



THE  
**JERE BEASLEY REPORT**

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# I. CAPITOL OBSERVATIONS

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## A SAD DAY FOR ALABAMA

It appears that the guilty verdicts against Don Siegelman and Richard Scrushy came as a surprise to many so-called judicial system experts. But, a number of lawyers who kept up with the trial had a different view of how it had been going. Frankly, because I didn't witness any part of the trial and only got my information from media reports, I won't speculate on whether the verdicts were justified by the evidence or not. In any event, regardless of how you may have felt about the guilt or innocence of the defendants when the trial started, the guilty verdicts in any corruption case involving a former governor and a powerful corporate executive would be considered by many as a black eye for the state. It's a sad commentary when powerful men abuse their positions—assuming that the jury verdict was correct—regardless of who they are and what position they hold. It should be noted that a public official or corporate executive, or a lawyer in private practice for that matter, can still abuse the trust that goes with their position and yet not be guilty of a crime.

As far as this specific case is concerned, the nation only sees a guilty verdict in a high profile criminal case against a once-powerful state official and a corporate executive with very strong political connections. For any state, that can never be good news. Even so, good can still come for Alabama as a result of this trial if a renewed push comes about for a complete reform of the financing of political campaigns and a reworking of the laws that govern the ethical behavior of public officials and the conduct of elections in our state. I hope reform of that nature will become a reality and very soon.

All of us must have compassion for the families of all of the defendants, including the two who were convicted, all of whom have had to see a family

member undergo years of investigation and then go through a lengthy trial that highlighted the news on a daily basis. On a personal note, I have known Mack Roberts, one of the defendants, for over 30 years. Based on what I have known about him, I would never believe that Mack would ever knowingly break any criminal law. In my opinion, he is completely trustworthy and totally honest. I was very happy to see Mack found not guilty by the jury.

Interestingly, there were several individuals involved in the trial whose lights shone brightly throughout the entire ordeal and continue to do so. For example, the two primary prosecutors for the government, Louis Franklin and Steve Feaga, did exceptionally good jobs in handling a most complex case against a formidable team of lawyers representing the defendants. I believe the federal lawyers were **smart** to try the case inside the courtroom and not get caught up in the afternoon news conferences that were held daily by the defense team. Certainly, Judge Mark Fuller, who presided over the trial, received extremely high marks for his handling of a most difficult case. From all accounts, the judge did a great job.

Finally, all Alabamians should be glad that this chapter in our state's political history is nearing a completion. There has to be a lesson to be learned by all of us from this trial, and that is no person—regardless of his or her position or status—is above the law.

## THE TIMING IS RIGHT FOR REFORM

Alabama's election laws, which include the financing of campaigns, and our laws relating to lobbying are badly broken and must be fixed. It would be hard for anybody to defend the current system or to convince me that we don't need total reform in these critically important areas. An editorial appeared in *The Birmingham News* on July 9<sup>th</sup> that is pretty much on target. While you might not agree with the writer that a special session of the Legislature is a good idea, I believe you will agree that there is a definite need in Alabama for

the type reform mentioned. The editorial in its entirety is set out below for your consideration:

*In Tennessee, a federal sting operation led to the indictments of five current or former lawmakers on bribery and extortion charges. In February, the Legislature passed a sweeping ethics bill that limits campaign contributions to candidates and political action committees and reins in lobbyists' wining and dining of public officials. In North Carolina, a state investigation resulted in three people being*

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*charged with violating that state's lobbying laws by not disclosing they were under contract to influence lawmakers to pass the state lottery. Last week, the House agreed almost unanimously to ban lobbyists and their clients from giving big gifts to lawmakers and executive branch officials. The Senate could go along this week.*

*In Alabama, a federal probe netted public corruption convictions last month of former Gov. Don Siegelman and HealthSouth founder Richard Scrushy. So far, though, there is nothing but talk about the need for reforming Alabama's campaign finance and lobbying laws. It is a popular subject on the campaign trail. Just about every candidate has come out in favor of banning money transfers among PACs that are designed to hide from the public the true source of a contribution. So let's see those candidates on the hot seat. Governor Bob Riley, after the primary runoff on July 18th, should call lawmakers into special session to reform Alabama's campaign finance and lobbying laws. He should do so now, rather than waiting for the regular legislative session that starts in March, for a couple reasons:*

- To put legislative candidates on the spot. If, as seemingly all of them claim, they want reform, they will pass Riley's bills. If not, they have to answer to voters in November. Riley's Democratic opponent, Lt. Gov. Lucy Baxley, presides over the Senate. Could she afford for the Legislature not to pass reform bills, especially since she made them part of her platform?*
- Timing is everything. When the Legislature convenes in its regular session, the Siegelman conviction will be nine months old. Re-elected lawmakers will be sitting fat and happy for the next four years, and many won't want to cut off the lobbyists' entertainment spigot, or*

*make it harder to be re-elected. They will start dealing with budgets and the hundreds of other bills that are part of a regular session. Campaign finance and lobbying reform likely will suffer the fate it has in the past several sessions: death.*

*Riley, for his part, said Friday he believes campaign finance and ethics reform is "a great idea," but said he would be accused of political grandstanding if he called a special session this summer. Two years ago, Democrats accused Riley of exactly that when the governor tried to call the Legislature into special session to deal with accountability bills, including bills that would ban money transfers between PACs and force lobbyists to disclose every cent they spend on lawmakers. (For the record, we prefer a bill that would ban virtually all lobbyists' spending on public officials.)*

*The timing for a special session this summer may be wrong politically for Riley, but that works both ways. It is wrong politically for Democrats, as well. But that's the main reason the timing is as right as citizens could hope for to actually get the Legislature to pass serious campaign finance and lobbying reform bills. Call a special session, Governor.*

It may be wishful thinking, but I believe a special session limited to reform might just accomplish that which hasn't happened in any regular session on that subject over the past 30 years. Governor Riley and Lt. Governor Baxley would do the people of Alabama a great service if they would simply join hands—forgetting politics for a spell—and support a special session of the Legislature limited to reform of our broken systems relating to elections, ethics, and lobbying. In 5 to 10 days the legislators could come to Montgomery—perhaps during the week after Labor Day—pass a package of reform bills—and then go home. Any member of the Legislature

who has opposition in the general election and who opposed reform during such a session—given that the public clearly wants meaningful reform—would be guaranteed to get a visit to Buck's Pocket in early November. Of course, a good package of bills would have to be prepared in advance of the session. I would suggest that former Governor Albert Brewer be selected to draft the legislation with the assistance of former Supreme Court Justices Gorman Houston and Ralph Cook. These men could do the job quickly and well, in my opinion.

Source: *Birmingham News*

### **ALABAMA IS STILL OPEN FOR BUSINESS AND IS DOING VERY WELL**

A report released in late June of this year by a leading national firm has to be considered great news for Alabama's economy. The report from Industrial Info Resources, a Texas-based firm, gave Alabama outstanding marks for its industrial development efforts. Our state has 193 active industrial projects worth a total of \$3 billion, a 9% jump in project expenditures from the same time in 2005, according to data from the study. Alabama received extremely high marks in the study for its industrial growth. It's real good to know that our state is recognized as a good place for business and industry.

Neal Wade, the director of the Alabama Development Office, has done a tremendous job in selling Alabama's business climate to industry prospects. But when you consider all that Alabama has to offer, selling our state shouldn't be that difficult. Unfortunately, Neal and others have to overcome the negative information put out by the "tort reformers" concerning our state. While false and certainly misleading, it still causes problems. I realize that Alabama's record growth in the important area of industrial development is a bitter pill for those folks to swallow. Clearly, the story they tell the public through the media and by way of political ads is nothing like the truth when it comes to what all is going on in Alabama.

The truth is that Alabama has been very good for business and still is. When I was a mere child, I used to ask my mother how certain things would be if I tried them. On occasion, she would answer: “the proof is in the pudding.” It took me a good while to figure out what she meant by that statement. I finally figured it out—it’s sort of like when an industrial prospect is looking at Alabama as a possible location and is being told about all of our state’s advantages. Once they try Alabama, they always seem to like it here. So when you consider that Alabama was named as **State of the Year** for the fourth consecutive year by Southern Business and Development magazine, it’s a pretty good indication of what’s happening in our state. That ranking, based on corporate and industrial jobs created and investments, placed Alabama over 16 other Southern states. The State of Alabama also received the “Golden Shovel” award, which was based, among other economic indicators, on jobs created and amount of company investment. This sort of factual reality makes it real hard on those who try to sell the myth that Alabama is “Tort Hell” and thus bad for business. Business locators like Alabama. I guess the **proof** really is in the **pudding!**

Source: *The Montgomery Advertiser*

#### **ALABAMA MOVED ENTIRE 2008 PRIMARY TO FEBRUARY**

As everybody now knows, the Alabama Legislature has moved the state’s entire primary election—not just the presidential preference primary—from June to February in 2008. This was done by mistake and it wasn’t discovered until late June. You will recall that the lawmakers wanted to make Alabama an early primary state so that presidential candidates would have to come in early to campaign. Before this discovery, election officials were voicing concern over the fact that the new primary date, February 5, 2008, is also Mardi Gras Day. While it doesn’t affect most of our state, Mardi Gras Day is a major holiday and tourist event in Mobile. As it now stands,

the legislation moving up the presidential preference primary has set all primary elections for the first Tuesday in February.

Alabama’s presidential preference primary was moved from being one of the last in the nation to being one of the first. I believed that was a good move. Under the new law, in 2008 it would go from June 3<sup>rd</sup> to February 5<sup>th</sup>. This would put Alabama’s primary shortly after the Iowa caucuses and New Hampshire primary. Obviously, this would make Alabama—a southern state—most important in the selection process for both parties. It’s my belief that no candidate can be elected president unless they can do well in the south.

Unless the date is changed, the 2008 primary election for the state Supreme Court and other state appellate courts, the presidency of the Public Service Commission, many county commission seats, and a good number of circuit and district judgeships will be shifted from June to February. In an added twist, the Legislature left the primary runoff for state and county offices on the last Tuesday in June. That means a candidate involved in a run-off would have to run from February 5<sup>th</sup> to June 24<sup>th</sup>. This would mean that the run-off campaigns would take more than four months, and that simply won’t work.

It should be noted that Alabama is one of four states being considered by the Democratic National Committee for an even earlier primary. The DNC will decide on August 17<sup>th</sup> whether the DNC approves Alabama. If so, I suppose the new law would have to be changed to accommodate that decision. But, there has been opposition to even having an earlier primary in any state because of the historical significance of the early voting in Iowa and New Hampshire.

#### **TEXAS AND DRUG MAKER SETTLE MEDICAID FRAUD CASE**

The State of Texas has reached an \$8.5 million settlement with Illinois-based Baxter Healthcare Corp. for alleged Medicaid fraud. A scheme to report falsely wholesale prices of spe-

cific drugs and devices prescribed for Medicaid patients, thus defrauding the state Medicaid program, was the basis for the complaint against the drug company. Specifically, Baxter was accused of falsifying wholesale prices in Texas of I-V fluids and injectable medications. The State of Texas has been very active in going after the drug companies that have been cheating that state. It certainly appears that the drug industry took the same approach with the states that Exxon took with Alabama on royalty payments—that it could cheat and most likely never get caught—and it hasn’t worked for that industry either.

Source: *National Law Journal*

#### **A BRIEF LOOK AT THE RUN-OFF ELECTIONS**

As predicted, very few people showed up to vote in the July 18<sup>th</sup> run-off election in Alabama. It may wind up being less than 10% of the registered voters. A few counties broke the low voter turn-off trend because of heated local races. Otherwise, things statewide were pretty dull. Perhaps, the loss by George Wallace, Jr. in the Lt. governor’s race was the biggest news on July 19<sup>th</sup>. His defeat brings to an end a political career for a candidate with the most famous name in the history of Alabama politics.

As for Luther Strange, the winner in that race, some political observers are now asking why close to \$3 million would be spent in a race for an office that has absolutely no power or authority. They might also wonder where that money came from. Remember, this spending was just in the primary. The fall contest pitting Luther against Jim Folsom could be even more costly. In my opinion, Luther and Jim are after an office that should be completely taken out of the legislative branch of government, but that’s another story for another day. I will write more on that thought in a future issue.

For now, I sincerely hope that all of the candidates who survived the primaries—Republicans and Democrats alike—will put their respective cam-

paigns on hold until after Labor Day. That would be doing the people of Alabama a tremendous favor. There will be plenty of time for running and political promises in the fall.

## II. THE NATIONAL SCENE

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### **ORDINARY FOLKS HAVE A NEED FOR LOBBYISTS TOO**

The large and powerful companies in Corporate America (sometimes referred to as “Fat Cats”) have always had ready access to the seats of power at the national level, and that has also been the case in almost every state capitol in America. In recent years that access has become much easier. Lobbyists representing these Fat Cats, who actually are more powerful than some of the elected officials, virtually control much of what happens in government. To say that Corporate America is well stocked with lobbyists is a gross understatement. Unfortunately, there are few organizations that really represent the interests of working men and women, the owners of small businesses, senior citizens and minorities. Groups such as AARP, Common Cause, Public Justice, Center for Justice & Democracy, and Public Citizen are a few that readily come to mind. I have known for several years of the good work that Public Citizen has done. I am not sure, however, that most American citizens really know much about the consumer advocacy organization. For that reason, I will discuss some of what Public Citizen has done and some of its current projects.

For 35 years Public Citizen has taken on and challenged the corporate Fat Cats in our country and has represented the public’s interest in the halls of power. The consumer advocacy group has also had to take on the federal government in the process. They have done all of this with a relatively small staff. Currently, Public Citizen has a number

of issues and projects they are involved with. Some of them include:

- Public Citizen is spearheading efforts to clean up corruption in Washington and expose Congressional abuses;
- They are challenging limits on compensation to victims of corporate wrongdoing;
- They are opposing federal pre-emption of state liability claims;
- They are advocating strong safety and health standards for motor vehicles, food, drugs, and medical devices;
- The group is pushing for energy conservation and fuel economy to reduce global warming;
- They are seeking public financing of elections;
- Public Citizen continues to be a leader in the fight for victims of asbestos exposure;
- They have battled the U.S. Chamber of Commerce and other tort reform groups which undermine citizen access to the courts; and
- Public Citizen has opposed price-gouging by oil companies.

We need other groups that—like Public Citizen—refuse to accept corporate or government gifts or donations. As a result they can be free and independent in their work. Over the 35 years of their existence, Public Citizen has been a steadfast **beacon for independence, truth, and justice**. Their goal is to secure corporate and government **accountability**. I sincerely believe that Public Citizen is a group that should be supported by any citizen who believes in freedom and justice for all Americans. I also believe strongly that we need more groups like Public Citizen to carry on the fight.

### **CENTER FOR JUSTICE & DEMOCRACY STUDY**

The Center for Justice & Democracy released a new study last month revealing how the U.S. Chamber of Com-

merce provides substantial financial and strategic assistance to local front groups to influence state elections, including funding major media buys to smear local candidates in political races around the country. The report, “The Secret Chamber—The Inner Workings of the U.S. Chamber of Commerce and the Hijacking of an Election,” draws from a cache of newly-released papers and deposition testimony uncovered in connection with litigation surrounding the failed 2004 election bid of Deborah Senn for Washington State Attorney General. Joanne Doroshow, Executive Director for the Center for Justice & Democracy, had this to say:

*Most people believe the Chamber is an apolitical and innocuous business support organization. But it is anything but. This group has its hands in just about every level of electoral politics, dipping into the very foundations of our democratic process. It is important that this effect, which has largely stayed under the radar, become known to the public.*

I would recommend that you obtain a copy of the full report. It tells how the U.S. Chamber has been used by powerful special interests in a manner that few people—once they learn what is going on—would ever tolerate. Some of what the Chamber does in political campaigns is nothing short of “gutter politics” of the worst sort. Apparently, the leadership of the U.S. Chamber condones this sort of thing. In the process, the Chamber is taking in and spending tens of millions of dollars in political races around the country. You can read the full report by going to [www.centerjd.org/lib/studies.htm](http://www.centerjd.org/lib/studies.htm).

### **ANOTHER RECORD REVENUE YEAR FOR INDIAN GAMBLING**

Last year, tribal casinos received \$22.6 billion in gambling revenue. In comparison, this was double the take of Nevada gambling. In fact, it was a record year for Indian casinos. That was a 15% increase from the \$19.6 billion that Indian

casinos reaped in 2004, according to the National Indian Gaming Association. Tribal gambling has recorded double-digit growth almost every year since Congress created the legal framework for it in 1988. There are now 408 Indian gambling facilities nationwide, including 247 full-service casinos with slot machines and other Las Vegas-style games in place. Other gambling centers are smaller or offer video poker, bingo, or other similar games.

This is a very large operation, with facilities being operated by 223 Indian tribes in 28 states. Indian gambling generated 600,000 jobs nationwide last year, according to the report. Nevada casinos brought in \$11.6 billion from gambling in 2005, according to the Nevada Gaming Control Board. When you are comparing the Indian tribe gambling to the Los Vegas operations, there is a very big difference. Unlike Indian casinos, though, Nevada casinos rely on hotels, restaurants, and shows for about half their revenue, pushing their total take for 2005 past \$20 billion. The Indian casinos took in almost all of their money strictly from gambling, with only a very small percentage coming from non-gambling entertainment. No wonder Jack Abramoff saw the opportunity to make millions when he set out to cheat and steal from the tribes he represented.

Source: *Associated Press*

### **A GEORGIA PRIMARY ELECTION RACE SENDS A STRONG MESSAGE TO THE NATION**

I don't believe anybody can now dispute the fact that Ralph Reed was closely connected to Jack Abramoff, the corrupt influence-peddler and lobbyist referred to above, and that corruption in and around government is now a national issue. These two men benefited financially in a very big way from their very close association. It was made quite apparent in Reed's first venture into politics as a candidate how the American people really feel about corruption in influence-peddling government. As you probably know, Ralph Reed—with all of his political connec-

tions and access to huge sums of campaign money—lost his race in Georgia, a race that everybody said when he qualified couldn't be lost. In fact, right up to election day, the polls showed the race to be a dead heat. It is most significant that Reed was not only defeated, he was beaten soundly. That loss is being seen as most important from a national perspective in relation to the fall elections. I believe it's an indicator of the public's attitude concerning corruption and influence-peddling in government. If I am correct, this will be a major factor in the fall elections.

The fact that Reed took gambling money initially seemed to come as a surprise to many of Reed's followers and supporters, especially those connected to the Christian Coalition. According to a U.S. Senate report, an Indian tribe sent Reed, the former Christian Coalition leader, more than \$5.3 million through intermediaries to satisfy what were described as his "political concerns." The gambling money came to Reed for his work in Alabama to defeat a state lottery and video poker legislation in 1999 and 2000 on behalf of the Mississippi Band of Choctaws. Reed clearly wanted to hide the source of his newly found wealth. His rejection in Georgia, a fairly conservative state, and one where Republicans in national elections have done very well, is most significant and doesn't bode well for a number of Republican candidates in this fall's congressional races.

As you may recall, the Mississippi tribe was a client of Abramoff. According to Nell Rogers, a Choctaw official, Reed didn't want to be paid directly by a tribe with gambling interests. According to Ms. Rogers, who testified before the Senate Indian Affairs Committee, the payment method was recommended by Abramoff "to accommodate Mr. Reed's political concerns." Obviously, a major concern to Reed was that it would be very difficult for him to explain to ordinary folks, who were sending their hard earned money monthly to the Christian Coalition, why he was taking millions of dollars of gambling money and working for the casinos. That certainly didn't fit

his public image and the conservative message of morality that he preached.

The bipartisan Senate report clearly tied Reed to the influence-peddling operation run by Abramoff on behalf of Indian tribe casinos. The report by the Senate Indian Affairs Committee portrayed Reed as a central figure in Abramoff's lobbying operation, which has been the focus of a criminal investigation by the Justice Department. It seems that Reed used his contacts with conservative Christian groups in the South and Southwest beginning in the late 1990s to block the opening or expansion of casinos that might compete with the gambling operations run by Abramoff's clients.

As you know, Abramoff and his former partner, Michael Scanlon, have pleaded guilty to conspiring to corrupt public officials and bilking some Indian tribe clients out of tens of millions of dollars. These confessed criminals are still cooperating with a federal grand jury investigation that is threatening to derail the careers of several members of Congress. It was significant that Reed's name was invoked repeatedly at the trial of David H. Safavian, the former White House aide who was convicted of lying to federal investigators in a matter that involved Abramoff, Congressman Bob Ney (R-OH), and Reed. The Senate report, a result of a two-year investigation by the Indian Affairs Committee, said of Abramoff and Scanlon, "The depth and breadth of their misconduct was astonishing."

The Senate report documented payments to Reed from two sources, \$1.3 million from the Choctaw Indians of Mississippi, paid through Abramoff's law firm, Preston Gates, through May 1999, and \$4 million that Reed and his associates received from organizations controlled by Scanlon in 2001 and 2002. The report found that Reed's involvement with Abramoff's Indian tribe clients actually dated from 1998. At that time, Reed sent a telling e-mail message to his close friend Abramoff, noting that he was "done with electoral politics" and, "I need to start humping in corporate accounts!—I'm counting on you to help me with some contacts." That

pretty well explains what Reed and Abramoff set out to do. The sad part of this story is how Reed used some good folks in the Christian community for his personal financial gain. It's obvious that the people of Georgia won't tolerate a hypocrite, and that's good news. It caught up with Reed in his bid for public office, and it will likely catch up with others in the fall elections.

Reed's loss in Georgia sends a clear message to all national politicians and one that they best take to heart. That message is that folks don't like hypocrites, and neither will they tolerate **corruption and greed**.

Source: *Associated Press*

### **TEXAS INDIAN TRIBE SUES ABRAMOFF AND REED**

In a related matter, a Texas Indian tribe filed a federal lawsuit last month alleging that Jack Abramoff, Ralph Reed, and their associates engaged in fraud and racketeering to shut down the tribe's casino. The Alabama-Coushatta tribe of Livingston, Texas, alleged that the defendants defrauded the tribe, the people of Texas, and the Legislature to benefit another of Abramoff's clients—the Louisiana Coushatta tribe—and “line their pockets with money.” Coushatta tribe permanently shut down its casino. The funding for economic programs evaporated, over 300 jobs were lost in Polk County, and the Alabama-Coushatta tribe has spent years struggling to recover and revitalize its economy through other means, the tribe said in its lawsuit.

The lawsuit, filed in the U.S. District Court for the Western District of Texas in Austin, also names Abramoff's ex-business partner Michael Scanlon, a former aide to former Rep. Tom DeLay, R-Sugar Land; Neil Volz, a former aide to Rep. Bob Ney, (R-OH); and Jon Van Horne, Abramoff's former colleague at his law and lobbying firm, Greenberg Traurig. Although the tribe alleges Greenberg Traurig was part of the scheme, it did not name the law firm as a defendant. It was reported by Associated Press that the tribe has been in settlement discussions with that firm.

Source: *Associated Press*

### **IT APPEARS THAT ROVE MAY HAVE DODGED A BULLET**

I have always felt that regardless of what he might have done, Karl Rove was too smart and perhaps too powerful to ever be indicted for a criminal offense. It now appears that I was correct, now that more details of the Valerie Plame leak investigation that resulted in the indictment of one powerful person are coming out. In his syndicated column released on July 12<sup>th</sup>, the ultra-conservative columnist Robert Novak—with close ties to the Bush White House—revealed his side of the story relating to the Plame affair. The columnist now says Rove was a confirming **source** for his story on the CIA officer. Novak—for whatever reason—underscores Rove's role in a leak President Bush once promised to punish. In fact, the President said he would fire those responsible for the leak. But, I doubt seriously that this President could ever afford to fire Rove.

Source: *CBS News*

### **LAWSUIT FILED OVER CIA LEAK BRINGS IN SOME BIG NAMES**

Joseph Wilson and his wife, Valerie Plame, the CIA officer whose identity was leaked to reporters, have filed a civil lawsuit in federal court against Vice-President Dick Cheney, Karl Rove, and Scooter Libby. These defendants, along with other White House officials, were accused in the suit of conspiring to destroy Ms. Plame's career. Cheney, Rove, and Libby were accused of revealing Plame's CIA identity in seeking revenge against Wilson for criticizing the Bush administration's motives in Iraq. The lawsuit accuses Cheney, Libby, Rove, and 10 unnamed administration officials or political operatives of putting the Wilsons and their children's lives at risk by exposing Plame. It was alleged in the complaint:

*This lawsuit concerns the intentional and malicious exposure by senior officials of the federal government of ... (Plame), whose job it was to gather intelligence to*

*make the nation safer and who risked her life for her country.*

As you know, Libby is the only Administration official who has been charged criminally in connection with the leak investigation. He faces trial in January on perjury and obstruction-of-justice charges, accused of lying to FBI agents and a federal grand jury about when he learned of Plame's identity and what he later told reporters. I am not sure where this suit is headed, but it has the potential of uncovering more of how this Administration deals with their political enemies.

Source: *Associated Press*

### **DEMOCRATS SHOULD DO WELL ON NATIONAL LEVEL THIS FALL**

According to a recent poll, it is now very clear that Republicans could lose control of Congress in November. The latest *Associated Press-Ipsos* poll found that Americans, by an almost 3-to-1 margin, hold the GOP-controlled Congress in low regard and want Democrats to take control after a dozen years of Republican rule. According to the poll, the Democrats hold the edge among “persuadable voters,” a prospect that doesn't bode well for the Republicans. Democrats also do much better with voters who label themselves as “conservative,” and that was a shocker.

The election ultimately will be decided in 435 House districts and 33 Senate contests, in which incumbents typically hold the upper hand. But the survey underscored the difficulty Republicans face in trying to persuade a highly skeptical public to return them to Washington. To take control of Congress, the Democrats must displace 15 Republicans from House seats and six Republicans from the Senate. The AP-Ipsos survey asked those polled if the “election for the House were held today, would they vote for the Democratic or Republican candidate” in their district. Based on the response, Democrats were favored 51% to 40%. Interestingly, because those wanting a change included a good number of so-called **conservative** voters, it is very bad

news for Republican candidates.

I suspect the Reed loss in the Lt. governor's race in the Republican primary in Georgia—a rejection of the poster-boy of the conservative wing of the Party, a reaction to corruption and influence peddling—will get the attention of those who are in charge of the national Republican Party. Incidentally, the Georgia vote came after the poll mentioned above was done. All of this should help Democratic candidates in the Congressional races this fall. But, we should remember—the national Democratic Party is certainly capable of **messing** things up between now and Election Day in November, so stay tuned!

Source: *USA Today* and *Associated Press*

### **GLOBAL WARMING SIMPLY CAN'T BE IGNORED OR DISMISSED ANY LONGER**

All Americans should be both shocked and greatly concerned over how the Bush White House and many in Congress have virtually ignored the obvious dangers associated with global warming. In my opinion, the weight of evidence on this issue is not only overwhelming, but highly disturbing. We have had clear warning signals over the past several years indicating that something is badly wrong as a result of global warming pollution. It seems clear that the earth's climate is being changed at a rapid pace. The repercussions are being felt and killer heat waves, more fierce storms, shrinking ice caps, and rising sea levels are all examples. It is sad—but true—that the U.S. is the world's largest emitter of global warming pollution. There are many examples of what is happening that should make President Bush and others wake up on the issue of global warming. For example, the effect that global warming is having on wildlife is beginning to show up around the world. The following are five shocking examples of what's happening right now relating to wildlife that should be clear warning signals:

- **Coral reefs** have undergone extensive damage, called coral bleaching,

because of increasing temperature of ocean waters. In one year alone, 16% of the world's coral reefs were wiped out.

- Surprised researchers found dead **polar bears** far out at sea last year. Forty percent of the ice in the Arctic has already melted and polar bears must travel further and further to find food. The bears simply couldn't swim far enough to reach the receding ice, and many of them drowned!
- Thousands of **caribou calves** have been swept to their deaths when migrating across rushing rivers that should have been iced over.
- **Penguins** struggle for their lives because they cannot find enough of their main food source, krill, which are dying off because of rising ocean temperatures.
- **Beautiful Monarch** butterflies experienced a mass die-off in 2002 due to hazards caused by the increased rainfall attributed to global warming; scientists fear that this is the first of many similar incidents.

Wildlife and nature are speaking to us on this critically important issue, and it's time for each and every one of us to listen. That certainly includes our elected leaders and those who run the large and powerful oil companies. We can't afford to let these oil companies continue to set policy for our nation's government in this important area of concern. All American citizens, even those who head up major corporations, have a vital stake in this battle. Each of us can play a vitally important role in a nationwide movement to address global warming. We simply can't afford to sit back and let the oil companies and a few politicians dictate our nation's policy on global warming. If you agree, let President Bush and your U.S. Senators and members of Congress know how you feel. If you want more information on the subject of global warming, a good source is [www.environmentaldefense.org](http://www.environmentaldefense.org).

### **U.S. SUPREME COURT WILL HEAR STATES' CASE AGAINST EPA OVER CLIMATE CHANGE**

During his first run for the presidency George W. Bush was telling the voters that once elected, he would make sure that carbon dioxide was properly regulated. But in early 2001, shortly after taking office, President Bush changed his tune. One reason he gave for the change of mind was that it would be too expensive to force reductions of the leading heat-trapping "greenhouse gas." Of course, that is at the very heart of the debate over global warming. Since Bush was elected, almost nothing of consequence has been done to avert the most serious problem of climate change. In fact, the White House has pretty much danced to the tune played by the oil company executives on this issue. Now the U.S. Supreme Court is involved, and what it does may force the president to shift gears once again. On the other hand, the High Court could accept the Administration's argument that there are other and cheaper ways to address climate change. In any event, the justices have agreed to take up a case brought by a dozen states to require the Environmental Protection Agency (EPA) to regulate carbon dioxide released from the tailpipes of automobiles and other motor vehicles.

The ruling could be one of the Court's most important ever involving the environment because it will determine how the nation addresses global warming. As you may know, the states have been in a running pollution battle with the Bush Administration for the past several years. The Supreme Court will decide whether the EPA is required under the federal Clean Air Act to treat carbon dioxide from automobiles as a **pollutant** harmful to public health.

Repeatedly, President Bush has rejected calls by environmentalists and some lawmakers in Congress to regulate carbon dioxide, favoring voluntary actions and development of new technologies to curtail such emissions. But a dozen states argued that carbon dioxide and other heat-trapping chemicals from automobile tailpipes should be treated as unhealthy pollutants and regulated.

The states filed a lawsuit in an effort to force the EPA to curtail such emissions just as it does cancer-causing lead and chemicals that produce smog and acid rain. That certainly seems a logical approach to the problem. This will be the Supreme Court's first major case involving climate change.

Reduction of all greenhouse gases is absolutely necessary if we are to reduce the amount going into the atmosphere. I believe most American citizens believe that prompt action on climate change is critically important. The states involved, which together account for more than a third of the car market, contend the Clean Air Act makes it clear that carbon dioxide is a pollutant that should be regulated if it poses a danger to public health and welfare. They argue it does so by causing a warming of the earth.

In their appeal, the states contended that the case "goes to the heart of the EPA's statutory responsibilities to deal with the most pressing environmental problem of our time," the threat of global warming. California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington are the states that brought the lawsuit. They were joined by a number of cities, including Baltimore, New York City and Washington D.C.; the Pacific island of America Samoa, the Union of Concerned Scientists; Greenpeace; and Friends of the Earth. The case will be watched closely.

Source: *The Insurance Journal* and *Associated Press*

#### **LONG-STANDING PROBLEMS AT FDA CONFIRMED**

Over the past few years, we have frequently written about the many problems at the federal Food and Drug Administration (FDA). Recently, a survey by the Union of Concerned Scientists confirmed what many medical and healthcare experts have felt relating to the performance of the FDA. Dr. Sidney Wolfe, Director of Public Citizen's Health Research Group, issued the following statement relating to the study:

*In research results released today,*

*the Union of Concerned Scientists (UCS) confirmed a long-standing problem at the U.S. Food and Drug Administration (FDA): Agency workers who analyze drugs for safety and effectiveness are being thwarted in their jobs, and as a result, drugs with questionable safety records are approved for use by millions of Americans. While the tendency may be to blame the current administration, this problem has been going on well before President Bush took office. In fall of 1998, Public Citizen conducted a similar survey as UCS and found that drug officers then had serious concerns about the safety of the drugs the agency was approving. Then, as now, the officers said that standards had sunk and that drugs were being approved too quickly and without regard for patient safety. Nineteen medical officers identified 27 drugs put on the market during the previous three years that they thought should not have been approved. Eight medical officers reported 14 instances in three years in which they had been instructed not to present their own opinion or data to an FDA advisory committee when doing so might have reduced the likelihood that a drug would be approved.*

*The culprit is two-fold. First, FDA user fee legislation creates an inherent conflict of interest. Under this legislation, companies—primarily drug companies—this year will pay \$380 million to the FDA. An agency cannot effectively regulate industries that pay the salary of so many of its employees. Second, there is a dangerous lack of congressional oversight of the FDA. The last serious oversight hearing was held 20 months ago by Sen. Charles Grassley (R-Iowa). Meanwhile, the agency continues to approve drugs that have no unique benefits but serious risks that can endanger the lives of those who take them, and fails to*

*promptly remove drugs from the market once presented with evidence of dangers. It is inexcusable for Congress to sit idly by while patients die needlessly. Until user fee legislation is repealed and Congress holds regular oversight hearings—as it used to—the public will see the same survey results repeated in future administrations.*

I hope President Bush and the leaders in Congress—both Republicans and Democrats—will unite on this issue and correct the problems that exist at the FDA. While these problems have been identified on numerous occasions, they linger on. We can no longer afford to sweep them under the carpet. The time to act is now. It will take the repeal by Congress of some bad laws, passage of some needed legislation to strengthen the agency, and finally more funding from our lawmakers. This is something that—in the interest of public health—can't be ignored any longer.

Source: Public Citizen

#### **FDA ISSUES FEWER CITATIONS RELATING TO SAFETY AND QUALITY**

I have said on a number of occasions that the Food and Drug Administration (FDA) is little more than an extension of the powerful drug industry. That's why I wasn't surprised to learn that the FDA is citing fewer companies for poor quality or safety standards despite a relatively constant number of violations by companies. This information comes from a congressional report and ties in with the conclusions reached by the UCS survey. The FDA issued 535 warning letters in the fiscal year ended September 30<sup>th</sup>, a 15-year low and down 54% from five years earlier. The report, resulting from an inquiry initiated by Rep. Henry Waxman (D-CA), also says that the FDA has routinely rejected enforcement recommendations of its field inspectors and sometimes responded so slowly that it missed internal deadlines to take action.

The FDA in a statement responded that the numbers from the report don't

tell the whole story and that the agency protects the public by concentrating on high-risk cases. The FDA claims compliance has actually improved. In reviewing thousands of pages of FDA documents, according to *USA Today*, congressional investigators found at least 32 cases in which inspectors' calls for warning letters, product seizures, or court injunctions were denied. Examples in the report show how far apart inspectors and decision-making officials can be:

- The FDA's Denver office in 2001 recommended a warning letter to a company whose hangover treatment had what inspectors said was a toxic level of caffeine. Three people who took it were admitted to emergency rooms. FDA headquarters said the concerns didn't meet the "regulatory significance threshold for enforcement."
- An "anti-itch" cream contained no active ingredient. It took FDA headquarters 11 months to reject an inspector's call for a warning letter. Documents indicate the FDA noted that the company was a "very small operation," which is irrelevant.

I have little confidence in the FDA's ability to do its job properly. The power and influence of the drug industry is so great in Washington that the FDA has been made largely ineffective in its regulatory role. A major problem is that Congress has underfunded the agency consistently, which has made the FDA far too dependent on the drug companies for financial assistance. That has led to the "tail wagging the dog" in too many areas of regulatory concern.

Source: *USA Today*

#### **EXPERIMENTS ON HUMANS TO INCLUDE CHILDREN**

It appears that the Bush Administration had a great deal of help from the pesticide and chemical industries when the Environmental Protection Agency (EPA) proposed rules authorizing experiments on humans with pesticides and other chemicals. Notes from meetings

with pesticide industry lobbyists, which raise some interesting questions, have been made public by Public Employees for Environmental Responsibility (PEER), a Washington, D.C. public interest group. Industry requests for exemptions allowing some chemical testing on children, along with other requested provisions, were incorporated into the human testing rule that was ultimately adopted on January 26<sup>th</sup>.

According to PEER, at the August 9, 2005 meeting, held inside the President's Office of Management and Budget (OMB), representatives of the pesticide trade association, Crop Life America, as well as Bayer Crop Life Science, met with OMB and EPA officials. Also attending was a former top EPA official, James Aidala, who now acts a lobbyist at a law firm representing chemical companies. The meeting notes detail industry concerns about the text of a proposed rule that the Bush Administration first made public a month later on September 12<sup>th</sup>. One could conclude from the meeting notes that the pesticide industry's top objective was getting access to children for experiments.

The deadline for EPA final approval for a controversial class of pesticides derived from nerve agents called organophosphates was August 3<sup>rd</sup>. This appeared to be a top industry priority. At press time, we hadn't heard whether approval was given, but I suspect it was. Interestingly, the human testing rule adopted by EPA earlier this year contains the loopholes advocated at the OMB meeting for exposing children to pesticides. These include testing on workers and exposures unconnected with the approval process for new pesticides or new uses for existing agents. In addition, the rule broadly allows dosing experiments on infants and pregnant women using non-pesticide chemicals. PEER Executive Director Jeff Ruch made this observation:

*Using human beings as guinea pigs to test the toxic strength of commercial poisons has become a central regulatory strategy under the Bush Administration.*

Although there is nothing inherently

wrong with government officials meeting with representatives of a regulated industry, it is important that other views be heard at similar meetings and seriously considered. I also believe that all meetings of this kind should be made public and not hidden from view. It certainly appears that testing of the sort described above should be a matter of public interest.

### **III. LEGISLATIVE HAPPENINGS**

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#### **NEW ALABAMA CHILD SAFETY SEAT LAW LAWS IS IN EFFECT**

Alabama children now come under a stronger child safety seat law that requires booster seats for the first time in the state. The new law, pushed through the Legislature largely by VOICES for Alabama's Children, took effect on July 1<sup>st</sup>. This is a needed change for Alabama children and a good move from a safety standpoint. State Senator Quinton Ross, motivated by the death of his own niece in an accident in 2003, worked with VOICES for three long years to get the Legislature to finally approve the stricter child safety seat law. Interestingly, the bill finally passed on the final day of the regular session.

For years, state law has required children 3-years-old and under to use safety seats. Those 4 and 5 had to be restrained, but it could be with adult seat belts. Children that age aren't tall enough for seat belts to secure them properly during a collision, which meant that they were at risk of significant injury. The legislation will require children to be in rear-facing car seats until they are 1 year old or weigh 20 pounds. Then they must be in forward-facing car seats until they are 5 year-olds or weigh 40 pounds, in booster seats until they turn 6, and in regular seat belts until they turn 15. The last requirement applies to the rear seats because state law already requires all front-seat occupants to wear seat belts. The new law covers passenger cars, pickup

trucks, vans with seating capacity for 10 or less, minivans and sports utility vehicles. All of the legislators, and especially Senator Ross, should be commended for passing this needed legislation.

#### **OTHER SAFETY LAWS THAT WERE PASSED**

In addition to the child restraint law, the Alabama Legislature passed some other safety laws during the last regular session. Some of these new laws include the following:

Motorists will be required to move over a lane when approaching a stopped emergency vehicle on a four-lane highway.

It will now be a separate crime to shoot into an occupied or unoccupied school building or school bus.

The publication of Social Security numbers on state documents will be restricted.

The state's ban on students carrying cell phones to public schools was repealed. Each city or county school board will now be able to set its own policy.

## **IV. THE CORPORATE WORLD**

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#### **STATES SUE CHIP MAKERS OVER PRICE FIXING**

A number of states filed a lawsuit last month against seven global memory chip makers, accusing the companies of overcharging their customers and price fixing. Earlier, New York Attorney General Elliot Spitzer filed a separate lawsuit to recover damages for consumers in his state. These developments open a new chapter in the four-year-old investigation that has already led to large fines for the companies and prison sentences for several executives.

The multistate suit, filed in federal District Court in San Francisco, accused the chip makers of conspiring to fix prices and manipulate supply from 1998 to 2002. Consumers and equipment manu-

facturers were overcharged. The end users—the consumers—may have overpaid for the memory chips by hundreds of millions of dollars because of the price fixing. The case involves dynamic random access memory, or DRAM, chips, which are commonly used in personal computers, printers and electronics devices like cell phones and digital cameras. The chip companies named in the multistate suit include Infineon Technologies, Hynix Semiconductor, Micron Technology, Mosel Vitelic, Nanya Technology, Elpida Memory, and NEC Electronics America. California and Illinois are the co-leaders in the suit, which involves 34 states, including Florida, Massachusetts, Maryland, Ohio, and Pennsylvania, as plaintiffs.

The computer makers that bought the chips include Apple Computer, Dell, Gateway, I.B.M., Hewlett-Packard and Compaq Computer, which merged with Hewlett-Packard in 2002. The civil lawsuit grew out of the criminal case brought by the Justice Department in 2002 charging Hynix, Samsung, Infineon, and Elpida of conspiring to fix prices of DRAM chips. In that case, Micron agreed to cooperate with investigators in exchange for amnesty from criminal charges, while Samsung, Hynix, Infineon, Elpida, and 12 chip company executives pleaded guilty to price fixing. Collectively, the companies and individuals paid more than \$730 million in fines, and several executives received prison sentences.

*Source: New York Times*

#### **CRIMINAL ACTS AND CORPORATE FRAUD ARE OUT OF CONTROL**

Over the past few years, we have witnessed the worst examples of corporate crime and intentional fraud committed by corporate bosses that our country has ever experienced. From Enron to WorldCom, with many other corporations in between, we have seen some real bad conduct by corporations and their bosses. The following are a few examples: cheating the government on federal contracts, fraud involving mutual fund practices and finite reinsurance

transactions, securities fraud of all sorts, corporations cheating the federal government, large and small, on government contracts and on federal programs; cheating of the federal government by companies doing business in Iraq; massive fraud relating to Katrina; actual looting of corporations by their bosses; failures by corporations to fund employee pension plans—and the list goes on.

Sadly, **bad conduct** by some corporations and their bosses has dominated the news on the business pages almost daily, and that has been the case for the past five years. It has become commonplace for the news media to report cases in which corporate executives have cheated the government, other companies, the public, and even their companies' own employees and shareholders. When will all of this stop?

The American people want corporate fraud and criminal activities by corporate executives to be stopped now, and they expect government to act aggressively to accomplish that goal. Clearly, the federal and state governments have a shared responsibility to make this happen. It's also essential for the criminal and civil courts to be kept open and available to deal with this most serious problem, which that has become like a cancer in our country. I suppose that all of this sort of thing has been going on for years, but the public just didn't know about it. I have always suspected that the "tort reform" movement was devised by smart folks in the very beginning to protect corporate wrongdoers. I am now firmly convinced—more than ever—that I was on target at the time in my suspicions.

#### **BOEING GETS FAVORABLE TREATMENT IN A MOST SERIOUS CRIMINAL CASE**

The federal government has settled its criminal case against the Boeing Company. The timing of the Justice Department's announcement concerning the settlement of Boeing's criminal case, however, was more than just a little interesting. A news release on the settlement was put out on June 30<sup>th</sup>, the

Friday before the July 4th weekend—a rather strange time to talk about such a serious case. Obviously, none of the national media representatives had Boeing on their minds during that weekend. Clearly, the announcement didn't concern just another run-of-the-mill Justice Department criminal case. Could it be that this deal is not one that the government is real proud of?

In any event, the Justice Department announced that Boeing will not be criminally prosecuted for its alleged criminal activity. Instead, Boeing will pay a \$50 million criminal penalty and another \$615 million as a civil penalty to resolve federal claims against the company. The case involved the company's improper hiring of the former Air Force Acquisition Chief, Darlene A. Druyun, by Boeing. The charges against Boeing would be classified by any standard as major. The settlement also dealt with Boeing's handling of a competitor's proprietary data and information in connection with the Evolved Expendable Launch Vehicle Program and certain NASA Launch Services Contracts.

There were several interesting aspects of this non-prosecution agreement. It appears that Boeing's lawyers were able to get some extremely favorable language put in the settlement agreement. It's apparent that Boeing had good reason for not wanting the full document released to the news media and ultimately to the public. I surely do hope that this isn't typical of how the government plans to handle major criminal case in the future.

#### **HEALTH CARE PROVIDER TO SETTLE MEDICARE CHARGES**

We are still getting reports of companies that have been caught cheating the federal government on government programs. One recent case involved Saint Barnabas Healthcare System, which will pay \$265 million to settle federal charges that it cheated Medicare out of more than \$500 million by inflating charges for seriously ill patients. Prosecutors alleged that Saint Barnabas hospi-

tals deliberately inflated charges for patient care under the Medicare program. The hospitals apparently started tacking on extra charges, such as the cost of nursing and housecleaning, making treatment appear more costly than it actually was.

Prosecutors became aware of the allegations in 2002 when three whistleblowers filed suits alleging Medicare overcharges. This is just another example of a situation where a corporation cheats the government on a federal program designed to help citizens. It's impossible to understand how any company could believe cheating the U.S. taxpayers who pay the cost of federal programs can be justified. Those companies are also cheating the very citizens who are to be the beneficiaries of those programs, and that is a sad commentary on our times.

*Source: National Law Journal*

#### **TENET TO PAY \$900 MILLION FOR CHEATING THE GOVERNMENT**

Over the past year, Tenet Healthcare Corp., the nation's second largest hospital chain, has been in the news for a number of reasons. Now Tenet has agreed to pay \$900 million to settle claims brought by the U.S. Justice Department that it had systematically cheated Medicare by using several illegal billing practices. The settlement stems at least in part from a whistleblower lawsuit filed in November 2002 by two whistleblowers

The claims against Tenet that led to this settlement included allegations that it was abusing a Medicare provision that provides for supplemental payments for unusually expensive cases, referred to as "outliers." Those claims against Tenet led to a massive investigation that included prosecutors in the Eastern District of Pennsylvania; the Central District of California; the Northern District of Alabama; the Eastern District of Louisiana; the Eastern District of Missouri; and the Western District of Tennessee. All corporations that engage in health care fraud in any form must be brought to justice. Fraudulent efforts by

hospitals or other health care providers to claim excessive sums from the Medicare program simply can't be tolerated. It's good to see the Justice Department aggressively going after these wrongdoers. Under the terms of this settlement, Tenet, which is headquartered in Dallas but operates dozens of hospitals throughout the United States, will pay a total of \$900 million over a four-year period, plus interest, to resolve various allegations involving its billings to Medicare and other federal health care programs. The settlement also says Tenet will waive its right to pursue receipt of \$175 million in certain outlier and disproportionate share payments that have never been recorded by the company pending a resolution of these issues and the uncertainty that they would ever be received.

According to Tenet, this settlement will bring to a close several previously disclosed investigations, including one by the U.S. Attorney in Los Angeles into Medicare outlier payments; and six others relating to physician financial arrangements by the U.S. Attorneys in Los Angeles; El Paso, Texas; Memphis, Tenn.; St. Louis, San Francisco and New Orleans, as well as civil litigation over Medicare coding that the Department of Justice filed against the company in January 2003.

The bulk of the settlement—more than \$788 million—related to claims arising from Tenet's receipt of excessive "outlier" payments, which are intended to be limited to situations involving extraordinarily costly episodes of care. Tenet inflated those charges "substantially in excess of any increase in the costs associated with patient care and billing for services and supplies not provided to patients," according to the Justice Department.

About \$47 million of the settlement apparently related to claims that Tenet "paid kickbacks to physicians to get Medicare patients referred to its facilities. It was alleged that Tenet billed Medicare for services that were ordered or referred by doctors with whom Tenet had "an improper financial relationship." Another \$46 million apparently were

related to claims that Tenet engaged in “upcoding,” a term that refers to situations in which improper diagnosis codes were assigned to patient records in order to increase reimbursement.

Finally, the settlement calls for Tenet to enter into a multi-year “corporate integrity agreement” with the Office of Inspector General (OIG) in the U.S. Department of Health and Human Services. Interestingly, OIG promised not to exclude Tenet hospitals from any federal health care program if Tenet will execute an acceptable corporate integrity agreement. The plan calls for Tenet to employ an independent review organization to provide an external review of the company’s ongoing compliance in the areas of Medicare coding, physician financial relationships, setting of hospital charges, and quality of care.

It should be noted that the Tenet settlement is similar to other settlement reached by the Justice Department with health care providers including the one involving St. Barnabas Healthcare mentioned above. I am told there will be more settlements of this nature involving others coming very soon. For the life of me, I can’t understand how any corporate board could allow its company and top executives to lie, cheat, and steal in its dealings with the federal government. The old excuse that “everybody is doing it” is clearly no justification. Repeat violators should be **banned** from participating directly or indirectly in federal programs by contract or otherwise. In my opinion, that’s the surest way to stop corporations like Tenet and many others from cheating, getting caught, paying a fine, and then being allowed to keep on doing business with the government.

Source: *The Legal Intelligencer*

#### **MOTOROLA SUED OVER ADELPHIA FRAUD**

Adelphia Communications Corp. sued Motorola Inc. for \$1.1 billion, claiming the maker of cable boxes helped Adelphia founder John Rigas direct a fraud that led to the cable company’s collapse. The suit claims Motorola falsified documents to help Rigas and his son

Timothy Rigas book “phantom income.” The suit filed in U.S. Bankruptcy Court, just hours after cable box maker Scientific-Atlanta Inc. agreed to pay \$20 million to settle a Securities and Exchange Commission lawsuit claiming it also helped the Rigas deceive investors. Adelphia said that “Motorola was an active and knowing participant in the Rigas insiders’ fraudulent accounting scheme.”

Source: *Associated Press*

#### **MORGAN STANLEY TO PAY \$10 MILLION FINE**

Morgan Stanley has agreed to pay a \$10 million civil fine to settle charges by the Securities and Exchange Commission (SEC) that it failed to maintain safeguards to prevent the misuse of inside information. The SEC also censured the securities firm under the settlement. The investment house has agreed to refrain from future violations of the securities laws. Morgan Stanley, the third-largest U.S. securities firm by market value, also agreed to hire an independent consultant to review its policies and practices for preventing misuse of confidential company information. In a civil lawsuit, the SEC said Morgan Stanley for years failed to adequately maintain and enforce procedures to prevent the misuse of inside information regarding companies whose securities are held in hundreds of thousands of employee and employee-related accounts. The agency did not say whether any illegal insider trading or other improprieties had occurred using inside information as a result of the alleged lapses.

From at least 2000 to 2004, Morgan Stanley failed to conduct needed surveillance of hundreds of thousands of employee and employee-related accounts to detect possible insider trading, according to the SEC. Interestingly, this was the second SEC fine against Morgan Stanley in recent weeks. On May 10<sup>th</sup>, the firm agreed to pay \$15 million to settle charges by the SEC that it repeatedly failed to provide tens of thousands of e-mails that the Commission sought in major investigations over

several years. I hope the firm has learned its lesson and doesn’t just consider the fine as a part of the cost of doing business.

Source: *Associated Press*

#### **TECHNOLOGY FIRM SETTLES SEC CHARGES**

Technology company Scientific-Atlanta Inc. has agreed to pay \$20 million to resolve federal regulators’ allegations that it helped now-bankrupt Adelphia Communications Corp. to inflate its earnings improperly by some \$43 million in 2000. The Securities and Exchange Commission (SEC) reported the settlement with Scientific-Atlanta, a cable television technology company that was acquired by Cisco Systems Inc. in February for \$6.9 billion. The SEC said that Scientific-Atlanta, a maker of boxes that go on top of cable TV sets, entered into a marketing agreement with Adelphia in 2000 that Adelphia misused to inflate its earnings by around \$43 million. Adelphia asked Scientific-Atlanta to increase the price of the boxes it sold to the company and give the amount of the price increase back to Adelphia as marketing support payments. Adelphia used the price increase to inflate its earnings artificially.

Source: *National Law Journal*

#### **COUNTY MEDICAL CENTER SETTLES KICKBACK ALLEGATIONS**

Not all of the wrongdoing relating to federal programs involves large corporations. For example, Marion County Medical Center, located in Marion County, South Carolina, has agreed to pay the United States \$3.75 million to resolve allegations of health care fraud against the government. The settlement resolves allegations that Marion County Medical Center submitted false claims to Medicare, Medicaid, and TRICARE, the U.S. military’s health care program, by engaging in financial relationships with certain physicians that were prohibited under the Stark Law and/or the Anti-kickback Statute. The settlement also resolves allegations that Marion submitted claims to Medicare for professional

services for initial hospitalizations that were coded at a level higher than the services that were provided.

Source: Department of Justice News Release

## V. CAMPAIGN FINANCE REFORM

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### **PUBLIC FUNDING OF CAMPAIGNS FOR FEDERAL OFFICE MAY BE THE ANSWER**

Four major national campaign reform organizations have launched a campaign to build public and political support for comprehensive public financing of congressional campaigns. Common Cause, Public Campaign Action Fund, Public Citizen, and the U.S. Public Interest Research Group (US PIRG) unveiled their “Voters First” pledge that they will ask all congressional candidates to sign. The pledge includes specific policies to make elections fair for all, restore congressional accountability, and protect voters’ right-to-know. Candidates for federal office will be asked to support a comprehensive agenda to clean up Congress. They will be asked to sign the pledge in congressional districts across the country.

A nationwide public opinion revealed that many voters are tired of politicians who put the public’s interest behind the agendas of big political donors and Washington lobbyists. The polling showed that voters are ready to embrace substantive reform that will help put their concerns at the top of the congressional agenda after the fall elections. In the wake of massive lobbyist scandals, the soaring costs of national and state campaigns, and almost total discontent with Washington generally, voters are clearly ready for a more open, clean, and fair system of campaign funding, according to the pollsters. The survey also found that candidates who sign a pledge to support reform would receive a dramatic boost from voters. For example, a Republican candidate gains 26% and a Democratic candidate gains 13% over an opponent from the

other party who refuses to sign a pledge of support, the polling revealed. Common Cause President Chellie Pingree, who sees a need for prompt action, observed:

*The scandals have made clear to voters that money talks. A public financing system for Congress would go a long way toward putting constituents’ concerns first, and involving lots of new people and fresh ideas in the political process.*

It should concern all American citizens that, even with all of the scandals and wild political spending, neither the Bush Administration nor Congress seems overly concerned. Public Citizen President Joan Claybrook, who believes that inviting a Clean Elections’ system of full public financing for Congressional campaigns is the answer, observed when the movement was announced:

*Government ethics—especially these days—is a laughable oxymoron. Congress has some ethics rules on the books, but no one is watching. Congressional ethics rules regarding gifts and travel need to be strengthened—and enforced.*

Nobody can dispute that at present, political campaigns are totally dominated by special interest money. Tremendous sums of money are being donated directly, as well as indirectly, to political campaigns, and as the old saying goes—“money talks.” For that reason, among others, the political playing field must be shifted in a direction that gives ordinary folks a real voice in government on the federal level. The Voters First Pledge calls on candidates to put voters ahead of lobbyists and the suppliers of their funding by supporting legislation to:

- **Make Elections Fair.** Establish and enforce campaign spending limits by providing a set amount of public funding for all candidates who agree to take no private contributions.
- **Restore Accountability.** Pass and enforce meaningful new restrictions

on gifts and travel from lobbyists and other powerful interests for members of Congress.

- **Protect Voters’ Right-To-Know.** Require full disclosure on the internet of all lobbyists’ contributions and any fundraising help members of Congress get from lobbyists.

While I have never believed that public financing of political campaigns in federal elections would ever happen in my lifetime, I have now changed my mind—the reason being that voters appear to be ready to demand a change in that direction. Frankly, this approach may be the only answer. What do you think?

Source: Public Citizen

## VI. PRODUCT LIABILITY UPDATE

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### **NEW DRUG MAKERS’ LABELING IS DESIGNED TO PROTECT CORPORATE WRONGDOERS**

As of June 30th, drug manufacturers were required by the Food and Drug Administration (FDA) to provide more concise and better organized patient information package insert sheets. On the surface, this seems like a good thing, and it really should be. Any drug approved within the last five years must now have new requirements implemented gradually over the next seven years. The inserts must feature:

- a table of contents;
- a toll-free number to encourage reporting of adverse drug events;
- the initial date of FDA product approval; and
- a section called “Highlights” that will summarize some of the most important drug information including benefits, risks, and usage.

Unfortunately for persons who have an adverse result because of using a “bad drug,” there is a more sinister

aspect to this labeling change request. Some believe that the label changes will make it more difficult to sue drug manufacturers in product liability lawsuits. In an effort to aid the drug manufacturers, the FDA included wording in the new requirement that could exempt them from state product liability lawsuits. While I doubt that will ever happen, I do anticipate that it will be used as a defense in cases. If the courts follow established law, it shouldn't be a problem. The adequacy of information provided in the information sheets to healthcare professionals and to patients has recently been a source of class action lawsuits over drugs such as Vioxx, Bextra, and Celebrex. Drug companies simply haven't consistently furnished adequate information on certain drugs. The FDA's new rules could be a positive step in improving medication use if fully implemented. But, the FDA has no business trying to block the constitutional right of a victim, or a victim's family in case of death, to file a civil lawsuit in court.

Source: *Insurance Journal*

#### **SENSOR MAKER MAY BE AT FAULT IN FORD TRUCK FIRE LAWSUIT**

You will recall that Ford Motor Company has encountered lots of problems with fires relating to Ford F-150 pickups. A Massachusetts-based manufacturer of sensors and controls that has been implicated has denied responsibility for a pickup truck fire that an Iowa man says killed his wife last year. A lawsuit was filed against Ford Motor Co. and Texas Instruments Inc. arising out of that incident. It was alleged that a faulty cruise control switch caused the fire in 2005 that spread from a garage and into the Iowa family's home. A 74-year-old woman died in the fire that destroyed the home. The lawsuit blamed the fire on the **cruise control deactivation switch** in the 1996 Ford F-150 pickup.

The switch was manufactured by Texas Instruments' sensors and controls division, which was sold to Bain Capital LLC, of Boston, for \$3 billion in April. It is now known as Sensata Technologies

Inc., and is based in Attleboro, Mass. The lawsuit, originally filed last year in a Texas federal court, was transferred to Iowa in February. The lawsuit claims the company rushed to design a switch for Ford to cement its relationship with the automobile manufacturer and to ward off competitors. It is claimed that the company learned of design problems with the cruise control switch as far back as 1991.

The lawsuit claims Ford and the switch manufacturer tried to get each other to indemnify the other from damages in lawsuits related to engine compartment car fires they believed were related to the switch. It is alleged that the switch manufacturer failed to exercise reasonable care in the design, manufacturing, and testing of the switch. The lawsuit also claims the switch manufacturer agreed to support Ford's initial recall of cars and supplied new switches even though those switches were also faulty. It was claimed that the company acted in an effort to preclude government intervention. The National Highway Traffic Safety Administration (NHTSA) opened a series of investigations into Ford engine compartment fires between 1998 and last year. The lawsuit claims the switch manufacturer was at fault for failing to address problems with the switch in a timely and effective manner. Sensata denies the allegations, claiming the switches complied with government and industry standards and were a state-of-the-art design at the time they were made.

Interestingly, Sensata claims that the switches were misused in an unforeseeable manner by others and claimed that their switches were only a component in a larger assembly that was under the Ford's control. The company said it was Ford's duty to inform consumers of any potential hazards. Ford recalled nearly 800,000 vehicles in January 2005 because of a cruise control switch problem. Last September, the recall was expanded to include 3.8 million pickups and sport utility vehicles from the 1994-2002 model years. The broadened recall would seem to indicate Ford had knowledge of the problem, but

delayed action. Ford takes the position that the fire in this case did not originate in the pickup. NHTSA, in September, was investigating 1,170 allegations of engine fires related to cruise control switches. Lawsuits similar to this one have been filed in Georgia and Arkansas.

Source: *Insurance Journal*

#### **GROUP SEEKS PROBE INTO EFFECTIVENESS OF FIRESTONE RECALL**

A research group has asked federal highway safety officials to study the effectiveness of the big Firestone tire recalls of 2000 and 2001. Safety Research & Strategies Inc. says some tires weren't replaced and continue to be linked to rollover crashes on Ford Explorers. In a filing with the National Highway Traffic Safety Administration (NHTSA), the group cited four cases in which spare tires not captured during the recalls were put into service and later failed, allegedly causing crashes. The result was one death and three crippling injuries. The group wants NHTSA to initiate a "recall query," an investigation into whether a past recall was adequate. If the regulatory agency determines the efforts weren't sufficient, it could order further steps by the companies, such as additional advertisements. Safety Research & Strategies is a research group that specializes in motor vehicle safety issues.

As of late last year, federal authorities had linked 271 fatalities to accidents involving Firestone tires, most involving Ford vehicles. Bridgestone Corp.'s North American unit, which produces the Firestone brand, and Ford Motor Co. broke off commercial relations in 2001 in a dispute over which company was to blame for a rash of deadly rollover accidents involving Explorer sport-utility vehicles equipped with certain Firestone tires. Bridgestone, which is based in Japan, announced a recall in August 2000. But, Ford demanded a much larger replacement program in 2001. When Bridgestone refused, Ford recalled the tires on its own. Later in 2001, Bridgestone announced a more limited replacement program of its own.

As you will recall, Ford and Bridgestone settled their dispute last year, with the tire company agreeing to pay the auto manufacturer \$240 million. Bridgestone says it replaced more than 6.3 million of the 6.5 million tires it originally estimated were in use in August 2000. Thus far, Bridgestone has settled more than 2,300 personal-injury lawsuits arising from the recalled tires. Our firm has handled a number of cases involving Ford and Firestone tires over the last few years. Significantly, and not coincidentally, each of these cases also involved Ford Motor Company as a defendant.

Source: *Wall Street Journal*

### **THREE TOYOTA EXECUTIVES ACCUSED OF FAILING TO RECALL VEHICLES**

Three executives at **Toyota Motor Corp.**, a company that built a global business on a reputation for quality, have been accused of failing to recall a vehicle they knew was faulty and could cause injuries in an accident. Interestingly, the accusation came from Japanese police officials. These officials filed papers with Japan's prosecutors' office relating to the need for a recall. It was alleged that three Toyota officials, all responsible for quality control, failed to recall faulty models of the Hilux Surf, a recreational vehicle sold in Japan.

The problem, a faulty relay system of rods in the steering column, was said to have surfaced in Hilux models built from 1992. It was alleged that Toyota knew about the problem from around 1995 or 1996. The police further alleged that Toyota officials knew the problem might lead to an accident. Even so, the officials failed to issue a notice of recall, according to the police. The filing to the prosecutors' office alleges that the fault may have led to an accident in August of 2004, when a Hilux veered out of control and hit an oncoming car. Five people were injured in the accident.

Even though there were customer complaints about the Hilux in 1996, the company decided a recall wasn't warranted. But in March and April 2004, the company received new customer com-

plaints of a problem, and in October, Toyota decided to recall 330,000 models made between 1988 and 1996. But, Toyota said the recall had already been under consideration in July, before the August accident. Recalls have become common in the global automobile industry as cars have grown more complex. But the allegation that Toyota failed to issue a recall even though it knew of the problem is potentially a far more serious matter. Widespread coverage of a scandal at Mitsubishi Motors Corp., when courts concluded that faults with a vehicle weren't disclosed and later led to a pedestrian death, caused serious damage to the Mitsubishi brand and contributed to a sharp decline in its sales.

Source: *Wall Street Journal*

### **LAWSUIT ARISING FROM FAULTY REFRIGERATOR SETTLED**

Mr. and Mrs. Randall Rutz, who were avid campers, were sleeping in their camper back in 2005 when it caught fire. The cause of the fire was traced to cracked tubing in the camper's Norcold refrigerator, which resulted in it leaking flammable hydrogen. Randall Rutz, who was 46-years-old at the time, died of smoke inhalation and third-degree burns to more than 70% of his body. His wife, Brenda Rutz, suffered second- and third-degree burns as well as injuries to her lungs and vocal cord. She has permanent scarring and still has a tracheotomy in place. A lawsuit was filed against the manufacturer of the refrigerator and the seller of the camper.

The case, which included the wrongful death claim and the wife's personal injury claim, was settled for a total of \$7 million. Apache Village, a camper dealership in Hazelwood, Missouri, paid \$1.5 million, and Norcold and its insurer paid \$5.5 million. It appears that Norcold knew of the potential fire hazard as early as 1999. In 2000, the company notified federal officials that it was recalling more than 40,000 refrigerators. Unfortunately, neither Mr. and Mrs. Rutz, nor the two previous owners of the camper, ever received notice of the

recall. Norcold could have easily found the owners of all the campers by having their Vehicle Identification Numbers tracked, but that wasn't done until late 2004. It should be noted that Mrs. Rutz received a recall notice from the company seven months after the fire. Obviously, Norcold didn't do an adequate job of getting the refrigerators recalled. But, the company contended that it followed federal regulations in conducting the recall.

A Norcold official testified that, as recently as April of this year, there were still about 14,000 defective refrigerators, part of the recall, that haven't been replaced. Discovery in the case revealed that before the Rutz fire, Norcold was aware of 216 fires that involved property damage. Apparently, there hadn't been any injuries or fatalities in those fires, and that's good. But, the Rutz case is one that—with a proper recall—could have been avoided.

Source: *News Democrat*

### **TRIAL STARTS IN LAWSUIT AGAINST FORD AND SEAT BELT MAKER**

Jury selection began on July 17<sup>th</sup> in Greenville County, South Carolina, in two lawsuits against Ford Motor Company and three other defendants. The product-liability cases, filed in December 2002, arose out of a single-vehicle crash involving a Ford Explorer that killed one passenger and left the driver in a wheelchair. Allegations against Ford and three other defendants are centered on the seat belts and speed control of a 1995 Ford Explorer XLT. Sonya Watson, who was 17-years-old, was driving the Explorer on an interstate highway. There were four other passengers, including the driver's grandmother and two other relatives. The driver lost control of the Explorer, and the SUV hit a grass median area. When the driver attempted to get back on the highway, the vehicle rolled, flipping about three or four times. One passenger, a 46-year-old female, died from multiple trauma after she was ejected from the vehicle.

A wrongful death suit was filed by the

victim's family against Ford, TRW, Inc., TRW Vehicle Safety Systems (which made the vehicle's seat belts), and D&D Motors. The lawsuit claims that the Explorer was defective in several particulars, including the front and rear seat occupant restraint systems, the front seat system, the chassis, steering and component sub-assemblies; the electric cruise control and its acceleration systems. It was alleged that because of the defects the vehicle accelerated suddenly, the driver lost control, she tried to correct, and the Explorer rolled over.

A second suit against Ford and other defendants was filed by Ms. Watson and other family members, including her younger sister, who was also in the vehicle at the time of the accident. That lawsuit seeks damages for bodily injury, pain and suffering, medical expenses, permanent impairment, permanent disfigurement, lost wages, parental loss of consortium, and punitive damages. Ford, as is usually the case, will defend the case aggressively. They will claim driver error, denying that the Explorer has any defects, and will say it's perfectly safe. The trial of the cases is expected to last three weeks.

Source: *Yahoo News*

### **BAD NEWS FOR FORD IN EXPLORER CASE**

Ford Motor Company got some bad news when a state appeals court in California approved \$82 million in damages in a case brought by the family of a woman who was paralyzed when her Ford Explorer rolled over and the roof caved in. On July 19<sup>th</sup>, the court reduced the award but said in its opinion that large damages were clearly justified as a result of Ford's Motor Co.'s reckless conduct in marketing an unsafe product. Benita Buell-Wilson, who was 46-years-old, was injured in a rollover accident in January 2002.

Ms. Buell-Wilson was driving a 1997 Explorer on a California freeway when her SUV went out of control and rolled over. The pillars holding up the Explorer's roof crumpled, crushing the driver as she hung upside down from her seat belt. An athletic woman, who

was then completing a master's degree in education, she was left a paraplegic. Ms. Buell-Wilson remains in constant pain and has to be cared for by her husband and children.

The court said there was evidence that Ford had known that the Explorer was unstable and prone to rollovers, but that the company had decided not to make changes because that would have cut into profits. The court also considered evidence that the roof of the vehicle was weak and stated in the opinion that Ford could have strengthened the Explorer for about \$20 per vehicle. A jury had awarded Ms. Buell-Wilson and her husband \$122 million in compensatory damages and \$246 million in punitive damages. After a post-trial hearing, the trial judge found those amounts excessive and reduced the total award to \$150 million.

In its opinion, the appeals court said the reduced award for Ms. Buell-Wilson's pain and suffering and lost quality of life was still too large and reduced those damages to \$18 million. Other compensatory damages awarded to the couple were not changed, however, leaving their total compensatory damages at \$27.6 million. Significantly, the court said punitive damages of \$55 million were appropriate because of the "catastrophic nature" of Ms. Buell-Wilson's injuries and Ford's "reckless disregard for the safety of others" in its design of the vehicle. Ford can still appeal to the California Supreme Court. If that appeal is unsuccessful, Ford will most likely petition the U.S. Supreme Court for a review.

Source: *Associated Press*

## **VII. MASS TORTS UPDATE**

### **PUBLIC'S OPINION OF FDA HAS GONE SOUTH IN RECENT YEARS**

Based on the experience we have gained from drug industry litigation, I can certainly understand why the

public's opinion of the Food and Drug Administration has deteriorated over the past few years. This belief has been verified by a recent study that dealt with opinions of the FDA's performance. It determined that the decline was the result of sinking confidence in the federal government combined with an increasing number of drug-related lawsuits. The research was conducted between 2003 and 2006 by the Chicago-based legal consulting firm Zagnoli McEvoy Foley (ZMF). The research illustrates that the FDA's positive "halo effect," which benefited pharmaceutical companies in the past, has been tarnished in recent years. The research in 2003 and early 2004 involved jurors and mock jurors from mock trials questioned by ZMF. These people had been involved in about a dozen pharmaceutical products liability cases around the country. The persons involved consistently gave comments displaying their trust in the FDA, saying for example, that "a drug can be trusted if FDA approves of it."

In addition, the fact that a drug had FDA approval could immunize a pharmaceutical company of guilt in a juror's eyes, as a result of the "rubbing off" of the FDA's perceived credibility, according to Andrea Blount, a ZMF consultant, who worked on the research. By 2005, the FDA's status had started to decline, with many of those questioned saying that the FDA doesn't do an adequate job of protecting American citizens from the possible dangers of defective drugs, according to the research. The erosion in confidence, according to ZMF's research, was spurred by an apparent loss of confidence in the federal government in the wake of failed relief efforts for Hurricane Katrina victims, concern over the Iraq war, and increasing numbers of prescription drug-related lawsuits. As a result of these qualitative observations, according to Ms. Blount, ZMF decided to test its findings with a formal poll. In February 2006, the firm conducted a nationwide, online survey of jury-eligible Americans to assess their attitudes about the pharmaceutical industry and the FDA. According to Ms. Blount, less than one-third of

those surveyed held a positive perception of the FDA.

It's fairly easy to see why a person who hasn't dealt with the drug industry would have believed that the FDA was doing its job. For example, most folks also believed that the FDA actually tests drugs, which is not true. Most of those same folks believe that all FDA funding came from the government, which again is only partially true. In fact, a lot of the funding comes from the pharmaceutical companies in many forms. As we have reported consistently, the FDA is understaffed and underfunded. I am convinced that is a major reason for the agency's repeated failures to do its job well. The pharmaceutical companies influence the FDA's conduct in so many ways that it is easy to understand why many observers see the FDA as almost an extension of the drug industry.

#### **FINAL JUDGMENT IN FIRST VIOXX TRIAL**

A final judgment has been signed by the judge in the first Vioxx case to go to trial. You will recall that a Texas jury returned a \$253.4 million verdict against Merck & Co. last summer on June 23<sup>rd</sup>. District Judge Ben Hardin, who presided over the trial, signed the final judgment awarding the plaintiffs \$26.1 million in damages, plus \$1.25 million in pre-judgment interest. Judge Hardin ordered Merck & Co. Inc. to pay the plaintiff \$24.45 million in actual damages, but reduced the \$220 million in punitive damages awarded by the jury to the statutory cap in Texas of \$1.65 million. The jury in the case found that Merck's wrongdoing was a contributing cause in the death of Robert Ernst, a 59-year-old Wal-Mart employee, who died in 2001 after taking Vioxx.

The jury also found that Merck's failure to warn about Vioxx's dangerous condition and the drug's defective design were producing causes in Ernst's death. It was significant that Judge Hardin **denied** Merck's motion seeking a judgment notwithstanding the verdict. Mark Lanier, of the Lanier Law Firm in Houston, who represented the victim's family, says he is pleased with the judg-

ment. However, Mark will appeal it on the grounds that Texas' statutory cap on punitive damages is unconstitutional. Mark, who is a very good lawyer, did an outstanding job in this case. He is to be commended for taking Merck on before all of the damaging information was known by the medical community and by the public.

#### **MERCK'S MISREPRESENTATIONS WILL AFFECT NEW TRIAL MOTIONS**

Vioxx cases that resulted in verdicts for Merck & Co. may have to be tried again. The reason that new trials are likely to be granted as a result of a prominent medical journal contradicting a key defense used by Merck in those cases. *The New England Journal of Medicine* issued a correction that stated that the conclusions of the APPROVe study—a study written by Merck consultants and employees and the one upon which Merck based its litigation defense—were **false**. Specifically, Merck had touted the study as evidence that Vioxx elevated the risk of cardiovascular problems only after 18 months of use. After reviewing previously unreleased data, the *Journal* editors announced that the "18 month" defense was incorrect. Merck was aware of the internal data and the falsity of the study's conclusions before the study was published. The fact that Merck lied—and was caught after intentionally using the 18-month-use myth in trials—is a most serious matter. It's an issue that most judges would consider compelling in dealing with new trial motions.

Merck has used the 18-month threshold as a cornerstone of its defense in all of the Vioxx lawsuits involving short-term use. The *Journal* correction certainly casts serious doubt on that defense and in my opinion should probably kill it altogether. So far, Merck has lost three Vioxx cases and won four. Two of Merck's wins came in cases where the patient took the drug for a few months. It's quite clear that Merck has been lying to courts and juries about the APPROVe data. Merck manipulated the data so the drug would

look much safer than it actually was.

Andy Birchfield and Leigh O'Dell of our firm have filed a motion for a new trial in the Irvin case that was retried in New Orleans. Initially, the basis was that, among other things, a Merck witness had lied under oath about his credentials. But, the recent developments add greatly to the motion. They believe the misrepresentations by Merck and the subsequent *Journal* correction will now bolster the motion because these occurrences show Merck committed a "fraud on the court" by saying Vioxx's risks don't appear for 18 months when Merck knew that to be a false statement. The Irvin family has fought a good fight against tremendous odds in their case and clearly deserves a new trial. If it's granted, it would be a third trial of their case. The first trial resulted in a mistrial because the jury couldn't reach a verdict. The second one—held in New Orleans after Katrina had virtually shut down the city—resulted in a defense verdict.

#### **MERCK WINS CASE IN NEW JERSEY**

After a lengthy trial a jury in New Jersey returned a verdict in favor of Merck & Co. Jurors decided that Vioxx was not responsible for the heart attack of the 68-year-old plaintiff. The case was the first in which jurors considered whether Merck failed to warn patients about the drug's cardiac risks, rather than just doctors as in earlier trials. The jury found that Merck failed to warn the female plaintiff of the cardiac risks of the drug. But, the jury found that Vioxx was not a substantial contributing factor in Elaine Doherty's 2004 heart attack.

Lawyers for Mrs. Doherty, a grandmother of six, claimed during the trial that Vioxx was a major cause of her heart attack and that Merck downplayed the risks of Vioxx both to doctors and to patients. Mrs. Doherty, the first female Vioxx user to have a case tried, had taken Vioxx for over two years before suffering a mild heart attack in January 2004. I suspect the facts that the plaintiff had not suffered a major heart attack and was apparently in reasonably good

health at present played a major role in this case's outcome.

#### **THE CALIFORNIA TRIAL AGAINST MERCK SHOULD BE OVER SOON**

As previously reported, our firm is helping to try the case involving Stewart Grossberg against Merck & Co. in California. We hope that the case, which started on June 21<sup>st</sup>, will go to the jury around the first week of this month. Paul Sizemore from our firm is assisting some very good lawyers from Girardi & Keese, a California firm, in trying the case. I understand from Paul that the case has gone well thus far. Mr. Grossberg took Vioxx for a number of years and suffered a heart attack. I hope the jury will return a favorable verdict for him in this case.

#### **MORE VIOXX CASES ARE SET FOR TRIAL THIS YEAR**

A number of other Vioxx cases will be tried in both federal and state courts this year. The case of Barnett v. Merck & Co., which is in the MDL, will be tried in New Orleans starting on July 31<sup>st</sup>. Mark Robinson of the California firm of Robinson, Calcagnie & Robinson, along with Andy Birchfield and Leigh O'Dell from our firm, will try this case for the plaintiff. Another case, Dedrick v. Merck, will also be tried in New Orleans on November 27<sup>th</sup>. Andy Birchfield and Leigh O'Dell are handling the Dedrick case, which also will be tried before U.S. District Judge Eldon Fallon in the MDL. Unfortunately, New Orleans is still a city with a tremendous number of distractions for potential jurors. Conditions there are still very bad, and its people, who are still hurting from Katrina, are greatly concerned over the possibility of another storm coming in.

Currently, there are two state court cases scheduled to be tried in Alabama. The Crook case is scheduled to be tried in the Circuit Court of Jefferson County starting on October 23<sup>rd</sup>. Steve Heninger and Lew Garrison, of the Birm-

ingham firm of Heninger Garrison Davis, LLC, and at least one lawyer from our Mass Torts Section will try this case for the plaintiff. Another case, Albright v. Merck, will also be tried in Jefferson County starting on December 11<sup>th</sup>. This case will be handled by the Heninger firm with our assistance.

There are other state court cases currently set for trial that our firm won't be actually involved in. The Anderson case against Merck is set for trial in the Tribal Court of the Mississippi Band of Choctaw Indians and is scheduled to start on August 7<sup>th</sup>. My friend, Dave Matthews, who is with Abraham, Watkins, Nichols, Sorrels, Matthews & Friend, located in Houston, Texas, is handling this case. Two other cases, Hatch and McFarland, both against Merck, are scheduled for trial in New Jersey, starting on September 11<sup>th</sup>. But, Merck is hard at work trying to sever the cases so it can proceed with the trial of only one plaintiff. Those cases are handled by the Seeger Weiss and the Anapol Schwartz firms. The Miller case, also handled by Dave Matthews, is set for trial in Harris County, Texas, on November 8, 2006. Finally, the *Schwaller* case against Merck is set for trial in Madison County, Illinois, on December 11, 2006. That case is being handled by John Driscoll of the St. Louis, Missouri firm, Brown & Crouppen. Hopefully, each of these cases will go to trial as scheduled this year.

#### **VIOXX, CELEBREX AND BEXTRA CONTINUE TO RECEIVE BAD REVIEWS**

Several of our readers have asked me to explain in more detail some of the history behind the drugs referred to as Cox-2 inhibitors and also to give more information on some of the recent developments. These once-popular prescription drug painkillers, namely Vioxx, Celebrex, and Bextra, continue to receive negative reviews concerning their safety risks for consumers. These drugs have either been pulled from the market or been required to contain a "Black Box" warning. That type warning is the strongest warning a prescription

drug can have on its label. As you know, the cardiovascular risks associated with these medications are great. It seems that more damaging information is revealed almost daily that had been withheld from the FDA, the medical community and the public.

Specifically, Vioxx was withdrawn from the market in September 2004, because of its increased risk of heart attacks and strokes in users of this drug. Nonetheless, Merck, the manufacturer of this drug, has claimed that their internal study called "APPROVE" was the first indication that the company had of cardiovascular safety risks associated with Vioxx. Merck also stated that this risk did not present itself until after 18 months of use. But, after extensive discovery of Merck's internal documents, it is apparent that there were several studies indicating an increased risk of heart attacks and strokes for both short and long-term users. Recent information, which will be discussed below, not only destroys Merck's 18-month arguments for all Cox-2 drugs, but it also reveals added risks to users of these drugs.

As you know, the Food and Drug Administration (FDA) took Bextra off the market and required Celebrex to have a Black Box warning on its label, because of an increased risk of heart attacks, strokes, and serious allergic skin reactions in users of these Cox-2 drugs. Pfizer, the manufacturer of Bextra and Celebrex, also has several internal studies that show increased risk of heart attacks and strokes in users. Despite the FDA's rulings, Pfizer's internal studies, and safety risks associated with Pfizer's competitor drug—Vioxx—Pfizer continues to deny any health risk associated with the use of Celebrex and Bextra.

In recent months, several published articles and studies have provided further concern for risk associated with the Cox-2 drugs. Last month, the *New England Journal of Medicine* (NEJM), one of the world's leading medical journals, significantly weakened Merck's argument concerning the "APPROVE" study which it said shows Vioxx had an increasing cardiovascular risk only after

18 months of use. After a more detailed review, the *NEJM* deleted several of Merck's references to safety risks only appearing after 18 months of use. Merck has relied on this myth of a required 18 months period of use to discredit the valid claims of users who took Vioxx for some period less than 18 months. Now juries will less likely be persuaded by Merck's well-paid experts and company employees that a consumer has to be on any of the Cox-2 drugs for a certain amount of time before the safety risk materializes. That has been proved to be patently false.

A follow-up review to Merck's "APPROVe" study has confirmed that the increased risk of heart attacks and strokes remains in a user up to one year after Vioxx usage has stopped. Previous assumptions were that once a user stopped using any of the Cox-2 drugs, the chance of cardiovascular risks was terminated. Now, consumers of Cox-2 drugs must face health hazards from these drugs long after they quit using them. Potential claims against the Cox-2 manufacturers may also increase because of the additional number of injured victims who have suffered a cardiovascular risk within this time period after stopping the use of the drugs.

In June, *The Circulation-Journal of the American Heart Association* reported a study showing that the risk of death and/or recurring heart attacks increased in users of Cox-2 drugs who have had previous heart attacks. The study looked at patients with first-time heart attacks between 1995 and 2002. The study revealed that 9,773 patients experienced re-hospitalization for heart attacks and 16,573 patients died while using NSAID's, such as these Cox-2 inhibitors. There were a total number of 58,432 patients included in this study. This study confirmed that Cox-2 inhibitors increase the mortality rate for users with previous heart attacks. Therefore, these drugs should always have been used, if at all, with extreme caution. Nonetheless, the manufacturers of these Cox-2 drugs have consistently denied their prior knowledge of cardiovascular safety risks associated with

their drugs. These companies have also failed to warn doctors to use caution when prescribing these drugs to patients with the risk factors mentioned above.

As litigation continues over the Cox-2 inhibitors, the additional reports and studies relating to the safety risks associated with these drugs will ultimately make it difficult for the manufacturers of these drugs to defend these claims. But, because of the power, influence, and wealth of the companies involved, it will never be easy to try these cases. It will always be a battle to the end with companies like Merck and Pfizer involved.

#### **JURY FINDS THAT PAIN PATCH CAUSED WOMAN'S DEATH**

A Texas jury has returned a verdict against Johnson & Johnson in a death case involving a Duragesic pain patch manufactured by the company. The suit, brought by the family of a Texas woman, resulted in a verdict of \$772,500. The 42-year-old woman died in 2004 after a patch, designed to release pain-killing drugs that she was using to manage pain from a car wreck, leaked. I believe that this was the first trial involving this product. The Houston state court jury found the two Johnson & Johnson units that make the Duragesic pain patches responsible for the woman's death. It might be helpful to go into the history of the patch.

In 2005, the Duragesic patch generated worldwide sales of about \$1.6 billion for Johnson & Johnson. The patches have caused other problems. The Food and Drug Administration is presently investigating 120 deaths tied to pain patches made by Johnson & Johnson and Mylan Laboratories Inc. Johnson & Johnson added warnings last July to the patch's label, saying doctors shouldn't prescribe them for patients who can't tolerate similar drugs or who may be prone to abusing them. The patches, introduced in 1990, release the opiate fentanyl. According to researchers, fentanyl can cause addiction or death. Mylan Labs, which is

located in Pennsylvania, began marketing a generic version of the patch in 2005. Over 80 million Duragesic patches are sold each year in this country. Thus far at least 100 other lawsuits have been filed involving the patches. Interestingly, the FDA hasn't seen fit so far to order the patches removed from the market.

During the trial in Texas, the family contended that managers at Janssen Pharmaceutica Inc. and Alza Corp., two Johnson & Johnson units that make Duragesic patches, sped up production in 2003 and 2004 when faced with the loss of patent protection. Competition from generic patches caused Duragesic sales to fall 28% to \$325 million in the first quarter of this year, according to data obtained by *Bloomberg News*. The family in the Texas case contended that the woman's system was flooded with fentanyl after her patch leaked. Reports were produced at trial showing she actually had 10 times the therapeutic dose of fentanyl in her body when she died. Other evidence in the case showed that Johnson & Johnson recalled a batch of Duragesic patches four days after the death in this case in February 2004 after getting reports of leaks. An FDA report said the company recalled a total of 2.5 million patches between April 2003 and June 2004 because of consumer complaints about leaks.

Source: *Bloomberg News*

#### **THE NUMBER OF PAXIL LAWSUITS IS INCREASING**

A number of lawsuits involving the drug Paxil have been filed around the country. As has been reported previously, the antidepressant can cause addiction and severe drug withdrawals. Sometimes these can be life-threatening. The popular drug is a very big seller for GlaxoSmithKline, its maker, which has marketed it heavily using advertisements featuring high profile spokespersons. In August 2004, SSRI Citizen, a consumer advocacy group, announced antidepressants like Paxil are "Unsafe At Any Dose," as part of a national awareness campaign.

As powerful drug companies, enjoying

multi-billion dollar profit generators like Paxil, try to increase drug revenues even more, medical experts, regulators, and patients worry that the information they receive is filtered to allow the maximum amount of returns instead of keeping patients safe. I believe the system must be changed for medical decisions so that both the medical community and the public are properly informed about drugs being put on the market.

#### **AN IMPORTANT RULING BY A FEDERAL JUDGE IN ANOTHER PAXIL SUIT**

The widower of a woman who committed suicide after taking the anti-depressant drug Paxil has won a significant ruling in a wrongful death suit against the drug's manufacturer. This ruling by a U.S. District Judge in Pennsylvania will allow the plaintiff to pursue his claim that the company hid the truth about the drug's side effects from the FDA. The judge refused to dismiss the suit on statute-of-limitations grounds as requested by the defendant. The judge found that the plaintiff must be allowed discovery on issues relating to when the manufacturer first learned of Paxil's alleged risk of suicide. The judge's ruling stated in part:

*Discovery is necessary in order to allow [plaintiff] to uncover relevant information solely in the defendant's control. Issues that must be fleshed out include: the date and extent of defendants' alleged knowledge of Paxil's risk of suicidality; the scope of defendants' duty to disclose the risk and its efforts, if any, to do so; and its communications, if any, with Mrs. Hoppe or her doctor or others similarly situated.*

In the suit, plaintiff Jon R. Hoppe claims that when his wife was prescribed Paxil to treat her depression, the drug "actually worsened the effects of her depression and induced her to commit suicide." The suit alleges that Mrs. Hoppe hanged herself in her basement in September 2002. It was contended by the plaintiff—in opposition

to the defendant's motion to dismiss—that SmithKline fraudulently concealed Paxil's risk of suicidality from the 1990s, when they gained actual knowledge of the risk, until the spring of 2004 when they were ordered by the Food and Drug Administration (FDA) to change Paxil's labeling and notify the health care community.

Documents from the company show that the manufacturer knew as early as 1997 of studies showing suicidality in Paxil users. In 1993, the FDA approved Paxil as safe and effective for use by adults based on information SmithKline had provided during the FDA's approval process. But soon after the drug went on the market, hundreds of cases of suicidality in Paxil users were reported, including one Paxil user's murder of his family and subsequent suicide that was the subject of a February 2000 lawsuit. Despite those reports, SmithKline "continued to adhere to the false claim that Paxil suicide risks are not significant enough to warrant action." Of the nine studies SmithKline allegedly commissioned on the use of Paxil, it made public the results of only one. In April 2004, the FDA ordered SmithKline to revise Paxil's label to add warnings about the risk of suicidality. In May 2004, the company sent a "Dear Doctor" letter to health care providers to notify them of the labeling change. The Paxil cases are tragic examples of how drug companies put profits over the welfare of their customers.

Source: *The Legal Intelligencer*

#### **THE RISKS OF TAKING FOSAMAX APPEAR TO BE GREAT**

Last month we wrote about the mounting problems associated with the popular osteoporosis drug Fosamax. Since that time it has become most apparent that the problems are widespread. As a result, the Fosamax litigation scene will be very active. Osteonecrosis of the jaw (ONJ), a disfiguring condition that leads to the breakdown of the jawbone and loss of teeth, is clearly a most serious matter. Fosamax has been taken by a tremendous

number of women for stronger bones. Unfortunately, they were never warned by Merck & Co. of the risks associated with Fosamax. It is now abundantly clear that Merck knew about the risks. The FDA had actually asked the drug company to warn about ONJ. Obviously, Merck had a duty to inform doctors and patients. For years, doctors and dentists have known about the increased risk of ONJ caused by chemotherapy. But, the medical community had little, if any, knowledge connecting Fosamax use and ONJ.

In January 2005, the FDA recommended that Merck change Fosamax's label to include ONJ warnings. As a result, the company revised its packaging information in July of last year. As we stated last month, this drug is one of Merck's best sellers, with \$3.2 billion in sales and 22.4 million prescriptions written in 2005. The company says on its website that most reported cases of bisphosphonate-associated osteonecrosis have been in cancer patients treated with the drugs intravenously. The statement says:

*ONJ is not well understood and may occur for a number of reasons....In controlled clinical trials involving more than 17,000 patients, contributing as much as 10 years' data with alendronate [the technical name for Fosamax] there have been no reports of ONJ.*

At its 2006 annual meeting, the American Association of Endodontists said that until further information becomes available, all patients taking bisphosphonates should be considered at some risk for ONJ. Patients were told to inform their dental care providers and other specialists that they are on the medications. It has been reported that some dentists actually turn away patients who tell them that they are on bisphosphonates. Others ask those patients to quit the medication until their dental treatment is finished.

Perhaps it would be helpful to set out exactly what osteoporosis is all about and how Fosamax comes into the picture. First, let's take a look at osteoporosis.

- Osteoporosis is thinning and weakening of the bones.
- It affects mostly women after menopause.
- In both men and women, osteoporosis may also be caused by certain medicines called corticosteroids, used to treat some leukemias and also to suppress rejection after bone marrow and organ transplants.
- Osteoporosis can cause fractures, which may happen during everyday activities, such as lifting, or from a minor injury that would normally not cause bones to break.

Fosamax, which is being taken by a tremendous number of women, is made by Merck & Co. As advertised and promoted by Merck, Fosamax is said to be for:

- The treatment or prevention of osteoporosis in women after menopause.
- Treatment to increase bone mass in men with osteoporosis.
- The treatment of osteoporosis in people taking corticosteroids.

Our firm continues to investigate potential claims for women who have taken Fosamax and who have suffered severe injuries and disability as a result. Any person who is now taking Fosamax should contact their personal doctor and discuss whether they should remain on the drug. If you need additional information on the ongoing litigation over the drug, you can either go to our website, [BeasleyAllen.com](http://BeasleyAllen.com), or contact either Jerry Taylor or Chad Cook directly at our office (800-898-2034).

#### ***IT'S NOT THE FIRST RODEO FOR SMITH & NEPHEW***

At the end of June, the Antitrust Division of the U.S. Department of Justice (DOJ) issued a subpoena to the global medical technology company Smith & Nephew, Europe's largest seller of orthopedic devices. Earlier that month, the DOJ had already issued subpoenas to

other orthopedic companies, such as Johnson & Johnson, Stryker, Biomet, and Zimmer Holdings—all competitors of Smith & Nephew. Specifically, the subpoena was targeted at Smith & Nephew's orthopedics business and requested documents from January 2001 to the present over possible violations of U.S. antitrust laws. Reportedly, the subpoena concerns the manufacture and sale of orthopedic implant devices.

This is not the first time the company has been subpoenaed by the U.S. government. In March 2005, Smith & Nephew's orthopedics division, along with its rivals, received a subpoena from the U.S. Attorney's office over compensation agreements between the company and orthopedic surgeons. At press time, that investigation was still in progress.

Smith & Nephew, an international company operating in 33 countries around the world, has annual sales of \$2.6 billion. In September of 2003, Smith and Nephew withdrew two of its knee replacement products from the U.S. market after potential problems were identified. Those devices were the Oxinium Genesis II and the Profix II, which were implanted between February of 2002 and September 2003. Our firm is currently representing individuals who were injured by these devices. Smith & Nephew marketed these devices to be implanted without cement, even though the FDA had not approved that method. A cementless device is more easily replaced at a later date, because it doesn't require the traumatic chiseling of hardened cement. This is an attractive selling point, especially for a younger patient who will likely require another replacement later in life. What these patients did not bargain for, however, was a device that loosened and resulted in disabling injuries. It will be interesting to see what the DOJ investigation and the discovery from our cases reveal concerning any deals made with doctors in the context of these knee devices.

Source: *USA Today*

#### ***DRUG TRIALS MAY INFLUENCE DOCTORS' PRESCRIBING PATTERNS***

A Danish study that was reported in the June 21<sup>st</sup> issue of the *Journal* of the American Medical Association deals with a situation that directly affects how drugs are prescribed in this country. Doctors who participated in a drug company-sponsored trial of asthma medications were more likely to prescribe that company's drugs. But, participating in the trial had no impact on the physicians' adherence to international treatment guidelines for asthma, according to the study. Dr. Bruce M. Psaty, professor of medicine and epidemiology at the University of Washington, Seattle who was the author of an accompanying editorial in the journal, said:

*The study authors conclude—and I think correctly—that physician involvement is a powerful tool for influencing specific drug preferences.*

According to Dr. Psaty's editorial, this pattern is part of a much broader picture. Regarding influencing prescription practices, Dr. Psaty stated:

*There are many areas of influence where industry tries to influence prescribing practices. There is influence on trial reporting and results, and also the trial questions they agree to fund.*

More and more studies and papers are addressing this larger picture, including a recent report that found that clinical trials funded by drug companies and other for-profit entities were more likely to report positive findings for the drug in question than similar trials funded by nonprofit groups. A study published earlier this year found that the drug industry is paying for more and more medical research, with half of all studies now funded solely by the private sector. Although doctors are often involved in company-sponsored clinical trials, the effects of their participation have not been fully studied, according to background information in the new paper.

Drug companies used to pay doctors

to participate in “seeding” trials, where they put patients on a drug and agreed to collect minimal data. Thus, using a company’s drugs can raise physicians’ comfort level, and that’s the company’s motivation. Dr. Psaty had this to say on the practice:

*No good information comes from it, but the physician learns how to spell the drug name and the appropriate dosing. He feels comfortable with it.*

Although those trials are no longer allowed, the trials that are the subject of the new study are only marginally different. The authors involved in the study compared 10 Danish medical practices that were involved in a trial of asthma medicine with 165 practices that were not participating in any such trial. The study involved 5,439 patients being treated with asthma drugs in the trial-related practices and 59,574 patients in the control practices. Use of inhaled steroids among asthma patients increased from 68.5% to 72.9% during the second year in the practices involved in the trial and from 69.1% to 73.3% in the other practices. The trial had no impact on how doctors adhered to international treatment guidelines, but it did affect which specific drugs were favored. The study was sponsored by drug manufacturer AstraZeneca, Denmark. The company contributed data for the trial, but was not involved in the study’s design and interpretation of the data. Use of the sponsor’s drug increased from 74.8% to 81.5% in the practices participating in the trial but only from 73.6% to 76.6% in the control practices. It would be great if we could separate the scientific aspect of these trials and the marketing issue. In regard to the small trials, Dr. Psaty says:

*The scientific rationale for launching these thousands of small trials is not clear. My own bias is that the health of the public would be better served by fewer small trials and more long-term studies that fully address the health benefits and health risks of drugs. I’m not against companies coming up*

*with good products. I’m for it, and those products can then be used appropriately to enhance the health of the public.*

I hope the FDA will take action to make sure that drug companies act responsibly and separate real trials from trials designed for marketing to the extent possible. In my opinion, the FDA has a responsibility to make sure trials are properly carried out over an adequate period of time with results that can be trusted. Trials that are motivated by marketing should never be allowed.

Source: *HealthDay News*

### **FDA EXPECTS HIGHER RATE OF FAILURE THAN GUIDANT**

A Guidant Corp. implantable heart device may fail about 10 times more often than the company projected last year, according to a Food and Drug Administration (FDA) analysis that came to light in a Texas lawsuit. The confidential FDA document, written on June 16, 2005, was unsealed in a product liability lawsuit involving Guidant’s defibrillators. The FDA analysis found thousands of units of one Guidant model may experience malfunctions within five years. After Guidant began its recall, it said no more than 292 of the units were likely to break down. The agency’s higher projection will be a factor in lawsuits by patients who received the faulty devices.

As you know, Boston Scientific bought Indianapolis-based Guidant in April for \$27.5 billion. According to a regulatory filing by Boston Scientific, more than 3,000 patients could pursue liability claims related to the defibrillators. There have been about 340 cases already filed in the courts so far, according to information from the company. Guidant recalled 109,000 faulty defibrillators in 2005. In its memo, the FDA said “most” of the 16,000 recalled Contak Renewal defibrillators may have damaged insulation within five years, and 40% of those damaged devices would **fail** to produce an adequate electrical shock in a medical emergency. At that rate, at least 3,200

Renewal units were likely to fail. Regarding another heart device problem, some hospitals in this country have cut back on their use of drug-coated heart stents, citing a Swiss study that found uncoated stents had fewer complications. The only drug-coated stents in the U.S. market are made by Boston Scientific and Johnson & Johnson.

Source: *Bloomberg News*

### **BOSTON SCIENTIFIC RECALLS GUIDANT DEVICES**

In a follow-up to the above, Boston Scientific Corp. has now recalled nearly 23,000 heart pacemakers and defibrillators that could fail because of an electrical flaw. The company has asked doctors to check 27,000 patients who had been implanted with potentially faulty devices. This is the second time Boston Scientific has warned about products of the former Guidant Corp. since the company bought Guidant in April. Apparently, it will take Boston Scientific as long as two years to fix design, manufacturing, and supplier problems that contributed to a wave of recalls and warnings last year involving nearly 300,000 devices. It appears the problems involve far more than Guidant’s shortcomings in failing to promptly notify doctors, patients, and regulators about device flaws. A spokesperson for Boston Scientific says:

*In truth, there are deeper issues that will require time to address, that will lead to problems that will then have to be communicated. It will take 18 months to two years to get all of those things taken care of. That should never happen, and it happened batch after batch after batch, and now we’re paying the price*

The latest recall involved certain batches of a low-voltage capacitor provided by an outside supplier. Quality control reviews should have detected the problem. Instead, five malfunctions were reported in devices that either had already been or were about to be implanted in patients. No deaths were

linked to the five malfunctions, but in two cases pacemaker patients temporarily lost consciousness, according to the company. In four cases, patients required surgery to replace devices.

Boston Scientific is asking its sales force and managers of hospital inventories to return some units of six models of defibrillators and pacemakers that have potentially faulty low-voltage capacitors, which are used to store electrical charges. The company is recommending that people see their doctors at the earliest opportunity. The company was advising doctors to check for signs of a malfunctioning capacitor, such as prematurely dead batteries or a device that stops working as intended to restore a normal heart rhythm. Devices affected include Insignia and Nexus brand pacemakers, Contak Renewal TR/TR2 cardiac resynchronization pacemakers, and Ventak Prizm 2, Vitality, and Vitality 2 cardioverter defibrillators.

Since June 2005, Guidant has issued safety warnings or recalled more than 88,000 defibrillators, and has recalled or issued warnings on about 200,000 pacemakers. Boston Scientific also inherited liability lawsuits connected with the products, which have been linked to at least seven deaths. Guidant had been criticized for failing to notify doctors, patients, and regulators of the extent of its product problems, and Boston Scientific has vowed to do a better job.

Source: Associated Press

#### **EVIDENCE IN SUIT LINKING MERCURY AND AUTISM FOUND TO BE LACKING**

Parental advocates fighting to prove a link between mercury-containing vaccines and autism suffered a setback last month when a federal judge dismissed a lawsuit against a producer of a treatment given pregnant women. The District Court Judge determined that a mother of an autistic child “failed to present sufficient evidence” that would suggest a link between RhoGAM and autism. The anonymous mother had sued producer Ortho-Clinical Diagnostics, Inc., a subsidiary of Johnson & Johnson.

Between 1968 and 2001, RhoGAM contained the thimerosal preservative, which advocates have cited as a source of mercury poisoning. Amy Carson, co-founder of Asheville-based Moms Against Mercury, said mercury-based vaccines, many of which contain thimerosal, have led to mercury poisoning, which is frequently identified as autism. Ms. Carson believes that the result in the North Carolina case was a setback for other similar claims. I am not sure that will be the case because causation can be a case-by-case issue. But, the science problems would be a major concern if that was the real reason for the court’s ruling.

Source: Winston-Salem Journal

#### **THE FDA MAY HAVE MADE ANOTHER MAJOR MISTAKE**

A federal drug safety official believes that a controversial antibiotic made by a French drug company should be withdrawn from the market. Dr. David Graham, who is with the Food and Drug Administration’s drug safety office, believes that the agency’s approval of Ketek, (also known as telithromycin), an antibiotic made by Sanofi-Aventis was a mistake. Dr. Graham (who is said to be on the drug industry’s worst enemies list) questioned the approval process used by the FDA, writing in an internal memo:

*It’s as if every principle governing the review and approval of new drugs was abandoned or suspended where telithromycin is concerned. We don’t really know if the drug works; no one is claiming it works better than other, safer drugs; and we’re flying blind as far as safety goes, except for our own A.D.R. data that suggests telithromycin is uniquely more toxic than most other drugs.*

Dr. Graham concluded that the agency should recommend the drug’s “immediate withdrawal.” Since Dr. Graham’s e-mail message, the FDA did announce changes to Ketek’s label emphasizing that the drug could in rare

circumstances cause serious liver injury, liver failure, and death. In addition to liver problems, Ketek can also cause blurred vision and loss of consciousness. In patients with myasthenia gravis, a rare neurological disorder, it can cause death.

More than five million prescriptions for Ketek have been written in the United States since its approval in 2004. Fourteen adult patients have suffered liver failure after taking Ketek. At least four of them have died. Twenty-three others have suffered serious liver injury. Most of the reported problems involving Ketek occurred in otherwise healthy patients.

It appears that the FDA approved Ketek based partly on the company’s reported experience with the drug in other countries, which is called **post-marketing surveillance**. In the United States, many drug problems are not reported to the agency, and such surveillance is even less reliable in other nations, according to Dr. Graham’s e-mail message and other documents that were reviewed by the *New York Times*. Dr. Graham made this statement:

*For FDA to refer to its being reassured by postmarketing data from Latin America and Europe as a basis for declaring ‘Ketek is safe’ is in my opinion a great abuse of such surveillance data.*

This appears to be another example of how the FDA fails to perform its responsibility to protect the public health relating to drugs approved for sale in the U.S. I suspect there will be further developments concerning this drug.

Source: New York Times

#### **MEDTRONIC SETTLES ACCUSATIONS ON KICKBACKS**

Medtronic, one of the nation’s largest medical device manufacturers, has agreed to pay the federal government \$40 million to settle accusations that its spinal-implant division had paid kickbacks to doctors as a way of inducing them to use its products. The Justice Department accused Medtronic of

paying kickbacks through what officials described as “sham consulting agreements, sham royalty agreements and lavish trips to desirable locations” offered to doctors by the company from 1998 to 2003.

Complex back surgery has become a lucrative business for companies making implants, and Medtronic was accused of spending tens of millions of dollars on consulting contracts and other types of payments to prominent spine surgeons. It was claimed by a whistleblower who managed Medtronic’s travel services that the company gave some surgeons “excessive remuneration, unlawful perquisites and bribes in other forms for purchasing goods and medical devices.”

Source: *New York Times*

## VIII. BUSINESS LITIGATION

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### **ALABAMA POWER COMPANY SUES CABLE COMPANIES**

Alabama Power Co. has sued one cell phone company and eight cable television companies over unpaid bills. The utility company says it will take down the defendants’ transmission gear from electric poles unless these defendants pay for the space. The state’s largest electric utility sued the companies in mid-June, claiming unpaid bills of more than \$1 million. Defendants in this case include Charter Communications (the largest Alabama cable company); cable operator Comcast; and Cingular Wireless (the cell phone company which is a joint venture between BellSouth and AT&T). The suit, filed by Alabama Power in the Circuit Court of Jefferson County, alleges that each cable company signed a contract agreeing to pay rent in return for the right to attach onto electric poles the gear that transmits TV signals to customer homes. It is alleged in the suit:

*Alabama Power may terminate the respective pole attachment*

*agreements and remove the cable access television equipment of the defendant.*

Alabama Power says that Comcast owes \$434,967; Cingular Wireless owes \$3,574; and Charter owes \$689,000. Obviously this is not just a run-of-the-mill collection lawsuit. Alabama Power also sued Coosa Cable, Mediacom, Northland, Sky Cable, Southern Cable, and West Alabama Cable for lesser amounts than the amounts allegedly owed by Charter and Comcast. All but the Cingular Wireless contract were agreed to in March 1993, with Cingular’s dating from 1998. I must admit that I was shocked to learn that these cable companies wouldn’t pay their debts.

Source: *The Birmingham News*

### **ENERGY UNIT SETTLES CLASS ACTION LAWSUIT OVER ACCOUNTING PRACTICES**

Williams Cos. Ins. will pay \$290 million to settle a shareholder class action. The lawsuit was the result of accounting practices related to energy trading and potential liability associated with Williams Communications Group Inc., a former unit of Williams. That company later went bankrupt. The settlement covers investors who purchased Williams securities between July 24, 2000, and July 22, 2002. Williams had guaranteed more than \$2 billion of Williams Communications debt.

Source: *National Law Journal*

### **MUSIC INSTRUMENT MAKER SETTLES PRODUCT DISPARAGEMENT LAWSUIT**

First Act Inc., a Massachusetts music instrument maker, has settled its lawsuit against Brook Mays Music Co. for \$16.7 million. Earlier a jury had found that the defendant had falsely disparaged the products of the bargain-priced musical instrument maker. The settlement comes after the jury verdict in 2005 in which a civil jury awarded First Act \$20.7 million. Brook Mays had planned to appeal, but the settlement will end the lawsuit, and it appears all parties are satisfied with the result.

The history of the case is as follows. In December 2005, a jury in Boston ruled unanimously in favor of First Act. The company had sued Brook Mays in 2003 after the Dallas-based retailer sent a flier to band directors and consumers claiming that First Act and other imported instruments were of poor quality and that repair parts might not be available. First Act labeled the flier as “a calculated smear campaign.” The company said it had a nationwide network of repair technicians and that Brook Mays’ statement was false. First Act’s strategy of selling instruments through mass retailers instead of traditional music stores has caused an uproar in the band-instrument market. You would have to go back to the advent of catalog retailers decades ago to find a similar situation.

Other companies, such as guitar makers Fender and Yamaha, also sell instruments at big retailers. But, it appears that First Act may have been the first to sell band instruments at mass merchants such as Wal-Mart Stores Inc. Brook Mays has 63 stores in eight states, mostly in the South, and apparently saw this as a threat to their business.

Source: *Claims Guides*

### **GABELLI TO PAY \$130 MILLION TO SETTLE LAWSUIT**

One of the country’s best-known money managers, Mario J. Gabelli, and some of his affiliated companies have agreed to pay \$130 million to settle a civil fraud lawsuit that accused Gabelli of orchestrating a scheme to deceive the Federal Communications Commission (FCC) in its auction of cellphone licenses in the late 1990s. The settlement was approved last month by a New York federal judge. The lawsuit against Mr. Gabelli was filed more than five years ago by a whistle-blower, a lawyer who was involved in the auction, under the False Claims Act. The lawsuit accused Mr. Gabelli and other Gabelli affiliates—mostly friends and associates of Mr. Gabelli with little, if any, experience in the communications field—of creating a series of sham com-

panies that bid for FCC licenses at a discount under a program that favored minorities and small businesses. Many of those licenses were later resold with hefty profits, according to allegations in the lawsuit.

Source: *New York Times*

## IX. INSURANCE AND FINANCE UPDATE

### **VESTA INSURANCE GROUP IS IN DEEP TROUBLE**

Vesta Insurance Group, which is based in Birmingham, Alabama, is in serious default on loan agreements. Texas regulators have now taken over six of the company's subsidiaries. Regulators have also seized control of Vesta companies in Hawaii and Florida. This would mean that eight of the company's 10 subsidiaries have now been seized. Six insurers owned by Vesta will be operated by the Texas Commissioner of Insurance as part of a court-ordered rehabilitation. The court order puts Vesta in default on long-term debt securities. Vesta's last annual report, which was filed in 2004, revealed that the company had about \$218 million of outstanding debt securities. Vesta said at that time it would not be able to pay the entire amount if creditors demanded immediate repayment after a default.

Vesta was once one of the state's most valuable publicly traded companies, and one with some real strong political connections. The State of Texas has taken over Vesta Fire Insurance, Vesta Insurance Corp., Shelby Insurance, Shelby Casualty Insurance, Texas Select Lloyds Insurance, and Select Insurance Services. After the takeover, Texas Select was actually shut down. Florida is operating Florida Select Insurance. Hawaii is operating Hawaiian Insurance & Guaranty. It has been reported that Vesta, which lost \$318 million from 2001 through 2004, hasn't filed Securities and Exchange Commission financial documents in two years.

The company's shares have been removed from the New York Stock Exchange. The company's troubles began back in 1998, when the company began examining accounting irregularities and Chief Executive Robert Huffman resigned. The company erased \$49 million of profit reported for 1993 to 1997. Vesta said \$29 million of profit came from premiums improperly reported as income. I am told that we will be hearing lots more about this company in the coming weeks and months. Vesta's problems could prove to be embarrassing for a few politically-connected lobbyists and perhaps a public figure or two in Alabama.

### **ILLINOIS ATTORNEY GENERAL SUES LIBERTY MUTUAL**

Illinois Attorney General Lisa Madigan has filed a lawsuit against Liberty Mutual Insurance Company and seven affiliates, alleging that the company and its affiliates participated in a bid-rigging and business-steering scheme. The civil complaint, filed last month in Cook County Circuit Court, alleges that the companies violated the Illinois Consumer Fraud and Deceptive Business Practices Act by paying undisclosed contingent commissions to insurance brokers and agents to induce them to steer business to Liberty Mutual. Contingent commissions are payments that insurers pay to brokers and agents in addition to the base commissions. Contingent commission amounts are usually based on the volume and profitability of the business a broker or agent produces for an insurance company. The investigation by the Attorney General's office found that, because contingent commissions are based on volume and profitability, they encourage brokers and agents to improperly steer their clients to particular insurers in violation of the fiduciary duty they owe their clients.

The complaint also alleges that a Liberty Mutual affiliate company also participated along with several other insurers in a scheme led by Marsh & McLennan Companies, Inc., to rig bids for excess casualty insurance. The

lawsuit alleges that Liberty Mutual also failed to disclose its affiliate's role in the bid-rigging scheme. Attorney General Madigan stated:

*It is of great concern that one of the country's largest insurance companies would rig bids and induce brokers and agents to breach their duties to their clients in the ways we have alleged in this lawsuit.*

In its lawsuit, the State of Illinois seeks restitution for injured policyholders, civil penalties under the Consumer Fraud Act, and an injunction that would bar Liberty Mutual from engaging in the alleged conduct in the future. Earlier this year, the New York and Connecticut Attorneys General filed similar complaints against Liberty Mutual based on their investigations of bid-rigging and steering. The Illinois Attorney General has been working cooperatively with the Attorneys General of New York and Connecticut. The Liberty Mutual lawsuit is part of the Illinois Attorney General's wider investigation of the insurance industry, which began in late 2004. To date, Illinois has settled with several insurers and brokers, resulting in the recovery of tens of millions of dollars in restitution and penalties.

Source: *Claims Guides*

### **THE NUMBERS OF UNINSURED DRIVERS INCREASING NATIONWIDE**

If a person is injured in a motor vehicle accident in this country, the chances are about one in seven that the at-fault driver is uninsured. According to a recent Insurance Research Council (IRC) study, the estimated percentage of uninsured motorists increased nationally from 12.7% in 1999 to 14.6% in 2004. Interestingly, the magnitude of the uninsured motorists' problem varied widely from state to state. Unfortunately, Alabama doesn't fare very well when it comes to uninsured drivers on our highways. It should be noted, however, that a motorist with very low liability limits is not much better than one with no insurance if you or a

member of your family suffer serious injuries or death from major motor vehicle collision with such a driver at fault.

In 2004, 25% of Alabama motorists were uninsured. Our neighboring states came out as follows: Mississippi 26%; Georgia 10%; Tennessee 21%; Florida 19%; Louisiana 10%. The recently released study, *Uninsured Motorists, 2006 Edition*, examines trends from 1999 to 2004 in the percentage of uninsured drivers by state. In 2004, the five states with the highest uninsured driver estimates were Mississippi (26%), Alabama (25%), California (25%), New Mexico (24%), and Arizona (22%). The five states with the lowest uninsured driver estimates were Maine (4%), Vermont (6%), Massachusetts (6%), New York (7%), and Nebraska (8%). IRC estimates the uninsured driver population, using a ratio of insurance claims made by individuals who were injured by uninsured drivers to claims made by insured drivers. The study contains recent statistics by states on uninsured motorists claim frequency, bodily injury claim frequency, and the ratio of uninsured motorists to bodily injury claim frequencies. Elizabeth A. Sprinkel, senior vice president of the IRC, who sees the problem as significant, stated:

*Even though most states require drivers to maintain insurance, the problem of uninsured motorists persists. Responsible drivers who purchase insurance end up paying for injuries caused by uninsured drivers.*

The IRC study examined data collected from eleven insurers, representing approximately 58% of the private passenger auto insurance market in the U.S. For more detailed information on the study's methodology and findings, you can go to IRC's website at <http://www.ircweb.org>. The Insurance Research Council is a division of the American Institute for CPCU and the Insurance Institute of America. The Institutes are independent, not-for-profit organizations dedicated to providing educational programs, professional cer-

tification, and research for the property-casualty insurance business.

It's quite apparent that a good number of drivers on our nation's highways don't carry liability insurance. Many who do actually have very low limits. Because of this reality, all persons should increase their **own uninsured motorist coverage** to the highest amount that can be written by their own liability insurance companies. This will cover persons under your own policy adequately when they are involved in a collision with an uninsured or under-insured motorist. Many people don't realize they can get higher uninsured motorist coverage from their company. As a result they wind up with very low limits, which will always be the minimum required by state law. Most insurance companies like that situation and won't tell their customers that their uninsured coverage should be increased to protect them and their families.

Source: *Insurance Journal*

#### **PORT AUTHORITY IN MISSISSIPPI WILL FILE SUIT AGAINST FORMER INSURER**

The Jackson County, Mississippi Port Authority plans to sue its former insurance carrier. Port commissioners will sue Arch Specialty Insurance to try to settle unresolved claims of about \$5 million in storm damage to the port. The lawsuit will be filed in Jackson County Circuit Court. It appears not only individuals have problems getting insurance claims paid. Commissioners have canceled their policy with the insurance company and approved hiring Lloyd's of London as the port's new insurer. In addition to Arch providing primary coverage, excess coverage was provided from two other companies, Essex and Lloyd's.

The dispute centers on damage assessments made by an adjuster from Arch and an independent adjuster. An important aspect of the problem involves the port's loss of business because of Hurricane Katrina. Arch paid some money toward resolving claims, but company officials refused to join port officials in reviewing other claims

and the difference in assessments from Arch and port adjusters. The delay has prevented the port from receiving money from the Federal Emergency Management Agency, which isn't available until after insurance companies make settlements.

Source: *Insurance Journal*

#### **WORLD TRADE CENTER DEVELOPER AND THE NEW JERSEY PORT AUTHORITY SUE INSURERS**

The Port Authority of New York and the State of New Jersey, together with World Trade Center developer Larry Silverstein, have filed a civil lawsuit against seven insurers over delays in payments they say are needed to rebuild on the site of the September 11<sup>th</sup> terrorist attacks. The Port Authority and Silverstein filed their suit in a state court in New York. Allianz Insurance Company, Industrial Risk Insurers, Travelers Indemnity Company, Royal Indemnity Company, Gulf Insurance Company, Zurich American Insurance Company, and Employers Insurance of Wausau were named in the suit as defendants. According to Silverstein, some insurers have indicated they might halt monthly payments following a new deal, called the **Conceptual Framework**, which shifted responsibilities and financing between Silverstein and the Port Authority. Without the insurers' funds, the World Trade Center site can't be rebuilt, according to Silverstein. The Conceptual Framework is an agreement that realigns the interests in the World Trade Center site in order to facilitate its prompt redevelopment. It appears that insurance companies may be using the agreement as an excuse not to pay claims in a timely manner.

The lawsuit filed by these plaintiffs seeks a declaration that the Conceptual Framework does not impact the insureds' rights to recover fully all amounts currently due and to be paid in the future by these insurers. Interestingly, Silverstein has been using \$4.6 billion being paid out in insurance proceeds to pay rent for rebuilding rights at ground zero and to build the 1,776-foot

Freedom Tower, which has already begun construction. Insurers are still challenging court rulings awarding those proceeds. It appears that this litigation, which has been in the courts now for over four years, will be going on for a good while longer. The latest suit is just the last in a series of lawsuits filed involving insurance claims and coverage issues arising after 9/11.

Source: *Insurance Journal*

### **LAWYER AWARDED \$11 MILLION BY JURY IN SUIT AGAINST ALLSTATE**

A state court jury in New Mexico has awarded an Albuquerque lawyer nearly \$11 million after she sued an insurance company that she contended literally destroyed her law practice. The lawyer had been a defense lawyer for Allstate Insurance Co. and apparently had done a considerable amount of work for the company over a period of time. The insurance company routinely hired the lawyer, Suzanne Guest, to represent the company in accident claims.

But when two accident victims sued both Allstate and Ms. Guest, the company apparently went back on a promise to defend her. After the company refused to defend Ms. Guest, she then had to give up all her Allstate cases because an obvious conflict of interest was created. It was proved at trial that basically all the lawyer had done in her practice was to work for Allstate. The end result was that she had to give up her practice because of Allstate's actions in the case against her. The jury found Allstate at fault and awarded Ms. Guest \$1.8 million in compensatory damages and \$9 million in punitive damages.

Source: *Insurance Journal*

### **AUSTRALIAN LIQUIDATOR PURSUES GENERAL REINSURANCE FOR \$400 MILLION**

As you are aware, our firm is representing Tennessee Insurance Commissioner Paula Flowers, as the Liquidator for three failed Tennessee insurance companies. Our case has moved forward

and seeks damages against General Reinsurance, among others, whom we allege are responsible for the financial collapse of three very large insurance companies in the state of Tennessee.

A case that is very similar to ours has been proceeding in Australia. There the court appointed a liquidator, Tony McGrath, to see after the remaining assets of Australian insurance company HIH. Just as in the United States, when an insurance company suffers financial collapse, instead of going into bankruptcy, the insurance regulators, known as "liquidators" are appointed to oversee the remaining assets of the insurance company so that policyholders and stockholders are treated fairly.

In the HIH litigation, General Reinsurance is alleged to have been involved in reinsurance fraud that caused the collapse of the company. This is very similar to our case here. The basis of the claims is that General Reinsurance was involved in allowing HIH executives to falsely boost their profits in the late 1990's through fraudulent reinsurance coverage. Reinsurance is insurance coverage that one insurance company buys from another insurance company to help mitigate their liability should policyholder claims exceed the original insurance company's ability to pay. In addition to General Reinsurance, there are several other defendants in this suit. One of the defendants is the international reinsurance broker Guy Carpenter & Company. There are also several executives named as defendants.

### **TENET RECEIVES \$340 MILLION FROM INSURERS FOR HURRICANE DAMAGE**

Not all the news concerning Tenet Healthcare Corp. is bad. Insurance companies have paid the Dallas-based company \$340 million to cover claims from Hurricane Katrina. Five of Tenet's hospitals in the New Orleans area and one in Biloxi, Mississippi were damaged by the storm. Apparently, the Tenet settlement is one of the first major commercial property insurance settlements coming after last summer's hurricane. The settlement was paid by insurers

that underwrote Tenet's property insurance in 2005 and 2006.

All of Tenet's hospitals and its five diagnostic imaging centers in the hurricane's path suffered significant damage. Two of the hospitals in New Orleans—Memorial Medical Center and Lindy Boggs Medical Center—have not reopened. The company plans to sell those two hospitals and two others in Kenner, Louisiana, and Gretna, Louisiana, by the middle of next year. It's rather interesting that these claims were paid—arising out of the same storm—when others are being denied.

Source: *Insurance Journal*

### **TRIAL OF FIRST KATRINA INSURANCE LAWSUIT COMES TO END**

The first trial to determine whether insurance policyholders who lost homes in Hurricane Katrina are entitled to recover losses that insurance companies claim were caused by flooding was completed in Mississippi last month. The lawsuit was filed on behalf of a police officer, Lt. Paul Leonard and his wife, who had taken out homeowners' insurance with Nationwide Mutual Insurance Co. long before Katrina destroyed their Pascagoula home on August 29<sup>th</sup>. After the storm, Nationwide predictably blamed the damage on water, not wind. The company claimed that Lt. Leonard's policy didn't cover floods.

The Leonards contend that Nationwide denied their claim without thoroughly investigating the damage to their house, which is located several hundred yards from the Mississippi Sound near the eastern end of the state's shoreline. Because I attended a junior college in that area, I am familiar with cities and towns located along the Mississippi Gulf Coast.

The Leonards, who purchased their policy more than a decade ago, also contend that their insurance agent had assured them they didn't need to buy flood insurance for their home because their policy would cover **all** hurricane damage. The Leonard home and its contents sustained around \$160,000 in damage. Evidence in this case, which

was tried without a jury before U.S. District Judge L.T. Senter, was completed on July 19<sup>th</sup>. The case was argued and submitted to Judge Senter. At press time, there hadn't been a ruling.

Source: *Associated Press*

### **FEDERAL REGULATION OF INSURANCE WOULD NOT BE GOOD FOR POLICYHOLDERS**

On July 11<sup>th</sup> U.S. Senator John Sununu (R-NH), who introduced the National Insurance Act of 2006 along with Senator Tim Johnson (D-SD), opened hearings on the federal legislation. The Act would allow life and property/casualty insurers to choose federal rather than state charters under an "optional federal charter" regulatory system. The Senate Committee on Banking, Housing, and Urban Affairs took up the subject of insurance regulatory reform at the hearing, which has attracted a great deal of attention. Senator Sununu, who is a member of the Committee, stated:

*This hearing provides a welcome opportunity for committee members to examine the issue of insurance regulatory reform, including the legislation that Senator Johnson and I have put forth to improve the regulation of life and property and casualty insurance. I look forward to reviewing the specifics of the 'National Insurance Act of 2006' with the witnesses today and at additional hearings expected to be held this summer and fall.*

In effect, all of this is simply an attempt by the insurance industry to take away states' authority to regulate insurance and protect the public. The regulation of insurance has traditionally been a state responsibility. This legislation, which is being pushed by many in the insurance industry, is not good for consumers.

Reform at the state level is more likely needed, and that would produce better results than federal involvement in insurance regulation. This is a question involving traditional states' rights and I hope that view will

prevail in Congress. Unlike banking and other financial service industries, the property/casualty insurance industry is primarily a state-based business. Although some insurance products cover interstate activities, most of the companies' products that directly affect people—automobile, farm, and homeowners insurance—are single-state products. State-level regulators have the best understanding of the products and the people for whom they provide protection.

If anybody believes that federal regulation on any subject is superior to state regulation, all they have to do is check the performance of the National Highway Traffic Safety Administration (NHTSA) and the Food and Drug Administration (FDA). We need to strengthen the role of the states in regulating insurance and not scrap the current system in favor of a federal take over. Incidentally, Alabama's Insurance Commissioner, Walter Bell, is one of the state commissioners who is opposing the legislation. The Commissioner should be commended for his stand.

## **X. PREMISES LIABILITY UPDATE**

### **CEILING COLLAPSE IN BOSTON TUNNEL KILLS MOTORIST**

We have been hearing and reading in the news for several years about all of the problems related to what is referred to as Boston's Big Dig. Unfortunately, a recent tragic accident has put the tunnel back in the news. At least 12 tons of concrete fell from the ceiling of the tunnel in mid-July, crushing a woman to death. Nobody would expect that sort of thing to ever happen. As a result, new questions are now being raised concerning the safety of the \$15-billion underground highway and tunnel system. The ceiling collapse in a connector section of Interstate 90 followed a winter in which one of the country's most ambitious urban infrastructure

projects has been plagued by falling debris, floods, leaking walls, and concerns about construction methods in the transportation labyrinth. As you probably know, this tunnel passes under the Boston Harbor and ends at Logan Airport. The I-90 connector, opened in 2003, runs under an industrial part of south Boston near the city's new convention center. Obviously, this tunnel has very heavy traffic.

Milena Delvalle, a 38-year-old Boston restaurant worker, was killed in the accident. She and her husband were headed to Logan International Airport to pick up relatives when at least four slabs of concrete—each weighing three tons—fell on their car. The husband was able to escape through the driver's side window with only minor injuries. But, Mrs. Delvalle was tragically killed. Apparently, steel tiebacks that held the 40-foot ceiling sections in place gave way, causing the accident. The ceiling panels were set in place in 1999, bolted to the tunnel roof by the tiebacks. At least 17 areas of the Big Dig use similar construction, according to authorities.

To say that there has been a great deal of controversy surrounding the tunnel is an understatement. Governor Romney and Massachusetts Turnpike Authority Chairman have been at odds for several years. The Big Dig has long been faulted for cost overruns, questionable construction, and charges of an "ongoing pattern of mismanagement." In May, six contractors who supplied concrete to the Big Dig were charged with providing substandard materials. Building the Big Dig, a seven-mile system, has been compared to constructing a project comparable to the Panama Canal under a major American city. The last major section of the project was completed this year, but some construction continues. Governor Romney ordered a portion of the tunnel shut down when defective bolts were discovered in that section. This latest tragic occurrence, resulting in a death, is another sad chapter in a series of mishaps. I hope this will be the last of this sort of thing to happen. But, based on what we have learned, that may prove not to be the case.

## **NEW YORK TO SUE EXXONMOBIL OVER OIL SPILL**

ExxonMobil Corp. faces another lawsuit over the massive underground oil spill in Brooklyn that has caused problems with the city waterway. As previously reported, the leak was first detected years ago. A number of lawsuits have been filed against the oil company because of the slow pace of the cleanup. New York state environmental officials are now taking the issue to court. An estimated 17 million gallons of petroleum once lay in a vast plume beneath the streets that were a major home to oil refineries for more than a century. The countless spills that went unnoticed for decades, eventually formed a 52-acre subterranean blob. It appears that authorities have been aware of the problem since 1978. ExxonMobil accepted responsibility for much of the damage in 1990. It claims to have pumped some 9 million gallons out of the ground since that time.

In the latest filing the Department of Environmental Conservation is pursuing legal action against Exxon "to ensure that the company fulfills its obligation to clean up petroleum contamination" in Brooklyn. Officials had been negotiating with Exxon in an attempt to improve the cleanup plan, but were dissatisfied with the discussions. ExxonMobil, through a spokesperson, takes the usual company line, and says, the company is "committed to meeting our environmental responsibilities at the site." The state also has negotiated with Chevron Corp. and BP PLC, which also had facilities in Brooklyn, but hasn't taken legal action against them. I suspect those companies are easier to deal with than Exxon, which in my opinion, believes it is **above** the law.

Source: *Forbes News*

## **ORKIN WILL FINALLY PAY \$4.6 MILLION TO A FORMER CUSTOMER**

Recently, we reported on the long legal battle between Orkin Exterminating Company and homeowner Collier Black. It now appears that the battle is over and that justice will finally be

done. Orkin, which is a wholly owned subsidiary of Rollins, Inc., has now agreed to pay Mr. Black nearly \$4.6 million. The Orkin customer, whose Ponte Vedra Beach home was severely damaged by termites while under a life-time Orkin contract, took the Atlanta-based pest-control company to arbitration in 2003 and received a \$4.2 million judgment. Orkin appealed, taking the matter to court, with interest accruing on the original judgment award. In February a federal appeals court upheld the arbitration panel's award.

In late June, a U.S. District Judge issued an order setting the interest, which puts the total awarded at \$4.58 million. Mr. Black, a 53-year-old retired publisher, fought Orkin for several years. Largely as a result of the Black case, the Florida Attorney General's Office is currently investigating Orkin's business practices. State investigators are trying to work out an agreement with Orkin that would include a cash settlement and changes to the company's procedures involving inspections, treatments and repairs of homes. I hope the Orkin customers around the country, who now total over 1.6 million, will get better treatment than the Florida customers got.

## **FIRE VICTIM'S ESTATE FILE SUIT AGAINST APARTMENT BUILDING OWNER**

The family of a 71-year-old woman who died in a fire at her apartment in 2005 has filed a civil lawsuit against the owner of the building. It is alleged in the suit, filed in a Ohio state court, that Perrysburg Ecumenical Housing Inc. was at fault for not installing a battery backup for the smoke detector in the woman's apartment. The smoke detector was hard-wired into the apartment's electrical source and failed to go off because it had no battery back-up. The fire knocked out electricity to the apartment, and as a result there was no warning from the smoke detectors. A warning device that **doesn't warn** is totally **worthless** in situations such as the one described above.

# XI. WORKPLACE HAZARDS

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## **CONSTRUCTION SITE CAUSES PERMANENT INJURIES TO ALABAMA MAN**

Our firm handled a claim recently for a worker who was injured on the job while working at the Hyundai Plant in Montgomery, Alabama. Our client, Eddie Dean, suffered serious and disabling injuries in an incident that took place on March 17, 2004, at the Stamp and Weld Building located at the plant. Mr. Dean was employed by PCE Constructors, which subcontracted to perform electrical work at the Hyundai plant. On that date, Mr. Dean and other PCE crew members were removing debris to provide a safe environment before moving and setting electrical switchgears in the building's sub-station room.

As part of their clean-up, Mr. Dean picked up one end of a pallet and the foreman picked up the other end to discard it because the pallet was covered with debris, empty concrete bags, and blue dust. Mr. Dean took one step and fell down into a hole. He actually fell down a 21-foot open shaft to a concrete floor below. There were many large holes in the floor in this building, but each was barricaded with steel and adequately marked as a "hazard"—except this one. The contractors responsible for securing the hole were at fault in failing to properly secure the opening in some manner and to warn of the hazard. No reasonable person under the circumstances would have identified it as a danger or hazard. Mr. Dean didn't, nor did any of his co-workers, and as a result he became a victim.

Mr. Dean filed suit against multiple defendants because there were a number of different corporations involved at the worksite. Jay-Ton Construction, Inc., a defendant who was hired by Jesco, was responsible for pouring concrete at this particular shaft. The shaft was 38 inches wide by 59 inches long and 21 feet deep to the floor below. After pouring the shaft, Jay-Ton left a hole in the floor leading to the

shaft and covered it only with a wooden pallet, which was not properly secured to the cover. Jay-Ton failed to properly warn of the hazards relating to this hole. There were no visual warnings of any kind. Those responsible left the hole in this dangerous condition for a considerable length of time. Jay-Ton had subcontracted with CCK South, Inc. and Burchette Concrete, Inc. to perform slab and concrete work at the stamp and welding building. These companies had left a number of empty concrete bags and other debris piled on top of the pallet, which also was covered with blue dust (material called "shake"). Jay-Ton failed to check the work of these two defendants and failed to require a clean-up of the mess they had left. Rust Constructors, Inc., another defendant, provided safety training and safety meetings at the construction site. Hyundai Motors America was the general contractor on the job site and responsible for overall safety on the job site. Both Rust and Hyundai failed to implement adequate safety rules to prevent this type of near-fatal incident from happening.

As a result of the combined and concurring negligence of these defendants, Mr. Dean suffered a most severe injury to his left knee and has had to undergo 5 surgeries on the knee. His doctors have stated that Mr. Dean's permanent injury and resulting disability have adversely affected his quality of life and his ability to return to the type employment he was engaged in. As a result of this catastrophic injury, Mr. Dean can neither stoop, bend, crawl, climb or kneel, which restricts his work potential. He will be required to have at least one knee replacement and probably several during his lifetime. The number will depend on his age at the time of the first replacement. Mr. Dean also suffered other injuries, but his knee has caused the main problem. Although at age 31, Mr. Dean had the potential to continue working in the construction and welding fields, now he will most likely never be able to perform that type of work again. As a consequence, Mr. Dean will have to be retrained for other employment.

The Dean case was settled after a successful mediation, with \$1.5 million to be paid immediately. In addition to that amount, the liability insurance carrier will also pay all past medical expenses and will pay all future medical expenses that are related to Mr. Dean's injuries. The life care plan for our client projected future medical expenses at about \$220,000. The liability insurance carrier also agreed to reimburse the workers' compensation carrier for all subrogation claims for payments of compensation, past medical bills, and indemnity payments, and agreed to satisfy all subrogation liens for future medical payments. The workers compensation carrier will keep medical benefits open. Julia Beasley handled this case for Mr. Dean and his wife and did a very good job for them.

#### ***JURY RETURNS VERDICT IN MAINE DEFAMATION CASE***

A federal court jury in Portland, Maine, awarded nearly \$3 million to a Maine woman recently in a defamation lawsuit. Deborah Galarneau's lawsuit claimed she was defamed by Merrill Lynch after she was fired in January 2004. Merrill Lynch claimed it was legally mandated to explain the firing to the National Association of Securities Dealers. Galarneau said Merrill Lynch notified the association that she was fired for inappropriate bond trading and for making decisions on trades that she was not authorized to make. Ms. Galarneau said she had done nothing wrong and that Merrill Lynch's actions resulted in her inability to find work elsewhere.

In a defamation case, plaintiffs must prove the actions against them were malicious or motivated by ill will. In this case, the jury awarded \$850,000 for compensatory damages and \$2.1 million in punitive damages against Merrill Lynch. Merrill Lynch says it will appeal. Ms. Galarneau, who was 57 years old, was a broker with Merrill Lynch in Portland for 15 years, beginning in 1989. She sought damages for lost pay and for future pay that she would have earned if she had continued working to

retirement age in 2012. Interestingly, at least two letters from Merrill Lynch attorneys had actually defended Galarneau's handling of the account that was in question. An internal review of her conduct also found no wrongdoing. Obviously, this was good evidence at trial for Ms. Galarneau.

#### ***EXXONMOBIL ORDERED TO PAY \$5 MILLION TO WORKER'S WIDOW***

A jury in Louisiana has ordered ExxonMobil to pay \$5 million to the widow of a former contract worker at the company's Baton Rouge plant who died of a disease caused by exposure to asbestos in the 1960s. The jury found that ExxonMobil was solely responsible for the worker's contracting mesothelioma—cancer of the lining of the lung or abdominal cavity linked to asbestos. According to evidence in the case, Exxon knew about all the dangers since the 1930s and protects its own employees from those dangers. The victim was a contract worker at the Baton Rouge plant in the 1960s whose job was to chip paint with asbestos from pipes at the facility. In the 1960s, ExxonMobil began using contract workers to do some work at the plant. It appears that Exxon used precautions to prevent its own workers from being exposed to asbestos, but failed to take the same precautions for contract workers.

#### ***PIZZA HUT SETTLES OVERTIME SUITS BY EMPLOYEES***

Pizza Hut has agreed to pay \$12.5 million to settle two class action lawsuits involving overtime pay for managers at its company-owned restaurants. The settlement will end a federal lawsuit claiming Pizza Hut, part of Louisville-based Yum! Brands Inc., improperly classified restaurant managers as exempt from overtime pay, even though most of their duties involved handling food, ringing up checks and cleaning up, much like workers who get overtime. The settlement also covers a similar suit in Califor-

nia state court. It will award the workers \$1.35 million in the federal case and \$11.15 million in the state lawsuit. Pizza Hut will also pay the administrative costs of handling and distributing the money. The settlement has received preliminary approval from a federal judge last week.

Although the workers' lawyers had estimated the federal case could involve as many as 3,100 workers and cost Pizza Hut as much as \$300 million in actual and punitive damages if it lost a jury trial, the settlement terms limit the pool of workers to a few hundred. The effect on local managers likely is limited because Louisville is a franchised market and the federal case dealt with company-owned stores. Federal law and a court ruling limited the number of people in the class. The federal settlement would apply to restaurant general managers or training managers outside California who have worked at Pizza Hut at any time since August 18, 2000, and who signed on to the class action before November 4, 2005. The state settlement covers the same positions for managers who worked at Pizza Hut in California any time since August 18, 1999.

At press time, it was unknown as to how many people will actually share in the settlement fund. Eligible workers will receive notice of the agreement and be given the chance to opt out. That would let them keep the right to sue Pizza Hut on their own if they believe they deserve more in damages. Any unclaimed money from the settlement will be donated to the charity Doctors Without Borders, which is located in New York.

#### **MIGRANT WORKERS FILE A MOST INTERESTING SUIT**

A lawsuit was filed earlier this year in U.S. District Court in Nashville that could have national implications. The suit against Arkansas-based Superior Forestry Service Inc. claims that the defendant failed to pay about 41 Mexican workers the prevailing wage as required by the Labor Department. In fact, it was alleged that the migrant

workers didn't even receive the minimal wage. It was also alleged that the company didn't pay correctly for the pine trees planted by the workers.

The lawsuit, filed by the Southern Poverty Law Center, involves the federal H-2B program for legal migrant workers. This program allows companies to bring in foreign workers to perform low-skilled, nonagricultural jobs that a company hasn't been able to fill locally. Companies must agree to pay the prevailing wage for their area and industry. In addition, they must provide workers with a place to live. If a worker stays for the whole term of the contract—usually less than a year—the company must pay travel costs home. Besides minimum and prevailing wage, the lawsuit alleges that the company, located in Tilly, Arkansas, didn't pay workers overtime for working more than 40 hours a week, didn't give an accurate accounting of their time and pay, and didn't pay in a timely manner.

The lawsuit claims the company violated the Fair Labor Standards Act, and seeks back pay, travel expenses, other monetary damages, and an injunction prohibiting the company from violating U.S. wage and working condition laws. If the plaintiffs prove a violation of the FLSA, the plaintiffs and others similarly situated will be entitled to recover their unpaid minimum and overtime wages, plus an additional equal amount in liquidated damages.

It's most significant that this lawsuit comes as Congress debates increasing the number of foreign guest workers allowed to enter the country each year. It was reported in an article on the lawsuit appearing in *The Tennessean* that one of the workers frequently worked from dawn to dusk and six or seven days a week. Tree planters are paid by the bag, earning \$25 to \$28 for each 1,000 pines planted, instead of by the hour, according to the SPLC. The case involves issues that could mean that the guest worker visa isn't an advantageous path after all. One of the SPLC lawyers handling the case, Andrew Turner, says:

*They (the workers) would have*

*been better off undocumented than captive to employers who don't comply with wage laws.*

Lawyers for the plaintiffs are seeking class action status for the case which could affect as many as 1,500 workers. The court originally denied class certification. But, the plaintiffs have been allowed to renew their motion for a class action. A trial date has not been set for the case. This will be a most significant case and one that will be watched closely.

Source: *Associated Press*

#### **JURY FINDS FOR WELDING ROD MAKERS IN SOLIS CASE**

We wrote about the Solis welding rod case last month. In that case, the jury found that the makers were not liable for the plaintiff's health problems. The Solis case was the first to go to trial of about 3,800 cases filed nationally. Defendants in the case were Cleveland-based Lincoln Electric Holdings Inc.; Troy, Ohio-based Hobart Bros. Co.; TDY Industries Inc., part of Pittsburgh-based Allegheny Technologies Inc.; and ESAB Group Inc., a Florence, South Carolina-based subsidiary of London's Charter PLC. TDY stopped making welding products in 1992.

It should be noted that this case was hand-picked for trial by the welding industry under rules set by the trial judge. I understand that the next case to be tried will be selected by the plaintiffs' committee. As you know, there are other lawsuits pending in state courts across the country. Observers stated that this case was **weak** on the causation issue, which means that the jury could have found an inadequate warning, but that the plaintiff's health problems weren't actually caused by the fumes from the welding rods.

## XII. TRANSPORTATION

### **MORE CAUSE FOR CONCERN OVER FUEL TANK SAFETY**

The explosion in mid-air of a Paris-bound jumbo jet about 10 years ago received a great deal of attention. As you may recall, the incident killed all 230 passengers aboard. Trans World Airlines Flight 800 crashed minutes after takeoff from New York's John F. Kennedy International Airport. A spark ignited vapors in a fuel tank located in the center of the Boeing 747's wing. Officials suspected that a short circuit transferred excess voltage into the tank. The 1996 accident was thoroughly investigated by the Federal Aviation Administration (FAA).

It appears that the primary cause of the accident—the flammability of fuel tanks—hasn't been fixed even though 10 years have passed since the crash. There is a dispute between the FAA and the airline industry over whether the problem is fixed. Part of the problem appears to be the result of cash-strapped carriers not wanting to spend the money required to really fix the problem. The cost of the modifications proposed by the FAA, which the industry says is \$420,000 per plane, is the problem. Safety experts acknowledge the FAA's proposal to reduce the flammability of fuel tanks is aimed at preventing a "rare occurrence." Even with a low level of probability, however, the consequences of another explosion would result in a massive loss of life. Regulators note that since 1989, center fuel tank explosions have caused four airplane accidents, leading to 346 fatalities.

After Flight 800 went down, the FAA issued more than 100 directives ordering airlines to overhaul wiring and to complete assessments of fuel tank systems to ferret out equipment or processes that could spark a fire and explosion. The studies led to the discovery of 200 previously unknown ignition sources. After the agency issued the proposed rule that would mandate its

system on numerous Boeing and Airbus models, it received comments from airlines saying its analysis was flawed and that the costs of the new system outweighed its benefits. The FAA is still reviewing comments and says its final ruling could come by September 2007. Also, Boeing says it will install a system designed to reduce the flammability of fuel tanks on its new 787 aircraft and is testing the system on other models. I hope this safety issue will be resolved.

Source: *New York Times*

### **CONCERN OVER AIRLINER ENGINE BREAKING APART**

There is another safety concern relating to jet engines and resulting fires. An engine break-up that nearly destroyed a Boeing 767 in Los Angeles recently while the plane was on the ground has gotten the attention of federal investigators. They are hoping that the failure won't indicate a recurrence of a most serious problem that was supposed to have been taken care of and eliminated in 2003. Hopefully, that will be the investigators' conclusions after the matter is fully investigated. Here is what has been reported concerning the incident so far. American Airlines mechanics were testing the engine on June 2<sup>nd</sup> after the crew of an earlier flight had reported that the engine wasn't performing properly. During the test, an internal disk came apart, slicing open a fuel tank in the left wing. As a result, the fuel spilled onto the ground and caught fire. Had this occurred in flight, it would have been a disaster.

Fortunately, there were no injuries during this test. It appears that under the rules of the National Transportation Safety Board, this event may not even qualify as an **accident** because there was **no intention** at the time **to fly the plane**. But experts told the *New York Times* that such "uncontained failures"—so called because the engine cowling does not hold in the debris—actually resemble "a roulette game." John Goglia, a former member of the board and an aircraft maintenance expert, told the *Times*:

*There's 360 degrees around, and it's really the luck of the draw which way the pieces come out. If the parts fly off in flight and hit the wing, where fuel is stored, or the fuselage, the results could be pretty devastating.*

You may recall that the first such reported engine explosion occurred during a flight of a United Airlines DC-10 in 1989. That engine was mounted in the tail. The debris from the explosion disabled the plane's hydraulic system. The crew was able to land that aircraft in a field at the airport in Sioux City, Iowa, maneuvering only by varying the thrust on the two surviving engines. Tragically, in that accident 111 people were killed. The on-the-ground explosion in Los Angeles during the test is similar to one in Philadelphia in 2000, involving another Boeing 767 owned by US Airways. In both of these accidents, mechanics were testing the engines by revving them toward full power when they broke up, leading to catastrophic fires.

In addition to those incidents mentioned above, an Air New Zealand 767 suffered an **uncontained failure** at 11,000 feet on a flight from Auckland, New Zealand, to Brisbane, Australia, in 2002. Fortunately, that plane was able to land safely. But as a result, in March 2003, the Federal Aviation Administration (FAA) ordered inspections of the part involved. Obviously, the agency believed the inspections would solve the problem. Unfortunately, that may turn out not to have been the case.

The engine in all of the incidents mentioned was a variation of the popular General Electric CF6. According to GE, about 3,400 of the engines were in service, of which two-thirds reportedly were inspected. GE claims that no problems were found during the inspection. The engine involved in Los Angeles, however, was not due for inspection, according to investigators. The inspection interval is usually set at half the number of flights at which engineers believe a problem will develop. The present inspection limit now is 11,000 "cycles," or engine start-ups and shut-downs. Aviation experts say that one

likely outcome was that the government would require inspections at shorter intervals. The engines involved were built between 1982 and 2001. In 2001, the company switched to a stronger disk. The engines are used on a variety of large airliners. The FAA is currently investigating the failure in Los Angeles. It will be interesting to see what turns up. I hope there will be an explanation that isolates this incident, thereby not affecting other engines in service.

Source: *New York Times*

### **CREW FATIGUE FOUND TO BE A CAUSE OF TRAIN COLLISION**

The National Transportation Safety Board (NTSB) has reported that the crew of a Union Pacific freight train probably was asleep when it collided with another train in Texas two years ago. That collision resulted in the release of a plume of chlorine gas that killed three people and injured 30 more. The wreck occurred on June 28, 2004 near San Antonio. The Union Pacific train crashed into a Burlington Northern Santa Fe train as it moved onto a rail siding. It was reported that both the engineer and the conductor had worked very long scheduled hours in the days before the collision in Macdonia, Texas, and had not gotten adequate rest because of their schedule. The engineer had sped up the train as he passed through signals directing him to slow down and to stop, which caused the investigators to work hard at finding out why this occurred. It was the NTSB staff's conclusion that the two men were probably asleep at the time of the accident.

The Union Pacific locomotive had slowed at a point where it didn't have to, then the throttle moved for no clear reason and the train apparently accelerated through yellow lights and blasted right through a red stop signal at 45 mph. The investigation also found that the conductor had been drinking before the accident. Union Pacific claims to have improved its safety practices since the accident. Hopefully, the work schedules of crews were affected by these changes.

Source: *Associated Press*

### **JURY RETURNS VERDICT FOR FAMILY IN A 4-CAR COLLISION**

A California state jury awarded \$3.7 million in damages to a family that suffered injuries during a crash involving vehicles owned by Harris Ranch Beef Co. and FedEx Ground Package System Inc. The jury found that California-based Harris Ranch should pay 80% of the damages and that Pittsburgh-based FedEx Ground, the trucking division of shipping giant FedEx Corp., should pay 20%. A husband, wife, and their 11-year-old son sued FedEx Group and Harris Ranch after the 2003 accident. The Harris Ranch tractor-trailer rear-ended the FedEx Ground delivery van, which crossed the double yellow line and hit a Toyota Tacoma before crashing into the plaintiffs' 1999 Dodge Durango. The wife had to be airlifted to a hospital, where she underwent emergency abdominal surgery for severe internal injuries. The damages included \$2.5 million for the woman's "physical pain and mental suffering."

Source: *National Law Journal*

### **SETTLEMENT REACHED IN AIRPLANE CRASH LAWSUITS**

A settlement has been reached in the cases filed against Chalk's Ocean Airways arising out of a plane crash off the coastline of Miami, Florida. Relatives of the 20 passengers and crew killed in the seaplane crash last year have settled their claims. The crash involved a Chalk's Ocean Airways sea plane that plunged into the ocean just off the coast of Miami, Florida. All of the related lawsuits against the airline have now been settled. The 58-year-old Grumman G-73T Turbo Mallard, owned by the Fort Lauderdale-based airline, crashed on a flight to Bimini, Bahamas on December 19<sup>th</sup> of last year. The total amount of the settlement will be about \$51 million, which will come from insurance companies and will exhaust all of the available insurance coverage. The seaplane crashed shortly after takeoff when its right wing broke off. The National Transportation Safety Board is still investigat-

ing whether it had adequate inspections and maintenance.

Source: *Orlando Sentinel*

### **MORE LAWSUITS FILED IN NEW YORK BOAT CASE**

We have written in earlier issues on the capsizing of a tour boat last fall on Lake George, New York that killed 20 people. There have been several lawsuits filed arising out of that incident. Two more lawsuits have now been filed: One by the estate of a Michigan woman that says the makers of the tour boat's pump and engine should among those held responsible; and the other by the estates of two other Michigan women against several companies and individuals, including the boat's owner, operator, and captain. At press time, the National Transportation Safety Board was still investigating the incident and hadn't determined the cause of the October accident. As a matter of interest, 19 of the 20 people killed were from Michigan and most were senior citizens. This was a tragic accident and one that should have never occurred.

Source: *Insurance Journal*

### **U.S. SUPREME COURT BACKS WORKER IN RETALIATION CLAIM AGAINST EMPLOYER**

A new standard has been established for anti-retaliation claims by workers. This came about when the U.S. Supreme Court in late June affirmed a jury award for a female Tennessee forklift operator who was transferred to a more physical job after she filed a lawsuit accusing her employer of sexual harassment. By a 9-0 vote, justices said that Sheila White, who was the only female on the job, was improperly punished with a suspension for 37 days over a Christmas holiday and a transfer from operating the forklift to doing more physical work as a yard worker. Clearly, this case sets a much broader, employee-friendly benchmark for anti-retaliation claims. The High Court's ruling tilts the balance of power in employment settings toward employees. Under the High Court's new stan-

dard, employers are liable for unlawful retaliation if their actions “interfere with an employee’s efforts” to ensure that he or she is not discriminated against in the workplace. Under this ruling trial courts must determine on a case-by-case basis whether “reasonable” employees would be intimidated by actions taken by employers against them.

One important aspect of the court’s ruling is it appears that most employment retaliation suits should be heard by a jury and not a judge. Without a doubt, employees will have more job protection as the result of this decision. Retaliation against employees who complain about discrimination or harassment on the job can’t be tolerated.

As a matter of interest, some 20,000 retaliation cases were filed with the Equal Employment Opportunity Commission in 2004, a number that has doubled since 1992. The cases now account for more than one-quarter of the federal agency’s docket. I wasn’t surprised to learn that the Bush Administration, rejecting the broader standard used by the Equal Employment Opportunity Commission, backed the railroad in this case.

Source: *Insurance Journal*

## XIII. ARBITRATION UPDATE

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### **CONSUMERS DON’T LIKE FORCED ARBITRATION**

On a regular basis I continue to hear Alabama consumers complain about being forced to sign binding arbitration agreements when they buy automobiles, trucks, and other consumer products. I also hear from folks who have valid claims against companies arising out of consumer transactions and who learn to their detriment that they have either unknowingly signed an agreement that contained such an arbitration provision or had one placed in a monthly statement without their knowledge. These consumers then found their claims shunted into arbitration where

they have little change of success. To summarize all of this, consumers don’t like mandatory, binding arbitration and can’t understand how corporations can get away with this sort of thing.

Every single public opinion survey that has polled the arbitration issue recently has reported that folks all over the country strongly dislike mandatory arbitration that is binding. The thing that really concerns most of the folks I talk with is that politicians don’t seem to recognize that there is even a problem. Consumers can’t understand why politicians won’t help them. My response is simply that consumers have very little political clout and that big money in the form of campaign contributions is the thing that gets the attention of most politicians. I hope that will change one of these days.

### **MANY BUSINESSES DON’T LIKE BINDING ARBITRATION**

It has become apparent that many businesses that have gone through an arbitration that was both mandatory and binding—including those who pled to include such arbitration provisions in their own contracts—are now having second thoughts about the process. Many are finding arbitration to be both lengthy and expensive. Often they find that the sales pitch put out by the tort reformers that arbitration is quicker, cheaper and more efficient is far from true. Having to pay three arbitrators in some arbitration proceedings at rates that are from \$500 to \$10,000 per day is not too attractive to some of these corporations. Also, the lack of rules and procedures in arbitration often causes the proceedings not to go well. The lack of appeal rights and other enforceability issues continue to cause major concerns. Many times having to go to a court to enforce an arbitration order proves most difficult and adds additional expenses.

As arbitration has fallen out of favor, mediation, another alternate resolution method, seemingly is gaining traction among businesses. The mediation environment, which is less formal, tends to be cheaper, less adversarial, and quicker

than an arbitration hearing. Also, it works, which I can’t say for arbitration. At a recent continuing legal education event for corporate counsel held in Atlanta, Georgia, David C. Vigilante, associate general counsel and chief litigation counsel at Turner Broadcasting, spoke. Mr. Vigilante reportedly told the audience that he’s not a fan of arbitration because the process requires companies to **give up** some **legal rights**—and it’s **binding**. He called mediation “the worthwhile companion to its less worthwhile...arbitration.” I suspect more and more in-house counsel for corporations are starting to share those feelings.

## XIV. HEALTHCARE ISSUES

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### **THE FDA HAS A SIGNIFICANT BIRTHDAY**

As we all know, the Food and Drug Administration (FDA) has been around for a long time. In fact, the agency has just celebrated its 100th anniversary. As you know, the FDA has the responsibility by law to regulate industries that fall under its control by law. The agency, as a part of its duties, is also supposed to protect the public. Leading independent experts on nutrition, food safety, and drug safety believe that the FDA is failing to protect Americans. While the beleaguered agency obediently rushes expensive new drug therapies on the market, it does virtually nothing to help reduce the toll of diet-related and drug-induced disease in America, according to Public Citizen’s Health Research Group and the Center for Science in the Public Interest (CSPI).

Passage of the 1906 Pure Food and Drug Act took place 100 years ago. The FDA was first known as the Bureau of Chemistry. A lot has changed in the 100 years. Representative Henry A. Waxman, who battles for consumers, had this to say:

*FDA was our country’s first consumer protection agency and*

*Americans have relied on FDA to ensure the safety of their food and drugs for 100 years. Under the Bush Administration, FDA has undermined enforcement and betrayed its consumer-first legacy. FDA must start enforcing the law and return to a culture that places public health concerns ahead of industry profits.*

Rep. Waxman is not the only national leader who is concerned over the FDA's performance. CSPI executive director Michael F. Jacobson gave the following appraisal of the agency:

*The FDA's centennial is not so much a time to celebrate, but to mourn the FDA's gradual descent into irrelevancy. The great Republican president Theodore Roosevelt would be sick to his stomach if he could see how Harvey Wiley's hard-charging tiger of an agency became such a pliant pussycat.*

According to Public Citizen's Health Research Group, some of the problems and failures at the FDA include:

- **User fees.** The FDA's increasing reliance on so-called user fees from drug and medical device companies encourages the agency to treat those companies more like fee-paying customers. Instead of being fully funded by the government, FDA took in \$380 million in user fees in the 2006 fiscal year. Former FDA official Janet Woodcock stated that the law authorizing such fees creates a "sweatshop mentality" at the agency's Centers for Drug Evaluation and Research.
- **No Learning from Drug Mistakes.** In testimony before the Institute of Medicine, Public Citizen Health Research Group director Dr. Sidney M. Wolfe cited 13 instances of drug approvals that either should not have been approved (including Crestor, Rezulin, and others), or should have been restricted (Accutane and others) or withdrawn (Baycol, Seldane, and others) earlier than they were.
- **Tobacco Failures.** Five companies

illegally market and promote laser treatment for smoking cessation. Public Citizen has petitioned the FDA to crack down on those companies, because the FDA hasn't approved the device and there's no evidence the treatment works. Consumers who are convinced to pay up to \$399 for laser treatment may be diverted from real programs that work, such as nicotine gum or patches—thus fewer smokers will be helped to quit. And, though it had essentially removed nicotine-containing beverages from the market in 2002, those drinks have reappeared. In June of this year, NICLite, which the company breathlessly says is the "World's only Nicotine Replacement Drink!," and that it is "classified as a Dietary Supplement by the FDA," began a marketing campaign. According to Dr. Wolfe, either the company is lying about the status of these products or the FDA inexplicably reversed itself and declared that they can legally be sold as dietary supplements. Either way, it represents a failure of the FDA to enforce the law of the land.

Dr. Wolfe, who in my opinion is one of the most dedicated consumer advocates around today, observed:

*The FDA's 100<sup>th</sup> anniversary propaganda campaign hides and denies the many ways the agency is engaging in an unprecedented assault on the American public on behalf of its drug, device, food, and other industry 'clients'.*

As you know, the FDA also has responsibility for our country's food supply. CSPI says failures on the food side of the FDA include:

- **Obesity.** Over the past three decades, rates of obesity have doubled in young children and adults, and tripled in teenagers. In 2003, then-Commissioner Mark B. McClellan declared FDA's intention to "confront the obesity epidemic... to help consumers lead healthier lives through better nutrition." Three years later, according to CSPI, the agency has done essentially

nothing. Even with a food that's a major contributor to obesity—soda—FDA has declined to place health notices on cans and bottles, require added sugars to be listed separately on labels, or require multi-serving containers to list the number of calories for the whole container.

- **Heart Disease.** One of the most potent promoters of heart disease is the trans fat in partially hydrogenated oil. Although after a 10-year slog the FDA finally required trans fat to be listed on nutrition labels—spurring some manufacturers to abandon the oil—the FDA has done nothing to get restaurants to disclose or eliminate it. In 2004 CSPI petitioned the agency to ban partially hydrogenated oil and, until such a ban, to require disclosure in restaurants, but the FDA has not acted. The result: thousands of unnecessary premature deaths every year.
- **High Blood Pressure.** Perhaps the single most harmful substance in the food supply gets zero attention from the FDA—sodium chloride, or salt. CSPI and the American Medical Association want FDA to revoke the "Generally Regarded as Safe" status of salt and to treat it as a food additive, subject to reasonable upper limits in packaged foods. In 2004, the head of the National Heart, Lung, and Blood Institute estimated that cutting the sodium content of the food supply in half would save 150,000 lives per year.
- **Fraudulent Labels.** Of 11,000 employees, the FDA has a grand total of four people at headquarters to police food labels. Thus, supermarket shelves are graced with carrot cake virtually without carrots, fruitless "fruit snacks" made with high fructose corn syrup, "whole wheat" products with a lot of white flour, and the like. CSPI says the most significant FDA labeling initiative in recent years was an industry-written initiative to let manufacturers place misleading "qualified health claims" on food labels. FDA's own research found that the program confused con-

sumers, but the program, pushed by food companies, continues.

- **Food Safety.** Faced with the emergence of dangerous chemicals (such as mercury or acrylamide) in food, the FDA takes years before acting—and even then, its response is typically tepid. Faced with outbreaks of bacterial pathogens in food, FDA is similarly nonresponsive: Salmonella in eggs could be all but eliminated with finalized on-farm regulations to control the hazard, but those have been delayed for years. Shellfish contaminated with deadly *Vibrio vulnificus* kill 20 or so people every summer, but FDA relies on an industry-funded partnership with state governments to ensure shellfish safety.

Even though CSPI is a nonprofit organization with only one lawyer on staff, it has been able to force labeling changes from major companies such as Tropicana, Frito-Lay, and Pinnacle Foods. You have to wonder why the FDA can't or won't do its job. Even when the regulatory agency is handed neatly wrapped complaints on a silver platter, it is said that the FDA ignores these complaints in all too many cases. A major reason for the FDA's failures is their reliance on the drug industry—an industry it's supposed to be regulating and controlling—for help. Congress is a major part of the problem since it fails to adequately fund the FDA which allows the drug companies in many cases to come in and fund studies. Consider the following appraisal of an industry tactic, described as **industry capture**, on how the drug industry influences FDA actions:

- The FDA often relies on advisory committees made up of outside experts to offer science-based advice, particularly on approvals of drugs and medical devices. But those panels often include—and are sometimes dominated by—scientists or researchers who have direct financial relationships with the companies whose products are under scrutiny. In recent years, FDA advisory committees evaluating antihypertensives, various diabetes drugs, and the pediatric use of anti-

depressants, have all included industry-funded scientists. On one committee, 10 of 32 panelists investigating the controversial painkillers known as COX-2 inhibitors, including Vioxx, had ties to the makers of those drugs.

CSPI and Public Citizen acknowledged that the FDA has many hard-working, diligent civil servants who simply need more resources to do their jobs effectively. Based on our experience with the FDA and from drug litigation, I agree with their assessment. Both the Bush Administration and Congress have severely hampered the agency in a number of ways. Here are just a few:

- the Administration, by leaving the agency rudderless and without a permanent commissioner for roughly 70% of the Bush presidency; and
- Congress, by abdicating much of its oversight responsibility, and by slashing the headquarters staffing of the food side of the agency by 11% since 1978.

Unfortunately, much of the attention the Bush Administration does pay to the FDA comes in the form of unwelcome political interference. For example, the FDA's failure to approve the over-the-counter use of the contraceptive Plan B is one case where the agency has been accused of letting politics, rather than science, rule the day. Incidentally, Susan Wood, the assistant FDA commissioner for women's health, resigned over the matter, citing political interference from then-Commissioner Lester Crawford. I will close on this subject by quoting what Dr. Wolfe of Public Citizen had to say about the FDA's anniversary and its responsibilities:

*As we celebrate the 100<sup>th</sup> anniversary of this important agency, there are too many instances in which it appears to be moving back to the 19th century, when industry did whatever it wanted. All too often, the FDA seems to forget that it is a regulatory agency with legally mandated responsibilities to protect the public.*

If you believe that the FDA can do a better job of regulating those industries under its authority, and in protecting public health, get involved and let your elected officials on the national level hear from you. Public pressure from real people—once it reaches a certain level of intensity—is the only thing that will make some politicians do the right thing in most cases.

Source: Public Citizen

### **PRESCRIPTION DRUG PRICES GOING UP UNDER NEW FEDERAL LAW**

I continue to be amazed at how truly bad the new Medicare drug benefit program actually is. It will prove to be one of the worst things Congress, under pressure from the Bush Administration, the drug industry, and the insurance industry, has done in recent years. The drug and insurance companies, along with the pharmacy benefit managers (PBMs), are literally making a killing. Two recent surveys of drug prices by consumer advocacy groups verify what I have been saying for months. These studies show a disturbing pattern of price increases as the new plan was getting under way. An analysis of 193 brand-name prescription drugs by the AARP found that their average wholesale prices increased 3.9% over the first three months of this year, almost four times the general inflation rate. Those increases are driving up retail prices for consumers who pay out of pocket and will result in higher insurance premiums for many of those who have drug coverage. My brother, Billy, who has two pharmacies in Alabama, says that his stores have received tremendous wholesale price increases on drugs, and many of his customers are being hurt badly by the new program. In fact, some folks can't afford drugs under the new plan that previously they could afford to buy.

The second survey, by Families USA, a patient advocacy group, found that virtually all of the new private drug plans under Medicare raised their prices for frequently used medicines between mid-November 2005, when enrollment began, to mid-April 2006. For 19 of the

top 20 drugs prescribed for older Americans, these changes were virtually identical, on average, to changes in the wholesale prices charged by manufacturers. Congress should change the law and should do so immediately. One glaring problem, for example, is not allowing the Medicare program to negotiate prices directly with the pharmaceutical companies. Most American citizens are shocked when they learn that the federal government doesn't have the authority to negotiate prices with the drug companies. This is just one of many problems, however, and because of the powerful forces involved, don't expect anything to happen. The power and influence that the affected industries have in this Administration is awesome.

Source: *New York Times*

#### **FEDERAL GOVERNMENT PROBES DRUG BENEFIT CALL CENTERS**

On another matter involving prescription drugs, the Government Accountability Office (GAO) released a report recently that is most disturbing. The consuming public generally knows very little about the drugs prescribed for them—other than what they get from television advertisements run by drug companies or when they see fit to ask their local pharmacists for help. Because insurance companies have a vested interest in the prescription drug program that went into effect on January 1<sup>st</sup>, you would expect those insurance companies that are a part of the new drug program to have good answers to legitimate questions asked by the public.

We now learn that insurance companies offering prescription drug coverage through Medicare routinely failed to provide accurate and complete responses to questions posed over the telephone by federal investigators. Many of the 43 million people eligible for Medicare drug coverage rely on insurers' call centers for information about what plan would best meet their needs. Recently federal investigators made 900 calls to 10 of the largest drug plan sponsors. I was shocked to learn that they

got a complete and accurate answer only one-third of the time. The overall accuracy and completeness rate for the centers ranged from 20% to 60%. According to a report, only one insurer gave the proper, full answer more than half the time.

According to the investigators, insurers were unable to answer 15% of the questions asked. It's quite clear, based on these reports, that Medicare beneficiaries face challenges in obtaining the information needed to make informed choices. Accurate and understandable information should be available for our seniors. Unfortunately, that doesn't appear to be the case. Senior citizens are being hurt when they should be receiving help. The Bush Administration and its friends in the insurance industry should make sure that the problems are corrected.

Source: *Associated Press*

#### **DRUGS FROM CANADA SHOULDN'T EVEN BE NECESSARY**

A bill to let Americans import prescriptions drugs from Canada was awaiting final approval by a Senate-House conference committee at press time. The U.S. Senate voted on July 11<sup>th</sup> for a bill that would ease a regulatory ban on Canadian medicine crossing the border. Although our citizens deserve cheaper medicine, I am not sure that this route is the safest one to travel. The thing that really bothers me is how Canada can sell drugs to the United States much cheaper than our citizens can buy the very same drugs here. How can that be? A local doctor told me several months ago the problem is that the U.S. subsidizes the rest of the world when it comes to the cost of prescription drugs. From all accounts his assessment is correct. Our Washington politicians need to stop letting the powerful drug industry run the show and instead take action to reduce the excessive costs of all prescription drugs in the U.S. Americans should be able to buy prescription drugs at home and not have to look at Canada or to any other foreign country as a source of their needs.

#### **MARKETING THE ILLNESS AND THE CURE**

I must confess that until recently the term **restless legs syndrome** meant absolutely nothing to me. Now ads appearing on television, in magazines, and on the Internet are aggressively marketing the first pill approved to treat this once-obscure condition, which causes an irresistible, sometimes debilitating urge to move. Praised by some neurologists and patients' advocates for raising the profile of an under-diagnosed, under-treated condition, the ads are also raising some real concerns. Although I now understand that restless leg syndrome (RLS) is a bona fide condition that can make victims miserable, skeptics are afraid that hyper or fidgety people who simply have a hard time sitting still, or even twitch a little bit in their sleep, will receive the inappropriate diagnosis of a serious neurological condition requiring treatment with a powerful prescription medication. GlaxoSmithKline Inc., the drug company involved, has taken the now-accepted position of aggressively marketing a drug that could be misused or over-prescribed.

The debate has focused attention on what some have dubbed "disease-mongering"—taking something that is within normal bounds and labeling it a disease needing pharmaceutical treatment. Dr. Lisa M. Schwartz of Dartmouth Medical School, says:

*We're increasingly turning normal people into patients. Shy people have social phobia, requiring psychotropic drugs. High-strung boys have attention deficit disorder and need amphetamines. Baby boomers with slightly elevated blood pressure have pre-hypertension and line up for beta blockers. A few nights of restlessness calls for sleeping pills. The ordinary experiences of life become a diagnosis, which makes healthy people feel like they're sick.*

As I now understand it, RLS is a collection of symptoms that has been recognized as a neurological condition since the 1940s. Victims frequently experience an overwhelming urge to move

their legs, often at night, sometimes accompanied by what's described as a vague itchy, tugging or "creepy-crawly" sensation. Many sufferers jerk involuntarily while sleeping. The symptoms are sometimes so intense so as to severely limit victims' lives, precluding jobs that require long meetings or long plane rides. For example, RLS can be so disruptive that sufferers are disabled by sleep deprivation. Including milder forms, it may affect 3% to 15% of the population. Although the condition appears to run in families, the cause is unknown.

Last year, GlaxoSmithKline Inc. won approval for the first time to sell one of these drugs, Requip, specifically for RLS. The company spent about \$27 million to advertise the drug for that purpose in 2005, according to TNS Media Intelligence, which tracks advertising. Since the FDA approval, and the advertising campaign that followed, sales of the drug in the U.S. have jumped from \$97 million to \$146 million. Supporters claim that the campaign has been positive, educating the public about a condition doctors frequently miss, leaving victims to suffer or have other conditions diagnosed and subjected to futile, perhaps dangerous, mistreatments. Interestingly, one of the supporters, Restless Legs Syndrome Foundation, an advocacy group based in Rochester, Minn., gets about \$450,000 in funding from GlaxoSmithKline.

Because doctors don't know a great deal about RLS, the massive advertising campaign referred to above could lead to doctors prescribing the drug when it's not necessary. On the other hand, researchers are concerned that patients may be suffering from non-RLS conditions that will go undiagnosed. Obviously, when a company spends \$27 million to advertise a drug and the sales of that drug jump drastically, there has to be a connection.

Source: *Washington Post*

## XV. ENVIRONMENTAL CONCERNS

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### **MERCK RESEARCH PLANT CHEMICALS RESPONSIBLE FOR FISH KILL**

A research facility operated by Merck & Co. in West Point, Pennsylvania, dumped a chemical compound that included cyanide into the sewer system, killing more than 1,000 fish in Wissahickon Creek, a tributary of the Schuylkill River. The U.S. Environmental Protection Agency (EPA) said that during the course of a federal and state investigation, the drug company came forward to disclose that a vaccine research facility released about 25 gallons of potassium thiocyanate into the sewer on the morning of June 13<sup>th</sup>. That appears to have been the main cause of the fish kill. The compound "reacted in a bad way with the chlorination system and created a chemical that was very toxic to the fish," according to the EPA. Potassium thiocyanate is used for making industrial chemicals, pharmaceuticals, and pesticides.

It appears that proper procedures for waste disposal of the chemicals were not followed by Merck. Chemicals should have been treated and rendered "neutral" at Merck's own waste treatment facility before being released into the sewer. Penalties could go as high as \$32,500 for each violation, per day, under the Clean Water Act. The agency is now trying to determine whether actual violations have occurred. EPA officials believe that the chemicals entered the Upper Gwynedd Township wastewater treatment plant before flowing into the creek.

Unfortunately, the Merck-related fish kill wasn't the only problem. A large fish kill led authorities to issue health advisories for Wissahickon Creek and parts of the Schuylkill River in late June. People were told not to swim or splash in the water, drink from it, or eat the fish. The advisory was later lifted for the Schuylkill. Restrictions remain for the Wissahickon, as authorities await the results of testing. The creek faces other

problems as well. Problems at the Ambler sewage treatment plant sent 55,000 gallons of raw sewage into the Wissahickon. The state Fish and Boat Commission said no additional fish were killed by the spill, which was caused by electrical problems at the plant.

Source: *Associated Press*

### **OIL COMPANY PAYS \$12 MILLION TO REVERSE LAKE DAMAGE**

Occidental Chemical Corp. has agreed to pay \$12 million to help reverse damage to Lake Ontario caused by releases from its Niagara Falls, New York, manufacturing plant. The agreement settles a 1983 lawsuit by New York State over polluting chemical discharges from the facility, and frees Occidental from further claims against the operation. The settlement amount, to be paid over four years, is designed to compensate the state's residents for warnings against eating fish from the polluted lake, state officials said. It was reported that Occidental has already taken steps to stop pollution from the plant. The settlement is meant to repair lingering environmental damage, according to Judith Enck, an environmental specialist in the New York Attorney General's office.

Source: *National Law Journal*

## XVI. TOBACCO LITIGATION UPDATE

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### **TOBACCO MAY KILL ONE BILLION THIS CENTURY**

With the trends indicating that appellate courts generally are favoring the tobacco industry, it might be a good time to take a look at what the tobacco industry is actually doing to folks who smoke. If current trends hold, tobacco will kill a billion people this century. According to public health officials, this will be 10 times the toll tobacco took in

the 20<sup>th</sup> century. Tobacco accounts for one in five cancer deaths, or 1.4 million deaths worldwide each year, according to two new reference guides that chart global tobacco use and cancer. Lung cancer remains the major cancer among the 10.9 million new cases of cancer diagnosed each year, according to the Cancer Atlas.

Reducing tobacco use would have the greatest effect of any single factor on global cancer rates, according to health officials. Improving nutrition and reducing infection by cancer-causing viruses and bacteria could also cut rates dramatically. Dr. Judith Mackay, a World Health Organization (WHO) senior policy adviser, stated:

*We know with cancer, if we take action now, we can save 2 million lives a year by 2020 and 6.5 million by 2040.*

The new Cancer Atlas and updated Tobacco Atlas were released last month at a International Union Against Cancer conference. The American Cancer Society published the two atlases with help from the Union, WHO and Centers for Disease Control and Prevention. An estimated 1.25 billion men and women now smoke cigarettes, according to the Tobacco Atlas. Although it's difficult to understand why anybody would ever smoke, at the same time, it's as certain as "death" and "taxes" that once you start—for whatever reason—it's virtually impossible to stop, once you get hooked. Tobacco is the only product on the market today that, when used by a consumer exactly as the maker and seller intended for the product to be used, will actually kill the user. That's a sad commentary on the history of the tobacco industry in this country and our government's repeated failures in dealing with a most serious problem.

#### **SURGEON GENERAL WARNS OF SECOND-HAND SMOKE**

We have believed for a long time that lots of people have been hurt, with many dying, as the result of second-hand smoke. Now, the Surgeon General has

declared that second-hand smoke does in fact harm nonsmokers. I hope this will fuel nationwide efforts to ban smoking in public. On the subject of second-hand smoke, U.S. Surgeon General Richard Carmona had this to say:

*The debate is over. The science is clear: Second-hand smoke is not a mere annoyance, but a serious health hazard.*

More than 126 million nonsmoking Americans are regularly exposed to smokers' fumes—what Dr. Carmona termed as "involuntary smoking"—and tens of thousands die each year as a result, concludes the 670-page study. The report cites "overwhelming scientific evidence" that second-hand smoke causes heart disease, lung cancer, and a host of other illnesses. It calls for completely smoke-free buildings and public places, saying that separate smoking sections and ventilation systems don't fully protect nonsmokers. Seventeen states and more than 400 towns, cities, and counties have passed strong no-smoking laws.

There is another part of this problem. Public smoking bans don't reach inside private homes, where just over one in five children breathe their parents' smoke. Children's bodies that are still developing are especially vulnerable. Second-hand smoke puts children at risk of sudden infant death syndrome, or SIDS, as well as bronchitis, pneumonia, worsening asthma attacks, poor lung growth, and ear infections, the report found. Banning smoking in public places doesn't attack the problem in the homes of American smokers.

Dr. Carmona implored parents who can't kick the habit to smoke outdoors, never in a house or car with a child. Opening a window to let the smoke out won't protect them. "Stay away from smokers," he urged everyone else. Even a few minutes around drifting smoke is enough to spark an asthma attack, make blood more prone to clot, damage heart arteries, and begin the kind of cell damage that over time can lead to cancer, he said. When questioned about how the Bush Administration would

implement his findings, Dr. Carmona would only pledge to publicize the report in hopes of encouraging anti-smoking advocacy. He said that passing anti-smoking laws is up to Congress and to state and local governments. Public health advocates believe the report should accelerate an already growing movement toward more smoke-free workplaces. Matthew Myers, who is with the Campaign for Tobacco-Free Kids, believes that:

*This could be the most influential surgeon general's report in 15 years. The message to governments is: The only way to protect your citizens is comprehensive smoke-free laws.*

The report shouldn't surprise doctors. It isn't a new study, but a compilation of the best research on second-hand smoke done since the last Surgeon General's report on the topic in 1986, which declared second-hand smoke a cause of lung cancer that kills 3,000 nonsmokers a year. Since then, scientists have proved that even more illnesses are triggered or worsened by second-hand smoke. More than 35,000 nonsmokers a year die from heart disease caused by second-hand smoke. Regular exposure to someone else's smoke increases the risk of a nonsmoker getting heart disease or lung cancer by up to 30%, Dr. Carmona found. Some tobacco companies are now acknowledging the risks. But R.J. Reynolds Tobacco Co., which has fought the smoking bans, challenges the new report's call for complete smoke-free zones and insists the danger is overblown.

In addition to the scientific report, Dr. Carmona issued some common sense advice for consumers and employers:

- Choose smoke-free restaurants and other businesses, and thank them for going smoke-free.
- Don't let anyone smoke near your child. Don't take your child to restaurants or other indoor places that allow smoking.

- Smokers should never smoke around a sick relative.
- Employers should make all indoor workspace smoke-free and not allow smoking near entrances, to protect the health of both customers and workers, and offer programs to help employees kick the habit.

Source: *Associated Press*

### **CASINO WORKER SUES OVER SECOND-HAND SMOKE**

New Jersey's casinos, which recently won exemption from that state's indoor smoking ban that has now taken effect, may now have another reason to be concerned. In a suit filed on July 10<sup>th</sup>, a Tropicana Casino & Resort employee claims that his lung cancer was caused by 25 years of involuntarily inhaling other people's smoke on the casino floors. I suspect there will be more lawsuits like this one filed over second-hand smoke. In this case, the employee, who claims he never smoked, was diagnosed last year with lung cancer and underwent surgery to remove the top lobe of his right lung in September. He has 80% likelihood of cancer recurrence and is susceptible to numerous increased and life-threatening health risks, such as diabetes, according to his complaint.

By adopting the Smoke-Free Air Act, effective April 15<sup>th</sup>, New Jersey became one of 11 states to ban smoking in indoor public places. Four other states prohibit smoking in workplaces and restaurants. Impetus for the ban grew from a 2004 study showing that in New Jersey, bars and restaurants had more than nine times the levels of indoor air pollution than in New York City, which had previously banned smoking in those establishments. Because of their political clout, casino gaming areas were exempted from the New Jersey law. But, the exemption does not grant immunity from tort liability for lawsuits filed by employees and patrons for personal injuries caused by environmental tobacco smoke exposure. It will be most interesting to follow the progress of this case, which appears to be most

significant. It has already gotten the attention of business owners whose facilities have allowed smoking over the years.

Source: *New Jersey Law Journal*

### **FLORIDA SUPREME COURT RULES FOR TOBACCO INDUSTRY—BUT LEAVES A DOOR OPEN FOR INDIVIDUAL LAWSUITS**

Tobacco companies in the United States have won a major legal victory in Florida. The ruling by the Florida Supreme Court, in what is one of the last remaining personal injury class action cases against tobacco companies, is a real blow for victims. The court reversed a \$145 billion punitive damages award that had been returned against tobacco companies for injuring smokers. The court ruled that the award, which had been the largest ever by an American jury, was excessive. The court also ruled that smokers' cases "are highly individualized" and as a result "do not lend themselves to class action treatment."

That ruling affects an estimated 300,000 to 700,000 sick people in Florida. The suit filed by Dr. Howard Engle, a pediatrician in Miami who has emphysema, accused the tobacco industry of misleading people about the dangers of smoking. Originally filed in 1994 on behalf of all addicted smokers in the United States, the 3<sup>rd</sup> District Court of Appeal permitted a trial only after reducing the class to Florida smokers. The case then was appealed to Florida's highest appellate court.

A majority of the state's high court did, however, reinstate two individual jury awards. A \$2.85 million damage award, which had been returned in favor of a smoker, Mary Farnan, was kept intact. A \$4.023 million award to another smoker, Angie Della Vecchia, was also affirmed. But, another award, a \$5.8 million award to Frank Amodeo, who like Farnan and Della Vecchia was a cancer-stricken smoker who brought the original suit, was not restored in the court's ruling.

The Florida court did support a part of the jury's original verdict in the Engle case that found that smoking **causes** a variety of diseases, and that tobacco

companies **concealed** information and had **acted negligently**. This part of the court's ruling will result in a number of individual cases being filed in Florida. Those cases would be for specific damages to individual smokers. It's also possible that those cases could result in awards of punitive damages. So, while the class action lawsuit is over, individuals can still file their own claims. Those lawsuits will have to be filed within one year from the court's ruling, as I understand it. If you or a family member have such a claim, contact a lawyer and find out exactly what can now be done on individual claims. Failure to file suit within the designated time would bar any claim.

Source: *Associated Press*

### **THE FEDERAL GOVERNMENT'S CASE IS STILL BREATHING**

Even before the Florida decision, the civil racketeering case filed by the Department of Justice against Philip Morris and several other large cigarette makers appeared to be dead in the water. The government, which originally filed its case in 1999, now seeks damages of \$14 billion over 10 years, as well as fines if youth smoking rates do not decline, and government monitoring of company research and development. As you may recall, a nine-month trial concluded a little more than a year ago. According to sources, a ruling is expected from Judge Gladys Kessler of the U.S. District Court for the District of Columbia within the next few months. Tobacco companies have already won several major victories in that case, including a ruling in February 2005 that the government cannot seek financial penalties from tobacco companies for previous wrongdoing, only for future infractions. In response, the Justice Department cut its financial demands from \$280 billion to the current \$14 billion. The Bush Administration made it clear early on that it wanted this case to go away and not be a bother to the tobacco industry. While the case may still be breathing, some say it's on life-support with time running out.

## XVII. THE CONSUMER CORNER

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### **A SHOCKING REPORT RELATING TO MEDICATION ERRORS**

I was shocked to learn that medication errors harm 1.5 million people and kill several thousand each year in the United States, costing the nation at least \$3.5 billion annually. While I knew that the error rate was fairly high, I certainly didn't realize how bad it actually was. The Institute of Medicine, the nation's most prestigious medical advisory organization, released a report, "Preventing Medication Errors," on July 20<sup>th</sup> that revealed the magnitude of the problem. It's estimated that as many as 7,000 persons die annually due to medication errors. Drug errors are so widespread that hospital patients should expect to suffer one every day they remain hospitalized, according to the report.

The report is the fourth in a series done by the Institute of Medicine that has called attention to the enormous health and financial burdens brought about by medical errors. You may recall that the first report, "To Err Is Human," was released in 1999. While that report caused a sensation when it estimated that medical errors of all sorts led to as many as 98,000 deaths each year—more than was caused by highway accidents and breast cancer combined—unfortunately very few of the Institute's recommendations from the report have been implemented.

The report contained a number of recommendations that will be fairly easy to do. For example, drug makers were told to package more pills in individual packages. The companies were also criticized for failing to disclose the results of all clinical trials involving their drugs. That's a much broader problem and one that has been debated for a long time. An interesting aspect of the report concerned the common practice of drug companies providing free drug samples to doctors. The Institute recommended that the practice should be discouraged because in many cases the

samples were poorly controlled.

At least a quarter of the errors are preventable, according to the report. The Institute of Medicine urged major steps be taken by the government, health providers and patients alike. Four of every five U.S. adults take at least one medication or dietary supplement every day. Interestingly, almost a third take at least five. The more a person uses, the greater their risk of bad interactions. This is especially true if multiple doctors prescribe different drugs without knowing what the person already takes. The following are some of the report's major recommendations:

- All prescriptions should be written electronically by 2010, a move one specialist called as crucial to safe care as X-ray machines.
- The government should speed electronic prescribing, including fostering technology improvements so that the myriad computer programs used by doctors, hospitals and drugstores are compatible. Fewer than about 20% of prescriptions are electronic, said report co-author Michael Cohen, president of the Institute for Safe Medication Practices. E-prescribing does more than counter bad handwriting. The computer programs can be linked to databases that flash an alert if the prescribed dose seems high or if the patient's records show use of another drug that can dangerously interact.
- Patients and their families must be aggressive in questioning doctors, nurses and pharmacists about medications. Get a list of each drug you're prescribed, why and the dose from each doctor and pharmacy you use, and show it at every doctor visit. "Take active steps to make sure you know what you're getting, and is it what you need," said report co-author Dr. Wilson Pace of the University of Colorado.
- The nation should invest about \$100 million annually on research into drug errors and how to prevent them. Among the most-needed studies is the impact of free drug samples, which

often lack proper labeling, on medication safety.

- The Food and Drug Administration should improve the quality of drug information leaflets that accompany prescription drugs, but often have incomplete information or are written in consumer-confusing jargon.
- The government should establish national telephone hotlines to help patients unable to understand printed drug information because of illiteracy, language barriers or other problems.

The Institute of Medicine is an independent organization chartered by Congress to advise the government on health matters. It's a group with credibility and one that should carry weight with Congress and the healthcare industry. I don't believe that most folks had any concept of how bad the medication error problem is. For that reason, this report should be given immediate distribution nationwide. Clearly, it must be taken seriously by all concerned and its recommendations implemented.

*Source: Associated Press and New York Times*

### **THERE CAN BE A SILENT KILLER IN OUR HOUSES AND WORKPLACE**

Hundreds of people die each year from unintentional carbon monoxide (CO) poisoning associated with the use of consumer products. As you know, carbon monoxide is a poisonous gas that results from the incomplete combustion of fuels such as natural or liquefied petroleum gas, oil, wood, and coal. It is called the **silent killer** because carbon monoxide **can't be seen or smelled**. Although the Consumer Products Safety Commission (CPSC) keeps up with deaths related to carbon monoxide, it should be noted that the hundreds of deaths caused annually by carbon monoxide from consumer products don't include those deaths resulting from fire or motor vehicles. I will concentrate here on the problems that arise from the use of consumer products in the home.

According to the last statistics compiled by the CPSC, the majority of deaths

reported are caused by defective heating systems. LP-gas heating accounted for approximately half of the estimated heating deaths. While natural gas heating accounted for a lesser number, it was still a significant number of deaths. It should be noted that any fuel-burning appliances can be a potential source of fatal or hazardous carbon monoxide levels. Engine-driven tools, including corporate generators that are powered by gasoline, propane, or natural gas engines, produce large amounts of carbon monoxide. This occurs even when sufficient oxygen is available for combustion. These products may or may not emit an irritating exhaust.

In order to detect carbon monoxide, every home should have a carbon monoxide alarm in the hallway near the bedrooms and all sleeping areas. If you have battery-operated devices, you should check your batteries monthly and replace them annually. With an electric-powered alarm, make sure it has a battery back-up. There are certain standards that the CO alarm must meet in order to be reliable. You should check to be sure that your alarm meets one of the following standards:

- Canadian Standards Association 6.19-01. 2001;
- Underwriters Laboratories Inc. 2034, 2nd ED: March 2005; or
- International Approval Services 696, 2nd ED: June 1, 1998.

You can get more information concerning the hazards related to carbon monoxide—the silent killer—by going to the CPSC website at [www.cpsc.gov](http://www.cpsc.gov).

#### **CPSC WARNS CONSUMERS ABOUT DANGERS OF TUBE KITING**

Just before the July 4<sup>th</sup> holiday weekend, the U.S. Consumer Product Safety Commission (CPSC) warned consumers about the possible dangers associated with a new type of water recreation known as “tube kiting.” The CPSC is concerned as a result of death and injury reports associated with tube kiting. The agency is currently investigat-

ing two versions of these products to determine whether there is a significant product hazard. Tube kiting, a relatively new form of extreme water sport, is extremely dangerous. The CPSC is aware of at least two deaths associated with tube kiting, which according to all reports is growing in popularity this year. A 33-year-old Texas man was killed in late April while tube kiting. In Wisconsin, a 42-year-old man died from injuries associated with tube kiting in June. The CPSC is also aware of 12 serious injuries associated with tube kiting. The reported injuries include a broken neck, punctured lung, broken ribs, broken femur, chest and back injuries, and facial injuries, such as jaw fractures. In one incident a 14-year-old girl who was tube kiting lost consciousness when it fell about 15 feet and struck the water.

Tube kites are very large, sometimes round, inflatable water devices that can be more than 10 feet in diameter. The tube is hooked to the back of a boat by a tow rope, and the tube rider pulls back on a rope as the boat travels at speeds between 25 and 35 miles per hour. The ride begins when the tube is lifted into the air trailing the boat. Possible reasons for incidents and injuries include:

- rider’s difficulty in controlling the tube;
- boat operator inexperience; and
- how the tube reacts in certain weather conditions.

The conditions of highest concern are wind gusts that can cause the tube to spin out of control, or sudden slowing or stopping by the boat operator, which can cause the tube to nose dive into the water. In some cases, the sudden stopping of the boat might cause the tube rider to continue past the boat and hit it or hit other boats or stationary objects, such as a bridge. The National Park Service has banned the inflatable devices in at least one of its parks, Glen Canyon National Recreation Area in Utah, which includes Lake Powell, where there have been at least four serious injuries.

Source: CPSC

#### **MYSPACE CHANGES ARE NOT ENOUGH**

Myspace.com, the popular online social network, has been in the news recently for a number of reasons, and most of them are bad. Myspace.com, owned by News Corp., on its face appears to be pretty innocent. Before going further, I wonder how many adults with children still at home even know what Myspace.com is all about. I suspect most children—especially teenagers—have a pretty good idea of its availability and know how it functions. Unfortunately, so do the adult sexual predators who are a menace to society. In my opinion, all of us need to find out more about this site. Myspace.com, described as “a place for friends,” and one “that lets you meet your friends’ friends,” is very dangerous for children. Viewers are invited to “create a private community.” The truth of the matter is that Myspace.com is a very dangerous place for youngsters. Clearly, the site has the potential for great harm to innocent children.

New security measures for young users of Myspace.com that have been promised won’t be enough to stop online child predators, safety experts warned. The popular online social network recently restricted adult access to the information teenagers post about themselves. Myspace users who are 18 or over could no longer request to be on a 14- or 15-year-old’s friends’ list unless they already know either the youth’s e-mail address or full name. In theory, that means they won’t have access to personal information on their profiles. But, Monique Nelson, executive vice president of online safety advocate Web Wise Kids, believes the changes aren’t enough. In this regard, she says:

*They’re going to lie about their ages. There’s no way to check age verification. In that respect, I don’t think that’s going to be very effective.*

It’s most significant that the changes referred to above came only after a \$30 million lawsuit was filed by the mother of a Texas teenager who claims she was

raped by a man she met through the site. The lawsuit claims MySpace.com was at fault for failing to protect teen users despite numerous warnings of the dangers. Even though the site is supposed to prohibit children 13 and under from setting up accounts, the Austin teenager was only 13 when she set up her profile last year.

MySpace.com has no mechanism for verifying that users submit their true age when registering. Under the changes, any user will still be able to get a partial profile of younger users by searching for other details, such as display name. The difference is that currently adults can then request to be added to a youth's list to view the full profile. That option will disappear for adults registered as 18 and over. Those under 18 will still be able to make contact. Without age verification, adults can sign up as teens and request to join a 14-year-old's list of friends, which would enable the full profiles. It's time for our elected officials to get involved and put real restrictions on MySpace.com. I would also encourage the churches to take an active lead, and if nothing else, help educate both adults and children about MySpace.com.

Source: *Forbes News Service*

#### **JURY VERDICT FOR FAMILY OF CHILD KILLED BY LAWN MOWER**

A state court jury in Virginia has awarded \$2 million to a couple whose 4-year-old son died after being run over by a riding lawn mower at his day care center. The jury found the mower's manufacturer, Cleveland-based MTD Products Corp., legally responsible for the April 2004 death of the child. The jury held MTD Products liable for not designing a mower that automatically stops its blades whenever it rolls backward.

#### **DEBT COLLECTORS WHO PLAY ROUGH SHOULD HAVE TO PAY THE CONSEQUENCES**

We have seen a tremendous rise in American consumer debt over the past few years. It has been reported that the

level of consumer debt has now reached the record level of about \$2.2 trillion. Federal government regulators have become greatly concerned over aggressive and sometimes unscrupulous tactics by debt collection agencies. In April, the Federal Trade Commission, which enforces the Fair Debt Collection Practices Act, the federal law that governs debt collection practices, reported that it received 66,627 complaints against third-party debt collectors last year—more than against any other industry, and nearly six times the number in 1999.

The collection agencies often buy the debt from more established companies for pennies on the dollar and seek to collect even if the debt has been paid or was never valid to begin with. Sometimes, consumers pay up simply because they are worn down by threats from the companies and are afraid that their credit rating will be damaged. Threats and intimidation are effective tools for the representations of these collection agencies. It should be noted that their victims are not just the poor and disadvantaged. I understand that this breed of debt collectors will go after anybody.

Abusive, deceptive, and unfair tactics by collection agencies can't be tolerated. Fortunately, the FCC is taking action against debt collectors who step over the line. Last July, the commission won \$10.2 million—its biggest judgment for illegal collection practices—in a case against National Check Control of Secaucus, New Jersey. That company—now out of business—overstated the amounts consumers owed and threatened them with arrest and prosecution.

New York's Attorney General, Eliot Spitzer, recently sued a national debt collection company, accusing it of trying in thousands of cases to collect on debts that could not be verified. In its most recent annual report on the act, the FTC identified tactics that have become particularly common:

- misrepresenting the nature, size, and status of a debt;
- making constant harassing and abusive phone calls at all hours;

- contacting a debtor's relatives, employers, and neighbors;
- failing to investigate claims by consumers that a debt is paid, expired, or fraudulent; and
- threatening to sue or seek prosecution.

It should be noted that such threats are illegal unless the collector has both the legal basis to take action and the intent to take such action. In addition to filing complaints with regulators, a growing number of consumers are suing over debt collection abuses, according to the National Association of Consumer Advocates. The National Consumer Law Center, an advocacy organization based in Boston, is working to protect consumers against abusive collection practices. I hope other groups will join in this battle.

Source: *New York Times*

#### **LAWSUIT FILED OVER BAD DOG FOOD**

A woman in Fort Payne, Alabama, has filed a lawsuit against Diamond Pet Foods Inc., contending that the company produced contaminated dog food that killed two of her dogs. The lawsuit, filed in DeKalb County Circuit Court, accuses the company of negligence, breach of contract, fraudulent suppression, and breach of warranty. Both compensatory and punitive damages are being sought. It is alleged that Diamond knew its product contained deadly levels of aflatoxin, a fungus that grows on spoiled corn and is deadly if eaten by animals. Corn is an ingredient in the company's dog food.

The lawsuit alleges Diamond knew in September 2005 that its products contained the toxin, but continued to sell them until December 2005. The company's recall was at the request of the Food and Drug Administration. Diamond has confirmed that there are similar lawsuits pending across the country. Autopsy reports from the Alabama Department of Agriculture and Industries confirmed that the pets died from aflatoxin poisoning.

In December of 2005, Diamond Pet

Food acknowledged that it discovered aflatoxin in dog food manufactured at its facility in Gaston, South Carolina. Aflatoxin is a naturally occurring toxic chemical by-product from the growth of the fungus *Aspergillus flavus* on corn and other crops. At that time, Diamond notified its distributors and recommended that they hold the sale of all Diamond Pet Food products formulated with corn that were produced out of the Gaston facility. States serviced by the Gaston facility include Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky (eastern), Maine, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, West Virginia, Vermont, and Virginia.

Source: Fort Payne Times-Journal

#### **PERSONAL DATA BEING STOLEN**

There have been a number of incidents in which personal information and data of U.S. citizens have been stolen. The sources of the stolen information are companies, entities, and even government agencies. This appears to be a growing and most serious problem. I will discuss a few of those incidents below:

#### **STATE DEPARTMENT SUFFERS WIDESPREAD COMPUTER BREAK-INS**

In a most disturbing report, we learned last month that the State Department has been the victim of large-scale computer break-ins worldwide. Those incidents reportedly occurred over a period of several weeks in June and July. The State Department's headquarters and offices dealing with China and North Korea were targeted, according to *The Associated Press*. Investigators believe hackers stole sensitive U.S. information and passwords and implanted backdoors in unclassified government computers to allow them to return at will, according to the *Associated Press* report. This hasn't received a great

deal of attention, but it surely seems to be a most serious matter. If hackers can get into the government's computers with apparent ease, that is most disturbing.

#### **RED CROSS LAPTOP WITH DONOR DATA STOLEN**

A laptop containing personal information from thousands of blood donors—including Social Security numbers and medical information—was stolen from a local office of the American Red Cross. But, officials claim that the information was encrypted. The data included matching names and birth dates of donors from Texas and Oklahoma, as well as donors' sexual and disease histories. The Red Cross doesn't view this as a security breach at this point. The laptop was one of three stolen from a locked closet in the Farmers Branch office of the American Red Cross in May, but the two others did not contain the personal information.

It appears that local officials alerted police and national Red Cross offices. However, donors were not notified about the missing information since the Red Cross takes the position it had no legal obligation to do so. The laptops disappeared on two separate occasions in May, according to police reports. They could have been gone as long as a week before being reported missing. Red Cross supervisors have their own user names and passwords. Access is time-and-date based. The Farmers Branch Red Cross had lost a laptop with encrypted donor information in June 2005. It was reported that security in the Farmers Branch office was tightened after the most recent thefts.

#### **WORKERS SUE UNION PACIFIC OVER ID THEFT**

Concerns about identity theft has prompted a group of nine Union Pacific Corp. employees to file suit against the nation's largest railroad over the way it uses Social Security numbers to identify employees. The company said in May that a computer with names and Social Security numbers of 30,000 current or retired Union Pacific employees had been stolen from a personnel employee on April 29<sup>th</sup>. The lawsuit was filed in Pottawattamie County, Iowa, by the nine railroad employees on behalf of a class that could include 30,000 members, according to the lawsuit.

Union Pacific said in May that it had notified the 30,000 people affected, paid for their credit monitoring for a year, and encouraged them to put fraud alerts on their current accounts. The company claims the employee violated Union Pacific policy by transferring work files to a private computer to work on at home, and the private computer was stolen. The plaintiffs contend that employees continue to be put at risk every day because Social Security numbers are used to access routine information at work.

The lawsuit asserts that Union Pacific was at fault by failing to protect employees' Social Security numbers, by using them for purposes other than tax reporting, and by failing to use other employee identifying numbers. Union Pacific operates 38,654 miles of track in 23 states from the Midwest to the West and Gulf coasts, and they have lots of current and retired employees.

#### **PERSONAL DATA WERE POSTED ON NAVY WEBSITE**

Personal records for every Navy and Marine Corps aviator or aircrew member who has logged flight hours in the past 20 years have been posted on a public Navy

website for the past six months, compromising more than 100,000 Social Security numbers. The Navy Safety Center in Norfolk, Virginia, made an announcement relating to this incident last month. Investigators are said to be working to determine how the records landed on the Navy Safety Center's website. Officials shut the website down on July 6<sup>th</sup> after a private citizen reported finding the full names and Social Security numbers of affected persons posted. The list had been posted since December of last year and the safety center says it appeared to be "inadvertent" and the result of "human error."

The security breach involving personal information is among several data losses involving the federal government recently, including the loss of records related to more than 26.5 million retirees and active duty military personnel on a laptop that was stolen in May from a Veterans Affairs employee's home. The Government Accountability Office, the Agriculture Department, the Energy Department, and the Internal Revenue Service all announced that they have had similar personal data compromised recently via website postings, Internet hackers, and loss of electronic equipment. In late June, the Navy announced that personal information on 28,000 sailors and their family members was compromised when it appeared on a public website.

The Navy Safety Center list was apparently only discovered after it was brought to the Navy's attention. The list is said to include all retired, active duty, and reservist personnel who have logged flight hours in the past two decades. Interestingly, the Center is a command dedicated to improving the safety of Navy operations. The information was included on 1,083 computer disks that were sent to all Navy and Marine Corps commands. Navy officials are working on recall-

ing those disks. Navy officials encourage anyone whose name could have been on the list to carefully monitor bank accounts, credit cards, and other financial transactions to make sure the information is not being used fraudulently. Those who might have been affected can contact the Navy Personnel Command call center at 866-827-5672 for more information.

It's most apparent that we have a most serious problem relating to the types of incidents referred to above. Obviously, the risk to the individuals affected is great. I hope some smart folks are hard at work trying to find out how this sort of theft can be stopped.

*Source: Associated Press, Washington Post, and Houston Chronicle*

#### **ALABAMA TO RECEIVE FUNDS FROM WACHOVIA SETTLEMENT**

Under the terms of a settlement between state securities regulators and Wachovia Capital Markets LLC of Charlotte, North Carolina, Alabama will receive over \$300,000 as its share. In announcing the settlement, Joseph P. Borg, the Director of the Alabama Securities Commission, said it will include \$40,000 for investor education. The settlement results from allegations of potential conflicts of interest between Wachovia Capital Markets' research analysts and investment bankers. The settlement effectively resolves a 28-month multistate investigation by state regulators—including enforcement officials from Alabama—of Wachovia Capital Markets, which operates Wachovia Corporation's institutional brokerage and capital markets businesses. The settlement relates to the following charges:

- State investigators determined that Wachovia Capital Markets failed to supervise its employees in connection with potential conflicts of interest between equity research and investment banking, as evidenced by research analysts' participation in certain presentations with potential investment banking clients.

- In addition, research analysts' evaluations sought information regarding their interaction with investment banking and regarding the investment banking activity in their sector. Moreover, on occasion, Wachovia Capital Markets considered whether companies were potential clients in determining to provide research coverage on those companies.
- Wachovia did not keep certain electronic communications as required by state securities laws. Wachovia Capital Markets' e-mail system and procedures were inadequate to ensure all electronic mail communications were retained and readily accessible. As a result, 20% of the e-mail folders requested in November 2002 could not be produced and 42% of the e-mail folders requested in January 2003 were not produced promptly. Wachovia Capital Markets also failed to maintain a system that allowed it to locate and retrieve backup tapes for its e-mail system.

The multistate settlement is related to the April 2003 "global settlement" that 12 other investment banks have reached with state, federal, and industry regulators. Under the terms of the settlement, Wachovia Capital Markets will pay a total of \$25 million, including: \$20 million in penalties for failing to supervise its employees in connection with potential conflicts of interest between equity research and investment banking; \$1.65 million in penalties for failing to preserve required books and records; \$3 million, to be used for investor education, as designated by the Board of Directors of the North American Securities Administrators Association, Inc.; and \$350,000 for costs and expenses associated with the investigation. The investigation of Wachovia Capital Markets is part of a comprehensive regulatory effort to reform the relationship between investment banking and research and to manage appropriately conflicts of interest. Concerning the statement, Director Borg observed:

*Today's agreement is a major step in our ongoing efforts to help*

*maintain investor confidence by ensuring that all investors are provided with objective research and treated with fairness and honesty.*

As I have stated on previous occasions, Director Borg and his staff continue to do an outstanding job for Alabama citizens. This settlement is another example of that good work. We are most fortunate to have Joe Borg, who is one of the most respected of all professionals in his field, in Alabama state government.

## XVIII. RECALLS UPDATE

### **FEDERAL APPEALS COURT UPHOLDS AUTO RECALLS BY REGION**

A federal appeals court has unanimously upheld guidelines from the National Highway Traffic Safety Administration (NHTSA), the government's highway safety agency, allowing automakers to limit some vehicle recalls by region. Two consumer groups had challenged NHTSA's policy that allows automakers to conduct recalls involving defects related to regional conditions such as snow or heat. Public Citizen and the Center for Auto Safety asserted that a 1998 letter sent by NHTSA to automakers offering guidelines on the regional recalls should be considered a rule change requiring public comment. According to the consumer groups, that amounted to a "de facto regulation" and violated a federal law requiring that all vehicle owners be notified of a recall regardless of where they live or where the vehicle is registered.

The U.S. Court of Appeals for the District of Columbia Circuit disagreed. In its opinion, the court stated that the "guidelines are nothing more than general policy statements with no legal force." According to the court, the guidelines "do not determine any rights or obligations, nor do they have any legal consequences." Although that is the court's ruling, I believe that vehicle recalls should be national in scope.

### **TOYOTA TAKES A WEIRD POSITION WITH RECALL**

Toyota will voluntarily recall nearly 160,000 Toyota Tundra pickups this fall so that they can be made less safe for children riding in the front seat. The recall is meant to make Tundras comply with safety regulations. The applicable rules say that vehicles built after 2002 must have a child-seat anchor system known as LATCH in the front seat if they also have a front-seat airbag shut-off switch. The Tundra in question was built with an airbag shut-off switch, but not the LATCH system.

Toyota will remove the airbag shut-off switch. What Toyota is doing will make the vehicles unsafe for small children riding in the front seat. Those shut-off switches exist because airbags can injure and even kill small children even in minor crashes. Meanwhile, even without a LATCH system, parents can still install safety seats using seatbelts. Toyota originally discovered the compliance issue and, in a letter to the National Highway Traffic Safety Administration (NHTSA) in July 2005, the company asked regulators to let them to ignore it as "inconsequential to safety." Fortunately, and perhaps surprisingly, NHTSA denied that petition. Then Toyota asked NHTSA to reconsider, arguing that the solution would be worse than the problem. Here is what Toyota proposed as a solution in October 2005.

*[We] believe that the agency should understand that the likely remedy is to remove the airbag cut-off switches.*

Toyota is actually placing the blame on NHTSA. They say placing the LATCH system in the trucks' front seats would be far "too expensive," claiming that the rules required the switches to be removed in order to comply. To comply with the rule, Toyota is currently building new Tundra trucks without the switches. The Tundra trucks being recalled do have back seats, although they are very small ones. We all know that folks will sometimes put small chil-

dren in the front seats of cars and trucks for various reasons. For example, according to NHTSA, the Tundra's back seats are too small to fit rear-facing seats, the kind that infants ride in. In its final decision, published on June 28, 2006, NHTSA pointed out that the method a manufacturer might choose to remedy a compliance issue is not a determining factor when deciding that it must be fixed, so Toyota's warning made no difference. Any issue NHTSA might have with Toyota's solution to the problem will have to wait for another round of memos. NHTSA says they are closely reviewing Toyota's remedy.

By the way, in the event you don't already know what LATCH stands for, it stands for Lower Anchorages and Tethers for Children. Regardless of the use of LATCH systems or airbag cut-off switches, children are **always** safest in a back seat if at all possible. That should be the rule and not the exception, but it is not always possible.

### **TOYOTA RECALLS 400,000 VEHICLES FOR FAULTY ENGINES**

Toyota is recalling more than 400,000 vehicles with faulty engines, including some in this country. The recall affects more than a quarter-million vehicles sold in Japan. Twelve models manufactured in 2001, including Corollas and the Prius hybrid, are involved. The recall also affects about 150,000 cars sold outside Japan, mainly in the United States and Canada. They also were manufactured in 2001. In the U.S., more than 25,000 cars sold under the name Echo and Yaris, as well as nearly 8500 Prius vehicles, are affected by the recall. A faulty engine part could lead to an oil leak within the engine and cause it to stop completely. There have been no accidents caused by the fault, according to Toyota.

### **NISSAN RECALLS ALTIMA AND SENTRA SEDANS TO FIX ENGINE PART**

Nissan Motor Co. has recalled 200,866 Altima and Sentra sedans, the second

recall for the models in recent weeks, to fix a faulty engine part that can cause stalling. The new recall affects Altimas and Sentras from the 2003 model year with 2.5-liter four-cylinder engines, according to the National Highway Traffic Safety Administration (NHTSA). A sensor can fail, causing the engine to stop while the car is moving. The recall is a setback for Nissan, Japan's second-largest automaker, as it works to improve its reputation for quality in North America. Consumer Reports in 2006 ranked four of its models among the least reliable on the market.

The earlier recall, announced on June 22<sup>nd</sup>, covered 97,000 Altimas and Sentras from the 2006 model year. Their engines can use too much motor oil or catch on fire. Nissan suspended sales of the cars on June 2<sup>nd</sup> after more than 200 complaints, mostly from rental fleets, of excessive oil use. There were 17 reports of engine fires. Nissan is in the process of moving its U.S. headquarters from Gardena, California, to Nashville, Tennessee. Owners were to be notified, starting on August 21<sup>st</sup>. According to NHTSA, Nissan will reprogram the electronic control module, which apparently will fix the problem.

#### **COMPANY RECALLS MORE THAN 170,000 TRACTORS**

Husqvarna Outdoor Products, Inc. is recalling about 174,000 lawn tractors. The fuel line can separate from the fuel tank outlet, creating a potential fire hazard. So far, there have been three injuries because of the defect. The lawn tractors were sold under the brand names Husqvarna, Craftsman, Poulan Pro, Poulan, Weed Eater, Southern States, and Murray. If you have one of the recalled tractors, stop using it and contact Husqvarna at 866-284-8872. Husqvarna Outdoor Products, Inc. is headquartered in Augusta, Georgia. Its tractors are made in Orangeburg, South Carolina.

## **XIX. FIRM ACTIVITIES**

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### **EMPLOYEE SPOTLIGHTS**

#### **Charles Myrick**

Charles Myrick, who is now one of our very best employees, has worked for the firm for almost five years as a mail clerk. Charles and his co-worker, Fred Gamble, are responsible for sorting and delivering the mail for the whole firm. Because of the size of the firm, and the number of pieces of mail coming in and going out each day, this is a most challenging job. Charles is married to Shelia, who is a nurse in the neo-natal intensive care unit at Baptist Hospital South, and they have a 19-year-old son. In his spare time, Charles enjoys watching sports, mostly football. Currently, he serves as an usher at Christ Community Church in Montgomery.

In 1990, Charles was in a real serious accident, suffering a severe head injury, and remained in a coma for over three weeks. This man has come a long way, made a remarkable recovery, and has overcome a great number of obstacles that were placed in his life. Charles is a very hard worker and is an inspiration to all of us. We are very proud of Charles' accomplishments, and I can say, without reservation, that he is a good man and a most valuable employee. We are blessed to have Charles with the firm.

### **NEW LAWYER JOINS FIRM**

Alyce S. Robertson, who joined the firm on August 1<sup>st</sup>, has become our newest lawyer. Alyce has practiced law for over 10 years, graduating from the University of Alabama School of Law in 1995. Her most recent employment was in the Alabama Attorney General's office, where, over a period of seven years, she handled civil litigation involving state agencies and employees. Alyce is currently admitted to practice in all state courts in Alabama and also is admitted to the following federal courts: The United States District Courts for the Southern,

Middle, and Northern Districts of Alabama; The United States Court of Appeals for the Eleventh Circuit; and the United States Supreme Court. Alyce will work in the firm's Toxic Tort Section. We are fortunate to have a lawyer with Alyce's background, experience, and ability join the firm. We are confident that she will be an asset to the firm.

### **BEASLEY ALLEN WEBSITE**

We have a very good website, and our Information Technology Department does a good job of keeping it up to date and timely. Last year we had over 400,000 unique visitors and over 10 million hits on the site. Interestingly, the most frequently viewed sections are the lawyer bios and the case information parts. We find that our website is an excellent way to keep folks informed of what is going on at the firm. You can visit our website by going to [BeasleyAllen.com](http://BeasleyAllen.com).

## **XX. SPECIAL RECOGNITIONS**

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### **STATE TROOPERS ASSOCIATION**

The Alabama State Trooper Association does a very good job for its members and their families. Often, unfortunately, its good work is taken for granted even by some of its own members. The Association does an excellent job of representing its members and looking out for the welfare of troopers' families. They also have played a major role in working for legislation that affects the safety of all Alabama citizens. Over the past few years, the Association has worked hard to accomplish the following:

- The Association has worked very hard on legislation affecting law enforcement and specifically public safety;
- They worked to increase pay scales and benefits for troopers;

- They provide life insurance that covers the officers;
- They provide scholarships for the dependents of its members; and
- They have established and supported the “trooper teddy bear program,” to give teddy bears to traumatized children at accident scenes and in hospitals.

It’s been my experience that many Alabama citizens don’t realize how important the role is that Alabama State Troopers play today in our state. Safety on our highways is critically important to all Alabamians, as well as to those from outside the state who use our highways. We should thank those men and women who work hard to make this a reality. I fully realize that over the years state government has not done its job and as a result failed to adequately fund the Department of Public Safety. As a consequence, trooper pay scales and benefits have failed to keep pace with those in other states. Also, the number of troopers available for patrol duty in Alabama has been far too low, and safety on the highways has suffered as a consequence. I hope all of that is finally changing even though we are still behind other states. The Association has worked hard and should be commended for those things that have been accomplished.

**SHAREHOLDER SERVES ON CHILD PROTECT BOARD**

We encourage all of our lawyers to be good citizens which requires participation in the community. LaBarron N. Boone, a shareholder in our firm, has been extremely active in a number of areas. LaBarron currently serves on the Board of Trustees of Child Protect, a group that does good work. Child Protect was incorporated in November 1989 as the Children’s Advocacy Center serving Montgomery, Autauga, Elmore, and Chilton Counties. Child Protect assists the Department of Human Resources and law enforcement agencies in their investigations of child

sexual and physical abuse cases. Valid cases are turned over to the District Attorney’s office in the appropriate county for prosecution. Child Protect presently serves two judicial circuits, the 15<sup>th</sup> (Montgomery County) and the 19<sup>th</sup> (Autauga, Elmore and Chilton Counties). Child Protect, a non-profit, 501(c)3 corporation, is dependent on community support to fulfill its mission of serving children who are victims of abuse. The organization is a charter member of the National Children’s Alliance, a partner in River Region United Way, and a part of the Alabama Network of Children’s Advocacy Centers.

LaBarron presently serves as staff attorney for Child Protect, handling legal matters the organization encounters on a pro bono basis. He was the first recipient of the “Hands for Children Award,” which is awarded to a member of the Board of Trustees, last year. In my opinion, Child Protect does great work that is badly needed. We are proud of LaBarron for serving on their board and assisting in a most worthwhile manner.

**ALABAMA STATE BAR PROMOTES LAWYERS’ SERVICE DAY**

On June 10<sup>th</sup> the Alabama State Bar sponsored a statewide call to all Alabama lawyers to volunteer their time in community service projects. The slogan for the event was “Lawyers Rendering Service.” Although many people in our profession give countless hours to many worthy causes, this event was a way for members of our state bar to give back to their communities in a more unified way. There were four major projects set up across the state in the cities of Birmingham, Mobile, Huntsville, and Montgomery. The goal was to perform volunteer work in homeless and children’s shelters, in soup kitchens, and at various schools in the state.

Roman Shaul, a shareholder in our firm, was the chairperson for the Montgomery project. Several other lawyers from the firm participated. The event was well-attended, and many of the

lawyers who volunteered in Montgomery came from towns well over an hour away. The Montgomery project took place at Father Purcell Children’s Center. The Montgomery-based Center accepts and cares for severely disabled children from all over the state. This facility is so important because there are very few places in Alabama that can provide adequate, around-the-clock care for children who are so young and still maintain some quality of life for them. The lawyers who participated helped the Children’s Center by painting parts of their building that were in dire need of touching up. A fresh coat of paint was put on some playground equipment and physical therapy stations. Afterwards, the volunteers met and played with the children. We are very proud of all the lawyers who volunteered their time to help those who are less fortunate in their communities around the state.

**THE AMERICAN CANCER SOCIETY DOES GOOD WORK**

The American Cancer Society is an organization that does very good work. Its goal of finding cures for cancer is one that our firm supports. On June 24<sup>th</sup>, the American Cancer Society’s Junior Executive Board hosted its annual Gala titled “A Summer Night’s Dream.” Bill Robertson, a young lawyer in our firm, currently serves on this Board. The Board is made up of a group of young professionals in the Montgomery business community who share the common goal of supporting the fight against cancer. The Board develops programs to raise money for the non-profit organization. Its members serve as advocates to spread awareness about the disease.

The June event was held at the Mann Wildlife Museum on the grounds of the Montgomery Zoo, with many area patrons in attendance. During the group’s major fundraiser of the year, guests took tours of the museum and enjoyed a fun evening filled with good food, great music, and bidding opportunities during a silent auction. The event raised about \$10,000, which will be

used to support the Cancer Society's area programs and services. We are pleased to have Bill involved in this worthwhile project.

#### **FIRST BAPTIST NEHEMIAH PROJECT**

Chad Cook, one of our lawyers, was recently involved in an inner city revitalization program, "The Nehemiah Project," sponsored by First Baptist Church in Montgomery. First Baptist partnered with several organizations including Angel Haven Ministries, the YMCA, and Chisholm Baptist Church to rebuild an area of Montgomery that has been neglected for years. The core goal of The Nehemiah Project is to address the spiritual and social needs of Montgomery's inner city by lifting up Jesus Christ to the center of this area. This group, led by Douglas McElvy, past president of the Alabama State Bar, and his wife Eleanor, has done a magnificent job of implementing several programs for both children and adults. These programs include after-school tutoring, GED tutoring, neighborhood block parties, alcohol and drug education, and regular bible studies. Eleanor McElvy, who is gifted musically, has led choir and music classes and helped produce plays with the children in the area. Future community programs include sports, adult literacy training, money management seminars, computer education, and infant care. This group has also taken on the monumental task of totally restoring abandoned or condemned houses, affording good folks who need affordable housing a place to live. This group is living out *Matthew 25:40*. It is a great way to connect Jesus Christ with a community that needs help. It's time and effort well spent, in my opinion. We need more of this sort of thing, not only in Montgomery, but all over the country.

## **XXI. SOME CLOSING OBSERVATIONS**

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#### **FOOTBALL STARS SHARE THEIR FAITH**

Shaun Alexander and Heath Evans, two very good professional football players who have very close ties to our state, recently participated in a football clinic for youngsters in Mobile. It goes without saying that Shaun was a tremendous running back at the University of Alabama during his college days. Heath, also a running back, had a very good career at Auburn University. These two outstanding athletes have become very good friends and have a great deal in common. One thing that makes them relate to each other so well is their passionate love of their Lord and Savior, Jesus Christ.

The significant thing to report about these two outstanding young men is that not only are they outstanding athletes, but, more importantly, they are strongly committed Christians. It's significant that they not only "talk the talk," but "walk the walk," when it comes to their faith. For example, Shaun told the young athletes at the Mobile clinic that he has always had faith—both in his spiritual and athletic lives—and that he can't separate one from the other. As we all know, Shaun's faith and his play were both strong last season as he produced one of the best years ever for a running back in the NFL. He was named the league's Most Valuable Player and recently signed a new contract covering six years.

The effect that Shaun and Heath have on young people is tremendous. Their living testimony is something that young people can observe first-hand and emulate. Athletics can play a tremendous role in helping young people find direction and purpose in their lives at an early age. When persons such as Shaun Alexander and Heath Evans give all of the credit to God for their many accomplishments, that inspires young people. It also says a great deal about the character of these

men. While in Mobile, Shaun gave full credit for all his accomplishments to his faith in God, stating:

*I know I am going to have trials and tests, but I know if I am obedient that everything's going to be OK. It's not something you accept sometimes, but every day in everything you do. I'm not the greatest athlete. I'm not the fastest or the strongest. But I know if I am obedient there is going to be victory. ... God did some big things for me.*

It has to make all of us who have children or grandchildren in our schools feel real good to know that men like these two professional football stars are around and willing to help them. This is one of the reasons why I support the Fellowship of Christian Athletes so strongly. In my opinion, the FCA does a super job with young people. In fact, Shaun and Heath got their start with the FCA and it obviously had a tremendous effect on their lives. Fortunately, they are now hard at work helping others, and that's great news!

## **XXII. MY PARTING WORDS**

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A Baptist pastor, who shepherds a rather large church in an east Alabama town, made a statement that I have written down as a reminder for me when I tend to let my temper or strong opinions get me in hot water, which I must confess has happened on occasion. I have to be reminded from time-to-time that Jesus is in control of my life. As a result, all of my actions and reactions should be under His authority and control. James L. Evans, who is senior pastor at the First Baptist Church in Auburn, made this observation:

*But embodiment is more than just theological name dropping. We can paste a "Christian" label on almost anything. But just because the outside of the box says Christian*

*does not mean Jesus is on the inside.*

Sometimes we all tend to look at the **outside** of boxes in life and accept things as true without ever opening the box and taking a good look **inside**. I have to wonder how Jesus feels about groups—and even persons for that matter—who put His label on the **outside** of their box and yet have very little and sometimes absolutely nothing inside that even resembles Jesus or His teachings. I believe we all know the answer to that query! We must put Jesus on the **inside** of our box and then we can show His presence on the **outside**. It will reflect in how we deal with folks and how we treat them in our daily lives and undertakings. In order to live a true Christian life, Jesus Christ must be **embodied** in every aspect of our lives. We must not only bear the **name** of Jesus, but our thoughts, our words, our actions and actually every part of our very being must be an **embodiment** of

our Lord and Savior. When that is the case, folks who deal with us won't have to look **inside** our box in their **dealings** with us to decide whether we are really sincere or not.

In closing this month, I am reminded of the words of Jesus from what is referred to as the Sermon on the Mount, where He outlines the standards of living a Christian life. In His sermon, Jesus warned us:

*Not everybody who says to me, 'Lord, Lord' will enter the Kingdom of Heaven, but only the one who does the will of my Father in Heaven."*

*Matthew 7:21*

In fact, Jesus will tell some who profess publicly, loudly, and often of their close connection to Him that He **never** even **knew** them. That will come as a shock to many who have **talked** the **talk**—but never really **accepted**

Jesus—and as a result are unable to **walk the walk**. Unfortunately, for those at the final judgment, there won't be a second chance for redemption. This relates directly to what Pastor Evans was saying about labels and claims. Let me encourage you to examine whether you have a personal relationship with Jesus Christ. We receive Jesus and His kingdom by admitting that we are sick spiritually and in need of a spiritual physician, Jesus.

Without a doubt, Jesus knows what's in our box! We can't wait to accept Jesus. Neither can we fail to go about doing His will in our lives once we make that decision. We can let our light shine, empowered by the Holy Spirit, in our daily walk, so that others will come to know our Lord and Savior. If two football players can be an example by helping others get to know Jesus Christ—so should we. May God bless each of you, your family, and co-workers during the coming days.

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