedure when modifying its tanks, Marcus Oil also acknowledged it did not hydrostatically pressure-test the vessels after the welding was completed, according to the report. Actually, testing is the only way to prove that it's safe. The federal Occupational Safety and Health Administration (OSHA) cited Marcus Oil for several violations after the blast. OSHA originally fined the company \$107,250, but Marcus Oil settled those citations for only \$44,750. The company is now replacing all of its pressure vessels. This incident is a prime example of why government must regulate the activities of

corporations that engage in business such as the one described above. Laws must be passed establishing rules, procedures, and standards to govern the activities, and regulators must then do the job required of them.

Source: *Houston*

MISSISSIPPI OIL FIELD EXPLOSION KILLS 3 WORKERS

Three workers were killed in an explosion at an oil field owned by Partridge-Raleigh Inc. on June 5th. One of the workers was using a welding torch on a tank at the time of the explosion. Fortunately, a fourth worker, who was injured, didn't have life-threatening injuries. The cause of the blast at the 280-acre oil field is now under investigation.

Source: *Associated Press*

OCCUPATIONAL INJURIES AND ILLNESSES MAY NEVER BE COUNTED

A report in the April 2006 issue of the *Journal of Occupational and Environmental Medicine* indicates that the federal Labor Department's statistics for occupational illness and injury miss two out of every three cases. The report, titled "How must Work-Related Injury and Illness be Missed by the Current National Surveillance System?," seems to question OSHA's claims that workplace fatalities, injuries, and illnesses have been declining significantly. Employers, who are required by law to keep the record of injury and illnesses that forms the basis of the BLS reports, perceived "financial and regulatory disincentives for complete recording," according to the study.

Source: *Corporate Crime Reporter*

CONGRESS PASSES A BADLY NEEDED MINE-SAFETY BILL

The House of Representatives, reacting to a rise in coal-mining deaths this year, and the resulting public outcry, approved a measure that will require mines to store more oxygen under-

ground, allow for stiffer penalties for safety violations, and require wireless communications devices in underground mines. The enhanced safety measures, which had already passed the Senate, have gone to President Bush for approval. Even though Congress should be commended for passing the bill, it is impossible to justify the delay in acting. This marks the first significant revision of mine-safety laws since 1977. The legislation has been generally applauded by labor, industry and mine-safety advocates, but some have said the new rules don't fully address safety problems. The legislation, called the Mine Improvement and New Emergency Response Act, passed without proposed amendments that, if passed, would have further increased the amount of oxygen stored underground and required the wireless communication devices to be placed in mines in 15 months, rather than waiting three years.

The United Mine Workers of America will push the federal government to randomly test emergency oxygen packs used by miners. As you may recall, questions about the effectiveness of the devices during emergencies have been raised after recent mine accidents. Four annual inspections are now required of underground coal mines. Many safety experts believe this number should be increased by Congress. Thirty-three miners have already been killed in mine accidents this year. Clearly, something had to be done—after years of neglect—and I hope this legislation will provide to be adequate.

ASBESTOS CLAIMS TO BE SETTLED

The USG Corporation, the maker of gypsum wallboard, has received court approval for a plan to emerge from bankruptcy by paying as much as \$3.95 billion to resolve asbestos liability claims. The settlement of about 250,000 claims will be financed in part by the sale of \$1.8 billion in shares, guaranteed by the company controlled by the billionaire investor Warren E. Buffett. USG, based in Chicago, filed for bankruptcy

protection in Delaware in June 2001, listing \$2.7 billion in debts. Reportedly, there was no opposition to the reorganization plan. It is reported that the company could emerge from court protection very soon. USG plans to pay unsecured creditors in full with about \$1.4 billion. USG mixed asbestos into its wall products and joint compounds from 1930 until 1972. As we all know now, the fibrous mineral—linked to respiratory disease and cancer—was used as a fire retardant in construction materials, including insulation, and in brake pads and other automobile parts.

Source: *New York Times*

XIII. TRANSPORTATION

AIR TRAFFIC CONTROLLERS WHO ARE FATIGUED MAY BE CAUSE OF RUNWAY MISHAPS

The performance of air traffic controllers at O'Hare International Airport in Chicago has been the focus of a serious debate over safety. Federal officials now say that sleep-deprived air traffic controllers may be partly responsible for two close calls on runways at O'Hare. The incidents were part of a recurring pattern of fatigue for controllers at O'Hare, where officials were urged to "emphasize the importance of sleep management," according to a letter from the National Transportation Safety Board (NTSB) to the Federal Aviation Administration (FAA). NTSB aviation safety director John Clark sent the May 16th letter to Russell Chew, FAA's chief operating officer. The two incidents occurred in March of this year.

- On March 21st, a Lufthansa plane and a Delta jet were mistakenly instructed to take off at the same time on criss-crossing runways. The planes came within 100 feet before the pilots were alerted and stopped. The controller was in training and had an untreated sleep disorder, according to the federal authorities.

- Two days later, planes from United Airlines and its low-cost carrier, Ted, came within 600 feet of each other when one plane was sent to taxi across a runway where the other had started its takeoff roll.

Obviously, these incidents could have resulted in disaster and the loss of lives. Fortunately, that did not happen. However, it does put at issue some important safety concerns. The controller involved, who had just four hours of sleep, told NTSB investigators that he "was not as sharp as (he) could have been." The FAA found that both incidents were caused by controller errors. FAA spokesman Tony Molinaro told *USA Today*:

All I can say today is that we will analyze the issues that the NTSB team brought up in their report and consider the recommendations that they have made.

Clearly, the controllers must be alert at all times, and that means the rules and regulations relating to safety must be observed. These folks have important jobs with little, if any, margin for error. It's pretty obvious that a lack of sleep before coming on duty will result in fatigue, and for a controller that is a serious matter. This isn't a job where a tired and sleepy person can function well.

Source: *USA Today*

INJURED FIREFIGHTER SETTLES HIS CASE

A Kansas City firefighter, who was injured when a salesman working for a car dealer crashed a car during a test drive, has settled his case for \$5.9 million. Suit was filed naming the Jack Miller Oldsmobile Subaru dealership in Northland, Missouri, and Subaru of America as defendants. The lack of drug testing policies for sales staff at the dealership was an issue in the case. The salesman tested positive for marijuana after the accident. The crash occurred when the salesman took a curve at high speed, lost control of the car, and

crashed it into a fence and a tree. The firefighter's right arm, which was almost severed, required extensive surgery and other treatment. The salesman was convicted of second-degree assault for the wreck and sentenced to five years in prison. Interestingly, he has already been paroled.

Source: *Kansas City Star*

LAWSUIT FILED BY FAMILY OF TRAIN-WRECK VICTIM

The family of a man who died in a Mississippi train wreck that occurred in March has filed notice of intent to sue Hinds County, Mississippi, and other potential defendants. Hinds County, the town of Terry, railroad company CN, and Amtrak are all named in the letter of intent. The 24-year-old man died on March 30th when the car he was driving collided with an Amtrak passenger train at a grade crossing in Terry, Mississippi. At the time of the wreck, there were only cross bucks alerting people that a train track was there. Lights had been installed, but had not been turned on at the time of the collision. Warning lights were installed at the end of February by CN, but an inspector from the county had to give approval before power was connected to the lights.

Three days before this collision an electrical inspection of the site had been completed. Three days after the collision, Entergy received notification to connect the power. There is some question as to when Hinds County was notified about the needed inspection. Apparently Hinds County wasn't notified that such an inspection was needed until March 28th. The crossing now has crossing gates that come down when a train is approaching the intersection. This was not the first fatality at this crossing. This collision resulting in a fatality took place at the same crossing where a truck driver was killed in a collision in October 2000.

Source: *Clarion Ledger*

LAWSUIT FILED AGAINST ONSTAR WILL BE ALLOWED TO PROCEED

The parents of a Louisiana teenager who was killed will be allowed to proceed with their lawsuit filed against OnStar Corp. The parents filed a wrongful death lawsuit against OnStar, alleging that the company could have helped save their son's life, but instead refused to use its available technology to track the SUV. The victim's body was found on December 8, 2004, a month after he disappeared. The teenager had left in his parent's Chevrolet Suburban, telling them he was going to a friend's house to watch a movie.

When the teenager didn't return home, his mother contacted OnStar for help tracking the missing Suburban. Allegedly, an OnStar employee told her the company couldn't help because the tracking system was deactivated and that the system could only be reactivated from inside the SUV. The family claims that information was false and contend that the company failed to help only because the system was not under subscription. They claim further that, had OnStar helped them, their son might have been found alive. As it turns out, a man had murdered the teenager. Three men who had rented out the SUV for eight rocks of crack cocaine were charged in the murder case.

OnStar filed a motion to dismiss the lawsuit, claiming that the family could not claim negligence under the Louisiana Products Liability Act. This motion was denied by the court and the judge wrote in his opinion:

It appears the plaintiffs may be asserting a claim for negligent "service" as opposed to the vehicle being defective. To the extent that plaintiff asserts an alternative theory that the OnStar service was capable of working correctly and that defendants negligently failed to provide the service, the motion to dismiss will be denied.

We recently handled a case where at issue was the failure of a truck line to monitor the location of one of its

drivers. In that case a driver involved in a wreck in Montgomery had been reported as missing over a week-end with a company tractor and trailer. He had delivered a load in Atlanta and failed to show up as scheduled in Florida at the home-base of the truck line. A few days later—when returning to the company's terminal—the driver who had been on drugs was involved in the wreck which resulted in a fatality. In our case, the company had the ability to track its drivers at all times and failed to do so.

Source: *The Baton Rouge Advocate*

WOMAN WINS LAWSUIT ARISING OUT OF TRAIN CRASH

Universal Studios has been ordered by a jury to pay nearly \$12 million to a woman who was seriously injured in a 2003 Burbank Metrolink crash that left two people dead and 32 injured. The jury ruled in favor of Jennifer Kilpatrick after finding that one of Universal's truck drivers caused the collision. Ms. Kilpatrick, who broke her back and was among the most seriously injured on the train, spent three months in the hospital for surgery and rehabilitation.

The jury awarded her \$11,822,867 for medical expenses and pain and suffering. The plaintiffs contended that the 63-year-old truck driver ignored red lights and warning bells and tried to beat the train that ultimately collided with his truck. Lights at the crossing were working and the gates were down. It was obvious that the truck driver ignored all of these warnings. Universal claimed that the barriers were not clear enough. Metrolink was part of the original lawsuit, but agreed to confidential settlements with the accident victims before trial.

One of the train's passengers died later from injuries sustained. The jury must still decide on awards for several more of the victims, unless settlements can be reached with Universal. Before the trial, it was agreed to let the jury's decision on the company's liability in the first trial apply to all of the remaining cases. That will save time and the

jury will now decide on the amounts to be awarded to the other victims without liability having to be tried again.

Source: *Associated Press*

JURY AWARDS \$28.2 MILLION TO FAMILY OF DRUNK DRIVING VICTIM

A jury in Bexar County, Texas, awarded \$28.2 million to the family of a man who was fatally struck outside his home by a drunken driver. The jurors found the defendant, a 58-year-old male, liable in the 2004 death of the victim. The defendant had a blood-alcohol level twice the legal limit when his pickup hit the victim and his wife as they were about to get into their car outside their home back in 2004. The 33 year old victim was pinned between the two vehicles and dragged to his death. His wife suffered a broken neck and pelvis.

The defendant pleaded no contest to intoxication manslaughter and intoxication assault in his criminal case. He was sentenced to seven years in prison and 10 years probation. One million dollars in punitive damages were included in the verdict in the civil case. This verdict is just an example of the dangers of driving while intoxicated and the devastation it can cause. The public has to be made aware of this sort of thing. This tragic occurrence is also an example of why it's so critically important to keep the courts open and active.

Source: *Associated Press*

XIV. ARBITRATION UPDATE

NIKE SETTLES DISPUTE WITH DISTRIBUTOR

As I have stated on numerous occasions, while arbitration has no place in disputes involving consumers, there is a place where it works well and where it should be used. Disputes between major corporations—so long as both parties agree—are tailor-made for arbi-

tration. As the result of an order coming from an arbitration hearing, Nike Inc. will have to pay \$52.5 million in damages arising out of a contract dispute between its Converse Inc. subsidiary and Alon International S.A. Alon International, a footwear distributor, previously held the license for Converse in Brazil, Argentina, Paraguay, and Uruguay. The award of \$52.5 million by the arbitrator represents damages and legal fees, less some amounts already paid to Alon by Nike. This is the type of dispute that the Federal Arbitration Act was designed to handle.

Source: *National Law Journal*

ARBITRATION PANEL AWARDS \$22 MILLION TO EXXONMOBIL RETIREES

An arbitration panel of the National Association of Securities Dealers recently awarded \$22 million to a group of ExxonMobil Corp. retirees who accused brokerage firm Securities America Inc. of improperly putting them into high-risk investments between 1996 and mid-2003. The three-member NASD panel made the award against Securities America, a subsidiary of Ameriprise Financial Inc. The \$22 million award includes \$11.6 million in compensatory damages, \$3.5 million in punitive damages, and \$4.7 million in attorneys' fees and expenses.

Securities America's sales to ExxonMobil employees of variable annuities and Class B mutual fund shares were involved in the dispute. A Securities America broker had promised the 32 employees huge returns on their investments and put their retirement savings mostly into variable annuities and Class B fund shares. The broker allegedly failed to disclose the high fees that he and Securities America would receive. Typically, investors in Class B fund shares don't pay an upfront sales commission when they make a purchase, but often pay higher fees when they sell the shares.

Source: *National Law Journal*

XV. HEALTHCARE ISSUES

U.S. HOSPITALS SUED IN CLASS ACTION OVER NURSE PAY

My wife Sara is a registered nurse who taught nursing at Troy University for a few years. Because of her involvement, I have always known how critically important nurses are to the healthcare system. Nobody should doubt that we have a serious shortage of nurses today in the U.S. Neither should there be any doubt that we need to encourage more young people to consider nursing as their life's work. I have never felt that we paid nurses enough based on all that they do and their importance to the system.

I was interested to learn that a number of nurses filed four class-action lawsuits recently against some of the largest U.S. hospitals, including the number one chain, HCA Inc., claiming the hospitals conspired to depress wages for nurses amid a national shortage. The suits, filed in federal courts in Chicago, Memphis, Albany, New York, and San Antonio, Texas, seek back compensation and legal costs under federal antitrust laws.

Demand for full-time registered nurses exceeds supply by nearly 170,000 nurses this year, according to the American Hospital Association. That shortfall is expected to widen to more than 1 million by 2020, the trade group estimates. Wage increases for nurses have been insignificant during the decade-long shortage, according to a number of experts. Wages stagnated in 2003 and then fell 6.4% in 2004, leading to a decline in nurses working at hospitals, according to the Institute for Women's Policy Research. When you consider the heavy workloads, lack of respect for nurses in some instances at some locations and understaffed hospital environments make the career field for nurses unattractive. We must reverse that trend and get more nurses in the system.

Source: *Reuters*

DRUG COMPANIES FIGHT FOR BRAND DRUGS

Drug companies continuously fight to keep their branded drugs on the market and try their best to keep generic versions of those drugs off the market. But, I have learned that many of these companies sell generics at the very same time when they are filing lawsuits to keep generics off the market. An example is GlaxoSmithKline, a company that manufactures Flonase (fluticasone propionate), a nasal spray used to combat allergies and related symptoms. That drug is currently under patent. Interestingly, the same drug drug, fluticasone propionate, which is a generic nasal spray used for the very same purpose as the branded drug, is manufactured by Penn Laboratories, UK. Even more interesting, is the fact that Penn Laboratories is a GlaxoSmithKline Co. subsidiary. The generic drug is marketed and sold by Par Pharmaceutical, Inc., a generic company, located in New York. Obviously, the wholesale and retail costs of the two drugs differ greatly. Guess which one is much higher when sold to the drug stores and for resale to the stores' customers?

CONGRESS SHOULD BE GIVEN AUTHORITY TO REQUIRE THE FDA TO COMPEL MORE DRUG TESTS

The federal Food and Drug Administration should require drug makers to conduct additional clinical trials after the agency approves their products. On many occasions, to speed drug approvals, the FDA will defer some clinical trials until after a product is introduced on the market. As we have previously reported, companies have failed to complete two-thirds of the post-marketing studies they pledged to conduct for drugs now sold to millions of Americans. Currently, the FDA doesn't have the authority to force drug makers to finish the trials. While I realize that is difficult for most folks to believe, the FDA really doesn't have that power under current law. However, anybody who has dealt with the drug industry

and the FDA probably won't be at all surprised. If the general public only knew how weak and ineffective the FDA has been in regulating the drug industry, they would be shocked and would be demanding action by Congress.

Well, recently Congress had an excellent opportunity to get something done. I had hoped that a bill in Congress, which has now passed and been signed into law, would have given the FDA the authority it badly needs. An amendment was passed out of a House committee that contained a provision giving the authority for the FDA to require the drug companies to do the right thing in post-marketing studies. Under the amendment, which was attached to a "must-pass" appropriations bill, the agency could begin proceedings to stop the sale of specific drugs if promised clinical trials for those products weren't completed. Rep. Rosa DeLauro (D-CT), who offered the amendment, learned from a recent report from the Government Accountability Office about the glaring deficiencies and how the FDA is now unable to handle post-marketing drug safety. The GAO had urged Congress to give the FDA authority to require that drug makers **follow through** on clinical trials. Well, the amendment didn't stick and frankly I wasn't surprised. The drug industry lobby used its influence and power and killed the amendment on the floor. As a result, public health was the real loser. The Senate had a golden opportunity and failed to act. That, in my opinion, is inexcusable.

Source: *Boston Globe*

INDUSTRY'S ROLE IN HYPERTENSION DEBATE AT ISSUE

It appears that Merck & Co. and some of its corporate buddies are at it again. It was reported recently by the *New York Times* that Merck was one of three pharmaceutical companies that donated \$700,000 to a medical society that used most of the money on a series of dinner lectures last year to brief doctors on the latest news about high blood pressure.

The other two corporations were Novartis and Sankyo. These companies also gave the **money** that the medical society **used** to formulate the **main talking points** of those briefings. The main talking point presented to the doctors was an expanded concept of high blood pressure that many in the medical community say would increase the number of people taking drugs.

The dispute over the influence of drug industry money has been causing some to question the objectivity of those taking the money. The dinners promoting a new definition of high blood pressure illustrate connections — among the pharmaceutical industry, academic physicians, and societies that formulate opinion — that can ultimately affect patient treatment. And the dispute within the society reflects a growing concern that industry money is influencing scientific discourse in medical societies and elsewhere. Dr. Steven E. Nissen of the Cleveland Clinic, who is the new president of the American College of Cardiology, suggests that "the medical profession had become addicted to industry money just as the nation was addicted to foreign oil." After months of controversy within the American Society of Hypertension that included accusations of industry influence, the society's president, Dr. Thomas D. Giles, announced on May 19th that the group's leadership would be required to disclose more details about the money they receive from industry.

Source: *The New York Times*

ASBESTOS TIED TO LARYNX CANCER

Asbestos has long been associated with lung cancer and mesothelioma, which is, as you may know, a rare cancer of the lining of the chest and abdomen. It now appears that that asbestos can cause cancer of the larynx, according to a report of the Institute of Medicine. The Senate asked the Institute, an arm of the National Academy of Sciences, to look into the possibility that other forms of cancer could also be related to asbestos. The panel concluded there is sufficient

evidence to connect asbestos, the fibrous mineral once widely used for insulation, and laryngeal cancer. It found nine studies that supported the connection.

The report also noted that certain cancers of the larynx, the portion of the throat containing the vocal cords, and of the lung are similar. The disruption in air flow caused by the vocal cords could add to the chance that asbestos fibers are deposited in the larynx, according to the report. The analysis concluded that the evidence is suggestive, but not conclusive, connecting asbestos with colorectal and stomach cancer and cancer of the upper throat. It said there is insufficient evidence to connect asbestos to cancer of the esophagus.

Source: *Wall Street Journal*

FDA TO ORDER TRACKING OF MEDICINES

Responding to growing concerns about potentially dangerous counterfeit drugs, federal regulators will begin requiring wholesalers to track who handles the pharmaceuticals they sell. This is a move that could reshape the distribution system for medicines. The decision by the Food and Drug Administration (FDA), which will take effect on December 2, 2006, will close a legal loophole that has made it difficult to trace the true origin of some medications. As you may know, drugs can sometimes pass through the hands of multiple wholesalers before they finally wind up on drugstore shelves. This supply chain allows “gray market,” “foreign” and even “fake” products to get into the chain of distribution. According to FDA statistics, the regulatory agency opened 32 counterfeiting investigations in its 2005 fiscal year, and 58 in fiscal 2004, compared with only six in 2000.

The effect of the new requirement will be focused largely on secondary wholesalers, rather than the large primary wholesalers that handle most drugs and get nearly all of their products directly from manufacturers. For the first year of the requirement, the FDA will look at several factors, including a drug’s value in the U.S. market,

whether it is used for a particularly serious condition, and its prior record of counterfeiting concerns in the enforcement of the new request. Under the new federal requirement, wholesalers will have to supply a so-called pedigree, or record, tracing every middleman who has handled the drug. If enforced, I believe this new requirement will make our supply of drugs brought into drug stores safer.

Source: *Wall Street Journal*

REQUEST TO REMOVE ORLISTAT FROM THE MARKET

As you may recall, Public Citizen petitioned the federal Food and Drug Administration in April to remove the diet drug Orlistat (XENICAL) from the market. The basis for the request was the fact that Orlistat can cause pre-cancerous changes in the lining of the intestines. This is called aberrant crypt foci (ACF). Thus far, the FDA has failed to take any action, which isn’t at all surprising. To get more information, you can read the full text of the petition at <http://www.citizen.org/publications/release.cfm?ID=7423>.

XVI. ENVIRONMENTAL CONCERNS

BCA WEIGHS IN ON THE ENVIRONMENT

I think most readers will find recent comments by the Business Council of Alabama (BCA) regarding our environment most interesting. The Alabama Environmental Management Commission has introduced a Draft 2010 Strategic Plan (“Draft Plan”) for Alabama. BCA, in a recent email to the Alabama Environmental Management Commission, has been critical of this Draft Plan in some areas that might surprise most Alabamians including many business owners in our state.

For instance, the Draft Plan has as a goal for the Alabama Environmental Management Commission (AEMC), to

ensure regulatory standards that are the “most protective of children’s health in the nation.” BCA’s position is apparently that a separate goal is not needed to protect “a subset” of all of Alabama’s citizens. I find it very hard to believe that BCA cannot see the need to be protective of our children’s health. I am quite certain that their members would want their own children’s health protected by a separate, more stringent standard, since it’s common knowledge that children are much susceptible to a number of environmental exposures than adults. At a minimum, children’s exposure levels can be much less than adults for the same or greater harm to ultimately occur.

Another example is the Draft Plan’s establishment of a Division of Environmental Justice within ADEM. BCA has said that if this goal remains in the Draft Plan, it should be general in nature, and that the development of a Division of Environmental Justice could actually “inhibit” the Department’s progress. This seems curious to me as well. Another area of particular interest to me is the BCA’s criticism of the goal and the Draft Plan to create a plan to reduce persistent bio-accumulative toxics (PBTs) in the environment. They apparently believe that the Environmental Protection Agency (EPA—your federal government) has been working for a number of years to reduce emissions of exposures to PBTs, even though the EPA’s funding is severely limited and there is no way the agency can get to all of the problems that a state may see fit to handle. It almost sounds as though BCA doesn’t want any state regulatory agency interfering with EPA. If EPA just can’t get to it, then I guess the bosses at BCA would be content with that result.

Pollution Prevention Initiatives is another area in which the BCA takes issue with the Draft Plan. In the Draft Plan, one of the goals is to expand pollution prevention initiatives and waste reduction/recycling programs. BCA’s position appears to be that, instead of expanding and enhancing programs in an effort to get better, the AEMC should focus solely on funding current pro-

grams. Additionally, BCA was very critical of appropriating additional funds to create a “blue ribbon” committee to focus on altering ADEM standards to be the most protective of children’s health in the nation. BCA doesn’t want funds going for this purpose, and it sounds an awful lot like they simply don’t want any language that would require or advocate that ADEM’s standards be the most protective of children’s health in the nation. That makes no sense to me. Our business leaders should want our children to be as safe or safer than any children in the country.

Finally, BCA even takes issue with the Draft Plan’s goal of adopting “Swimmable” Water Quality Use Classification for all waters where recreation occurs. The Business Council opposes this part of the Draft Plan because the expense would be too great. With all of the folks in our state who enjoy the use of our state’s recreation waters, we should want those waters to be as clean and safe as possible.

I certainly understand that the Business Council of Alabama is a politically powerful organization and one that is used to having input in every aspect of state government. At the same time, however, I guess I am just disappointed to see that they do not seem to care as much about children’s health and environmental exposures as most Alabamians do. I would hope that the bosses at the BCA would rethink their position on this critically important matter.

MASSIVE TOXIC TORT LAWSUIT FILED AGAINST FORD

More than 700 plaintiffs are seeking about \$2 billion for contamination of 900 acres in Ringwood, New Jersey. The case filed against Ford Motor Co., is a story about an environmental cleanup gone wrong, despite years of investigation and remediation. The property involved is the first in the nation that the Environmental Protection Agency has sought to relist on its National Priorities List of Superfund sites after having been removed. The litigation pits members of the Ramapough Mountain

Indian Tribe against the Ford, which owned the land and dumped waste products there from its Mahwah, New Jersey plant.

The plant closed more than 25 years ago, but hazardous waste remains on wooded hillsides and in abandoned mine shafts, streams, and yards in an area now largely parkland and homes. The waste persists despite a 10-year investigation and remediation effort by Ford that removed 7,000 cubic yards of contaminated soil and led the EPA in 1994 to remove the site from its Superfund list. Several times since then, Ford has gone back in for additional cleanup. A renewed remediation has removed 16,000 to 17,000 additional tons since 2004 and is still under way. Last September, Ford entered into a consent decree with the EPA to investigate the contamination.

On April 19th, the EPA published notice of its intent to relist the site, marking the first time it has tried to restore a delisted site. The suit, filed in state court in January and removed to federal court on March 9, names 13 defendants, including several Ford-related entities, companies allegedly involved with prior cleanup efforts, and a Wayne, New Jersey, company, Arrow Metals, accused of also dumping at the site. It appears, however, that Ford is the main defendant. The complaint accuses the automaker of failing to investigate and remove the contamination and of concealing its nature and extent from public officials.

The plaintiffs, who number over 700, say contaminated soil, air, and ground water continue to affect area residents, who have a higher incidence of leukemia and live with an elevated risk and fear of cancer. These plaintiffs are asking for medical monitoring, compensatory and punitive damages, and attorneys’ fees. Ford does not deny dumping toxic waste, primarily paint sludge, containing lead, arsenic, chromium, benzene, toluene, PCBs, and other dangerous chemicals. There does appear to be some dispute about how long the dumping actually went on and what other entities dumped various things in the affected areas.

MORE FUNDS SOUGHT FOR EXXON VALDEZ CLEANUP

ExxonMobil is again exhibiting its arrogant defiance and refusing to meet its legal obligations. When the Justice Department and the State of Alaska reached their \$900 million court settlement with the Exxon Corporation over the environmental damages caused by the Exxon Valdez oil spill, there was a provision for additional funding under certain conditions. The agreement was that, if unforeseeable damages occurred later, the two governments would have 15 years to ask for \$100 million more. The governments have now exercised this clause and are seeking \$92 million from ExxonMobil to complete the clean-up. Patches of oil, whose most toxic components have not dissipated since the spill in 1989, are causing problems. The lingering oil is still interfering with the recovery of animals in the area. Species like clams, mussels, and harlequin ducks that frequent the intertidal areas of Prince William Sound are the focus of this effort.

If anybody believes that ExxonMobil will do the right thing and pay for the requested clean-up, all you have to do is read the company’s media response. Predictably, the company says that any link between the remaining oil and effects on wildlife “is no more than a hypothesis.” Significantly, the request for additional money has the support of Alaska’s two Republican senators, Ted Stevens and Lisa Murkowski. They had encouraged ExxonMobil to provide the extra \$100 million without having to activate the formal “reopener” process set by the 1991 settlement. As you will recall, eleven million gallons of crude oil poured into the sound, contaminating about 900 miles of shoreline. The damage to the fishing industry and to native subsistence hunting lasted for years. The herring population, a crucial link between the tiny plankton at the bottom of the food chain and the larger predators at the top, crashed four years after the spill.

MORE PFC NEWS IN WEST VIRGINIA AND MINNESOTA

Conflicts of interest, real or perceived, between state environmental agencies or the companies they regulate remain a serious concern. These conflicts can occur when lobbying and campaign contributions are made by people affiliated with companies that produce or release toxic substances. We must keep in mind these are state agencies first and foremost that are responsible for environmental protection and public health. So it is of some concern when a lawyer who previously represented Dupont is named Head of the West Virginia Department of Environmental Protection. Dupont is one of the world's largest manufacturers of perfluorinated chemicals, including the chemical used in making Teflon. The state DEP has regulatory authority over the chemicals produced by Dupont in West Virginia. As you know, there has been a lot of debate, legal and otherwise, over the safety of perfluorinated chemicals and their presence in our environment.

It also is interesting to note that in Minnesota a former manager at 3M (another major manufacturer of PFCs) is Director of the Minnesota Pollution Control Agency, which has regulatory authority over PFCs that 3M produces in Minnesota for Scotchgard and other products. Again, this potential conflict—real or perceived—is one that at least would give the citizens of Minnesota some concern. Wouldn't you prefer that there be no appearance of a conflict of interest on the part of regulatory agency officials?

There is a lot of debate about PFCs. Scientists have actually compared PFCs to dioxin. An EPA advisory panel has described certain PFCs as likely human carcinogens. Although scientists still have much to learn about PFCs, we know they are toxic, extremely persistent, and that accumulate up the food chain. While most of us don't have dioxin in our bodies, almost all of us test positive for PFCs. The following should be enough to cause concern over the effects of conflicts of interest:

In Minnesota, agency officials claim that the commissioner of the Minnesota Pollution Control Agency (MPCA) has recused herself from issues related to 3M and PFCs. It is interesting to note that the recusal was never put in writing until a year and a half into her tenure. Even then, some of the staff working on PFCs did not learn of the recusal until a news reporter found out months later.

In West Virginia, a DEP employee has told federal investigators that, "Dupont reviewed and edited DEP news releases" related to PFCs. When one press release went out without Dupont approval, a company lawyer informed the environmental agency that this was "unacceptable." Reportedly, according to an investigative report in the Charleston Gazette-Mail, a Dupont official wrote that if Dupont received any media inquiries about the unacceptable news release, the official would state, "We understand that the DEP has disavowed that statement," and refer them to a Dupont ally in the department.

In Minnesota, it has been reported that at state Senate hearings, a former MPCA scientist testified that agency managers sat by while 3M representatives pressured her to limit testing for PFC contamination. The pressure was so strong that the former employee questioned whether her boss was the MPCA or 3M. Another MPCA employee reported that a 3M lobbyist told agency employees he had met with their boss, the commissioner, to discuss the need to get rid of certain staffers citing an employee who had been aggressively investigating PFC's. As expected, the lobbyist reportedly dismissed this as a joke at a later date.

For more than twenty years, both Dupont and 3M have had research showing that PFCs are toxic to labora-

tory animals. In 1982, 3M and Dupont met with the U.S. Environmental Protection Agency to discuss a 3M study that showed facial birth defects in rats exposed to large doses of a PFC. Not disclosed was a 1981 Dupont study that showed two of eight pregnant PFC workers also gave birth to babies with facial defects. I believe there needs to be trust that state environmental agencies are diligently protecting the environment and public health. Although I cannot say for certain that this trust has been breached in either West Virginia or Minnesota, it does appear that enough information is surfacing to cause any neutral observer to be greatly concerned. We don't need persons serving in key positions in regulatory agencies—state or federal—whose allegiance is to the very industry being regulated.

Source: *The Charleston Gazette*

BRAIN CANCER SAID TO BE LINKED TO CHEMICAL PLANTS

Two suits have recently been filed in state and federal courts in Pennsylvania against Rohm and Haas Chemicals. At least two men are claiming that their brain cancer resulted from spills, leaks, and discharges into the air, soil, and groundwater of massive quantities of highly toxic chemicals. These suits claim that the exposure has been going on for several decades. Clean-up of groundwater near the plant in question has been underway for about twenty years. The claimants in this suit live roughly a mile away from the plant. Among the chemicals that are alleged to have been discharged are trichloroethylene and vinyl chloride. As you probably know, vinyl chloride, according to the federal Agency for Toxic Substances and Disease Registry, is a carcinogen. Several other defendants are named in the suit, including companies that formerly ran the plant in question.

Source: *Chicago Tribune*

AN INTERESTING COINCIDENCE IN THE NATION'S CAPITOL

A rule, designed by the Environmental Protection Agency to keep groundwater clean near oil drilling sites and other construction zones, has been greatly weakened by the agency. Interestingly, this change came about after White House officials got involved after complaints by energy companies were made that the rule was too restrictive. A well-connected Texas oil executive appealed to White House senior advisor Karl Rove for help and it appears that Rove came to the rescue. The new rule, which took effect on June 12th, came after years of intense industry pressure. But, environmentalists say that the fight isn't over. They have internal White House documents that they say portrayed the new rule as a political payoff to an industry long aligned with the Republican Party and specifically with President Bush.

The Texas oilman and longtime Republican activist referred to above, Ernest Angelo, wrote a letter to Rove complaining that an early version of the rule was causing many in the oil industry to "openly express doubt as to the merit of electing Republicans when we wind up with this type of stupidity." Rove responded by forwarding the letter to top White House environmental advisors with a handwritten note directing an aide to talk to those advisors and "get a response ASAP."

The issue has been a focus of lobbying by the oil and gas industry ever since Clinton administration regulators first announced their intent to require special EPA permits for construction sites smaller than five acres. That was to include oil and gas drilling sites and was a way to discourage water pollution. Energy executives sought and received a delay in that permit requirement in 2003. Eventually, Congress granted a permanent exemption that was written into the 2005 energy legislation. The EPA rule issued last month, however, adds fine print to that broad exception in ways that critics, including six members of the Senate, say exceeds what Congress intended. For example,

the new rule generally exempts sediment — pieces of dirt and other particles that can gum up otherwise clear streams — from regulations governing runoff that may flow from oil and gas production or construction sites.

The rule has been called "yet another example of the Bush Administration rewarding their friends in the oil and gas industry at the expense of the environment and the public's health." There is no doubt that this White House has extremely close ties to the oil and gas industry. This is an industry that has pretty much had its way with the federal government for as long as Karl Rove was in charge of directing traffic in the White House.

Source: *Los Angeles Times*

VERDICT AGAINST VULCAN MATERIALS CO.

Vulcan Material Co., Dow Chemical Co. and RR Street Co. were defendants in a lawsuit filed by the City of Modesto, California in a state court in California. When the case was tried, it resulted in a jury returning a \$3.1 million compensatory damages award on June 9th against Vulcan, Dow and Street. In the subsequent punitive phase of the trial, the jury returned a punitive award of \$100,000 million verdict against Vulcan; \$75 million against Dow; and \$75 million against Street. Vulcan Materials, based in Alabama, sold the chemicals unit that made the compound used in the dry-cleaning of clothing. It was alleged in the lawsuit that the chemical compound polluted ground water in Modesto. The use of perc in dry-cleaning in that city was said to contaminate soil and groundwater based on conduct by the defendants from the 1960s through the 1980s.

XVII. TOBACCO LITIGATION UPDATE

GOVERNMENT OFFICIAL TO BE QUESTIONED IN TOBACCO CASE

A federal judge has ruled that Associate Attorney General Robert D. McCallum Jr. will have to undergo questioning in a lawsuit by a nonprofit group seeking records about the Justice Department's conduct in a landmark case against the tobacco industry. As you may recall, Citizens for Responsibility and Ethics (CREW) in Washington filed suit last year after the Justice Department ignored the testimony of one of its own witnesses in the tobacco trial and reduced the amount the Bush Administration is seeking from the tobacco industry from \$130 billion to \$10 billion. CREW said the Justice Department has failed to produce a single responsive document to demands for information under the Freedom of Information Act. U.S. District Judge Emmet Sullivan said the organization is entitled to look into the Department's handling of the document requests by questioning McCallum, the third-ranking official at the Justice Department. Allegations were made that the Administration caved in to the tobacco industry and drastically reduced the amount of money it is seeking. McCallum is said to be at the center of that bizarre development.

It might be considered significant that McCallum was the Bush administration's choice to become ambassador to Australia. Judge Sullivan's decision may cause this nomination to be in jeopardy. Senator Richard J. Durbin (D-IL) is blocking McCallum's nomination over allegations that he improperly influenced the government's lawsuit against cigarette manufacturers. The government lawyers say that the delay in responding to CREW's request is justified. But, Judge Sullivan said statistical data that the Justice Department sends to Congress every year destroy the government's argument that there is nothing unusual in the amount of time it has taken to

respond to CREW's lawsuit. In its lawsuit filed in October, CREW asked for records of all contacts between Justice Department officials and the White House concerning the tobacco litigation and records of all contacts between McCallum and his old law firm in Atlanta, which has done work for the tobacco industry.

XVIII. THE CONSUMER CORNER

IDENTITY THEFT IS A BIG TIME PROBLEM

There have been a number of reported cases recently where thefts of personal data was involved. When you consider the magnitude of the thefts and what was involved, it clearly is a big time problem. The potential for great harm to individuals and businesses is most apparent. A few of these are set out below.

VETERANS SUE OVER DATA THEFT

It appears that the damage done when thieves stole personal data on 26.5 million military personnel from a Veterans Affairs employee could be much greater than we were first told by the government. A coalition of veterans' groups has charged in a lawsuit filed last month that their privacy rights were violated by the theft. The class-action lawsuit against the federal government, filed in U.S. District Court in Washington, D.C., is the second suit filed since the VA disclosed the May 3rd burglary. The complaint demands that the VA fully disclose which military personnel are affected by the data theft and seeks \$1,000 in damages to each person — up to \$26.5 billion total. The veterans are also asking for a court order barring VA employees from using sensitive data until independent experts determine proper safeguards.

Among other things the complaint states:

VA arrogantly compounded its disregard for veterans' privacy rights by recklessly failing to make even the most rudimentary effort to safeguard this trove of the personally identifiable information from unauthorized disclosure.

In their lawsuit, the veterans groups say VA Secretary Jim Nicholson and other VA officials were at fault for the theft, which occurred even though the agency's Inspector General has warned every year since 2001 that access controls were weak. The suit also said the VA acted irresponsibly by failing to publicize the burglary after the data analyst promptly told his supervisors on May 3rd. During congressional hearings last month, VA Inspector General George Opfer said his office didn't learn of the crime until May 10th—and then only through office gossip. It appears that a 1974 federal privacy law generally requires agencies to have protections in place to prevent the unauthorized disclosure of personal information. The VA claims that the data analyst, who was fired, violated its established procedures by taking the data home without permission. VA Deputy Assistant Secretary Michael McLendon, who was the fired employee's boss, has stepped down.

The five veterans groups involved in the lawsuit are Citizen Soldier in New York; National Gulf War Resource Center in Kansas City; Radiated Veterans of America in Carson City, Nevada; Veterans for Peace in St. Louis; and Vietnam Veterans of America in Silver Spring, Maryland. The stolen information contained names, birthdates and Social Security numbers—and in some cases, disability codes — of veterans discharged since 1975. The VA has acknowledged, after an internal investigation, that the data may also include phone numbers

and addresses of those veterans, as well as the personal information for up to 50,000 active Navy and National Guard personnel.

HOTELS.COM CREDIT-CARD DATA LOST IN STOLEN LAPTOP COMPUTER

The Wall Street Journal has reported another example of sensitive personal data being lost by a company. The names and credit-card numbers of about 243,000 Hotels.com customers were on a laptop computer stolen from an employee of accounting firm Ernst & Young LLP. The computer was apparently stolen from the locked trunk of the employee's car in a parking lot in Texas. Hotels.com, which is owned by **Expedia** Inc., and Ernst & Young, its auditor, have started to notify people whose information was stolen. These individuals will be offered free credit-monitoring services. The theft occurred in February. According to the *Journal*, Ernst & Young wasn't able to reconstruct what was on the computer's hard drive until early May, at which point the firm notified Hotels.com.

This is the third recent theft of such data involving Ernst & Young. Earlier this year an Ernst & Young employee's laptop containing personal data of **Goldman Sachs** employees was stolen from a locked car in New Jersey. An Ernst & Young laptop containing information of employees from a number of companies was stolen from a locked conference room in an office building in Florida. Laptops are currently used by the accounting firm's 30,000 employees in the U.S. and Canada. It's pretty obvious that the company needs to take immediate steps to protect the personal information of people in its possession.

Source: *Wall Street Journal*

INSURER REPORTS THEFT OF DATA ON 930,000

The American International Group, one of the world's largest insurers, reports that a burglar stole computer equipment in March from one of its Midwest offices that contained personal information on 930,000 people. A spokesman for AIG, says none of the information had been put to use in any way, "as far as we know." The information was from employees of companies seeking corporate health insurance. The data had apparently been on a computer server and protected by a password. It consisted of names and Social Security numbers — sometimes together, sometimes separately — and, in some cases, fragments of medical information.

The information was provided to AIG by 690 insurance brokers seeking quotes for coverage on special high levels of health insurance for employees of companies around the country. AIG had a copy of the stolen information and had been trying since the break-in to connect the names with addresses so it could notify people that their data had been taken. Letters to the 930,000 are to go out soon. AIG says it will open a phone center to respond to their questions. The burglar also took a laptop computer, a camera and other computer equipment. For some reason, AIG didn't announce the theft when it occurred. The theft was first reported on June 12th by MSNBC.com. Remember the theft took place on March 31st.

Source: *New York Times*

TESTS SAY NEW SUVs OFFER MORE PROTECTION AGAINST ROLLOVERS

Newly designed sport utility vehicles are far safer than 2005 models when it comes to rollover risk, according to new federal crash test results released

recently. Passenger cars, which have much lower centers of gravity, have the lowest rollover risk of any class of vehicle, the National Highway Transportation Safety Administration found. They are followed by pickups, SUVs, and vans. According to NHTSA, the secret behind the improvement in SUVs is a feature called electronic stability control, now standard for the first time on a number of models. It detects through sensors when a driver is about to lose control of the vehicle and instantaneously corrects the potential veer by braking on the appropriate wheel. Electronic stability control also prevents the rear end of the vehicle from sliding out when a driver encounters a sharp curve or swerves to avoid an obstacle. For complete rollover test results, including for models unchanged from 2005, go to www.safecar.com.

NEW FEDERAL ATV RULES PROPOSED

Three-wheeled all-terrain vehicles would be banned and four-wheelers intended for children wouldn't go faster than 15 mph, under regulations which have been proposed by the Consumer Product Safety Commission (CPSC) staff. Major ATV manufacturers have agreed to stop selling three-wheeled models, which are three times as likely to cause injury as the four-wheeled variety, according to a CPSC report outlining the proposed new regulations. But there are new kinds of three-wheeled vehicles being sold in the U.S. A ban would "help ensure that three-wheeled ATVs will not be reintroduced into the U.S. market," according to the report.

Manufacturers also would have to offer free training for drivers and their families under the rules, which are designed to replace a patchwork of state regulations. The staff recommended that the commission propose the new regulations at a June 15th meeting. The commission will later vote on whether to do so. Hopefully, they will vote in the affirmative.

PRODUCT DEFECTS SHOULD BE REPORTED

The Consumer Product Safety Commission (CPSC) has proposed new factors for determining when manufacturers have to report defective products to the agency. The proposal would allow companies to take into account factors such as whether they complied with voluntary and mandatory safety standards and whether the product poses less risk because it is old and not being sold or used much anymore. However, not everybody believes this is a good change. In this regard, Rachel Weintraub, director of product safety for the Consumer Federation of America, had this to say about the changes:

This will result in less information being relayed to the Commission, and that's bad for consumers.

The home appliance and toy industries have been lobbying the CPSC since 2004 to spell out just which factors count in determining whether a product is unsafe and a candidate for a recall. The CPSC takes the position that the rule currently in effect is ambiguous because it directs manufacturers, retailers, and distributors to report to the CPSC when they can "reasonably support" that a product is defective. Consumer groups complain that the main changes were proposed by industry groups and that they might have the effect of shifting blame for mishaps from manufacturers to consumers. Companies are obligated to tell the agency immediately if they suspect a problem with a product, particularly if it poses the risk of serious injury or death. As you may know, most recalls are "voluntary" agreements, but the CPSC will sometimes press companies to make recalls and the agency has the last word when it comes to imposing penalties. Last year, the CPSC was responsible for some 400 recalls. About 27% of them were toy-related, with 7.5% being appliance recalls. Hopefully, the rule changes will prove to be good for consumers. We will see!

ILLEGAL SALES UP FOR PRESCRIPTION DRUGS SOLD ILLEGALLY ON LINE

A study says illegal online sales are up for prescription drugs. The National Center on Addiction and Substance Abuse reports that more websites are popping up, offering prescription medicines like OxyContin, Vicodin, Xanax and Ritalin. Center chairman Joseph Califano says the government needs to tighten laws that regulate Internet sales of controlled drugs. He says the online market has become a "candy store" for drugs. The center has checked Web sites for one week every year over the past three years. The study, which was released on June 19th, has more sites offering drugs without prescriptions. The number has been increasing since the annual review began three years ago.

It was pointed out that nine out of ten sites selling controlled drugs over the Internet don't even require a prescription. There are legitimate businesses online that hopefully obey the rules. However, I have always felt that taking prescription drugs is too important a health issue for a person to get drugs online. I was brought up to believe that your own doctor and your trusted pharmacist needed to be directly involved on all prescription drug issues.

Source: Associated Press

XIX. RECALLS UPDATE

This month, because of the length of this issue, we will list just a few of the recalls that were issued recently. I had hoped that the number of vehicle recalls would slow down a great deal, but that hasn't been the case.

CORVETTES RECALLED AFTER ROOFS FLY OFF

General Motors Corp. will recall more than 30,000 Corvettes. Customers have complained that the roof flew off while driving the

\$45,000 sports car. GM received 21 reports of roofs detaching from 2005 and 2006 model-year Chevrolet Corvettes coupes. Thus far there are no reported accidents or injuries, according to the company. GM asked owners of 2005 models to bring their cars into dealerships last year to fix the problem. The company issued a formal recall on May 27th after learning roofs also flew off 2006 models. Joan Claybrook, president of the Washington-based consumer group Public Citizen, observed:

It's a good thing that GM is doing this recall finally, because no roof is worse than a weak roof. The roof endangers other highway users as it flies off.

The recall applies only to 2005 and 2006 vehicles with roofs that are designed to be detachable by releasing latches. The unintentional separation occurs when adhesive that holds the base of the roof to the car frame weakens and fails, the National Highway Traffic Safety Administration reports on its website. Owners with problem roofs may notice water leaks or a snapping noise when going over a bump, according to GM. The automaker received 395 reports of partial separating of the roof, in addition to the 21 cases of it flying off. The Corvette roof weighs less than 10 pounds and is made of plastic that is molded into a magnesium frame.

VOLKSWAGEN RECALLS JETTAS AND BEETLES

Volkswagen AG will recall 362,000 Jettas and New Beetles for brake-light failures, according to NHTSA. The Volkswagen recall covers 1999 through 2002 Jettas and 1998 through 2002 New Beetles, the agency said. A brake light switch may not have been properly installed during previous recalls in

2003 and 2004, and the lights either don't work or stay on all the time. Volkswagen says that the recall affects vehicles with automatic transmissions and cruise control, and that no accidents or injuries were reported.

TOYOTA TO RECALL 320,000 PRIUSES

Toyota Motor Corp. will begin a global voluntary recall of nearly 320,000 of its hot-selling Prius gasoline-electric hybrid sedans to repair a potentially faulty steering system component. The campaign will involve about 170,000 vehicles sold in the U.S. That represents about two-thirds of the 268,000 sold since the hybrid's introduction here in July 2000. Toyota, noting that no accidents or injuries had been reported, sent letters in mid-June to owners of 2004 through early 2006 models of the popular hybrid.

The recall also covers eight other Toyota models—none sold in the U.S.—that use the same steering system. In all, Toyota is recalling 986,000 vehicles, more than half of them in its home market, the company said in a statement issued in Japan. The Prius recall does not involve any of the car's propulsion system components but a potentially understrength piece of the steering shaft assembly that could loosen or crack.

Owners will be asked to take their cars to a local dealer for diagnosis and repair once they receive the formal recall notice. Repairs will be done at no cost to owners. You can get more information on this recall by calling the company's national customer service line at (800) 331-4331.

JEEP GRAND CHEROKEES ARE RECALLED AFTER REPORTS OF SEAT FIRES

DaimlerChrysler AG has recalled about 111,000 Jeep Grand Chero-

kees after receiving reports of overheating and fires in heated seats. The automaker has received 32 complaints of the front seat electric heater element overheating or leading to a fire, according to a DaimlerChrysler spokesperson. The company apparently knew of a few cases of injuries, but did not have an exact number and says it doesn't know of any crashes resulting from the defect. The recall involves the 2003-2004 model years of the Grand Cherokee sport utility vehicle with heated seats. Owners are expected to receive letters about the recall this month.

HONDA RECALLS VEHICLES OVER DEFECTIVE PARTS IN STARTING ENGINE

Honda is recalling more than 500,000 vehicles to replace a faulty part used in starting an engine. Among the models affected are Odyssey minivans, CRV SUVs, and Step Wagon minivans. The three models were produced between 1994 and 1997, and more than 78,000 were exported to nations including the U.S. and Canada. Honda says repeated use of the parts that are weak against heat could cause the vehicle's engine to stop suddenly. Five cases of minor burns were reported after the solder used in the defective parts melted and flowed onto drivers' feet. The Odyssey vehicle is manufactured at Honda's plant in Lincoln.

SEIZURE LEADS NOVARTIS TO RECALL PATCHES

The Swiss drug company Novartis AG has recalled its cough-suppressing vapor patch. Consumers to stop using its Triaminic Vapor Patches immediately. The recalled patches include both the mentholated cherry and menthol scented versions sold by Novartis Consumer

Health. These patches should be discarded or returned to the place of purchase for a full refund. The patches contain camphor, eucalyptus oil and menthol and are meant to be applied to the chest or throat of children as young as 2 years old to allow vapors to reach the nose and mouth. The patches can be removed by children who could place them in their mouths. The recall came after a child suffered a seizure after chewing on one of the patches.

Ingesting camphor or eucalyptus oils can cause a burning sensation in the mouth, headache, nausea, vomiting or seizure. In the reported case of the seizure, the child apparently recovered that same day. Other complaints associated with the patches include reports of blistering, bruising, scarring, hyperactivity and depigmentation. Parents and other consumers with questions should contact Novartis at (800) 452-0051 or visit <http://www.triaminic.com>, the company said. Any adverse reactions associated with the patches should be reported to the Food and Drug Administration through the agency's MedWatch program, either online at <http://www.fda.gov/MedWatch/report.htm> or by telephone at (800) FDA-1088. Novartis said it has sold more than 50 million Triaminic Vapor Patches since introducing them in 2000. They are sold through pharmacies and retail stores.

XX. FIRM ACTIVITIES

SPOTLIGHTED EMPLOYEES

Greg Allen

I have been practicing law with Greg Allen for over 23 years and it has been quite an experience. Greg graduated from Jones School of Law in 1983, was admit-

ted to practice law that same year, and hasn't slowed down since that time. The Georgia native practices in our Product Liability Section where he has been involved in many cases that have resulted in substantial verdicts and settlements for his clients. Greg universally is recognized as one of the leading product liability lawyers in the country. He has taught products liability courses at a number of national seminars and has been on the cutting edge of litigation in his field. Not only has Greg taught courses at Jones Law School, but he has been honored by the creation of the "J. Greg Allen Trial Competition for the Future Trial Lawyers Association" at Jones.

Greg is a past president of the Montgomery Trial Lawyers Association and has been on the Executive Committee for the Alabama Trial Lawyers Association for a number of years. He is also member of the board of directors for the AIEG, which is an alliance of lawyers from all over the country who do products litigation. Greg is currently the chairman of the journal committee of the Alabama Trial Lawyers Journal; serves as chairman of the Steering Committee at Jones School of Law; and serves on the school's advisory board; and is also an active member of the Trial Lawyers for Public Justice.

Greg enjoys taking on giant corporations on behalf of folks who have been seriously injured and families who have lost loved ones as the result of using a defective product. He especially enjoys difficult and technical cases. His discovery efforts in technically challenging cases are second to none. In my opinion, I have never seen any lawyer who is Greg's equal in getting corporate discovery documents. A prime example was a case against General Motors where the automaker had been telling lawyers for several years that the 2500 project was a **vehicle enhancement program** which had absolutely nothing to do with safety. Greg was able to find out that the project really took \$2500 worth of metal out of each vehicle made over a period of years in certain Buick, Oldsmobile and Pontiac models.

You can imagine GM made a killing due to the number of vehicles sold, especially since the sticker price wasn't reduced. Safety was compromised by GM in a most significant manner and Greg was responsible for uncovering what they had done.

Greg is married to the former Jane Anne Howell of Lafayette, Alabama, and they have two children. Tracy, a graduate of Birmingham Southern, is continuing her education at Samford University. Evan, who is currently attending Birmingham Southern, is a modern day **Davey Crockett**, enjoying hunting, fishing and the outdoors. Greg and Jane, who are now "home alone," attend Eastern Hills Baptist Church in Montgomery. Needless to say, Greg is a most important person at our firm.

Kimberly Ward

Kimberly Ward, who is a lawyer in the firm's Toxic Torts Section, has decided to make a career change. Before coming to the firm, Kimberly completed a judicial clerkship for Alabama Supreme Court Justice Champ Lyons, Jr. Kimberly will eventually relocate with a firm, most likely in a much larger city such as Atlanta, and when she does, Kimberly will be an asset wherever she lands. In the interim, she will take a clerkship with Judge Joel Dubina, who is on the 11th Circuit Court of Appeals.

While with our firm, Kimberly has focused her practice in the fields of business torts, securities law and environmental cases. She had worked previously in the areas of nursing home litigation and mass torts. Kimberly has worked on cases involving variable annuity fraud, leaking underground storage tanks, illnesses resulting from diesel exhaust exposure and the herbicide "Agent Orange," and property contamination cases. Kimberly, an excellent lawyer with tremendous writing skills, has been a definite asset to the firm. We were pleased to have her with us for over four years and really hate to lose her. We certainly wish Kimberly the very best in all of her future endeavors. I can tell whatever firm that winds up having Kim-

berly as a lawyer, that they will be getting a good one!

Libby Rayborn

Libby Rayborn serves as my Executive Assistant. Libby, a native of Georgia, has worked with me for over 17 years. She grew up in Douglasville, Georgia, where her dad served as the minister of First Presbyterian Church until his retirement. Libby is married to Bill Rayborn. Her daughter, Ally, who is a cheerleader, is entering the 9th grade at Alabama Christian Academy. Libby enjoys watching college football (especially Auburn), going to movies, and spending time with family and friends. A good bit of her spare time is spent watching Ally cheer at football and basketball games and traveling with Ally to cheerleading competitions. Libby is an outstanding employee and has tremendous "people skills," which comes from really liking people and being sincerely interested in their needs when they contact our office.

Renee Lindsey

Renee Lindsey currently serves as Administrative Assistant to Executive Director Lisa Harris. She also serves as our Referring Attorney Liaison. In that capacity, Renee helps to keep lawyers who refer cases to our firm informed concerning the progress of their clients cases. In working with Lisa, Renee organizes mail, handles vendors, conducts price checks, maintains firm office supplies, handle parking issues, handles employee complaints and issues (which I hope are few in number), helps with new employee matters, sets up interviews and appointments, and handles the firm's insurance enrollment and cancellations.

Renee is married to Billy Lindsey, a former employee of the firm, who now works in real estate sales with John Hall Co. Billy and Renee have three children, Tripp 11, Casey 10, and Summer 8. Renee is currently enrolled at Troy University of Montgomery and if not in class or here at the firm, she can usually be found at a baseball field, football field, or soccer field, or at a dance class, gymnastics class or just working in the yard with Billy.

Renee is a valuable employee and we are fortunate to have her with us.

Shannon Rattan

Shannon Rattan, who was previously employed at the firm in the Accounting Department, came back to work with us in February as a Clerical Assistant in our Personal Injury Section. She also serves as a graphics assistant and on occasion helps out as a relief receptionist. Shannon's husband, Chris, is currently stationed at Parris Island, South Carolina, where he is a member of the Marine Corps band. They have two children. Sean Christopher will turn four this month, and Samuel Cade will be two years old in September. Shannon and the boys are looking forward to Chris' return to Montgomery in December of this year. Shannon is currently pursuing a Bachelors Degree in Music Education from Troy University and an Associates Degree in Early Childhood Education from Ashworth College. She is a very good employee and we are glad she is back with the firm.

Beverly Larkin

Beverly Larkin came to our firm in August 18, 2003 as a Clerical Assistant in our Consumer Fraud Section. In this position, Beverly scans and closes files to Retention. She has been married to John Larkin for 22 years and they have one daughter, Saundra, and twin boys, Lester & Sylvester. Beverly, who was born and raised in Tallassee by her parents, Rev. Elijah and Mrs. Willie Mae Thomas, has four sisters and four brothers. The rumor is that she is the smartest and toughest of the bunch.

Beverly is a member of the Rehoboth Baptist Church in Tallassee, where she has served as Church Secretary for the past 15 years. She also serves as a Sunday school teacher, and President of the Rehoboth Women Ministry. Beverly loves to read, going to movies, and spending as much time as possible with her family. She is a good person and a very good and loyal employee. We are proud to have Beverly with the firm.

XXI. SPECIAL RECOGNITIONS

BETTY DeMENT—A VERY SPECIAL PERSON—WILL BE HONORED

The Betty McClinton DeMent Endowment Scholarships has been established to honor Betty and her many accomplishments while she was associated with Auburn University. The scholarship will provide undergraduate scholarships to students in the College of Education. Betty, who worked in many capacities at Auburn University, did an outstanding job in all that she undertook. She served as Vice-President for Alumni Affairs and Executive Director of the Auburn Alumni Association from 1995—2004. My daughter Bee McCollum worked for Betty for several years after graduating from Auburn.

Bee says that Betty was a great employer in every respect who was totally dedicated to Auburn University and the Auburn nation. According to Bee, Betty was a very good person who always tried to do the right thing regardless of the consequences. I can think of no better way to pay tribute to all Betty did for Auburn than making a contribution in her honor to the scholarship fund. I commend my friend Dr. Ed Dyas of Mobile for getting the ball rolling on this project. If you would like to honor Betty and at the same time help a deserving student at Auburn, you can send your contribution to the fund to Josh Hawkins at the Office of Development, 317 South College Street, Auburn, Alabama, 36849.

THE CHRISTIAN LEGAL SOCIETY

The Christian Legal Society (CLS) was established some 45 years ago. CLS brings lawyers who profess to be Christians together and it has had a great ministry. The national convention of CLS will be held in San Antonio, Texas starting on Nov. 2nd. In my humble opinion, there isn't a time in our history when

there was a greater need for followers of Jesus Christ within the legal profession to stand up and be counted. I am convinced that the gospel message must be the basis for all that we do. A recent poll says that only 1% of the over one million lawyers in the U.S. are firmly committed Christians. While I don't believe that number could be accurate, I really have no way of disputing the result. Even if the numbers brought the percentage up to 49%, it still wouldn't be high enough. CLS says it is committed to turning the trend around. If you want more information about CLS and its mission, go to www.clsnet.org.

CHRISTIAN TRIAL LAWYERS ASSOCIATION

The Christian Trial Lawyers Association, founded by my good friend Mark Lanier who works out of Houston, Texas, held its initial meetings in December 2003. There are now over 500 active members of the association. CTLA's purpose is to advance Christian principles as they co-exist within the practice of legal work and to demonstrate professional accomplishments and godliness while defending Christian values to the public sector. The mission of CTLA is to encourage, support and equip its members to glorify Christ in every setting. The group's vision is to be a support network for promoting integrity and morality in the legal profession. Members strive to exemplify Christ-like character in their homes, offices, court rooms and communities. I can think of nothing better for any lawyer to do and especially those who—like our firm—represent folks who are simply seeking justice. You can get more information concerning the association by going to www.christiantriallawyers.org.

XXII. SOME CLOSING OBSERVATIONS

I read a letter to the editor recently in the *Montgomery Advertiser* that also

appeared in a number of other state newspapers. While I generally just read this sort of tort-reform propaganda and then discard it in the trash can, I decided that this one needed a response since it was so far off base. The following is my response that was printed in the *Advertiser*:

I was shocked to read Michael Ciamarra's letter to the editor concerning frivolous lawsuits in Alabama. The man obviously hasn't done any investigation of this matter. Had he done so, he would know that Alabama has what is referred to as the Alabama Litigation Accountability Act on the books. This law, passed in 1987, says that any person and his or her lawyer who files a frivolous lawsuit can be sued by the defendant in the case and that defendant can recover whatever damages sustained as a result of the lawsuit being filed. This law covers corporations that are sued. I feel sure Mr. Ciamarra and his so-called institute would know about this law. Interestingly, I have never heard the law mentioned by anybody who is out to destroy the jury system in this country.

Without the jury system, corporations like Enron, ExxonMobil, Tyco and others would never have to worry about their conduct and how others are hurt by it. I can tell you, without reservation, that any lawyer who advises a client to file a lawsuit that is without merit is asking for trouble. However, folks like Mr. Ciamarra consider all lawsuits frivolous—that is, unless they or one of their family become victims.

As I have stated on numerous occasions there are powerful forces at work in our nation whose sole goal is to tear down and destroy our civil justice system. They are totally dedicated to their mission and do this—wearing a cloak designed by their version of righteousness—while being financed and directed by the giants of Corporate

America. My Bible teaches me that these attacks must be resisted when false and that Christians have an obligation to stand up to those who put out the false information and distortions.

We have reached a stage in this country where victims of wrongdoing have a most difficult time getting justice. The powerful enemies of the court system have spent billions of dollars in their effort over the years to make justice is either unavailable to victims or restricted drastically. These forces have been engaged in one of the most effective smear campaigns ever devised. Those of us who understand their goal and the tactics they utilize must fight even harder to make sure that victims of wrongdoing will be able to get justice in the courtrooms of this country even when taking on the most powerful forces in Corporate America.

Lawyers, judges and legislators have definite responsibilities when it comes to protecting and defending those in our society who are considered to be poor or disadvantaged because of poverty or some unkind twist of fate. The Bible teaches us:

Woe to those who decree unrighteous decrees, Who write misfortune, Which they have prescribed To rob the needy of justice, And to take what is right from the poor of My people, That widows may be their prey, And that they may rob the fatherless.

Isaiah 10:1-2

It also tells us that we have a duty to protect the weak and those without power and authority who are in our midst. As a trial lawyer, I understand that my job includes seeking justice for the masses when they are victimized. Tom Methvin, our managing shareholder, recently wrote a paper entitled "Trial Lawyers and the Biblical Basis for what we do." It is one of the best articles that I have ever read on the subject. If you

would like to have a copy, write to Shanna Malone at P.O. Box 4160, Montgomery, AL 36103 and let her know and we will send it to you at no cost. You can also find a copy on our website beasleyallen.com.

XXIII. SOME PARTING WORDS

I have been asked on occasion why I include reflections of my Christian faith in a report that deals primarily with legal matters and sometimes political issues. My answer has consistently been that this part of the Report is meant to help folks who need help or who may be seeking direction in their lives or the lives of a family member or friend for whatever reason. I know from personal experience that we all need to be reminded from time-to-time that God is the source of all authority, power and provision in our lives. Without God we are nothing and can do nothing of any consequence. I firmly believe that. I have to say of all that is put in the Report each month, it's this section that gets the most feed-back and comments from our readers. I will candidly admit that all of the comments aren't always favorable. Nevertheless, I believe that my obligation to my Lord and Savior is not to back down. Of everything that goes into an issue, in my opinion, this part is the most important of all.

Over the past few weeks in my Sunday school class at St. James United Methodist Church, we have been studying Paul who was having to deal with a church in his day that had lost sight of its mission and was having major problems as a consequence. There was real division and strife in the Christian Church at Corinth and Paul had a duty to deal with it. Our churches in America would have a stronger witness to the world if we had the Apostle Paul's atti-

tude and dedication and had his 100% commitment to the cause. Paul considered himself a servant of Christ and a steward of God. He spent his life making Christ known and inviting people of all sorts to embrace Him as Lord and Savior. Paul's will was subservient to the will of Christ and that should be a model for all of us. For Paul nothing was more important than to take up the cross and "go make disciples of all nations"—even if it cost him his life. We don't have that latter concern, which should make our work in the mission field much easier. However, sometimes that can actually work in reverse.

Sometimes those of us who strive to serve Jesus Christ in today's world are prone to think of ourselves "as more highly than we ought to think." That is especially true of us lawyers and I must confess I have had the problem on a few occasions. It's important to understand our calling and that is to live as servants and stewards under the Lordship of Christ. Stewards are expected to be trustworthy and to work hard at the responsibilities we are entrusted with. Whatever we have in this life is not actually ours, but is only a gift on loan from God. All too many times we forget that—to our detriment. God expects us to be good and faithful stewards, serving responsibly with gratitude for the mercy that He has shown us.

We have many others who model for us what it means to serve as a faithful steward and humble servant of Christ. Men like Billy Graham, Billy Sunday, and even my friend Walter Albritton come to mind. With God's help we can model that kind of discipleship for others. It all begins with our willingness to think of ourselves as servants and stewards of our Lord Jesus Christ. Paul certainly did. We can do it too. When we do, it will make our lives and that of our family, business associates and friends much better. My pledge is to try harder to be like the role models mentioned above.

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