



THE  
**JERE BEASLEY REPORT**

SEPTEMBER 2006

Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., Attorneys at Law

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

*Helping those who need it most for over twenty-five years*

**[BeasleyAllen.com](http://BeasleyAllen.com)**

# I. CAPITOL OBSERVATIONS

---

## **NEW ORLEANS JURY RETURNS VIOXX VERDICT**

A New Orleans jury in the second Multi-District Litigation (MDL) trial awarded a \$51 million verdict against Merck with \$50 million being compensatory damages. The jury also found Merck's conduct so bad that it warranted a punitive award. Andy Birchfield and Leigh O'Dell from our firm served as co-counsel along with Mark Robinson of Robinson Calcagnie & Robinson, a California firm, during the trial of this matter. The case involved Gerald Barnett, a 62-year-old retired FBI agent, who suffered a heart attack after taking Vioxx. The fact that punitive damages were awarded in the second phase of the trial—while only for \$1 million—was most significant.

Andy serves as co-lead counsel for the MDL and has been involved in each of the trials that have occurred in the MDL. This was a major victory for all Vioxx victims. As expected, Merck had put on a full-court press in this case and had predicted a defense verdict to the media. The victory was also significant because of the location of the trial. The jury didn't buy Merck's defense and found that Merck had fraudulently misrepresented the heart attack risks associated with Vioxx. The Jurors specifically found that Merck was guilty of reprehensible conduct in its marketing of Vioxx and that Vioxx was the cause of Mr. Barnett's heart attack.

Clearly, this was a major victory for all Vioxx victims. As stated, the fact that the trial was held in New Orleans and in federal court is most significant. Hopefully, the media is finally beginning to realize how truly bad Merck's conduct has been. The more that is disclosed about Merck's knowledge of the deadly risks associated with taking Vioxx, the harder it will be for Merck to win in future trials. It is now abundantly evident

that Merck lied to the FDA, to the medical community, including the medical journals, and to the public. That sort of thing simply won't be tolerated by the American people. I predict that Merck will eventually have to change its trial strategy and start paying victims instead of paying their lawyers and cadre of highly paid experts. You will recall that the company set aside \$900 million for defense costs and that number is kept current as cases are tried.

## **SETTLEMENT IN DEATH CASE**

Our firm recently reached a settlement of \$4 million dollars with David Bulger, Inc., a trucking company, in a highway construction project death case. The settlement, which was partial in nature, was only for the claim against that company. We still have a claim pending against Wiregrass Construction Company, the general contractor on the project, which we believe has at least equal value. The case involves an accident that took place at a road construction project on County Road 10 in Macon County, Alabama. On May 9<sup>th</sup> of last year, the Assistant County Engineer, while inspecting the construction project, was run over by a dump truck owned by David Bulger, Inc. The truck was delivering asphalt to the job site. Wiregrass Construction had overall responsibility for traffic control and safety at the construction site. At the time of the incident, traffic was reduced to one lane on a rural two-lane highway. Flagger were supposed to be located at each end of the project to control traffic. An escort vehicle was supposed to escort highway traffic through the project. Wiregrass Construction failed to maintain the area in and around the construction project in a safe manner.

The dump truck involved was improperly allowed inside the project area which created a most dangerous situation. As highway traffic was being escorted through the project area, the dump truck pulled off the roadway and ran over the engineer who was killed. A post-accident drug screen of the dump

truck driver revealed traces of marijuana and other drugs in his body. Further, the dump truck driver's prior driving history revealed multiple moving violations and prior license suspensions. It was quite clear that the driver should never have been allowed to drive in a construction work zone. It is also clear that Wiregrass Construction failed to handle the entry of delivery trucks coming into the construction zone in a proper and safe manner. Now that the partial settlement has been reached with one of the defendants, we will proceed to trial against Wiregrass

## IN THIS ISSUE

---

I.	Capitol Observations . . . . .	2
II.	Legislative Happenings . . . . .	5
III.	Court Watch . . . . .	5
IV.	The National Scene . . . . .	8
V.	The Corporate World . . . . .	12
VI.	Campaign Finance Reform . . . . .	13
VII.	Congressional Update . . . . .	13
VIII.	Product Liability Update . . . . .	14
IX.	Mass Torts Update. . . . .	19
X.	Business Litigation . . . . .	25
XI.	Insurance and Finance Update . . . . .	28
XII.	Predatory Lending. . . . .	31
XIII.	Premises Liability Update . . . . .	32
XIV.	Workplace Hazards. . . . .	33
XV.	Transportation . . . . .	37
XVI.	Nursing Home Update. . . . .	39
XVII.	Healthcare Issues . . . . .	40
XVIII.	Environmental Concerns. . . . .	41
XIX.	Tobacco Litigation Update. . . . .	42
XX.	The Consumer Corner. . . . .	43
XXI.	Recalls Update . . . . .	45
XXII.	Firm Activities . . . . .	47
XXIII.	Special Recognitions. . . . .	48
XXIV.	Some Closing Observations. . . . .	49
XXV.	My Parting Words . . . . .	50

Construction. Mike Crow is the primary lawyer from our firm handling the case for the victim's family.

### **SOUTH CAROLINA SUES DRUG COMPANIES**

Our firm has been hired by the State of South Carolina in the AWP litigation to assist in the prosecution of the state's case. South Carolina Attorney General Henry McMaster has now filed a lawsuit against several pharmaceutical companies to recover over \$40 million in taxpayer funds. In announcing the filing, the Attorney General stated that the named companies fraudulently manipulated the prices of Medicaid and State Health Plan prescription drug claims. South Carolina is seeking to reclaim those funds on behalf of the state's taxpayers. South Carolina Medicaid and the State Health Plan are the largest two health plans in the state, covering over one million individuals. Interestingly, that represents almost 30% of the population of South Carolina. Together, the two plans have processed approximately \$5 billion in taxpayer-funded prescriptions since 1997. After the Attorney General carefully investigated this matter, he discovered that his state had been cheated. The defendants named in South Carolina's lawsuit are: Abbott Laboratories, Inc.; Baxter International, Inc. and its subsidiary Baxter Healthcare Corporation; Dey, L.P., formerly known as Dey Laboratories; Boehringer Ingelheim Roxane, Inc. and its subsidiaries Roxane Laboratories, Inc. and Ben Venue Laboratories, Inc.; and Schering-Plough Corporation and its subsidiaries Warrick Pharmaceuticals Corporation and Schering Corporation.

Since 1995, South Carolina Medicaid has spent over \$300 million on prescription drugs from these companies. The State Health Plan of South Carolina alone has spent over \$100 million. The pharmaceutical companies intentionally misreported the average wholesale price (AWP) of selected drugs which increased the reimbursements paid by Medicaid and the State Health Plans. This resulted in South Carolina taxpay-

ers being overcharged to the tune of at least \$40 million dollars and probably much more. When a patient fills a prescription at a pharmacy, the patient's health plan reimburses the pharmacy for the cost of the drug based on the drug's AWP. As we have reported previously, the AWP is a figure reported by the pharmaceutical company that has to be associated with the average price at which pharmacies buy their drugs.

False and inflated AWP figures for drugs provide greater financial incentives for pharmacies to buy and sell the drugs. Manipulating the average prices also provides higher sales revenue for the pharmaceutical companies, greater volume and market share for the drug companies and dramatically steeper drug costs for Medicaid and the State Health Plan. As in other states, taxpayers in South Carolina are the real victims of this pricing scheme. In bringing this lawsuit, the South Carolina Attorney General has two major objectives: First, South Carolina will seek to recover funds wrongfully taken from taxpayers over a period of years; and he hopes to restore public confidence in the stewardship of public funds.

Attorney General McMaster believes that the free enterprise system is strengthened when companies are held to high ethical standards. In this regard, he stated:

*I believe in free enterprise. There's nothing wrong with companies making a healthy profit. That's the American way. But companies that conceal actual prices and manipulate records to improperly increase profits at the expense of taxpayers must be held accountable. One obligation of this office is to protect taxpayers from fraud. We take that obligation very seriously.*

Currently, twenty-two other states have filed similar lawsuits alleging that a number of pharmaceutical companies knowingly inflating drug prices. Thus far, the Texas Attorney General has successfully recovered \$55.1 million from many of the same companies named in South Carolina's lawsuit. In related cases

filed by the federal government, pharmaceutical companies have paid approximately \$2 billion in criminal and civil liabilities. Our law firm was honored to be selected by the South Carolina Attorney General's Office to assist the state in the handling of the case along with a team of private attorneys. Dee Miles, Clint Carter and I have been designated "special counsel" to the Attorney General and will be involved in the case from our firm. Our goal is to recover for the citizens of South Carolina that which the named defendants in the pharmaceutical industry have wrongfully taken from them.

### **A REVIEW OF THE AWP LITIGATION**

There are now some twenty-two Attorneys General throughout the country (Alabama, Hawaii, South Carolina, Mississippi, Wisconsin, Illinois, Texas, Counties in New York, the City of New York, California, Arkansas, Arizona, Connecticut, Montana, Nevada, Massachusetts, Florida, Washington, Minnesota, Missouri, Ohio, Pennsylvania, and West Virginia), who have demonstrated great courage in standing up to the pharmaceutical industry and delivering the message that the industry must pay for their past sins. Cheating taxpayers can't be tolerated regardless of where the fraudulent conduct takes place or what means and methods are employed by the wrongdoers. We expect to file at least one more state case within the next few days.

In addition to representing Alabama, Mississippi, South Carolina, and Hawaii, our firm is also working closely with the other states, as well as with New York City and the New York Counties, on discovery efforts against the various defendants. Fortunately, we were able to start our discovery early in one of the first lawsuits filed. This has helped us greatly in preparation of the suits filed later on. It is a privilege to be working with all of these states on this important litigation against the powerful drug industry. The drug companies have gotten away with this overpricing scheme for far too long.

The wrongful conduct, which we certainly believe was intentional, has cost the states billions of dollars at the expense of their taxpaying citizens. We will update our readers as these cases continue to be developed.

#### **GSK To Pay \$70 Million In Settlement With States**

GlaxoSmithKline has agreed to pay more than \$70 million to settle lawsuits alleging that the London drug maker overcharged patients, health plans and insurers for pharmaceuticals. The settlement agreement winds up litigation filed by individuals, health plans and the states of Arizona, California, Connecticut, New York, Nevada and California. GSK had inflated the **average wholesale price** (AWP) of its products for more than a decade. It's possible that 34 other states could be eligible for funds under the settlement.

The state-level settlement comes about less than a year after GSK agreed to a \$150 million settlement to resolve litigation brought by federal healthcare programs based on the same theory of liability. In March, GSK agreed to pay \$13 million to state governments which had accused the company of charging too much for its antidepressant drug Paxil. It will be extremely difficult for other drug companies to deny liability in view of a major company like GSK agreeing to settlement on the same theory of liability.

#### **Mississippi Sues Maker Of Prescription Drug Zyprexa**

Mississippi has filed a lawsuit in state court against Eli Lilly and Co., alleging improper sales and marketing of the anti-psychotic prescription drug Zyprexa. The lawsuit seeks to recover money the State of Mississippi spent to purchase Zyprexa to treat symptoms for which the drug has not been approved. It also seeks money spent in providing health care to certain Medicaid recipients who allegedly suffered injuries or illnesses - such as diabetes - after taking

the drug. The lawsuit also seeks injunctive relief. The damages could be in the hundreds of millions of dollars.

Specifically, the lawsuit claims Eli Lilly trained and instructed its primary care sales force to attempt to expand the drug's market by convincing primary care physicians to prescribe the drug for mood, thought and behavioral disturbances. It also alleges the company established a consistent sales message to the primary care physicians "based on patients' symptoms and behaviors, rather than on their confirmed diagnoses." The drug maker, through its primary care sales force, presented the physicians with hypothetical patient profiles which included "patients complaining of symptoms such as anxiousness, irritability, mood swings and disturbed sleep, and submitting to physicians that such hypothetical patients would be medically indicated for treatment with Zyprexa." Eli Lilly also knew its drug increased the risk to patients of contracting diabetes, yet failed to warn of the danger. It is significant that in April 2002, nearly a year and a half before Eli Lilly first warned of the risk of diabetes in this county, the company changed Zyprexa's labeling in the United Kingdom and Japan to include warnings about the association between the use of Zyprexa and diabetes-related injuries.

Source: Associated Press

#### **Alabama's Workforce Training Program Number One**

AIDT, which is the State of Alabama's workforce training program, has continuously been ranked as one of the very best in the nation. In fact, in recent years it has climbed to the very top. It has been ranked number one in the nation in 2004 and again in 2006. It was ranked number two in 2005. The program's repeated top ranking as the nation's best workforce training program has added another medal to Alabama's effective economic development activities. Alabama currently ranks as "State of the Year" for the fourth consecutive year

based on job announcements in 17 southern and border states. No other state has won that title for four consecutive years. AIDT's training efforts have been a major factor in our state's economic success. Governor Bob Riley had this to say about the program:

*Alabama has become a national leader in many areas, especially when it comes to our economy. This award is further proof of the successes we're having and the strides we've made. A high quality workforce is our state's number one selling point when it comes to recruiting companies. Being consistently ranked at the top in workforce training is tremendously helpful to our economic development efforts.*

Jim Hayes, president of the Economic Development Partnership of Alabama, had this to say about Alabama's training program:

*Every economic developer in Alabama will tell you that AIDT is our greatest incentive for attracting new industry. Over the years we've seen AIDT perform near-miracles when it comes to recruiting, screening and training the workforce to meet the demands of a new or expanding company. They are a big reason for the impressive record Alabama has posted in attracting world-class companies, and a major contributor to the success that those companies have had in the state.*

AIDT, part of the State's Department of Post-Secondary Education, provides comprehensive workforce recruiting and training for employers who commit to create new jobs in Alabama. Since 1971, AIDT has customized training for more than 250,000 Alabamians seeking employment with more than 4,000 organizations. On a purely personal note, I helped start this program when I was involved in state government way back in 1971. The program was modeled after a similar program that was in place

at the time in South Carolina. Dr. T.L. Faulkner, Fred Denton, George Howard and John Moseley were a few of the people who were involved in getting the Alabama program up and running. The state has one of the very best persons in the business running AIDT at present. Ed Castille, who currently serves as Director, has followed in the tradition of George Howard, who during his tenure set the bar very high for his successor. I am very proud of having had a hand in starting something that turned out to be very good for the people of Alabama.

## II. LEGISLATIVE HAPPENINGS

---

### *THE GENERAL ELECTION*

I am told that the top Republican Party leaders are confident that they will have control over both houses of the Alabama Legislature after the general election. Insiders say that the GOP leadership will have access to tremendous sums of money from powerful special interests, which will be spent in the contested legislative races. The sources of this money are said to be primarily from the oil, insurance, finance, nursing home and automobile industries. It is predicted by a highly respected political consultant that a record amount will be spent in the legislative races this fall.

I have looked over the contested races and don't believe that there will be enough wins—even with the massive spending that is projected—to shift the balance of power in the Legislature. Ordinary citizens should have more in common with the platform made public by the Democratic Legislative Leadership last month than they have with the GOP's past performance in the legislature.

In trying to figure out what will happen in November, many believe that a major mistake was made by the

Republican Party leadership when they made a vicious attack on House Speaker Seth Hammett. The Speaker, who is known to be ultra-conservative, is widely respected by all political factions in Alabama. He is extremely popular back in his district. One capitol insider remarked, "If the Republicans will take on a man like Seth Hammett—with his strong record in the legislature for business interests—it tells me they have no regard for how legislators have voted in the past. It's a most arrogant attitude that may just backfire." Whether or not that is an accurate assessment remains to be seen. In any event, it will be most interesting to see how the legislative races come out.

### *AGENDAS ANNOUNCED FOR 2007*

Both political parties have announced their legislative agendas for next year's regular session. There are a few things that either needs to be added or strengthened in the proposals. Hopefully, each of the agendas will include strong campaign finance reform, a real curbing of lobbyists' power and influence, and passage of needed consumer protection measures. I am sure we will be hearing more on what each group proposes between now and November. I would encourage Alabama citizens to give the party leaders their input on what is needed in Alabama.

## III. COURT WATCH

---

### *THREATS AGAINST JUDGES ARE ON THE RISE*

It's unfortunate that political attacks on judges have become common place in this country. In my opinion, **extremist rhetoric** leveled at the judiciary is very dangerous and must end. In my opinion, it is something that can no longer be tolerated. Judges are virtually defenseless when attacked verbally or in print since they cannot respond to the attacks. I believe that the negative

political climate in the United States has had an adverse effect on our judiciary—both state and federal—and clearly that is not good. Political advisers, who thrive on negativism, have encouraged their candidates to attack judges for their own political gain. The phrase "**activist judge**" was invented by Karl Rove and it has been the theme used by the likes of Tom DeLay and other extremists over the past several years. I am firmly convinced that **extremist rhetoric** leveled on the judiciary has contributed to the rise in actual violence against judges and their families.

These attacks on sitting judges are totally unjustified and highly inappropriate by any standard. Yet, we see that sort of thing happening on a continuing basis on the national scene and in a number of states. While not all of the attacks come from politicians during the political season, I am convinced that **political consultants** are largely responsible for the current climate. We have seen high-ranking public officials at both the federal and state levels make inappropriate verbal attacks on judges when the attacks have no basis in fact. Unfortunately, the attacks energize folks who are a little off base to commit actions that perhaps they wouldn't otherwise take.

As we all know, not all of the attacks are political in nature and non-violent. Some are actual threats of violence and bodily harm against judges and their families. Some are in fact physical acts of violence. I am firmly convinced that the constant attacks by political figures on judges and the judicial system encourage the lunatic fringe in the U.S. to attack judges. Unfortunately, there have even been a few incidents of violence that ended with tragic consequences.

It is most disturbing to learn that threats against federal judges are on a record-setting pace this year. Threats and inappropriate communications relating to federal judges have quadrupled over the past 10 years. There were 201 reported such incidents in 1996 and 943 in the year that ended Septem-

ber 30th, according to the U.S. Marshals Service. This year alone, the Marshals Service has had 822 reports of inappropriate communications and threats. At that pace the numbers would top 1,000 for the year. A threat typically includes a direct reference to harm, a weapon, or a violent act. Inappropriate communications range from rambling letters to accusations of bias to envelopes that contain feces. U.S. Supreme Court Justice Ruth Bader Ginsburg revealed in February that she and former Justice Sandra Day O'Connor were threatened a year ago by someone who called on the Internet for the immediate "patriotic" killing of the justices. That is most disturbing and should be a wake-up call for all right-thinking American citizens.

Bar associations and other groups must get involved and find ways to protect judges from these unwarranted attacks. Fortunately, the Alabama Bar Association has become very active in this area. Birmingham Lawyer Sam Franklin and I headed up a bar committee recently that addressed the issue relating to criticizing and attacking judges in Alabama. Our committee worked very hard and came up with a set of rules that were adopted by the state bar earlier this year. Hopefully, the public realizes that an independent judiciary—free from threats and intimidation—is critically important in our nation.

#### **ALABAMA STATE BAR URGES JUDGES BE APPOINTED**

The Alabama State Bar has announced that it will push for merit-based appointment of appellate court judges. A bill will be introduced in the regular session next year that would provide for judges on the state Supreme Court and Courts of Appeals to be appointed. Fournier "Boots" Gale III, a Birmingham lawyer who is the bar's new president, has taken on as a major project. If the legislation is approved, a committee would recommend judicial candidates to the governor, who in turn would make the appointments. Every six years, voters

would decide whether to keep the judge in office. This is known as a retention election. As we all know, judges currently run in partisan elections, which have become the most expensive and perhaps the meanest in the country.

Alabama is one of seven states that elect appellate judges. Some form of merit-system appointment is used by 34 states. Alabama's judicial campaigns have become the most expensive in the country according to national organizations that track judicial elections. Since 1993, almost \$48 million has been spent in state Supreme Court races alone - including \$4.6 million spent in the Republican primary for five state Supreme Court races so far this year. That doesn't count the millions spent by third-party groups such as the American Taxpayers Alliance. That kind of spending can't be justified by any standard.

While I believe strongly that we have a system that is badly broken and in dire need of repair, I am not convinced that appointing judges is the answer. I would prefer non-partisan elections of all judges with strict limitations on both campaign contributions as well as spending by candidates and their campaign committees. To make things work, however, prohibitions on PAC giving as well as barring all spending by an entity other than a candidates' campaign committee. Groups such as the American Taxpayers Alliance—funded by powerful industry groups—should not be allowed to fund political ads for candidates or against candidates in judicial races.

The push by the state bar association, which has 15,000 members, to appoint appellate judges is one of its top priorities. Bobby Segall received lots of criticism over the issue during his time as bar president. In my opinion, none of the criticism was unwarranted. Actually, the effort began when another Birmingham lawyer, Bill Clark, served as state bar president two years ago. It simply continued during Bobby's term. For your information, Alabama's constitutions have required judicial elections

since 1868. The push for a merit selection system to take the politics out of state judicial selection is almost a century old. The prospects of easy passage in the legislation are not too promising. But, having an organized effort spearheaded by the State Bar Association is a plus. Nobody can argue with the fact that the system is broken. The question remains, however, as to what should be done to fix it.

#### **NEW JERSEY SUPREME COURT STRIKES DOWN CLASS ACTION BAN**

Trial Lawyers for Public Justice (TLPJ) and a team of consumer rights advocates have won a tremendous victory in a consumer rights battle of national significance. The New Jersey Supreme Court ruled in a recent case, *Muhammad v. County Bank of Rehoboth Beach, Delaware*, that corporations cannot use class action bans in their consumer contracts to avoid liability for cheating consumers. The Court rejected an attempt by a payday lender, which was charging 608% interest to use a class action ban to avoid accountability. The ban was struck down as "unconscionable and unenforceable."

The decision in *Muhammad* preserves the right of cheated customers to use class actions to hold corporations accountable. The effect of this ruling should be felt in other states. As Legal Services of New Jersey told the Supreme Court in an amicus brief:

*From the perspective of low-income New Jersey consumers, this is one of the most important cases ever to reach this Court.*

By its ruling, the court protected consumers by preserving class actions. The value of class actions to consumers and the public interest: was noted by the court. The opinion stated:

*The public interest at stake in [the plaintiff's] ability and the ability of her fellow consumers effectively to pursue their statutory rights under this State's consumer protec-*

*tion laws overrides the defendants' right to seek enforcement of the class arbitration bar in their agreement.*

The case was brought by Jaliyah Muhammad, a New Jersey woman who took out a \$200 loan from a payday lender called "Easy Cash". Because Muhammad had to "roll over" the loan twice, she had to pay a total of \$180 in interest on a \$200 two-month loan—a 608% annual percentage rate (APR)—despite a New Jersey law that makes it a crime to charge interest above 30% APR. Muhammad sued on behalf of New Jersey borrowers, alleging that Easy Cash and two other companies were the true lenders and were violating New Jersey's usury statute, Consumer Fraud Act, and civil racketeering statute. Michael J. Quirk, now of Williams, Cuker & Berezofsky in Philadelphia (and formerly of TLPJ), who handled the case on appeal, says:

*This is an enormous victory for low-income consumers who were charged interest rates of 600% and higher. By allowing these borrowers to bring their claims for class-wide relief, the Court ensured that high-cost payday lenders like these can be held accountable under New Jersey's consumer protection laws.*

The lead lawyers for the plaintiffs in the case were Mark Cuker of Williams, Cuker & Berezofsky and Donna Siegel Moffa of Trujillo, Rodriguez & Richards in Haddonfield, New Jersey. Paul Bland, Jr., who is with TLPJ, also assisted in the case. Hopefully, other appellate courts will follow the lead of the New Jersey court. Payday lenders are very close to being public enemy number one for low-income consumers.

Source: TLPJ

#### **WEST PALM BANK TO PAY \$50 MILLION IN PRIVACY CASE**

In my opinion, no governmental agency has any business selling the private information of citizens to third

parties for any purpose. Several months ago, we wrote about the State of Florida selling state records, which I thought at the time was a big mistake. The risks that practice creates for persons whose records are sold are most obvious. Now a lawsuit arising out of the sale of records will result in hundreds of thousands of Florida motorists receiving up to \$160 each. This is under a \$50 million class action settlement reached with Fidelity Federal Bank & Trust of West Palm Beach. The bank violated a federal anti-stalking law, brought about by the 1989 murder of TV actress Rebecca Schaeffer in California that makes it illegal for companies to buy driver records from state governments. The Florida settlement is the first for motorists whose records were sold by a state.

The lawsuits stem from a conflict, resolved two years ago, between federal and state privacy laws. In the case referred to above, Fidelity Federal bought 565,600 names of motorists from the Florida Department of Highway Safety and Motor Vehicles from 2000 to 2003. The bank then used the information to send marketing brochures for automobile loans. Fidelity Federal paid \$5,656, which amounts to a penny a name, for names and addresses of motorists who recently bought cars. Although no one contends that any physical harm came to the motorists in the Fidelity Federal case, federal law allows for penalties of up to \$2,500 per violation of the Driver Privacy Protection Act. U.S. District Judge Daniel T.K. Hurley has indicated that he will approve the settlement. If it is approved, motorists will receive claim forms next year.

Interestingly, Fidelity Federal had appealed the case to the U.S. Supreme Court, which declined in March to hear the case. Even though the High Court refused to hear the appeal, Justice Scalia took the most unusual step of commenting on it. The justice wrote:

*Because of other class actions currently pending in Florida involving the same question, the total amount at stake may reach \$40 billion.*

In another class action, which could be very large, several motorists have sued data gatherers ChoicePoint, Experian, Lexis Nexis, First American Corp. and a number of other companies for breaking the federal Driver Privacy Protection Act by buying driver records from Florida. The class, in that case, which has not been certified, would include every driver and vehicle owner in Florida. To give you an idea of how large the potential class is, it would involve 15 million people in all.

Federal law prohibits the disclosure of data unless the motorist authorizes it—"opts in"—with a check mark on the license application or car registration form. But Florida law allowed information to be disclosed unless someone "opted out," either at a driver license office or at [www.hsmv.state.fl.us](http://www.hsmv.state.fl.us). In 2004, Florida lawmakers passed a bill that made state law match federal law. You may recall that Congress passed the driver privacy law in 1993 in response to the killing of Ms. Schaeffer, who was the star of the sitcom *My Sister Sam*. The stalker tracked her down through California motor vehicle records. That sort of thing is why no state should sell citizens private information to any person, corporation, or entity. The risk for misuse is much too great to justify the practice.

Source: Palm Beach Post

#### **JUDGE REDUCES AWARD FOR MODESTO DRY CLEANING POLLUTION**

We reported in the July issue on the \$175 million jury award in California to the City of Modesto. That award has been reduced to \$13 million in the water contamination case against several companies, including Birmingham-based Vulcan Materials Co. While the trial judge reduced the punitive damages against two chemical companies, a request to order a new trial was rejected. Damages against Vulcan Materials Co. were reduced to \$7.25 million from \$100 million. Dow Chemical Co. was ordered to pay \$5.5 million, down from \$75 million. The verdict for RR Street & Co. Inc., of Naperville, Illinois,

remained at \$75,000.

As you may recall, the jury decided in June that the companies acted with malice because they failed to tell dry cleaners how to use and dispose of chemicals without harming the environment. Two other chemical companies—Pittsburgh-based PPG Industries and Dallas-based Occidental Chemical Corporation—were ordered to pay \$3.2 million for water pollution, but no punitive damages were awarded against those defendants.

Source: *Associated Press*

#### **NEW JERSEY COURT OVERTURNS VERDICT AGAINST STADIUM BEER VENDOR**

A New Jersey appeals court recently overturned a landmark \$105 million verdict against a stadium vendor that sold beer to a drunken fan who later paralyzed a girl in an auto wreck. Ordering a new trial, the three-judge state appeals panel said the trial court improperly allowed testimony about the “drinking environment” at the 1999 football game at Giants Stadium. The family claimed that vendors for Philadelphia-based Aramark Corp. continued to sell beer to Daniel Lanzaro during a 1999 New York Giants game even though he was clearly drunk, and that the concessionaire fostered an atmosphere in which intoxicated patrons were able to still buy alcohol. Hours later, Lanzaro caused the wreck that paralyzed then 2-year-old Antonia Verni from the neck down. The opinion by the court states:

*The admission of this evidence cannot be considered harmless. A central theme of plaintiffs’ case was the culture of intoxication at the stadium.*

Interestingly, the trial judge said a new jury can consider whether other defendants previously excluded can also be held responsible in the case. Those defendants include the National Football League, two bars where Lanzaro drank after the game and a friend of Lanzaro’s who drank with him on the

day of the accident. Lanzaro is serving a five-year prison term after pleading guilty to vehicular assault. He settled with the family for \$200,000 in insurance money to pay his portion of the damages. Lanzaro—who had a blood-alcohol level of .226, nearly three times the legal limit—testified he bought six beers at halftime even though he said he had already drunk at least six during the first half and was slurring his speech. The court’s ruling will be appealed to the state Supreme Court.

Source: *Associated Press*

#### **IMPORTANT COURT RULING HANDED DOWN**

The United States Court of Appeals for the District of Columbia Circuit in a ruling last month held that the taxation of non-economic damages for emotional distress and loss of reputation is **unconstitutional** because such a tax violates the Sixteenth Amendment of the U.S. Constitution. The opinion was written by Chief Judge Douglas H. Ginsburg, joined by Judges Judith W. Rogers and Janice Rogers Brown. The case was *Murphy v. IRS* (No. 05-5139), and it is very important for ordinary people.

## **IV. THE NATIONAL SCENE**

#### **A NATIONAL CRISIS THREATENS TO CRIPPLE OUR ECONOMY**

Folks in the U.S. are greatly upset over the outrageous prices they have to pay for gasoline and for good reason. The rapidly increasing costs of gasoline are causing a tremendous strain on people throughout the country. In my opinion, the failure of the Bush Administration and the Republican leadership in Congress should be a major campaign issue in congressional elections this fall. Currently, families have to decide how to cope with the high cost of gasoline at the pump while trying to still meet their other financial obligations. Many fami-

lies literally have to cut back on their purchases of food in order to buy gasoline. Tragically, family debts are rising along with the increasingly high cost of gasoline. People need relief and so far they aren’t getting any help from most of the politicians in Washington.

While the consuming public suffers, the giant oil companies are unashamedly raking in record profits. It’s not surprising that the world’s largest company, ExxonMobil, is leading the pack. Thus far, the Texas-based company has smashed all profit records for the oil industry. ExxonMobil’s profit for the second quarter of 2006 of \$10.7 billion—which is said to amount to \$1,318 a second - is the second largest ever reported by a U.S. company. Total revenues for ExxonMobil for that period was just over \$99 billion. Would you venture a guess as to which company holds the record? Based on projections the record held by ExxonMobil for profits in the last quarter of 2005 will likely be broken soon.

The attitude of our national political leaders over the plight American citizens find themselves in regarding gas prices reminds me of Nero fiddling while Rome was burning. Their failure to take action is appalling. Both the prices for gas at the pump and payments to corporate bosses in the oil industry are outrageous and can’t be justified. The golden parachute given to Lee Raymond on his retirement by ExxonMobil is a prime example of how that company operates and how little concern it has for how ordinary citizens are hurting. ExxonMobil justifiably caught considerable flack from the general public for its record fourth quarter profits, which came soon after gasoline prices hit record highs. But, when the company gave its outgoing CEO the retirement package worth about \$400 million it really put things in the proper perspective. The public outcry calling for restrictions to CEO pay came about shortly thereafter. Also, calls from lawmakers, who wanted to institute a windfall profits tax on the oil industry or even break up some of the

oil giants that merged in the 1990s, started to be heard. Unfortunately, all we have seen from Washington so far is talk.

It has become abundantly clear that the oil company lobbyists are so powerful in Washington that nothing of substance will be done to help consumers. Thus far nothing has happened to protect the public. Neither Congress nor the Bush White House has done anything to help consumers and that's hard to justify. With the current vice-president in power, we can't expect the Bush Administration to take on the oil companies. In my opinion, it will take voting some "rascals" out this fall in order for anything to be done in Congress. Hopefully, that will happen. If it doesn't—expect to pay more than \$4 a gallon for your gas next year—with no end in sight.

#### **AMERICAN BAR ASSOCIATION SAYS PRESIDENT BUSH OVERSTEPS POWER**

The American Bar Association has been critical of President Bush's continuing habit of writing exceptions to laws he has just signed. In a report highly critical of the practice, a Bar Association task force says the president has violated the constitution. The ABA group, which includes a one-time FBI director and former federal appeals court judge, believes the president has overstepped his authority in attaching challenges to hundreds of new laws. The attachments, known as bill-signing statements, say the President reserves a right to revise, interpret or disregard measures on national security and constitutional grounds. Michael Greco, President of ABA, observed:

*This report raises serious concerns crucial to the survival of our democracy. If left unchecked, the president's practice does grave harm to the separation of powers doctrine, and the system of checks and balances that have sustained our democracy for more than two centuries.*

The task force's recommendations were presented to the 410,000-member group at its annual meeting. ABA policy-makers will decide whether to denounce the statements and encourage a legal fight over them. The task force said the statements suggest the president will decline to enforce some laws. President Bush has had more than 800 signing statement challenges, compared with about 600 signing statements combined for all other presidents, according to the group. Frankly, I am not sure if Karl Rove really cares very much about the ABA's opinions and what the group has to say. Politically, it may just give Rove some bullets for his very active political gun. Nevertheless, it appears that the President has overstepped his bounds—for what it's worth.

Source: Associated Press

#### **CABLE CHOICE LEGISLATION NEEDS THE PUBLIC'S SUPPORT**

Parents should be greatly concerned over the filth that children are exposed to on a daily basis by television programming. Both the regular channels and the cable channels are full of programming filled with sexual content, extreme violence, profanity and gross conduct. Fortunately, at least cable choice has now become an option. The Parents Television Council is pushing hard to get a bill passed in congress that would provide families with cable choice. If passed, a bill introduced by Congressmen Dan Lipinski (D-IL) and Tom Osborne (R-NE), would give families the ability to take and pay for only the cable channels they want. The cable industry has been called on to support this plan. The PTC is leading a broad coalition of national organizations in support of Cable Choice. Concerning the current crisis, PTC Founder and President, L. Brent Bozell III, observed:

*Everyone knows that entertainment television is rapidly becoming a trash dump of indecency and in recent years this has become an issue of national*

*concern. Day after day and night after night, families are assaulted by graphic violence and murder; explicit sexual situations, even including depictions of brutal rape, incest, pedophilia, and the like; and filthy gutter language until recently never heard on television.*

*This year, Congress finally acted to increase the fines against those broadcasters who violate broadcast decency law. The broadcast airwaves are owned by the public, and community standards of decency must be protected. But cable is a different matter altogether, and another solution to the problem must be found.*

*There are three possible solutions to the cable indecency issue. The first is to give FCC the same oversight powers over cable as it has on broadcast television, but this idea is going to face philosophical and practical challenges. Second, there is the notion of family tiers, but what has been offered by the cable industry thus far is wholly unacceptable and is a product designed to fail. What the cable networks have put on the table as their idea of 'family tiers' is pathetic and everybody knows it. Moreover, with the problem of cable indecency reaching the epidemic level it has, the cable industry is in no position to define for families what a 'family tier' is.*

*Parents must be given real control over the programming that enters their homes via cable and satellite. Families must be given the right to pick, choose, and pay for only the channels they want to receive. Thus the third option—Cable Choice—is the best solution. I commend Congressman Lipinski and Congressman Osborne for siding with the overriding sentiment of American families and introducing this legislation that holds the promise of giving fami-*

*lies real choices in cable television programming.*

*If the entertainment industry really cares about giving parents 'complete control' over their television sets then they must and will support Cable Choice. If the television industry opposes Cable Choice, then their call for 'parental control' is exposed as a farce. Cable Choice is the one solution that will truly empower the consumer, free of any government regulation, to decide what he or she wants in his or her home. It is a solution that is being endorsed by Republicans and Democrats, conservatives and liberals, alike. "The entertainment industry has been maintaining for years it was up to parents to take a greater responsibility. This is the ultimate in parental control. "It is time, high time, that the cable industry stopped forcing consumers to subsidize its raunch. It is time for Cable Choice, and if the industry really cares about parental responsibility, it's time for the entertainment industry to put up or shut up.*

Cable choice makes sense and hopefully both the House and Senate will pass the legislation needed to make it a reality. You can help make a difference by contacting the Senators and House members in your state and ask them to support the cable choice legislation.

Source: Parents Television Council

#### **CONGRESSMEN INVESTIGATE AGENCY'S ACTIONS ON OFFSHORE OIL LEASES**

Republican Congressmen Tom Davis of Virginia and Darrel Issa of California have demanded that the Interior Department hand over documents and e-mails related to offshore oil leases. It appears that critical provisions were removed from the leases, resulting in a windfall for the oil companies holding leases. It's good to know that these key members of Congress are investigating the matter. They believe Interior Depart-

ment officials may be withholding information that could prove whether the incident was deliberate.

The provisions in question would have required the leaseholders to pay the government royalties once market prices reached a certain level. The Congressional Budget Office estimates the government has already lost \$2 billion and could lose another \$8 billion over the life of the leases. The Interior Department's inspector general is also investigating the matter. I suspect that in past years, this sort of thing would have gone unnoticed. The power and influence of the giant oil companies—with their cadre of well-connected lobbyists—has allowed the industry to run rough shod over the government employees who have had to deal with them. Hopefully, that is beginning to change.

Source: Associated Press

#### **TAX ABUSES BY THE RICH MUST BE STOPPED**

While working men and women, the owners of small businesses, and senior citizens struggle to pay their tax bills each year, billionaires in this country are being allowed to dodge taxes. That's just plain wrong and it must be stopped. The loopholes in our federal tax laws favor the rich and penalize all others. Last month, the Permanent Subcommittee on Investigations, a Senate subcommittee, started an investigation of the proliferation of offshore tax abuses. The committee has heard from several individuals who tried to use a complicated scheme to avoid taxes on hundreds of millions of dollars in capital gains. At least, that appears to be a start. But, it must go much deeper and really get to the heart of the matter.

Tax shelters are marketed to the rich and are designed to allow them to abuse the system. The subcommittee said that it would recommend changes in the federal tax law to halt offshore tax abuses. In my opinion, that is something that is long overdue. In addition to individuals, we have larger corporations which use offshore mailing addresses to

avoid paying taxes in the U.S. I would like to hear an explanation for why the tax code gives tax breaks to companies that move U.S. jobs overseas. In my opinion, this makes no sense whatsoever. A congressional study in 2000 found that 63% of U.S. corporations paid no income taxes. According to the study, between 1990 and 2000, corporate profits rose 93% while the average pay for CEOs increased by 571%. As a result, billions of dollars are lost by the government each year. Add to all of this the Bush tax cuts for the rich and that really compounds the problem.

Source: Wall Street Journal

#### **FEMA IS A NATIONAL DISASTER**

It has become abundantly clear that the federal government's handling of post-Katrina problems was a total disaster. In dealing with a natural disaster, the performance of FEMA has resulted in a national disaster. Unfortunately, even after a full year of mis-management and abuses, the problems still persist. FEMA is a classic example of governmental incompetence. The costs to taxpayers relating to Katrina have gotten totally out of hand and apparently there have been few real controls in place over the spending. For example, four no-bid contracts awarded by FEMA to house Hurricane Katrina evacuees have grown in value from \$400 million to about \$3.4 billion. All of the waste and excessive spending have prompted renewed scrutiny from Congress and federal auditors. FEMA's management of the aftermath of the storm should be the subject of a formal independent investigation. Each of the corporations receiving the no-bid contracts mentioned above is very well-connected politically.

The Department of Homeland Security's inspector general reviewed these contracts with construction and engineering firms Bechtel Corp., CH2M Hill Inc., Fluor Corp., and the Shaw Group Inc., to provide 150,000 trailers for hurricane victims. Now the Inspector General is taking a second look. FEMA is bidding at least \$1 billion for similar

work in future contingencies. The current review is checking into how the contracts were awarded, the parties involved and their documentary support. The “dollars and risk associated with sole source contracts” have been cited by the Insurance General.

The contracts, which were quickly awarded without taking bids as Katrina approached and hit the Gulf Coast, have been repeatedly faulted by the Inspector General’s office, congressional auditors and a Senate investigation for poor safeguards and high costs. FEMA had valued the four contracts at \$2 billion as late as last winter. Now, the agency has raised the limit for each firm. Security Secretary Michael Chertoff promised Congress in October that the contracts would be re-bid. He also promised to spin off \$3.6 billion in maintenance and future dismantling of the trailers to 36 small and minority-owned firms in March.

The initial contracts began under some rather unusual circumstances. It appears that the four firms were selected even before Hurricane Katrina made landfall. FEMA publicly announced contracting with the firms for housing on September 8<sup>th</sup>. These were letter contracts or agreements worth as much as \$100 million. FEMA claims that the initial contracts had a ceiling of \$500 million each. Politically motivated decisions should never be allowed when it comes to the spending of taxpayer’s dollars.

Interestingly, FEMA raised the ceilings of the contracts—to \$950 million for Shaw in February, to \$1.4 billion for Fluor in March and to \$575 million for Bechtel last month. The CH2M Hill contract will be returned to \$530 million. So far FEMA has paid the firms a total of \$1.9 billion. The agency is obligated for another \$1 billion based on company charges. There have been numerous charges of poor performance and abuse related to these contracts.

I was shocked to learn that FEMA has contracted to pay as much as \$7 billion for the 150,000 trailers. That amounts to about \$46,000 per trailer. By law, the agency is required to provide storm

victims housing for 18 months, although that term could grow. It is impossible to justify FEMA’s failure to have contracts in place to provide temporary housing before any major storm ever developed. Surely, somebody was listening to the forecasts of a rough hurricane season. Prearranging contracts, for example, could have avoided FEMA’s post-Katrina spending of \$1.8 billion to provide **hotel rooms and cruise ship cabins** to storm victims at three to six times the cost of what it paid them to rent apartments. It would have also avoided buying 26,000 mobile homes, many of which could not be used under agency rules.

Katrina was not the first major hurricane to hit the U.S. FEMA had to know that four hurricanes hit Florida in 2004. At the very least, planning for future storms should have started then. Members of Congress have said FEMA is unresponsive to complaints and warnings of mismanagement. If all of our government’s departments and agencies operate like FEMA, we are really in big trouble.

*Source: Washington Post*

### **SUSAN DUDLEY IS A BAD CHOICE FOR TOP GOVERNMENT JOB**

The recent announcement of the White House’s intention to nominate Susan Dudley as administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget represents another attack by the Bush Administration on the government’s ability to hold industry accountable and keep Americans safe. Although the OIRA is little known to the public, it has enormous power to weaken, delay and eliminate hard-won regulations designed to protect the public in the workplace, on our roads and in our homes. As you may already know, the OIRA reviews protections instituted by so-called watchdog agencies such as the National Highway Traffic Safety Administration, the Food and Drug Administration and the Environmental Protection Agency. Every-

thing from auto safety standards to limits on industrial chemicals and air and water pollutants are covered. Under the Bush Administration, the OIRA has weakened these already troubled regulatory agencies. If Ms. Dudley is confirmed by the Senate, many consumer advocates believe these agencies will be further stripped of their ability to stand up to government secrecy, politicization and corporate interests.

Throughout her career, Ms. Dudley has consistently fought against government safeguards and advocated a radical, hands-off approach to regulating corporations. As director of regulatory studies at the industry-funded Mercatus Center, Ms. Dudley has worked to strike down countless environmental, health and safety rules and found willing allies in the Bush Administration. She has opposed such things as the EPA’s attempts to keep arsenic out of our drinking water and to lower levels of disease-causing smog. The urgent need for NHTSA’s life-saving airbag regulations and the Department of Transportation’s hours-of-service rules to keep sleep-deprived truck drivers off our roads were actually questioned by Ms. Dudley. She has championed energy deregulation, which has led to skyrocketing prices and little consumer relief during record-setting heat waves. The list of why this woman is suspect on critical health and safety concerns goes on and on.

I agree with Public Citizen’s belief that Ms. Dudley is unfit because of her past record to head the country’s top regulatory oversight position. The Bush Administration had to know that her nomination would be opposed by environmental, health, labor and safety advocates because of her past record. Interestingly, the timing of the announcement came a week before the Senate was scheduled to adjourn. It was thought that the Bush Administration might have been planning another recess appointment. I don’t believe that happened. If it gets the chance, the Senate should vote against Susan Dudley’s nomination. In the opinion of

many safety advocates, public health and safety depend upon the Senate rejecting this nomination.

Source: *Public Citizen*

## V. THE CORPORATE WORLD

---

### **SEC SETTLES CHARGES AGAINST EX-WORLDCOM EXECs**

Civil actions against seven former WorldCom Inc. executives, including its former Chief Financial Officer, Scott Sullivan, have now been settled. The SEC had reached financial settlement terms with several individuals in previously announced cases for their parts in causing “fraudulent adjustments and entries in WorldCom’s books and records.” The last settlement involved Mark Abide, the former Director of Property Accounting. Hopefully, we are getting close to the end of the sordid mess caused by the scandals at WorldCom.

Source: *Reuters*

### **BANKS TO SETTLE GLOBAL CROSSING SUITS**

Goldman Sachs Group Inc., Merrill Lynch & Co. and about 25 other investment banks will pay a combined \$99 million to settle shareholder litigation arising out of the collapse of the former telecom grant Global Crossing Ltd. Goldman agreed to pay \$42.1 million and Merrill \$19.2 million under the settlement, which has received preliminary approval from a federal judge in New York. Other contributions to the settlement include \$17.4 million from two CIBC units of Canadian Imperial Bank of Commerce, \$3.8 million from JP Morgan Chase & Co., and \$2.9 million from Morgan Stanley Inc. Previous settlements have included a \$245 million settlement in 2004 with Global Crossing founder Gary Winnick and members of the board, as well as the company’s law firm.

The frenzy of network building during the technology boom in antici-

tion of an explosion of internet traffic was sort of like the gold rush in California years ago. This recent settlement agreement marks the latest in a series of settlements stemming from scandal and bankruptcy at a company that epitomized all that was going on in this industry. The suits included allegations of deceptive accounting and fraudulent deals to pump up revenues as the company and other backbone operators “traded unused capacity on their networks.” Investors also accused the investment banks of aggressively selling Global Crossing securities at inflated prices. The only things lacking in this story were shoot-outs like the one at the OK Corral.

In 2005, Citigroup Inc. agreed to pay \$75 million to Global Crossing investors and the company’s auditing firm Arthur Andersen LLP—which no longer exists—agreed to pay \$25 million. However, the latest settlements won’t be the final chapter in the litigation. Investor claims against Microsoft Corp. and Softbank Corp. of Japan are still pending. Global Crossing went into Chapter 11 bankruptcy protection in January 2002 with debts of \$11 billion. The company had built a transoceanic network of Internet backbones that investors expected to generate fortunes from the explosion of online traffic. Unfortunately, that never materialized. The New Jersey-based company emerged from bankruptcy in late 2003. While the victims of the massive wrongdoing at this campaign will never be fully repaid, at least some progress in that direction has been made.

Source: *Associated Press*

### **TYCO PENSIONERS GRANTED CLASS ACTION**

People employed by Tyco International Ltd. when it was run by a number of corrupt executives have won class action status for their lawsuit charging deception by the conglomerate’s retirement savings plan. The employees claim Tyco hid the true value of the company when offering its stock as an investment option in the plan and did so knowing

that the stock was a bad investment. U.S. District Judge Paul Barbadoro approved the class in a ruling last month. The judge said that in cases involving stock fraud and a company’s failure to disclose important information, isn’t required that investors have to prove they **relied** on information from the company.

As you probably know, Tyco manufactures a wide array of products from telecommunications equipment to home alarm systems. The company, which interestingly is registered in Bermuda, was run from Exeter, New Hampshire, at the time of the alleged fraud. It now operates from West Windsor, New Jersey. This was just one of a number of large corporations that were run by greedy, unscrupulous expectations.

A number of lawsuits filed by shareholders, including this one, have been consolidated in the U.S. District Court for New Hampshire, where Tyco formerly had its U.S. headquarters. Other former stockholders, including large investment funds, were granted class status in June. Any U.S. employee of Tyco who invested retirement savings in Tyco stock from August 12, 1998, to July 25, 2002, would be eligible to share in any funds that are recovered by way of judgment or settlement. Even though getting class action status is a major accomplishment in such lawsuits, shareholders still must prove their claims.

Former Chief Executive Dennis Kozlowski and former Chief Financial Officer Mark Swartz were convicted last year in a New York state court on multiple counts of grand larceny, conspiracy, securities fraud and falsifying business records. The two men conspired to defraud Tyco out of millions of dollars in order to fund their extravagant lifestyles. They were sentenced in September to up to 25 years in prison. A judge correctly refused to release them on bail while they appeal.

The shareholders’ lawsuits allege that the company misrepresented the value of Tyco and companies it acquired under Kozlowski’s leadership in a giant

accounting fraud. As a matter of some interest, Mrs. Kozlowski, who seemed to enjoy her husband's lavish lifestyle while it lasted, has apparently had enough since she has recently filed for divorce. Her exit sort of reminds me of the lyrics from the song about a modern-day Don Juan from Smokey Joe's Café, the Broadway play, which aptly stated, "When your money is gone—your honey will soon be gone!"

Source: *Associated Press*

#### **HEALTH SYSTEM SETTLES WHISTLEBLOWER CASE**

University Hospitals Health System has agreed to pay about \$14 million to settle a federal whistleblower lawsuit that alleged doctors improperly made referrals involving Medicare cases. The hospital system settled the case, which was filed three years ago. The lawsuit alleged that the system and its primary medical campus, University Hospitals of Cleveland, entered into improper financial arrangements with doctors to motivate them to make referrals to other doctors within the system in Medicare cases.

Dr. Thomas J. Kirby, a heart surgeon, filed the whistleblower lawsuit a few months after he was removed from the hospital system's staff. Dr. Kirby now practices medicine in Canada. The Justice Department reviewed and took over the case. The case was unsealed by a U.S. District Judge in Cleveland last month. In addition to the settlement payment, the hospital system has agreed to be monitored by the Department of Health and Human Services' Office of Inspector General. This sort of thing, which appears to be widespread, simply can't be tolerated.

Source: *Associated Press*

Utilizing loose regulations and lax oversights, new stealth PACs have poured millions of dollars into local elections in recent years. They have done so without having to reveal the identities of their donors who are pouring big bucks into their coffers for

## **VI. CAMPAIGN FINANCE REFORM**

---

### ***THE SILENCE IS DEAFENING***

Has anybody heard a "peep" out of any of the current crop of political candidates about the urgent need for campaign finance reform? I may have missed something, but thus far the public's cry for reform of a badly broken political system has fallen on deaf ears. Before the fall elections, the voters should attempt to find out where the candidates stand on this critically important issue. The media would do the public a great service if they would get involved in this issue. Some of the daily newspapers have voiced their editorial opinions on the problems and that is most helpful. Hopefully, the politicians are listening.

### ***THE NEED FOR A SPECIAL SESSION***

In my opinion, the Alabama Legislature should be called into a special session in early September and given the mandate of passing meaningful campaign finance reform legislation. It should be made effective and in place for the general election. The public would support such a session and would demand that it be productive. It would be very easy to put a package of bills together that would get the job done. The costs of such a session would be a good investment of taxpayer's dollars. Hopefully, Governor Riley will see fit to call the lawmakers to Montgomery so that our broken political system can be fixed.

### ***THE NEW STEALTH PACS***

Utilizing loose regulations and lax oversights, new stealth PACs have poured millions of dollars into local elections in recent years. They have done so without having to reveal the identities of their donors who are pouring big bucks into their coffers for

use in political races. Neither do they have to tell how they spend their money to influence these elections. Hundreds of millions of dollars have been spent by non-profit groups registered under section 501(c) of the federal tax code to influence elections in a number of states. Alabama has been one of the states. One of the more recent groups to do business in Alabama is the American Taxpayers Alliance, which was heavily involved in the judicial races in the Republican primary earlier this year. This group—without having to disclose the sources of their money—spent millions in one race in the primary. I have to wonder who all in Corporate America is interested in who sits on the Alabama Supreme Court. Since our firm has pending cases before the court, I must admit this approach to funding political candidates gives me some real concern.

## **VII. CONGRESSIONAL UPDATE**

---

### ***CONGRESS SHOULD PASS THE BAKER BILL IMMEDIATELY***

We have written several times in recent issues on swimming pool hazards. In fact, we featured the efforts of a brave mother whose 7-year-old daughter tragically died in a swimming pool accident. Each year, about 225 children under 5 year of age drown in swimming pools. Those incidents are a leading cause of accidental death for that age group. To help prevent such accidents, legislation introduced in the U.S. Senate which would require owners of swimming pools, hot tubs and spas to install suction-reducing drain covers to prevent children's hair and bodies from getting caught in high-powered suction devices, trapping them at the bottom of the pool. Incidentally, the plastic covers cost only about \$30.

As stated above, we wrote recently about the efforts of Nancy Baker, daughter-in-law of former Secretary of State

James A. Baker III, whose beautiful daughter died in 2002 after a spa drain trapped her underwater. The little girl was unable to get free and drowned. Mrs. Baker is due a great deal of credit for pushing this virtually important safety issue. She has repeatedly said that if the legislation saves someone “the days and nights and months of pain and grief and tears, then it’s not all for naught.” Drains can exert 400 pounds of suction pressure. Using the covers is a common-sense approach it’s simple, effective, inexpensive, and when used will save children’s lives.

These accidents are a national problem and unfortunately the public hasn’t been aware of how deadly a pool can be for children. It can be a death trap when it comes to small children. According to the Centers for Disease Control and Prevention, most child drownings happen at home. Since backyard pools have become more affordable and common, drain entrapment is an increasing concern for state and federal legislators. The Association of Pool and Spa Professionals estimates that the number of residential pool owners increased by 600,000, to more than 8 million, from 2001 to 2004, and hot tub owners increased by about 800,000, to more than 5 million.

If this legislation is passed, it will give pool owners a year to install protective drain covers. New pool owners could either use the protective cover or install more than one drain. It should be noted that increasing the number of drains decreases the suction. The bill would include a \$5-million incentive for education programs to raise public awareness. Enforcement costs are estimated to be about \$10 million. Representative Debbie Wasserman Schultz (D-FL) introduced a similar bill earlier this year. That House proposal addresses pool enclosures as well as drains. That should be made a part of the senate bill. I have to wonder why both the House and Senate haven’t already passed this important bill in its strongest form by now. Do you think maybe the swimming pool industry is opposing it? This bill should be

promptly passed and appropriately should be named the “Baker Act.”

## VIII. PRODUCT LIABILITY UPDATE

### *ELECTRONIC STABILITY CONTROL AND THE SPORT UTILITY VEHICLE*

Electronic Stability Control (ESC) is a generic industry term used to describe an intelligent braking system that has been available on many cars for a number of years. It is most significant that ESC can substantially reduce the likelihood of a fatal rollover in an SUV. Unfortunately, when it comes to safety and stability of SUVs, many manufacturers still refuse to install ESC even though it has been proven to reduce the likelihood of fatal rollover accidents in this class of vehicle.

Consumer advocates have argued for years that vehicles like SUVs with high centers of gravity are more susceptible to rollover accidents during foreseeable accident avoidance maneuvers. However, automobile manufacturers often respond that SUVs are not more prone to rollovers, but that vehicle operators put too much steer in the vehicles which causes the vehicle to get sideways and leads to lateral rollovers. ESC can all but eliminate this type of accident condition which is often referenced to as an “oversteer” condition. “Oversteer” is a technical term used in the automobile industry, and oversteer simply describes a condition when the back end of the vehicle breaks away during steering maneuvers and the vehicles gets sideways. Once a vehicle gets sideways it is much more likely to rollover, placing the occupants at a much higher risk for severe injuries or death.

Electronic Stability Control works with the vehicles anti-lock brakes and assists drivers in maintaining directional control of the vehicle during accident avoidance maneuvers or situations

where two tires get off the roadway. ESC will activate brakes on single wheels and reduce throttle speed to ensure that the vehicle continues in the driver’s intended path. Electronic Stability Control can measure roll rates and yaw rates of a vehicle and prevent the vehicle from getting sideways. ESC’s ability to prevent the vehicle from getting sideways in an oversteer condition allows an operator to maintain control of the vehicle and prevent a rollover.

Once a vehicle is prevented from getting sideways, the likelihood of rollover is substantially reduced along with the risk of severe injury or death. In fact, a recent study by the National Highway Traffic Safety Administration has found that ESC can reduce fatal SUV crashes by 63%. A 2006 study by the Insurance Institute for Highway Safety has also concluded that if all vehicles had ESC it could prevent as many as 10,000 fatal vehicle crashes a year. However, even with statistics like these, manufacturers have still refused to put ESC on vehicles as standard features.

Although different manufacturers brand Electronic Stability Control with their own individual names, it is essentially the same type of system. For example, General Motors refers to it’s ESC systems as Stabilitrac. Volvo describes it as Dynamic Stability Traction Control (DTSC). Ford calls it Advance Track. Despite different brand names, the systems provide essentially the same type of electronics and prevent the vehicles from getting out of control due to foreseeable accident avoidance maneuvers thereby reducing rollovers. Although the benefits of ESC are clear, manufacturers have been slow to respond to the added vehicle safety. Mercedes and BMW discovered the benefits of ESC as early as 1995 and included it on selective models. General Motors also included the system on 1997 Cadillac passenger cars. Honda provided the system on its Accord in 1997.

In fact, by 2000 most European and Japanese luxury car manufacturers

included ESC as a standard feature. However, many manufacturers like General Motors and Ford have lagged behind the industry in applying this technology to SUV's, the vehicles most vulnerable to rollovers during accident avoidance maneuvers. In 2003 General Motors first offered ESC as an option on its large size SUVs. Unfortunately, it was not until late 2005 when General Motors decided to make the feature standard on some of its more popular SUVs like the Chevrolet Tahoe and the GMC Yukon. In contrast, if you purchased General Motor's more expensive SUVs like the Cadillac Escalade and the GMC Yukon Denali, the technology was a standard feature as early as 2002.

Due to the importance of ESC in reducing fatal vehicle accidents, rollovers, and loss of control, many consumer groups and engineers believe that ESC should be a standard feature on all vehicles. We represent a number of clients who were involved in single vehicle SUV rollovers in late model vehicles which did not include ESC even though the manufacturers were aware of the systems and provided them as optional equipment. We believe the failure to include this accident avoidance system as standard equipment on vehicles is negligent and wanton conduct on behalf of manufacturers. Most, if not all, of the accidents we have seen involving SUV rollovers could have been avoided if manufacturers would have included Electronic Stability Control as a safety feature. It is incomprehensible that a manufacturer would come into court and blame drivers for rollover accidents when the manufacturers are aware of electronic safety equipment that would prevent these accidents but refuse to incorporate such features into their vehicles. Safety equipment in vehicles that is readily available should not be optional but mandatory for car manufacturers to install on their vehicles.

#### **JURY AWARDS \$18 MILLION IN FORD CASE**

A jury in Greenville, South Carolina,

awarded \$18 million last month in a lawsuit against Ford Motor Co. The jury found that there was a defective speed-control system in a 1995 Ford Explorer that crashed in December 1999 killing one woman and paralyzing another. Sonya Watson, who was 17 at the time of the crash and is now confined to a wheelchair because of his disabling injuries, was awarded \$15 million. The jury also awarded \$3 million to the estate of Patricia Carter, who was killed in the interstate crash in Laurens County. Evidence at trial was that the SUV "took off" while it was being driven down the interstate. All of the damages were compensatory.

#### **FORD SETTLES BURN LAWSUIT**

You may have thought that all of the old Ford Mustangs, which had badly designed fuel tanks, were off the highways or at least were in old-car museums. However, they are still on the road it seems. Ford Motor Co. has reached a settlement with an Iowa man who was severely burned three years ago after his 1967 Ford Mustang was hit from behind and burst into flames. David Baier and his wife sued Ford in 2004, alleging the car's gas tank was defective and caused the fire that left Mr. Baier permanently disfigured and deformed. A settlement of the case was reached and is confidential.

As you may already know, the "drop-in" gas tanks on the classic 1966 and 1967 Mustangs are a safety hazard. Ford has known about the problem, but has consistently denied that a problem exists. The Ford Mustang has a long history of litigation for precisely this very problem. Most current owners have no idea that their Mustangs have a bad fuel tank problem. Ford has settled dozens of other lawsuits involving the drop-in gas tank, which it abandoned in 1971. The automaker denies any wrongdoing, pointing to a federal investigation finding in 1976 that the vehicles didn't pose an unreasonable safety risk. I have to wonder if anybody would be surprised to learn that NHTSA has failed to

find a vehicle defect!

In this case, Mr. Baier was driving his Mustang slowly along a northeast Iowa highway in July 2003 when his vehicle was rear-ended. While the impact was slight, within seconds the Mustang's gas tank ignited and a huge fireball shot into the vehicle. Mr. Baier suffered third-degree burns to more than 40% of his body. In the design, the metal that formed the top of the Mustang's gas tank also served as the floor of the trunk. There was no significant barrier between the fuel tank and the passenger area. This created an obvious hazard. In the event of a rear-end collision, the probability of a fuel-fed fire was very high.

#### **LAWSUITS BEING FILED AGAINST COOPER TIRE AND RUBBER CO.**

There have been a good number of lawsuits filed across the country against Cooper Tire and Rubber Co. because of tires that are allegedly defective. The families of three persons in Florida who were killed in separate highway crashes have accused Cooper Tire & Rubber Co. of manufacturing defective tires that suffered tread separations. The victims' families are convinced that the deaths were caused by the defects. There have been a number of lawsuits filed nationwide that claim Cooper tires separated at high speeds causing highway crashes resulting in injuries and deaths. There are at least 21 lawsuits involving 12 deaths that have been filed against Cooper Tire in Florida alone since 2000. There are many more pending in other states.

In July of this year, the National Highway Traffic Safety Administration initiated a defect investigation into one line of Cooper tires—the Dominator Sport A/T. As you may know, Cooper Tire, which makes replacement tires, is the country's fourth largest tire manufacturer. Cooper has consistently denied a problem with its tires, including the Dominator. The company blames the crashes on service-related conditions that it says have nothing to do with a

“tire defect.” That shouldn’t come as a big surprise.

Cooper tires lack critical components: a strip called a belt edge wedge to prevent tread separation; a nylon overlay as an extra safety measure; and a good combination of chemicals and thick inner liner to prevent aging. Cooper Tire claims that not all tires need a belt edge wedge or a nylon overlay and that its inner liners perform so well that *Consumer Reports* listed four of its tires among the top ten tires with the ability to retain air.

A South Carolina judge wrote in one case that Cooper Tire had engaged in “misrepresentations, concealment, and disobedience” in the discovery process. This is a common tactic used by a number of corporate defendants, but Cooper Tire is one of the worst offenders. Cooper Tire defends lawsuits aggressively and nobody should ever expect an early settlement or any quarter from the company in handling claims. Some of Cooper Tire’s tactics designed to help the company defend lawsuits have drawn a great deal of criticism. For example, the company:

- hires private investigators to pick up tire tread evidence at accident scenes;
- makes discovery as difficult as possible;
- aggressively seeks gag orders and sanctions against lawyers who sue the company; and
- attempts to put company documents under seal in courts claiming they contain trade secrets.

The National Highway Traffic Safety Administration is responsible for determining if tires are defective. In August 2000, Firestone voluntarily recalled 14.4 million tires shortly after NHTSA began investigating reports of four U.S. fatalities. Federal complaint logs show 115 complaints against two to three dozen Cooper tire lines. However, interestingly, NHTSA doesn’t rely on the complaint log or lawsuits to start an investigation. Instead, it relies on tire production versus tire failure rates. All of that data is

supplied by tire manufacturers, a requirement in the post-Firestone recall era. It has been said that letting the manufacturers do this is like asking “the fox to guard the henhouse.” Relying on the actual culprit to tell NHTSA whether there is a problem with a product isn’t a very good way to handle problem-solving. In my opinion, NHTSA needs to investigate all Cooper tire lines that are being questioned. This is a public safety issue that demands attention.

### **A CLOSER LOOK AT OTHER TIRE RECALLS**

Our firm is representing a Montgomery businesswoman who was driving to a seminar in her Ford Expedition when a Continental General Grabber AW tire detreaded; after the tire detreaded, the vehicle began to roll over. Sadly, our client is paralyzed and confined to a wheelchair. The devastation being inflicted by these faulty tires continues to increase.

In the last few years, there have been a number of tire recalls. Everyone is familiar with the Firestone tire recall, which I believe is the largest recall of tires in history. Unfortunately, prior to the recall, many unsuspecting motorists were catastrophically injured and killed by defective Firestone tires. Less known, but potentially more problematic, is the Continental Tire of North America’s recall of the General Grabber AW and Contitrac tires which were equipped on the Ford Expedition and Navigator. These tires have detreaded in many parts of the world resulting in numerous catastrophic injuries and deaths continue to mount.

The method used to recall these tires is most disturbing. A Ford Expedition is equipped with a full-size spare tire. Ford and Continental dealers sometimes ignore replacing the fifth tire when customers return to have their tires replaced under the recall. As a result, individuals like our client are susceptible to one day driving their vehicles with a tire that was recalled and should have been replaced.

We believe the recall for these tires was classified as a “B” recall, which gen-

erally does not involve safety issues. However, Continental’s recall notice issued through the National Highway Traffic Safety Administration stated that “the tire could detread and cause the person to lose control of the vehicle, which may lead to life-threatening injuries.” That surely seems like a safety issue to me.

Continental Tire of North America (CTNA) is owned by Continental AG (Continental), a German corporation. After a number of injuries and deaths occurred, Continental began searching for the root cause of the tire detreads. During the discovery process, we learned that Continental had been on a cost cutting campaign at its Kentucky facility. The tires for the Ford Expedition and Navigator were manufactured at CTNA’s Mayfield, Kentucky plant. It appears that Continental used outdated technology at a facility that was never reconfigured for **radial tire production**.

### **COURT REJECTS CURBS ON RELEASE OF CRASH DATA**

A federal court, in a most important ruling, has ruled that information submitted to the federal government by automobile and tire manufacturers about crashes resulting in death, injury and property damage must be released to the public under the Freedom of Information Act (FOIA). Manufacturers have been required to submit the information, referred to as “early warning data,” under the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act since 2003, but, the U.S. Department of Transportation has kept the information from the public because tire manufacturers claimed that the TREAD Act prohibited its release under FOIA. The ruling by U.S. District Judge Richard Leon, who sits in the U.S. District Court for the District of Columbia, in a lawsuit filed in 2004, rejected the tire industry’s claim that the data cannot be released under FOIA. Relying on the “plain meaning” of the TREAD Act, Judge Leon held that it

“does not qualify” as a statutory exception to FOIA’s command that government records be released to the public on request.

The TREAD Act was passed to prevent tragedies such as the Ford Explorer/Firestone tire debacle. Public Citizen’s president, Joan Claybrook, who was a leader in the fight for passage of the act, praised the court’s ruling, stating:

*The point of the law was to ensure that the government and public receive the information they need to respond to serious safety problems involving vehicles and tires. Only if that information is available can we be sure that the government is doing all it can to respond to warning signals and thereby prevent needless deaths and injuries.*

Ironically, the DOT, which had been withholding the data, agreed with Public Citizen that the tire industry had wrongly claimed that the death, injury and property damage data couldn’t be released under FOIA. Even so, because of the pending lawsuit, the DOT has withheld not only death, injury and property damage data submitted by tire manufacturers, but also the same data submitted by automobile and parts manufacturers. The court’s rejection of the tire industry’s claims should now clear the way for the immediate release of the death, injury and property damage data. The DOT can no longer refuse to release this information, which it has conceded all along is “properly subject to release under FOIA.” That is certainly good news.

The August ruling followed a March 31<sup>st</sup> ruling in the same case that struck down a DOT regulation that purported to exempt from FOIA certain other categories of early warning data that it considered “commercially sensitive.” Those involved production numbers, warranty claims, consumer reports, field data, vehicle identification numbers and information about generic tires. The court held that the regulation was promulgated without proper notice and

comment. The effect of that ruling is to prevent the DOT from relying on the regulation to withhold that kind of data, although it may still consider on a case-by-case basis whether specific information requested falls within particular exemptions from release under FOIA. This is another example of Public Citizen’s persistence in fighting for the rights of victims.

Source: Public Citizen

### **GUIDANT SHOULD NOT BE ALLOWED TO KEEP RECORDS SECRET**

The briefs and evidence kept secret in a case involving the medical device company Guidant Corporation should be unsealed. A motion was filed by Public Citizen in the U.S. District Court for the District of Minnesota seeking to unseal these records. Public Citizen is attempting to make public judicial records from a case that is now over and closed. The case, styled *Cardiac Pacemakers v. Aspen II Holding Co.*, involved two subsidiaries of Guidant that produce and sell controversial cardiac rhythm management (CRM) devices. These two companies sued the health care consulting company Aspen Health Care Metrics for publishing information about the prices of Guidant’s pacemakers. The parties’ briefs, along with all supporting papers, were filed under seal without any documentation of need for secrecy. Consequently, information which is highly important to the public interest will remain secret unless the seal is lifted. Public Citizen’s motion reads in part:

*Under well-established law, the public has a presumptive right of access to judicial records, which may only be overcome by a showing of sufficiently important countervailing interests. Guidant has never made such a demonstration, and it does not appear that Guidant will be able to do so.*

Guidant has sought to conceal the prices paid for its CRM devices by extending confidentiality agreements

with its hospital customers to members of the public. It charged Aspen with interfering with its contracts and stealing trade secrets, even though the consulting company is a third party that did not agree to be bound by the confidentiality clauses in Guidant’s business contracts. The court’s partial summary judgment ruled against Aspen for contract interference, and the rest of the case was settled before trial. Public Citizen intervened independently today by filing a motion to unseal the summary judgment papers.

Guidant’s attempts to suppress publication of its products’ prices are detrimental to the public interest in maintaining price transparency. Guidant’s policy threatens to foster the artificial elevation of prices, which could limit public access to affordable health care. Guidant also has been implicated by former employees in a scheme to use pricing secrecy to defraud state and federal government agencies over the medical bills of senior and indigent citizens.

Other hospitals, purchasing organizations and health care industry actors which are subject to Guidant’s lawsuit threats should have access to the court records in the Aspen case. Guidant already has used the Aspen judgment to threaten the non-profit Emergency Care Research Institute (ECRI), the nation’s leading independent medical product testing organization, for publishing the prices of Guidant’s medical devices. ECRI’s pricing guide has been used by the health care industry for the past decade to determine the cost-effectiveness of various competing medical devices. The information now under seal should be in the public domain. Corporate misdeeds shouldn’t be the subject of protective orders or placed under seal. The public has a right to know about that sort of thing.

Source: Public Citizen

### **FALSE PARK AND BRAKE SHIFT INTERLOCK DEFECT**

An object at rest remains at rest until acted upon by an outside force - school

children learn this most basic tenet of physics at an early age. A parked car should remain parked until a driver shifts the transmission into gear - although it seems like a “no brainer,” apparently automotive engineers are still trying to figure this one out. Every year people are injured or killed when a parked car suddenly shifts into gear and begins to move unattended. When Audi began experiencing claims of sudden acceleration in the 1980s, many automakers began installing brake-transmission-shift-interlocks (BTSI) in their cars in an attempt to prevent such problems. Although the Audi-inspired BTSI campaign educated the public about this “new” safety feature, in reality such interlocked transmission designs were patented by many automakers in the 1930s. In its simplest form, a BTSI requires that a driver press the brake before the transmission can be shifted out of park and into gear. The interlocks can be placed on the transmission itself, but many are under the dash or mounted on the gear selector. Some can also be linked to whether the driver is seated in the seat and whether the seat-belt is buckled.

BTSI systems can be mechanical, electrical or a combination of the two, but the basic intent is the same—to keep a vehicle transmission in park until the driver disengages the interlock and shifts the transmission out of park. There are shortcomings to these systems however, and each has its own unique potential failures. For example, if the transmission is designed in such a way that it can be placed into a false-park position (where the vehicle acts and sounds as if it is completely engaged in park but is actually resting between park and reverse), then the interlocks are never engaged. As a result, the vehicle sits idling until the internal hydraulic pressure in the transmission builds until the reverse clutches engage and the car shifts into reverse. We will try a case against GM in Pickens County next month over the death of beloved grandmother who was run over and killed when her Chevrolet Celebrity shifted into reverse after idling for

several minutes. We look forward to showing the jury how dangerous this transmission is and how easily the design can be modified to prevent false-park.

Another potential BTSI failure occurs when the interlock is placed under the dash or mounted on the shift lever, but the engagement of the interlock is not properly aligned with the transmission park position. In this scenario, the vehicle can be placed fully into park but, because the interlock is misaligned, it fails to properly detect that the vehicle is in park. As a result, a child can pull on the shift lever and cause the transmission to shift into gear without having to press the brake. We are currently investigating a case where a young mother was pinned between her vehicle and a building and suffered an above-the-knee amputation. In that case, the interlock is not properly aligned with the transmission park selection so the interlock fails to engage even when the vehicle is placed fully into park. Most people believe that a car that shifts into gear and drives away on its own is defective. However, car makers consistently blame drivers when these tragedies occur. Because we believe in standing up for those who may not be able to speak for themselves, we look forward to trying these and other defective transmission cases.

#### ***CAR BUYERS MUST NOW BE TOLD ABOUT BLACK BOXES***

The National Highway Traffic Safety Administration has passed a regulation requiring car makers to inform customers when their car has been equipped with an Event Data Recorder. EDRs, similar to “black boxes” used in commercial airliners, record data about what a car is doing in the moments just before and after a crash. The devices don’t record the voices of occupants, but they do record such things as steering wheel movement, how hard the brakes are being pressed and the actual movement of the car itself.

About 65% of model year 2005 cars were equipped with EDRs, according to

NHTSA. Data from the recorders is used by law enforcement, accident reconstructionists, and lawyers to recreate events leading up to an accident. Data is also used by car companies to research how cars and drivers perform in actual crashes. Car companies must comply with the new regulation beginning in the 2011 model year. Information about the EDR, if one is installed, will have to be included in the vehicle’s owner’s manual. The new rule also requires EDRs to collect a uniform set of data. Having access to uniform data will help investigators to recreate crashes and determine causes.

However, some core safety experts believe that the new rule does not go far enough. If that is true, the result is that the public will remain in the dark about unsafe vehicles and the sources of crash injuries. The final rule issued by NHTSA has no protocol to ensure that government can get the data. If the government has access to the data, it would ensure the confidentiality and non-identification of any individuals, mitigating privacy concerns. In addition, most people don’t know that the EDRs record only the few seconds before and after a crash.

The rule requires EDRs to record certain kinds of key information. But it standardizes only some of those data elements, and fails to require automakers to install EDRs in all vehicles. Currently, 64% of vehicles have the device. For EDR data to be comprehensive and reflect actual crashes, 100% of vehicles should have them. NHTSA also exempts vehicles over 8,500 pounds, which includes most large SUVs, further diminishing the benefits of the rule. NHTSA should mandate EDR installation in all vehicles up to 10,000 pounds and expand the number of data elements—especially those data elements critical for safety analysis and emergency response—that EDRs must record.

The rule also fails to ensure ready retrieval of EDR data. It does not standardize a downloading protocol so that information may be easily retrieved and used for safety analysis. It requires only that EDRs survive crash tests conducted

at a top speed of 35 mph. However, in 2002, nearly 75% of vehicles with reported speeds involved in fatal crashes were traveling at speeds greater than 35 mph, and nearly 50% were traveling at speeds greater than 50 mph. Regarding notice to consumers, NHTSA's rule should not just require that manufacturers state in a vehicle's owner's manual that it is equipped with an EDR but should also require a window sticker to ensure that people are actually informed.

Sources: *CNN Money* and *Public Citizen*

### **NEW CAR ROOF RULES ARE NOT STRONG ENOUGH**

The new rule mandating roof safety strengths in automobiles is grossly inadequate from a safety perspective. Most independent safety advocates believe the new proposal is designed more to protect automakers from new cost burdens than to protect American motorists from crushed roofs in rollovers. The carmakers have been lobbying the National Highway Traffic Safety Administration to weaken the proposed rules, exempt some vehicles and change testing procedures. It is very clear that roof strength is a major highway safety issue. Each year, according to federal statistics, an estimated 7,000 people are killed or severely injured in rollovers in which the roof crushed. It is difficult to understand how NHTSA could fail to promulgate an adequate roof crush standard. It's even more difficult to understand how the carmakers could have the nerve to ask NHTSA to further weaken the rule that is inadequate in its present state.

## **IX. MASS TORTS UPDATE**

### **OUR MASS TORTS SECTION IS HANDLING A NUMBER OF SIGNIFICANT CASES**

With hard work and some dedicated

lawyers and support personnel, our firm has established a national reputation as a leader in the area of product liability litigation. In recent years we have developed one of the largest and most technologically advanced Mass Torts practices in the country. Presently, our lawyers in the Mass Torts Section are representing people in claims against companies that manufacture or market defective pharmaceuticals, over-the-counter medications, and medical devices. We have allowed our lawyers and their support personnel to focus on certain types of cases within the Section. Andy Birchfield heads up the Section and does an outstanding job. The following lawyers are in the Section: Chad Cook, Ben Locklar, Ted Meadows, Leigh O'Dell, Melissa Prickett, Paul Sizemore, Roger Smith, Jerry Taylor, Navan Ward, and Frank Woodson. We have an excellent staff of dedicated support personnel which is absolutely necessary because of the complexity of the cases handled. The Section is currently handling cases involving the following products:

#### **Fosamax**

This multi-billion dollar a year drug is manufactured by Merck. It is routinely prescribed to women in effort to treat or prevent osteoporosis. Unfortunately, it has been linked to jaw bone decay and osteonecrosis of the jaw. We are currently litigating claims where individuals took this drug and then experienced jaw decay, osteonecrosis, and infection of the jaw, or related problems.

Primary Lawyers: Gerry Taylor and Chad Cook

Primary Contacts: Lynette Burkey and Tabitha Dean

#### **Guidant Heart Devices**

In July of 2005, the FDA announced the recall of implantable defibrillators and pacemakers manufactured by the Guidant Corporation. These devices are surgically implanted in persons who have a type of heart disease that creates the risk of a life-threatening heart arrhythmia (abnormal rhythm). Some of the risks associated with the defibrilla-

tors are deterioration of wires and its inability to deliver therapy. One of the risks associated with the pacemakers is that a hermetic sealing component used in the subset of devices may experience a gradual degradation, resulting in a higher than normal moisture content within the pacemaker case. We are currently litigating claims involving these types of recalled devices.

Primary Lawyer: Ted Meadows

Primary Contact: Amy Brown

#### **Hormone Therapy**

For years, women have taken Hormone Therapy (HT) to reduce the symptoms of menopause. Studies now show that HT medications such as Prempro and Premarin can increase the risk of breast cancer, ovarian cancer, stroke and heart disease. We are currently litigating potential claims against the manufacturers of HT medications.

Primary Lawyer: Ted Meadows

Primary Contacts: Amy Brown & Katie Tucker

#### **Ketek**

This antibiotic is made by Sanofi-Aventis. The drug is typically used to treat respiratory tract infections, bronchitis, sinusitis and community acquired pneumonia. Recently, the label was changed to reflect reports of severe liver problems, including several deaths. This label change comes at a time where the senate is investigating allegations of fraud connected with the trials of Ketek, as well as how the FDA has handled safety issues. We are currently reviewing cases of death or serious injury due to liver or respiratory failure.

Primary Lawyer: Ted Meadows

Primary Contacts: Amy Brown and Katie Tucker

#### **Medtronic Heart Devices**

On April 16, 2004, the FDA announced the recall of numerous implantable defibrillators manufactured by Medtronic, Inc., which were implanted in 1997 and 1998. These devices are considered a Class I recall, which is the highest priority recall. In

addition, another recall was issued by the FDA on February 10, 2005, for additional Medtronic defibrillators whose batteries were manufactured between April 2001 and December 2003. We are currently litigating claims involving the particular recalled devices.

Primary Lawyer: Ted Meadows  
Primary Contact: Amy Brown

#### **Neurontin**

Neurontin was approved by the FDA in 1993 as an anti-seizure treatment used in epilepsy patients. But, recent statistics have shown that the vast majority of Neurontin prescriptions are for off-label uses. We are currently litigating claims involving suicide or attempted suicide as a result of persons taking Neurontin.

Primary Lawyer: Frank Woodson  
Primary Contact: Cathy Perry

#### **OrthoEvra**

OrthoEvra is a hormone contraceptive available in a transdermal patch. OrthoEvra is manufactured by Ortho McNeil (a subsidiary of Johnson & Johnson). Recently the FDA disclosed that excessive levels of estrogen delivered by the birth control patch can cause serious injuries and even death. According to the FDA women who use the patch are exposed to 60% more estrogen than those who are taking the pill, therefore increasing their risk of a serious adverse event. We are currently litigating claims including blood clots, pulmonary embolism, heart attack, stroke, and deep vein thrombosis. Many of the claims are for deaths of persons using the patch.

Primary Lawyer: Chad Cook  
Primary Contact: Tabitha Dean

#### **Paxil**

Paxil (paroxetine) is an anti-depressant manufactured by GlaxoSmithKline. In 2005 the FDA issued a Public Health Advisory for Paxil based on recent studies that showed an increase risk of heart birth defects in children born to mothers exposed to Paxil in the first trimester. Most of the cardiac defects

observed in these studies were atrial or ventricular septal defects, conditions in which the wall between the right and left sides of the heart does not completely developed. GlaxoSmithKline, maker of Paxil, sent a letter to doctors and healthcare professionals in September, 2005 advising of the label change that, according to data obtained from the National Birth Defects Prevention Study of infants, women who took an SSRI-antidepressant were more likely than those who were not exposed to have an infant with omphalocele (an abnormality in newborns in which the infant's intestine or other abdominal organs protrude from the navel) or craniosynostosis (connections between sutures-skull bones, prematurely close during the first year of life, which causes an abnormally shaped skull). Also, on July 19, 2006 the FDA issued another Public Health Advisory for Paxil based on a study that suggests there may be additional risks of SSRI medications, including Paxil, during pregnancy. This study focused on newborn babies with persistent pulmonary hypertension (PPHN), which is a serious and life-threatening lung condition that occurs soon after birth of the newborn. PPHN was six times more common in babies whose mothers took an SSRI antidepressant after the 20th week of the pregnancy compared to babies whose mothers did not take an antidepressant. We are currently litigating claims involving children born with birth defects to mothers who had documented use of Paxil during the first trimester of pregnancy.

Primary Lawyer: Chad Cook  
Primary Contact: Tabitha Dean

#### **ReNu with Moisture Loc**

ReNu MoistureLoc®, manufactured by Bausch & Lomb, is a solution used to clean contact lens. Bausch & Lomb announced on April 10, 2006, that it was suspending shipments of this contact solution and retailers were urged to remove the solution from their shelves. Reports of fungal keratitis infections in users of this solution are beginning to

surface in contact lens wearers who use ReNu with MoistureLoc®. The FDA issued a warning of increased numbers of the fungal infections in those who wear contact lenses. We are currently litigating claims involving significant adverse events such as fungal keratitis infection with partial or complete blindness, corneal transplant or other major eye surgery or procedure.

Primary Lawyer: Chad Cook  
Primary Contact: Tabitha Dean

#### **Serevent and Advair**

Serevent and Advair are prescription drugs manufactured by GlaxoSmithKline for the treatment of asthma. The Salmeterol Multi-Center Asthma Research Trial (SMART) study, which began in 1996 to assess the safety of Serevent and its relation to serious asthma-related health problems was halted in 2003 when the Food & Drug Administration announced that Serevent may be associated with an increased risk of asthma-related deaths, especially in African-American patients. We are currently litigating claims involving serious injury or death caused by Serevent.

Primary Lawyer: Chad Cook  
Primary Contact: Tabitha Dean

#### **Smith and Nephew Knee Replacements**

In September of 2003, Smith and Nephew withdrew two of its knee replacement products from the market in the United States after potential problems were identified. The products included in the recall are the cement less versions of the Oxinium Genesis II and Profix II. The complications stem from the products not bonding properly. We are currently litigating claims involving these knee replacements, which were done between February of 2002 and September 2003.

Primary Lawyer: Ted Meadows  
Primary Contact: Amy Brown

#### **Stevens- Johnson Syndrome**

Stevens-Johnson syndrome is an immune complex hypersensitivity reaction that can be caused from an infection or immune response to drugs. It is a

severe expression of a simple rash known as erythema multiforme. SJS is also known as erythema multiforme major. It affects all ages and genders including pediatric populations. The most severe form of SJS is toxic epidermal necrolysis (TENS). SJS occurs twice as often in men as in women. Most cases of SJS appear in children and young adults under age 30. Females with SJS are twice as likely as males to develop TENS, and have an even higher chance if taking a category of drugs known as NSAIDs, non-steroidal anti-inflammatory drugs.

Primary Lawyer: Frank Woodson  
Primary Contact: Cathy Perry

### **Viagra**

Viagra is a drug manufacturer by Pfizer used to treat erectile dysfunction. Our firm is currently investigating cases involving partial or complete blindness caused by non-arteritic ischemic optic neuropathy (NAION). This is a rare condition in which blood supply is reduced to the optic nerve causing permanent nerve damage. We are currently litigating claims involving significant adverse events such as blindness caused by NAION.

Primary Lawyer: Chad Cook  
Primary Contact: Tabitha Dean

### **Vioxx, Celebrex & Bextra**

As all America now knows, Vioxx, Celebrex and Bextra are popular and heavily advertised arthritis drugs commonly referred to as a non-steroidal anti-inflammatory drug (NSAIDs). Vioxx was taken off the market in September 2004. Bextra was taken off the market in April 2005. Celebrex currently carries a very strong black-box warning on its label. Vioxx, Celebrex and Bextra have all been associated with an increased risk of cardiovascular events such as heart attacks and strokes. These drugs are classified as COX-2 inhibitors. COX-2 inhibitors, like older NSAID drugs such as ibuprofen and naproxen, work to decrease swelling in effected joints. However, unlike older NSAIDs that also caused irritation to the lining of the

stomach by inhibiting the Cox-1 enzyme, it is theorized that COX-2 inhibitors only block the COX-2 enzyme, leaving the stomach protecting COX-1 alone. Recently published data calls the beneficial advantages of these drugs into question, and raises new questions about "serious cardiovascular events" related to this class of drugs. We are currently litigating heart attacks, stroke and death cases.

Primary Lawyers: Andy Birchfield, Ben Locklar, Leigh O'Dell, Melissa Prickett, Paul Sizemore, Roger Smith, Jerry Taylor, and Navan Ward

Primary Contacts: Lisa Bruner, Lynette Burkey, Stacie Kicklighter, Ann Kaufman, Audrey White and April Worley.

### **Zithromax**

Zithromax (azithromycin), manufactured by Pfizer, is a popular antibiotic used most often to treat respiratory infections, while also used to treat skin infections and some sexually transmitted diseases. Zithromax is taken once daily, usually two to five days under normal dosage. The most serious types of health problems that have been attributed to Zithromax include liver damage resulting in death or liver transplant surgery. The symptoms for liver damage may include yellow eyes, abdominal pain, nausea, clay colored stools, and dark urine. Recent warnings have been added to the label regarding abnormal liver function, jaundice, necrosis, hepatic (liver) failure and death, which have been reported by persons taking this drug.

Primary Lawyer: Chad Cook  
Primary Contact: Tabitha Dean

### **Zyprexa**

Zyprexa is a prescription drug designed to manage symptoms of schizophrenia and other psychotic conditions. This drug is Eli Lilly and Co.'s best selling product. The Consumer Group *Public Citizen* has criticized the FDA for failure to adequately inform physicians and patients of the serious risks associated with Zyprexa. We are currently investigating claims on behalf of

patients prescribed Zyprexa who have developed diabetes, hyperglycemia and other serious injuries.

Primary Lawyer: Frank Woodson  
Primary Contact: Cathy Perry

### **JUDGE ORDERS NEW TRIAL IN NEW JERSEY CASE**

Judge Carol E. Higbee has vacated the jury verdict for Merck & Co. Inc. in New Jersey. She ordered a new trial for a postal worker who blamed his heart attack on his two-month use of Vioxx. Judge Higbee's ruling nullifies the verdict for all purposes and will allow the plaintiff a new day in court. The retrial is tentatively planned for January. Judge Higbee said that evidence uncovered since the verdict showed that Merck failed to report material cardiovascular safety data connecting increased risk of heart attack with use of Vioxx for less than 18 months. This has to be a major blow to Merck and a tremendous victory for Vioxx victims. Several of the early cases were tried without the benefit of damaging information revealed after the cases were tried. Judge Higbee's ruling is most significant.

### **MERCK ORDERED TO PREPARE 39 VIOXX CASES FOR TRIAL IN NEW JERSEY**

Judge Higbee, the New Jersey judge who is managing 8,800 Vioxx lawsuits against Merck & Co., has ordered lawyers to prepare 39 cases for trial next year. Judge Higbee signed an order on July 21<sup>st</sup> identifying 39 plaintiffs whose cases will go to trial. The judge, who has already presided over three Vioxx trials, set January 16<sup>th</sup> for the next jury selection in her court. Five to 10 plaintiffs may be included in that trial. In my opinion, that is the proper approach and will result Vioxx cases being tried in an orderly fashion.

## **NEW JERSEY SUPREME COURT TO HEAR APPEAL ON VIOXX**

New Jersey's Supreme Court will hear an appeal by Merck & Co. of a lower court ruling that would let health plans that paid for prescriptions of its Vioxx sue as a class. An order, issued by the Supreme Court, allows Merck to appeal a unanimous March ruling by the New Jersey Appellate Division allowing the lawsuit to go forward. The suit had been approved as a nationwide class action lawsuit under the New Jersey Consumer Fraud Act by Judge Carol E. Higbee. As stated above, Judge Higbee is overseeing all Vioxx lawsuits in New Jersey, Merck's home state, where about half of the more than 16,000 Vioxx suits have been filed.

The International Union of Operating Engineers Local 68 Welfare Fund sued Merck in 2003, arguing its health plan would not have covered Vioxx prescriptions had Merck not concealed the cardiovascular risks of Vioxx. It's significant that Vioxx cost several times as much as older, traditional anti-inflammatory medicines. In a ruling last July, Judge Higbee certified the case as a class action. Health plans and unions could have paid for Naproxen or Ibuprofen at a fraction of the cost of Vioxx. In this type case, it won't be necessary for the plaintiffs to prove that Vioxx actually harmed any patients. That is not good news for Merck.

Source: *Associated Press*

## **CALIFORNIA JURY RETURNS VERDICT IN MERCK'S FAVOR**

The Vioxx case that was being tried in a California State Court resulted in a verdict in Merck's favor. This was a hard fought case and was a very tough loss. There were some unexpected developments during the trial, however, that hurt the plaintiff's chances of winning the case. The jury rejected the claim by the plaintiff who had suffered a heart attack in 2001 after taking Vioxx.

## **MERCK MOVES FORWARD WITH VIOXX SUCCESSOR**

Merck & Co. has given preliminary results of a study of its investigational painkiller Arcoxia to the FDA. The plans are for this drug to be the company's successor to Vioxx and it is projected as another "cash cow." Merck claims the study, comparing Arcoxia with the anti-inflammatory drug diclofenac, found the "relative risk" of certain cardiovascular events was similar. The incidence of patients withdrawing from the study due to side effects related to high blood pressure, edema and congestive heart failure was significantly higher for Arcoxia than for diclofenac, according to Merck.

FDA had sent Merck an "approvable letter" and was seeking more information on the drug. Final approval is yet to come. Based on our experience with Merck's studying and marketing and defense of Vioxx, I wouldn't believe anything Merck says without clear and convincing proof that its representations are accurate. Hopefully, the FDA will demand that sort of proof before giving its approval to this drug.

## **BEXTRA/CELEBREX UPDATE**

As we have reported, painkiller Bextra was removed from the market in April of 2005 because of the cardiovascular risks associated with its use. It also caused some people to have a severe allergic skin reaction. Like Vioxx, Bextra is a type of pain relief medicine that works by inhibiting the enzyme in our bodies called Cox-2. At the same time Bextra was taken off the market, Celebrex, a drug very similar to Bextra and Vioxx, was required by the FDA to have the most stringent warning the FDA can require, a "black box" warning, placed on its label. Celebrex was also found to cause increased cardiovascular risks to people who take it. Bextra and Celebrex are manufactured by the largest pharmaceutical company in the world, Pfizer, Inc.

Lawsuits have been filed in State and Federal Courts by people from all parts

of the country who say they have had heart attacks and strokes because of Bextra and Celebrex and the Federal lawsuits have been consolidated in a multi-district proceeding in San Francisco in front of Judge Charles Breyer. This litigation has moved into the discovery stage and the plaintiffs are now beginning to take depositions of key Pfizer employees. Judge Breyer has indicated he wants to begin trying cases in this MDL next year. Paul Sizemore from our firm is a member of the Plaintiff's Steering Committee in this litigation. Jerry Taylor, another of our lawyers, who is working on these cases, will take the first Pfizer witness' MDL deposition in the next few weeks. We will keep you informed as this litigation proceeds.

## **\$5 MILLION JURY AWARD IN DEATH OF YEAR-OLD BOY**

A jury awarded a Philadelphia family \$5 million last month in a case involving the death of a one year-old child. His parents had given the child Infants' Tylenol. The child's death in March 2002 came just 12 days after his first birthday. The official cause of death, according to the Philadelphia Medical Examiner's Office, was acetaminophen toxicity. The child's parents did not realize Infants' Tylenol was concentrated - three times the strength of regular Children's Tylenol—and that is something few parents would have reason to know.

The child became sick with a cold on March 16, 2002, and his parents gave him Infants' Tylenol. The label on the box states that parents should call their doctor before giving the medication to any child younger than two. However, their doctor had previously recommended Infants' Tylenol for the child. Therefore, the parents gave him two droppers every four hours. The child got sicker and sicker, but it did not occur to his parents that it was the Tylenol that was causing the problem. The child should have been getting half a dropper as needed. It's significant that the parents had used the drug with their other four children without incident.

The child was taken back to the doctor on March 19th. At that time, he was rushed to the hospital and was pronounced dead about a half-hour later. Stronger warnings on drug product labels are clearly needed. This is especially true with children's medicine. In this case a description that Infant's Tylenol is three times more potent than Children's Tylenol is a must.

Recently, McNeil did add a warning that multiple overdoses of **all** Tylenol medications can lead to liver toxicity. Tylenol has come under fire recently. A recent study published in the *Journal of the American Medical Association* found that healthy adults had abnormal liver-test results after taking maximum doses of Tylenol for two weeks. Nearly 40% of the people who took the equivalent of eight extra-strength Tylenol tablets a day, some with an opioid painkiller and some without, had test results that could signal liver damage.

Source: *Philadelphia Inquirer*

#### **FIRST TRIAL AGAINST WYETH OVER HORMONE REPLACEMENT THERAPY POSTPONED**

A good number of women have taken hormone replacement therapy over the past several years to help prevent osteoporosis. One such person is Linda Reeves, a 67-year-old secretary from Burton, Arkansas, who took Prempro. Ms. Reeves was diagnosed with breast cancer and her doctor instructed her to stop taking the pills. Ms. Reeves had a mastectomy and now has a fear that her cancer may return. She blames her cancer on roughly eight years of taking Prempro, an estrogen-progestin combination made by Wyeth, which is prescribed to relieve menopausal symptoms such as hot flashes.

Ms. Reeves' case was scheduled to go to trial against Wyeth in a federal court in Little Rock, Arkansas on August 21<sup>st</sup>. However, it was continued because of some evidentiary problems. There are approximately 4,500 lawsuits filed against the company over hormone replacement therapy to come to trial. It's most significant that internal marketing

documents have revealed that Wyeth put profits ahead of the welfare of patients. Wyeth halted a clinical study in 2002. The Women's Health Initiative study found Prempro patients had a higher risk of breast cancer, stroke and coronary heart disease. Prempro sales, along with those of sister drug, estrogen-only pill Premarin, dropped to \$909 million last year from \$2.07 billion 2001.

Wyeth ignored HRT's dangerous side effects and it appears the company was fully aware of the risks involved. There are numerous studies which found HRT doubles patients' risk of breast cancer. Sales representatives from Wyeth will testify they were ordered to minimize the drugs' risk, while at the same time promoting the drug for unapproved uses such as cardiovascular health and Alzheimer's prevention. While Wyeth never really explored the issue of breast cancer risk, the company claims that it did. That will be an issue for the jury to decide.

Presently, HRT is typically prescribed at low doses for short periods. Before 2002, however, women often took it indefinitely at higher doses. The breast cancer warning is now more forceful and is prominently displayed on the drug product label. The WHI study found that for each year 10,000 women took Prempro, there would be eight more cases of breast cancer than if they were all taking a placebo. Over the 5.2 years of the trial, the increase in adverse events including breast cancer, heart attacks and stroke was about one in 100. While that may not sound like much, it really does add up, considering that millions of women took HRT.

Other studies, which show a stronger correlation between HRT and breast cancer, will be crucial to the Reeves case. Company documents and testimony from sales representatives will be presented that will prove Wyeth recklessly promoted the drug to boost sales. One such document is a letter a former Wyeth salesman wrote to company executives, concerned about how HRT was being promoted. The letter dated July 18, 2000 reads:

*The desire for increased sales has overruled our company's ethical responsibility to promote our products safely.*

That letter was sent to the Office of Ethics and Business Conduct of American Home Products, (Wyeth's former name). The salesman wrote that he was instructed to promote HRT for unapproved uses such as preventing Alzheimer's and cardiovascular disease. He believed that it was unethical since many studies showed the drugs could increase the incidence of breast cancer and heart attack while having little effect on Alzheimer's. The sales representative wrote "the potential liability" from such practices could "pale in comparison" to "the suits over the diet drugs." It's significant that the man's managers at Wyeth accused him of insubordination when he complained.

The jury will eventually see a transcript from a Prempro launch party where Robert Essner, Wyeth's current chairman and CEO, told sales representatives that the company was creating an "HRT revolution" that would keep women on the drug from menopause to death and that there should be "no boundaries, no limits to your selling effort." That sort of thing will be difficult for Wyeth to explain away, but never doubt that they will try to do so. Hopefully, the case will be rescheduled soon and proceed to trial.

Source: *Associated Press*

#### **JURY RETURNS VERDICT IN FIRST PAIN PATCH SUIT**

A Houston jury returned a verdict in the nation's first case against drug manufacturers accused of selling an allegedly faulty drug patch designed to control pain. The family of Michaelynn Thompson sued Alza Corp. and Janssen Pharmaceutica Products, subsidiaries of the Johnson & Johnson Corp., alleging Ms. Thompson died from using the Duragesic patch. She had been prescribed the Duragesic patch to help control pain after she was injured in a

car accident. Ms. Thompson died because the Duragesic patch released too much fentanyl, a strong pain reliever, into her body.

The drug manufacturers claimed that the patch was accompanied by proper warnings and information and had been approved for use by the U.S. Food and Drug Administration. The jury found there was a defect in the patch and returned a \$772,500 plaintiffs verdict in the wrongful death suit. There are about 100 similar suits pending nationwide against the drug manufacturers.

Source: *Texas Lawyer*

### **RULES PLANNED FOR INDUSTRY TIES ON FDA BOARDS**

In my opinion, the Food and Drug Administration has a strong obligation to deal with a conflict of interest problem that has been around far too long. Persons who have financial ties to the drug industry shouldn't be allowed to serve on the FDA's powerful advisory boards. In this regard, several weeks ago the FDA announced an effort to write guidelines detailing the kind of industry ties that are permitted for those who serve. Critics have complained for years that those who sit on its boards often have such strong financial ties to drug makers that their advice is tainted. Advisory boards recommend drugs for approval. As a result, their votes can have enormous influence on drug company stock prices. The new rules, which are being debated internally within the ranks of the FDA, are an effort to codify how the agency grants "waivers," which allow experts with financial ties to drug makers to serve on the boards. The rules will have to go through a public comment period. The FDA has almost complete discretion in granting waivers. There doesn't appear to have been any real effort in the past on the Agency's part to control who all sits on these extremely important boards.

There doesn't appear to be any good reason why the FDA shouldn't tighten up its rules. The FDA should do a better job of keeping its advisory boards free

from the drug industry's **financial** influence. It's my belief that any person who is being paid directly or indirectly by a drug company shouldn't be allowed to serve on an advisory board. The FDA should do everything possible to keep anyone with industry ties from serving on advisory boards. The controversy over waivers reflects the growing influence of industry in medical research and the increasing importance of the advisory boards, which assess new drug applications and weigh drug risks.

Dr. Sidney Wolfe, director of Public Citizen's health research group, said the problem with the waiver process had nothing to do with excluding capable experts. He pointed out that a study by Public Citizen, published in April in a medical journal, found that the FDA barred advisory board members with conflicts of interest from attending meetings only 1% of the time. Twenty-eight percent of advisory board members disclosed a financial conflict, the study found. Dr. Wolfe believes that the "FDA abuses its discretion by failing to disqualify members with significant conflicts of interest." I have to agree with that assessment based on our experience gain from litigation involving the drug industry.

Source: *New York Times*

### **KAISER FINED \$2 MILLION FOR MISMANAGING KIDNEY TRANSPLANTS**

Kaiser Permanente has agreed to pay a \$2 million fine for mismanaging a kidney transplant program and endangering the lives of hundreds of patients. I believe that this is the largest fine that the California Department of Managed Health Care has ever imposed. Kaiser suspended its northern California kidney transplant program in May as a result of pressure from regulators and patient lawsuits. The problems arose when Kaiser ordered up to 1,500 patients be transferred to a new transplant center two years ago. Kaiser failed to discuss the transfers with regulators. As a result, the procedures were delayed.

### **THE CHARITE ARTIFICIAL SPINAL DISC**

According to the Institute of Medicine, over a million Americans are severely injured each year by medical devices. In 2002 alone, the FDA received more than 111,000 reports of adverse events involving medical devices. That number has increased since the Charite artificial spinal disc was approved in October 2004 for use in this country. As of July 2006, there have been more than 130 serious adverse events reported to the FDA associated with its use. Examples of the most serious adverse events include: migration of the artificial disc resulting in either removal of the disc or maintaining the disc, both followed by fusion; pedicle fractures; subsidence or a settling of the disc into the bone; and nicking of an vein or artery.

The Charite disc was developed at the Charite University Hospital in Berlin, Germany in the mid-1980s. Further refinements to the design were later incorporated at Waldemar Link GmbH, a European based medical device maker. In 2003, DePuy Spine, a division of Johnson & Johnson, acquired the Link Spine Group, and gained exclusive worldwide rights to the Charite. The Charite is approved for patients who have severe lower back pain and have obtained little or no pain relief after at least 6 months of non-surgical treatments, such as pain medications, physical therapy, injections, or manipulation. There have been reports of problems experienced by persons receiving the Charite disc.

### **LAWSUITS TARGET BOSTON SCIENTIFIC OVER GUIDANT HEART DEVICES**

Boston Scientific Corp. now faces about 550 individual and class action lawsuits related to problems with Guidant heart devices that became public last year, according to a Boston Scientific regulatory filing. As previously reported, Boston Scientific acquired Guidant in April for about \$27.5 billion. When the acquisition closed, Guidant was already facing hundreds of lawsuits

related to problems with implantable defibrillator devices that have been linked to multiple deaths. About 72 product-liability class action suits and about 477 individual suits are pending in various state and federal courts against Guidant, Boston Scientific. The company has set aside \$381 million for legal defense costs primarily related to the Guidant lawsuits.

Source: *Wall Street Journal*

### **ACCUTANE LINKED TO HEART AND LIVER PROBLEMS**

Accutane, the powerful acne drug already known to cause birth defects, appears to increase the risk for potential heart and liver problems much more than doctors had expected, according to a new study. The findings came from lab tests on 13,772 patients taking the popular acne drug. The study results underscore the need to closely monitor people taking isotretinoin, which is sold as Accutane and in three generic versions. The study revealed that abnormal results for cholesterol and liver function were more common than expected. Dr. Lee Zane of the University of California, San Francisco, co-author of the study, says that further studies are needed to determine any long-term health effects. It appears to be significant that in the current study, most patients' abnormal lab tests returned to normal when they quit taking the drug.

On March 1<sup>st</sup>, the U.S. Food and Drug Administration began requiring patients and doctors to register their use of Accutane, a program intended to stop birth defects. Isotretinoin can cause brain and heart defects in infants if a woman takes it during or immediately before pregnancy. Thus far, more than 71,000 patients have registered in the FDA's registry. Women who take it must have pregnancy tests and use birth control or abstain from sex.

It was already known that the drug could increase levels of cholesterol, liver enzymes and blood fats called triglycerides that can raise the risk of heart disease. But the new study found higher

than expected percentages of patients developing these abnormal lab results. Among patients with normal lab tests before they started taking the drug, 44% developed high levels of triglycerides. The package insert, by contrast, cites high triglycerides in 25% of patients. Thirty-one percent of healthy patients in the study developed high cholesterol levels and 11% developed abnormal liver tests. The patients, all members of the Kaiser Permanente health plan in northern California, ranged in age from 13 to 50 and were treated between March 1995 and September 2002. The findings were published in the Archives of Dermatology last month. Some patients in the study had more lab tests than others during their treatment with the acne drug, but, for their analysis, the researchers used only the most abnormal test result for each different test each patient had.

Source: *Associated Press*

## **X. BUSINESS LITIGATION**

---

### **CREDIT CARD ISSUERS AGREE TO \$336 MILLION SETTLEMENT**

A settlement has been reached in the case filed against Visa USA, MasterCard and a number of other credit and debit card issuers over charges for foreign currency conversions. The settlement is subject to approval by a federal District Court in New York. The settlement funds will go to pay claims by eligible cardholders and court-approved fees. The lawsuit alleged that the companies overcharged when converting foreign transactions into dollars and didn't disclose all fees. The settlement, reached with the help of a mediator, also includes an agreement to resolve related lawsuits, including one pending in California.

Defendants in the case include Visa USA, the domestic division of Visa International, which is headquartered in Foster City, California; MasterCard of

Purchase, New York; and Diners Club, the card issuer owned by Citigroup of New York. The suit also covers a number of debit and credit card issuing banks and thrifts, including Bank of America in Charlotte, North Carolina; Citigroup; JPMorgan Chase & Co. of New York; and Washington Mutual of Seattle. American Express Co., a defendant, was not involved in this settlement. Thus far nothing has been worked out with that company.

Source: *Associated Press*

### **GOOGLE SETTLEMENT IS APPROVED**

An Arkansas judge has approved a \$90 million settlement between Google and its advertisers. It has been claimed by the advertisers that Google, the Internet's leading search engine, had improperly billed them for "clicks" that didn't lead to genuine customers seeking their products. **Click fraud** is considered the Achilles' heel of the fast-growing Web search advertising industry. It occurs when a person, or an automated computer program, repeatedly clicks on an ad with the intent of driving up the costs for the advertiser. In June, rival Yahoo Inc. reached a preliminary settlement in a separate "click fraud" lawsuit filed in California.

Even though more than 70 objections had been filed. The judge called the Google settlement "fair, reasonable and adequate." Some of the plaintiffs told the judge that Google had not taken reasonable care to prevent click fraud and overstated the steps it has taken against would-be swindlers. Smaller companies were saying they didn't have the resources to research claims that Google engaged in "click fraud" to drive up ad costs. Clicking on the ads, typically displayed at the top and sides of Web pages, triggered sales commissions for Google even if the activity didn't lead to a sale. Click fraud drives up advertisers' costs by falsely indicating the number of Web users who have "clicked" on an Internet ad. A Texarkana company—Lane's Gifts and Collectibles—filed the lawsuit, which was

certified by the court as a class action.

The Google settlement is part of a broader legal action by plaintiff Lane's Gifts and Collectibles originally filed in February 2005 against Internet advertising industry players over the issue of so-called "click fraud". Click fraud cropped up several years ago as a way to drain ad budgets or funnel illicit revenue to websites in Google's network. Google has a legal duty to exercise reasonable efforts to filter invalid clicks.

Companies who advertise on a search system may pay from a few cents to several dollars per click, depending on the subject matter. When automated, bills can potentially skyrocket for advertising customers. By settling claims made in the class action lawsuit, Google will give advertising credits that are the equivalent of a \$4.50 refund on every \$1,000 spent in its ad network during the past 4 1/4 years. Interestingly, there will be no cash received by the members of the class. The Mountain View, California-based company did agree to introduce a new feature of its AdWords keyword advertising system that gives advertising customers a more detailed picture of invalid click activity in their Google ad accounts.

Source: Associated Press

#### **GM FILES CLAIM FOR BILLIONS IN DELPHI CASE**

As has been reported, Delphi Corp., which has a strong Alabama presence, filed for bankruptcy protection on October 28, 2005. On July 31<sup>st</sup>, General Motors filed a multibillion-dollar claim against the auto parts supplier. That was the deadline for filing unsecured claims. Interestingly, Delphi, a former subsidiary of GM, is still the automakers' biggest supplier. GM has said that Delphi's ability to continue operations directly affects the automaker's viability. It appears that Delphi also has claims that it will assert against the automaker. The committee that represents creditors has asked the bankruptcy judge for permission to take a larger role in negotiations between Delphi and GM. Apparently,

that is for the protection of the interests of creditors other than GM.

Delphi, which was spun off from GM in 1999, is the largest American auto-parts supplier to file for bankruptcy protection so far. The creditors committee has alleged that GM used the spin-off to rid itself of labor and retirement costs. The committee wants the right to sue GM and former Delphi executives who helped transfer those obligations to Delphi from GM. The automaker has given financial aid to Delphi in the attrition programs it has reached with its two biggest unions, but retained the right to get back those contributions once Delphi emerges from court protection. The request by the creditors committee was considered at a hearing on August 17th. Delphi has requested the right to abandon supply contracts it has with GM.

Source: Associated Press

#### **GE CAPITAL FOUND GUILTY IN FRAUD SUIT**

A federal jury in Texas found that GE Capital Corp. broke an agreement to raise financing for a Houston-based energy developer and forced it out of a proposed British electric power and gas-storage project. The jury found that GE Capital Corp., a unit of General Electric Co., acted with malice and awarded the developer \$136.8 million in actual and punitive damages. Canatxx Energy Ventures Inc., was co-developing with GE Power Systems, a \$1 billion electric-power and gas-storage project in Lancashire, England.

In its 1999 complaint, Canatxx said GE conspired to turn a Lancashire, England, power-plant project into a test bed for a newer model GE gas-turbine generator. It alleged that GE Capital failed to seek financing for the older style turbines that were originally specified by the co-developers and squeezed the company out once it found an alternate test site. The Houston jury found that GE Capital breached its fiduciary duties, committed fraud, conspired with unnamed others and committed acts of "unfair competition." It awarded

Canatxx \$136.1 million for actual damages and \$700,000 in punitive damages, finding that GE Capital had acted with malice toward the developer.

Pre-judgment interest and fees in the amount of \$100 million are being sought by the plaintiff. GE Power was dropped from the case several years ago and was not around for the trial. The power-plant project at the heart of the suit was never completed. The jury ruled in favor of GE Capital on several issues. It found the financier did not fraudulently induce Canatxx to enter into the original financing agreement, was not unjustly enriched by its dealings, nor did it make negligent misrepresentations to Canatxx. An appeal by GE is expected.

Source: Associated Press

#### **AUTOZONE AND WAL-MART SUED OVER PRICING**

Recently, a lawsuit was filed by the State of Arizona against Wal-Mart and AutoZone. The complaint filed by Arizona Attorney General Terry Goddard alleged that the two giant retailers intentionally defrauded customers by failing to post accurate prices on products or not posting any prices at all. Attorney General Goddard stated that Wal-Mart and AutoZone stores have a pattern of violations of state pricing laws going back to at least 2001. Arizona law used to require that prices be stamped on each item, but state legislatures, responding to retailer complaints of costs, what with the new scanner technology, agreed in 1993 to scrap that mandate. In exchange, however, stores agreed to abide by new laws, which require that the price of every item be posted on the shelf or near each display. The law also requires that the prices that are rung up by the scanners match those shelf prices.

Apparently, six-figure fines levied against both companies under state statutes have failed to get either company to comply with the law. It is felt that the two retailers simply con-

sider the fines a “cost of doing business.” After concluding that the state statutes had not induced a change in the pricing practice of Wal-Mart and AutoZone, redress is being sought under Arizona’s Consumer Fraud Act which carries significantly higher penalties than the state statutes.

The Arizona Attorney General maintains that Wal-Mart, the states’ largest retailer, failed more than half the compliance inspections conducted by the Arizona’s Department of Weights and Measures at its 70 Arizona stores dating back to the beginning of 2001. Wal-Mart had paid fines of more than \$450,000. AutoZone, the state’s largest auto parts retailer also failed more than half their inspections, paying more than \$170,000 in fines during that same time period. In defense of its practices, Wal-Mart claims that, “most of its stores stock hundreds of thousands of items and there is always a slight possibility of error as they make thousands of price changes each week.” Thus far, AutoZone has not made known its defenses to its pricing practice or the allegations against the company.

Source: *The Arizona Daily Star*

### **HOSPITAL CHAIN SETTLES LAWSUIT**

Hospital operator Sutter Health, which is based in Northern California, has settled a class action lawsuit filed against the company by agreeing to pay refunds and offer discounts to thousands of former patients. Sutter Health was accused of overcharging uninsured individuals for hospital services. Payments under the settlement could exceed \$275 million. The settlement resolves a class action lawsuit filed in 2004 that accused Sutter Health of charging uninsured patients inflated rates for services, while offering huge discounts to insurance companies and other government medical programs.

A wave of lawsuits have been filed in recent years accusing hospitals nationwide of gouging uninsured patients by charging prices far above the rates they charge big insurance companies like

Blue Cross and Medicare-Medicaid programs. Under the terms of the settlement, plaintiffs will receive discounts or refunds from their bills ranging from 25 to 45%, depending on which hospital in the Sutter chain treated them. Since 2004, Sutter has changed its billing policies to extend discounts to all uninsured patients. A lawyer representing the plaintiffs in the Sutter Health case said “hundreds of thousands” of uninsured Sutter patients will start receiving notices in mid-September informing them about the settlement.

Our firm is representing a class of uninsured patients in an Alabama court on similar claims against Community Health Services of Tennessee, one of the largest hospital chains in the country. The case against Sutter is almost identical to our case which is set for certification proceedings in October. We believe that it will be certified. If so, individuals will be eligible to receive financial benefits from the case.

### **COURT APPROVES SETTLEMENT OF SPRINT LAWSUIT**

**Sprint Nextel Corp.** has agreed to a settlement worth about \$29 million in a lawsuit filed by thousands of employees claiming the company’s stock was not a prudent retirement investment. A U.S. District Court Judge approved the settlement between Sprint and more than 85,000 current and former Sprint employees who participated in the company’s retirement plan since 1998. In the approval order, the court stated that the “conservative value” of the settlement was \$25 million.

Each of the approximately 85,000 affected employees who submit a claim is expected to receive benefits valued at \$400 to \$1,000, according to Susan Meagher, a lawyer involved in the class action litigation. About 63,000 of those affected either now work for **Embarq Corp.**, the phone company that spun off from Sprint in May, or no longer work for either company. Some former employees will receive cash, and others will receive benefits such as an increased company match for their

investments. Sprint is also offering financial planning seminars and meetings.

The lawsuit contended that the plaintiff’s retirement savings plans with the company included imprudent investments in Sprint stock. The company stock was said to have been too risky because, at the time, Sprint was transforming itself from a conservative, proven traditional telephone business into what essentially was a speculative startup focusing on the Internet and wireless services, according to the lawsuit. The lawsuit also claimed that Sprint executives did not release enough information about the company’s proposed, and ultimately abandoned, merger with **WorldCom, Inc.**

The lawsuit also raised an issue of what was described as conflicts of interest between **Ernst and Young**, Sprint’s former corporate auditor, and its former top two executives William T. Esrey, who was chief executive officer, and Ronald T. LeMay, who was the company’s chief operating officer. Those and other actions, the lawsuit contended, violated the company’s fiduciary duty under the Employee Retirement Income Security Act to participants in the retirement plans. Sprint claimed that the company’s stock was a prudent investment.

Source: *The Kansas City Star*

### **CHEVY CHASE BANK SETTLES CLASS ACTION LAWSUIT**

After a seven-year legal battle, Chevy Chase Bank has finally agreed to pay \$16.1 million to settle a nationwide class action lawsuit. The bank was accused of charging higher-than-promised interest rates on credit cards. A Baltimore Circuit Judge John M. Glynn has given preliminary approval to the settlement. Paul Bland Jr., was the lead attorney for the plaintiffs. Paul expects about \$11 million to be paid to hundreds of thousands of cardholders around the country. Chevy Chase is Maryland’s third-largest bank by deposit share, according to the Federal Deposit Insurance Corp. Under the terms of the settlement, Chevy Chase also agreed to remove negative reports

sent to the major credit bureaus for cardholders who missed payments or couldn't make full payments after the rates went up. Commenting on the settlement, Paul stated:

*Several consumers told us it was hard to buy a house because the bank listed them as a bad debtor on their credit report, and we felt that getting that corrected was an important part of the deal and could turn out to be worth more than the cash. I feel like overall this is a great deal and one of the proudest moments of my life.*

Trial Lawyers for Public Justice, a public interest law firm based in Washington, filed the lawsuit in February 1999. It was alleged that Chevy Chase increased interest rates above 24%, the maximum allowed under Maryland law, even though it had promised not to do so. Chevy Chase made the changes in 1996 when it moved its home office to McLean in Virginia, which had no state limit on interest rates. Chevy Chase later sold its card portfolio to First USA, now owned by JPMorgan Chase & Co., but retained liability in the case. The lawsuit took years to litigate as the Maryland Court of Appeals settled two major sticking points. The state's highest court overturned a lower-court ruling that blocked the lawsuit on grounds the dispute had to be resolved through arbitration and another ruling that found the plaintiffs' claims were pre-empted by federal law. Paul's office will notify cardholders about how to make a claim or object to the settlement agreement.

Source: *Baltimore Sun*

### **GEORGIA DOCTORS SUE MEDICAID FIRMS OVER PAY**

A group of Georgia doctors have filed suit against the private companies managing the state's Medicaid program. The doctors claim that the companies owe millions of dollars in outstanding claims to doctors, hospitals and other health care providers. The suit, filed in Fulton County Superior Court, alleges the com-

panies knew that they were incapable of paying for services on time when they bid for, and were awarded, state contracts totaling \$3 billion. Because of the companies' delinquency, the doctors in the suit allege they have had to lay off employees and scale back on providing services to low-income residents on Medicaid. The dozen doctors and medical offices who filed the suit are seeking class action status, which, if granted, would add thousands of other medical providers as class member plaintiffs.

These are doctors who have made a commitment to treat the less fortunate with a substantial percentage of their patients being Medicaid patients. The three private, for-profit companies named in the suit are Peach State Health Plan, Inc., AMGP Georgia Managed Care Company, Inc., and Wellcare of Georgia, Inc. These companies were selected last year from 10 that submitted bids to the state Department of Community Health after Georgia decided to move Medicaid patients into private HMOs. Under that program, doctors bill the HMOs for medical service they provide the patients. The states then pay the HMOs. The Medicaid Managed Care program went into effect June 1<sup>st</sup>, with 590,000 patients in Atlanta and Middle Georgia signed up. By October, one million Georgians on Medicaid and 200,000 in the PeachCare for Kids program for uninsured children are scheduled to get care from these three HMOs.

Source: *The Atlanta Journal-Constitution*

## **XI. INSURANCE AND FINANCE UPDATE**

### **ALFA ACTUALLY FILES A FRAUD LAWSUIT**

Believe it or not, Alfa Corp. has filed a civil suit accusing a north Alabama insurance agent of inducing the company to make a number of loans based on collateral that it says never existed, and it seeks money damages.

The suit was filed in an Alabama State Court against a longtime Alfa agent. Alfa had delayed the release of its second-quarter earnings report pending the completion of an investigation of alleged wrongdoing by an "unnamed agent." That agent has now been named and finds himself as a defendant in a civil lawsuit that alleges fraudulent conduct.

Alfa's complaint seeks money damages for fraud, breach of fiduciary duty, unjust enrichment and conspiracy. The total value of the outstanding loans originated by the agent is \$6.2 million. Alfa is trying to find out how much of that figure is actually backed by legitimate collateral. According to the suit, the agent got several personal loans from Alfa, totaling about \$168,000, securing them with farm equipment, including three tractors and a John Deere loader attachment. Alfa says that the serial numbers for the equipment were invalid and the collateral to secure the loans didn't exist. The complaint says the agent approved consumer loans for clients from Alfa, listing similar farm equipment as collateral. According to the suit, the equipment didn't exist and it is alleged that the agent pocketed some or all of the money himself. Surely, Alfa won't try to collect punitive damages in the case.

### **POLICYHOLDERS ARE LEFT IN LIMBO**

Last month, we reported on the problems facing Birmingham-based Vesta Insurance Group. As a follow-up to that story, Shelby Insurance, a subsidiary of Vesta, has informed thousands of policyholders in West Virginia they will have to find another insurer. Texas insurance regulators had ordered the company to stop issuing or renewing policies nationwide. As reported, the Texas Department of Insurance took over Shelby and five other Vesta subsidiaries earlier this month. The companies were to cancel existing policies, effective August 24<sup>th</sup>. Texas officials have ordered the liquidation of all Vesta operating units. On a side note, I keep hearing

from usually reliable sources who are familiar with the insurance department that some well-known Alabamians may be involved in Vesta's problems. Significantly, Vesta shares that sold for \$50 not too long ago were selling at 2 cents on August 8<sup>th</sup>.

#### **ST. PAUL SETTLES WITH THREE STATES OVER BROKER COMPENSATION**

The St. Paul Travelers Companies, Inc., entered into a \$77 million settlement last month with the Attorneys General of New York, Connecticut and Illinois, as well as with the New York State Department of Insurance, resolving issues relating to those states' industry-wide investigations into producer compensation, insurance placement practices and finite reinsurance products. As expected, St. Paul Travelers did not admit to any violation of federal or state law as part of the settlement. However the company did issue an apology. While that sounds good and is always good to hear it really doesn't amount to much in the scheme of things. Under the terms of the settlement, the company, among other things, agreed to do the following:

- pay \$37 million into a fund for certain excess casualty policyholders and pay \$40 million in fines;
- enhance the company's disclosures regarding its producer compensation practices;
- strengthen its ongoing training and education of employees;
- discontinue paying contingent commissions on excess casualty coverage in the United States through 2008; and
- discontinue paying contingent commissions on any line of business if 65% of the United States market for that line does not pay such commissions or has signed similar settlement agreements.

Attorney General Eliot Spitzer, Connecticut Attorney General Richard Blumenthal and Illinois Attorney General Lisa Madigan were all involved in the

settlement agreement. St. Paul Travelers has joined the growing number of insurers, brokers and agents who have pledged to make the market for insurance coverage more transparent and competitive. That is good to know, but is long overdue. But for the efforts of Eliot Spitzer, I doubt seriously if the fraudulent practices described above would have ever been dealt with.

St. Paul Travelers will have to reform its business so that consumers are given access to more information about their insurance transactions. Policyholders, who were economically harmed by their past conduct, will be compensated. The investigation found that St. Paul Travelers made undisclosed payments to insurance brokers and agents in exchange for business referrals, and participated in a scheme to fix insurance prices in the excess casualty area. It appears that St. Paul Travelers committed plain old fraud and did so intentionally.

Documents also detail St. Paul's use of improper "finite reinsurance" to bolster both its own financial results and those of its clients. For example, in the years 1999 through 2002, St. Paul entered into aggregate excess of loss reinsurance contracts with an insurer in Barbados, despite a side agreement that any losses suffered by the insurer would be made up by St. Paul. St. Paul Travelers acknowledged that certain of its employees violated acceptable business practices and St. Paul Travelers' own standards of conduct by engaging in improper bidding practices and certain "finite insurance" activities.

Under the agreement, \$37 million will be paid to St. Paul Travelers policyholders harmed by the company's bid-rigging activities. In addition, St. Paul Travelers will pay penalties of \$24 million to New York and \$8 million each to Connecticut and Illinois. In the fall of 2004, the New York Attorney General's office and the New York Insurance Department announced a joint probe of misconduct in the insurance industry. This investigation has resulted to date in guilty pleas from 20 insurance company executives

and officers, and the recovery of approximately \$3 billion for consumers and workers compensation plans.

*Source: Insurance Journal*

#### **AN UPDATE ON FLOOD INSURANCE ISSUES**

Neither the State of Alabama nor the Department of Insurance regulates flood insurance products or product rates. Flood insurance policies are written under the United States' Government's National Flood Insurance Program (NFIP), which is a statutorily mandated program administered by the Federal Emergency Management Agency (FEMA) under the National Flood Insurance Act of 1968. Insurance companies that write standard flood insurance policies under the NFIP are called "write your own insurers" or (WYO). The WYO simply operates as fiduciary and fiscal agent of the United States. Neither the WYO nor the State of Alabama create or regulate the terms and conditions of standard flood insurance policies. The terms and conditions of standard flood insurance policies (SFIP) are solely dictated by FEMA, and the federal treasury pays claims arising under such policies.

It is imperative that insured property owners familiarize themselves with the terms and conditions of their standard flood insurance policy. Courts have held that all citizens are charged with constructive knowledge of the provisions of federal insurance programs, and those citizens who elect to become actual participants in federal programs do so under a further legal duty to "familiarize" themselves with the requirements of those programs. A claimant may not recover under a standard flood insurance policy unless the claimant first establishes that all of the requirements of the policy have been met. Because the policy terms are dictated by FEMA, they cannot be waived or modified by the insurance company. In other words, an insured property owner cannot rely on any representations by his or her agent or claims adjuster that waive and/or in any way modify the terms and conditions of the

insured property owner's SFIP.

In the event of a loss, an insured property owner must file a signed and sworn proof of loss, and Article VII(J)(4) of the Standard Flood Insurance Policy requires that said proof of loss must be filed within 60 days of the loss. If the signed and sworn proof of loss is not filed within the aforementioned time period, the insured cannot recover as a matter of law. Every appellate court that has addressed this issue, including the 11th Circuit, has ruled in this manner. The proof of loss must include the following:

- The date and time of the loss;
- A brief explanation of how the loss happened;
- The insured's interest in the damaged property;
- The details of other insurance that may cover the loss;
- Any changes in title or occupancy of the insured property during the term of the policy;
- Specifications of the damaged buildings and detailed repair estimates;
- The names of mortgagees or anyone else having a lien, charge, or claim against the insured property;
- Details about who occupied any insured building at the time of the loss and for what purpose, and
- The inventory of damaged property.

It is important to remember that the proof of loss requirements cannot be waived or modified by the WYO (insurance company) the adjuster or insurance agent. Even if an insured relies on statements by the WYO's adjuster indicating that the proof of loss requirements will not be strictly enforced, failure to comply with the requirements will forfeit coverage. The rationale is that because the policy terms are dictated solely by FEMA, they cannot be waived or modified the WYO (insurance company). In other words, no one adjusting the loss is authorized to waive

or modify the requirement that a proof of loss containing the specific information listed above be timely filed.

All disputes arising from the handling of a claim for benefits under a SFIP policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood insurance Act of 1968, and federal common law. All state law based extra contractual and tort claims related to handling of a claim under a SFIP policy are barred and preempted by federal law. In short, WYOs are not subject to bad faith liability under state law if an insured property owner's claim for benefits is denied in bad faith. However, it is important to note that the federal courts have only addressed federal preemption as it relates to extra contractual and tort claims regarding the handling of the claim for benefits under a SFIP policy.

#### ***JUDGE RULES IN FAVOR OF INSURER IN MISSISSIPPI***

U.S. District Judge L.T. Senter, who heard the first wind and flood insurance claims arising out of Hurricane Katrina, has upheld the exclusion for damage caused by water and water-borne materials in an insurance contract. In his memorandum opinion in the widely-publicized Leonard case against Nationwide Mutual Insurance Company, Judge Senter affirmed that the insurer had met the "burden of proving" that the majority of the "damage to the Leonard's property was caused by water and water-borne materials within a provision of the Property Exclusions section of the Nationwide policy."

The Leonards, who did not carry flood insurance on their house, had claimed that the insurance agent told them they did not need it. Judge Senter rejected the Leonard's fraud claims. Although Judge Senter wrote that "almost all of the damage to the Leonard residence is attributable to the incursion of water," he recognized that the property was damaged "by wind-driven debris" to a larger extent than was provided for in Nationwide's initial

payment to the Leonards. He found that the Leonards were entitled to an additional amount, approximately \$1,200, from their insurance company as a result of these damages. If you are interested, Judge Senter's opinion can be found online at the U.S. District Court Southern District of Mississippi website <http://www.mssd.uscourts.gov/>.

#### ***JUDGE FOR KATRINA INSURANCE LAWSUITS SEEKS LAWYERS' ADVICE***

In a related matter, Judge Senter, the federal judge who ruled in the Lenoard case referred to above, and who is presiding over most of the Katrina insurance lawsuits, has solicited advice on the best way to resolve hundreds of cases in his court in a "just, speedy and inexpensive" manner. In a letter sent last month to roughly 180 lawyers involved in these cases, the judge asked whether lawsuits that homeowners filed against insurers for refusing to cover storm damage should be tried individually or in groups of plaintiffs. The inquiry asked about some form of representative trial as a feasible alternative to individual trials. Judge Senter has asked every lawyer involved in Katrina-related insurance litigation to give opinions on trial alternatives. He requested for confidential responses to be sent to him by August 25<sup>th</sup>. After he reviews those responses, Judge Senter will schedule a hearing to discuss all of the suggestions. This appears to be a good approach to handling a great number of cases.

#### ***CLASS ACTION STATUS DENIED***

Judge Senter has been active on another front involving a Katrina-related case. He ruled in that case that State Farm policyholders with potential Katrina insurance claims can't be represented through one lawsuit against the company. The judge decided that class action certification for the claim was not proper. It was significant, however, that he found State Farm's policy language to be ambiguous. The judge concluded "that the damage attributable to

wind and rain will be covered, regardless of whether an inflow of water caused additional damage that would be excluded from coverage.” State Farm can deny coverage only where it can prove water caused the damage, according to the court’s order. Conversely, homeowners can recover where evidence shows wind damage. Those facts, Judge Senter ruled, must be determined at trial.

#### **LOYOLA UNIVERSITY SUES OVER KATRINA PAYMENTS**

It’s not just individuals and business owners who have had a difficult time getting their insurance companies to pay valid claims. For example, Loyola University New Orleans has filed a class action lawsuit against a unit of Chicago-based CNA Financial Corp. claiming the school is still owed more than \$20 million for property damage and business interruption losses related to Hurricane Katrina. The suit was filed last month by Loyola against Continental Casualty Co. in a federal court in Louisiana. Flooding from Hurricane Katrina, which hit last August, damaged much of the housing used by Loyola students. The University couldn’t reopen, even on a limited basis, until January of this year.

After hiring an outside accounting firm to document its losses, Loyola submitted claims to Continental in April of more than \$6 million for property damage and \$22.5 million in business-interruption losses. Thus far, Continental has reimbursed Loyola only \$4 million. The complaint accuses the insurer of “arbitrary and capricious” behavior in not paying the claims.

Source: *Chicago Tribune*

#### **CONSECO TO SETTLE CLASS ACTION SUIT**

Insurer Conseco Inc. has agreed to settle a class action lawsuit filed against its life insurance division. A \$100.3 million charge for related costs in the quarter that ended June 30th was posted. The lawsuit, filed in 2004, alleged that Conseco Life Insurance Co.

forced clients to pay higher premiums on some universal life policies or surrender them for cash to burnish the parent company’s finances. The suit, which sought damages, claimed the practice enabled the suburban Indianapolis company to add \$360 million to its balance sheet.

The settlement, which is subject to a court approval, will be an important step for the company. Conseco is recovering from its 2002 bankruptcy and late 1990s loan program that allowed executives and directors to heavily borrow to buy Conseco stock. Such loans have since been banned by federal regulators.

Source: *Associated Press*

#### **INSURER SETTLES CHARGES OVER ITS FRAUDULENT SALES TO SOLDIERS**

Cheating and fraudulent conduct is bad and should never be tolerated. When the victims are members of the military and members of their families, however, it is just about as bad as it gets. One company that got caught has now agreed to a settlement. The American Amicable Life Insurance Company has agreed to pay up to \$70 million to settle state and federal complaints that it used deceptive sales practices to sell unsuitable insurance products to thousands of American service members across the country and on bases overseas. The company will pay \$10 million in cash refunds to 57,000 current and former service members who bought its products after December 31, 1999. The rest of the money represents the potential cost of raising the future cash value of policies sold to 13,000 other military customers and 22,000 civilians, although the final price tag will depend on how many of those policies are held to maturity. The company, which is based in Waco, Tex., also agreed to a five-year ban from sales on any military base, one of the longest suspensions ever imposed in the military insurance market.

The global settlement appears to have resolved all outstanding issues between

the company and an investigative task force that included the Justice Department, the Securities and Exchange Commission and insurance regulators in 41 states. The investigations were begun in mid-2004, after articles in *The New York Times* documented widespread and longstanding abuses in the sale of insurance, mutual funds and other financial products to young, financially unsophisticated service members.

The 20-year term policy combined a very expensive death premium with a slow-growing “savings fund” whose value did not surpass the accumulated premiums on the policy until the last years of its life—by which point, a high percentage of the policies sold to military personnel had long since lapsed, insurance investigators found. As part of the settlement, the company has agreed to stop selling the Horizon Life product in any market, a step Mr. Palmer said went into effect in mid-July. The full settlement agreement can be found on the Internet at [www.gainsurance.org](http://www.gainsurance.org), regulators said. Consumers may also direct questions to the company’s consumer service center at (800) 736-7311.

Source: *Associated Press*

## **XII. PREDATORY LENDING**

---

#### **PAYDAY LENDING WEBSITE MADE AVAILABLE**

In May, the Consumer Federation of America (CFA) launched a website at [www.paydayloaninfo.org](http://www.paydayloaninfo.org) to help consumers and policymakers combat extremely expensive check-based “payday” lending. While many websites about payday lending are nothing more than thinly veiled loan referral sites or advertising sites from the industry, this one is consumer-friendly. CFA’s website provides consumer-oriented advice and information to help protect borrowers against becoming trapped in high-cost, high-risk payday lending. As you know, payday loans are usually small cash

loans, secured by the borrower's personal check, and due to be paid in full on the borrower's next payday. The costs involved are outrageously high. Once a person gets involved with a payday loan, they are usually trapped into a very bad situation that may never end.

The consumer information site includes the basic facts on how payday loans work, industry information, the legal status of payday lending, and key features of state laws and regulations in all 50 states. Consumers can calculate the cost of using payday loans by entering the dollars borrowed, the fees charged, the length of the loan, and the number of loans or renewals used during a year. The website also links to research, reports, and updates on timely issues. In addition, visitors to the website can click on their state to connect with state regulators to file complaints or get information.

While this website has valuable information, I suspect it will be more helpful to lawyers and other consumer groups who take on the payday lenders in an effort to protect consumers. Hopefully, consumers who have to deal with payday lenders out of necessity will be able to access the information provided by the website before they get trapped into a payday loan.

#### **PAYDAY LENDING INDUSTRY IS BIG BUSINESS**

Lots of folks still consider payday lenders as just a bunch of small time loan sharks who are making a few loans and holding a few checks for their customers. That is far from true. Last year, the payday loan industry generated over \$6 billion in fee revenue and over \$40 billion in loan volume in the U.S. There are estimated to be more than 25,000 payday loan stores operating in the U.S. today. There are six publicly traded corporations in business and doing very well. There are a number of large federally chartered banks that have payday loan subsidies. In my opinion, this industry is like a cancer for people who have to borrow money from the payday lenders. Once they get a hold on a borrower these lenders never let them go.

## **XIII. PREMISES LIABILITY UPDATE**

### **EFFECTIVENESS OF POPULAR SMOKE ALARMS QUESTIONED**

Safety experts have questioned whether popular models of smoke alarms are adequate to meet the threat posed by fast-burning synthetic materials now found in American homes. There are two types of smoke alarms. First Alert and its manufacturing subsidiary BRK, which control 85% of the market, continue to make and sell millions of the cheaper ionization detectors despite knowing of their disadvantages. The following are two common types of smoke alarms:

- Ionization alarms, which detect smoke with the help of radioactive material, sound earlier in fast-burning flaming fires.
- Photoelectric alarms, which detect changes in light patterns, sound earlier in slow smoky fires, which take time to transition to flames.

Under longtime national standards, either alarm is acceptable. That does not mean that one is comparable to the other insofar as safety is concerned. Experts say both save lives, but the time needed to escape once flames start has gotten dangerously short, particularly for the disabled or impaired, because of fast-burning synthetics in furniture and carpets, and standards may need to change. In 2001, *Consumer Reports* recommended that homeowners install at least one ionization and one photoelectric alarm on every level of a house to improve warning times for different types of fires. An April report from the Public/Private Fire Safety Council went further, noting that some test escape times were "tight or insufficient" with either alarm for bedroom or living room flaming fires. The group suggested that Underwriters Laboratories modify its standard to require faster detection of smoldering fires. Current UL smoke

alarm standards, first developed in the 1970s, require alarms to respond within 4 minutes of a flaming fire and in a smoldering fire before smoke obscures visibility by more than 10% per foot.

In many modern homes, the tendency for synthetics—like nylon and polyester in furnishings, fabrics and carpeting—is to smolder for a long time, then burn faster than natural materials like wood and cotton, which char as they burn. Synthetics melt and pool, then give off substantially more energy when they burn, according to Tom Chapin, head of UL's fire protection division. That has shortened the time to "flashover"—from first flames to combustion of the entire room due to accumulated heat and gases—from an average of 12 to 14 minutes 30 years ago to about 2 to 4 minutes now, he says.

In the flaming scenario, the escape times are radically shorter. The not-for-profit safety certification company in February began studying the smoke characteristics from 40 materials now commonly found in homes. Results are expected by the end of the year and hopefully that will help in the effort to make alarms more effective. Also under study are the byproducts of today's smoke, which also can be lethal. Mr. Chapin says UL changes its standards "because of changes in technology and changes in the way people use things." He also pointed to an "unsettling" uptick in U.S. fire fatalities in the past 12 months to a rate of about 3,500 annually. One likely factor is the increasing use of candles as mood lighting. They now cause about 18,000 fires a year, triple the number five years ago.

Arthur Cote, executive vice president and chief engineer for the National Fire Protection Association, said 2004 data showed 96% of U.S. households had at least one smoke alarm. Civilian fire deaths dropped to 3,190 that year, down from 5,865 in 1977 when few homes had alarms. About half the deaths still occur in the small percentage of homes without smoke alarms, according to Mr. Cote.

BRK has had exclusive knowledge that occasionally, in real world fires

sometimes these ionization detectors simply don't go off at all. In a recent trial it was learned that 750 written customer complaints had been made since the 1990s alleging ionization detectors didn't sound in actual fires. First Alert requested all of those 750 smoke alarms back, almost half were sent, and they were tested. The manufacturer claims that the vast majority of the alarms passed all the tests. In any event, all persons should find out as much as possible about smoke alarms and take advantage of that knowledge in their homes.

#### **INDOOR POOLS MAY POSE A HEALTH HAZARD**

New research indicates that indoor pools are contributing to the increase in asthma among children. The research compared the number of pools in different parts of Europe with the incidence of the disease. Writing in the current journal *Occupational and Environmental Medicine*, the researchers said that the more indoor pools per capita there were, the greater the prevalence of childhood asthma and wheezing. The researchers, from the Catholic University of Louvain in Belgium, noted that as asthma and allergies have become more common in the developed world over the last 30 years, some people have suggested that increased exposure to chlorination byproducts in the air at indoor pools may play a role.

Chlorine products are regularly used in pools to fight disease. But they give off strong gases—giving pools their distinctive smell—when the water is disturbed or when the chlorine destroys organic matter from swimmers. The researchers wrote:

*The discovery that this chlorine-laden atmosphere can be deleterious to the lungs of young children exercising in it is not surprising.*

The study suggested that pools might need to be better ventilated. For the study, the researchers looked at the incidence of asthma, allergies and eczema

among almost 190,000 children in 21 countries. They then looked at the number of pools per 100,000 residents, a figure that varied considerably by region. Western Europe, for example, has many more pools than Eastern Europe. The strongest association was found by the researchers to be between indoor pools and asthma. Even after other factors like climate and altitude were taken into account, it remained the strongest factor.

Source: *New York Times*

#### **JURY AWARDS \$11.2 MILLION TO MAN HIT BY CARGO BOX**

A jury in New Jersey has awarded \$11.2 million to a 42 year-old man for injuries he suffered when a cargo container fell off a truck and onto the driver's side of his car. Piscataway-based Hapag-Lloyd America Corp., which supplied the cargo container involved in the January 2004 accident, was sued. The incident occurred on a state highway in New Jersey. The State Superior Court jury awarded the plaintiff \$8 million for pain and suffering, \$150,000 for hospital expenses and \$1.1 million for lost wages. His wife also received another \$2 million for lost services. The plaintiff is no longer able to work his job as a union plumber because of the injuries he suffered. The plaintiff, who once competed in triathlon events, now needs a cane to walk.

#### **WOMAN SHOT IN WAL-MART PARKING LOT WINS HER LAWSUIT**

A state court jury in Georgia recently awarded \$4.2 million to Katoria Lee, who was shot during a 2001 carjacking in the Riverdale Wal-Mart parking lot. The verdict was returned against both the retail giant and the man convicted of doing the shooting. Ms. Lee, an employee at the Hapeville Ford Motor Co. plant, stopped by the Riverdale Wal-Mart after work at about 1:30 a.m. back in March 2001, to pick up party supplies. Her 9-year-old son was asleep inside her Ford Explorer, which she

parked under a light pole close to the front entrance. When Ms. Lee left the store, a man waiting in the parking lot demanded her keys. Ms. Lee dropped the keys and ran, but the man shot her in the back with a .380-caliber handgun. Ms. Lee was able to get her son out of the SUV before the shooter drove away.

The lawsuit was based on a lack of security at the shopping center. A list of 398 visits by police to that store for various crimes in the 20 months leading up to this shooting was shown to the jury. All of that should have been sufficient to put Wal-Mart on notice that crimes were being committed at that location. Wal-Mart had a policy to have security patrols but chose not to put them into place at that store. Interestingly, Wal-Mart officials destroyed a surveillance videotape of the attack after the shooter was convicted in a separate criminal trial.

Source: *Atlanta Journal Constitution*

## **XIV. WORKPLACE HAZARDS**

---

#### **ACCESS SETTLEMENT IN KMART LAWSUIT**

A federal judge in Denver has approved a \$16.25 million settlement and a \$60 million revamp of Kmart stores nationwide to make them more accessible to people with disabilities. In the largest disability-access settlement in U.S. history, Kmart pledged to improve access to all 1,420 of its stores within the next seven years. Carrie Ann Lucas, who is deaf and legally blind, sued Kmart for better access in 1999. She has done a great service for hundreds of thousands of persons who have an impairment that restricts their mobility.

Ms. Lucas, 34, who has advanced neuromuscular disease, has been a Kmart shopper since she was a child. Her dispute with the national discount retailer began when she found that a Kmart store near her home didn't have

the necessary handicapped van parking space and had aisles that were too narrow and checkout lines that were impassible for wheelchair- and scooter-using customers. Ms. Lucas became the lead plaintiff in the lawsuit that became a nationwide class action against Kmart. The suit demanded that Kmart improve accessibility to its stores, including making shopping racks and appliances easy to reach.

As a result of the settlement, Kmart has formed a "settlement task force" to ensure the terms are carried out. The retailer has hired two architects to oversee the seven-year renovation. The company said it will bring all its stores into compliance with federal accessibility regulations, will ensure that its aisles are wide enough to accommodate wheelchairs, that its rest rooms and fitting rooms will be accessible and that one accessible checkout lane is open at all times. Compliance will be monitored using "mystery shoppers" as well as customer feedback through the Internet and a toll-free hotline. This is a very good settlement that will benefit a tremendous number of persons nationwide.

Source: *Denver Post*

### **CANCER RISK FROM INDUSTRIAL CHEMICAL RISES**

After a detailed study of the most widespread industrial contaminant in U.S. drinking water, the National Research Council has reported that evidence is growing stronger that the chemical causes cancer as well as other human health problems. The lengthy report clears a path for federal regulators to formally raise the risk assessment of trichloroethylene, known as TCE, a step that has been tied up by infighting between scientists at the Environmental Protection Agency and the Defense Department.

In 2001 the EPA attempted to issue a risk assessment that found TCE to be two to 40 times more carcinogenic than previously thought. But that action was opposed by the Defense Department,

the Energy Department and NASA—a rather strange position for that group to take. It is significant that the Pentagon has 1,400 properties contaminated with TCE. Already, some EPA offices are forcing tougher cleanups based on evidence that the chemical poses a greater-than-expected cancer risk. While that's good news, the question is, will those efforts get derailed?

The TCE issue was sent by the Bush Administration to the National Research Council for study. The excuse given by the White House was that the EPA had overblown the risks. The new report, released by the National Research Council, clearly does not support that position. "The committee found that the evidence on carcinogenic risk and other health hazards from exposure to trichloroethylene has strengthened since 2001," the report said. Federal agencies were urged by the report to complete their assessment of TCE risks as soon as possible using "currently available data." This means that the federal government should not wait for additional basic research, as suggested by the Defense Department, but instead should get on with the work at hand.

Stronger cleanup standards and lower limits for the chemical in drinking water are being demanded. Currently, the EPA allows 5 parts per billion. If the risk assessment sidetracked in 2001 is adopted that could be lowered to as little as 1 part per billion for drinking water. Congress should take this matter seriously and take appropriate action.

The report's authors told Congress that they did not think the EPA should throw out its 2001 draft risk assessment and start over. Instead, they believe that the TCE analysis can be completed within six months to a year. Dr. Gina Solomon, an environmental health expert who served on a scientific advisory board that reviewed the original assessment, believes that the new report could have a profound effect on the issue. She calls it "a very strong statement, a ringing endorsement of the EPA's 2001 draft risk assessment." Dr. Solomon, who is an associate clinical

professor of medicine at UC San Francisco and a staff scientist at the Natural Resources Defense Council, said the report also rejected a key position of the chemical industry and Pentagon environmental experts that TCE was not dangerous at low levels of exposure. The National Research Council wants Federal regulators to stick with the current scientific model that the cancer risk posed by TCE is proportional to the level of exposure.

In its report, the Council found the evidence of TCE risk was greatest for kidney cancer, but not as high for liver cancer. It did not study other diseases that could be connected, however, including leukemia. The report did find merit in the Pentagon's criticism of EPA methodology on epidemiology, which is the study of how disease is distributed in the population. It called for a new survey of prior research. The report from the National Research Council has been awaited by communities exposed to TCE across the country. It shouldn't be ignored by the Bush Administration.

Source: *Los Angeles Times*

### **WORKERS SHOULDN'T BE CHEATED OUT OF OVERTIME PAY**

Since 2000, the number of wage-related cases filed in federal courts has doubled. Most of those cases involve overtime claims. The Fair Labor Standards Act was passed in 1938. It required payment of a minimum wage to employees and provided for overtime pay when an employee worked for more than 40 hours. Traditionally, all workers were eligible for time-and-a-half overtime, except for those in the executive, administrative and professional categories. A 2004 change in the Act sought to define more clearly those exempt categories by using new job descriptions such as "exercises discretionary and independent judgment."

Last year, State Farm Mutual Automobile Insurance Co. reached a \$135 million settlement with claims adjusters, who said they had not received overtime pay, in violation of

California law. Allstate Insurance Co. agreed to pay \$120 million in a similar suit last year in California. In both cases, adjusters said they have been wrongly classified as exempt. In another case involving American Intercontinental University Online, the company violated the law when workers were told that they would not be paid for working more than 40 hours. American Intercontinental's workplace was described as a "high-tech sweatshop." People worked five to 15 hours per week on the job for which they were not paid. Workers were told they could only get overtime if they met quotas in recruiting students.

The failure of some large corporations to pay overtime to employees has clearly resulted in a significant increase in this sort of litigation. There have been a good number of federal class action lawsuits filed claiming overtime-pay abuses. The FLSA—passed in 1938—was designed in part to require corporations and other employers to pay overtime wages. Traditionally, all workers were eligible for time-and-a-half overtime, except for those in the executive, administrative and professional categories. Many companies use the practice of labeling employees as **executives** in an attempt to avoid paying overtime under the FLSA. That simply won't work under the law.

Source: *Chicago Tribune*

### **DOLLAR GENERAL MANAGERS SUE DOLLAR GENERAL**

Approximately twenty-five hundred former and current Dollar General store managers have filed a joint lawsuit in the United States District Court for the Northern District of Alabama alleging that the company intentionally misclassified them as "executives" in order to avoid paying the store managers overtime pay, a violation of the Fair Labor Standards Act (FLSA). A second lawsuit was filed in the same United States Federal Court by a single Plaintiff setting out the same claims. That suit seeks certification as a "collective action" for all persons seeking overtime

pay for Dollar General store managers. Each of these lawsuits is being filed in the Federal Court in Tuscaloosa, Alabama, because the Federal Court system has established a single "Multi District Litigation" Court to handle all of these FLSA claims against Dollar General. The Federal Court system often establishes an "MDL" Court in order to efficiently manage multiple lawsuits filed against a single Defendant.

A similar—but unrelated—lawsuit by store managers employed by Family Dollar Stores was tried to a jury verdict last April in Tuscaloosa and resulted in a \$38 Million verdict for the store managers. The "executive exemption" under the FLSA allow companies to pay store managers a set salary and avoid paying them overtime in the event a store manager works more than forty hours. However, the exemption also mandates that managers must actually do management duties as their "primary duty" as opposed to "manual labor." It's very clear that store managers of the discount retail stores like Dollar General and Family Dollar don't qualify as executives.

The complaint in the Dollar General case alleges that the company forced the managers to work from sixty to eighty hours of manual labor a week as their "primary duty" and that they spent as little as 10% of their actual time performing management duties, which results in "free labor" to the companies. Labor cost is reduced, the companies' highest expense, resulting in increased profits, all on the backs of the store managers. The FLSA is specifically designed to prevent this very scheme where Dollar General, Family Dollar and other companies are trying to cheat working folks out of a fair day's pay for a fair day's work. The companies all claim that their store managers "primary duty" is management and that they qualify as "executives" under the exemption. In the Family Dollar case, which is the only case tried to a verdict thus far, the jury rejected the company's "executive defense." Dee Miles and Roman Shaul from our firm will handle the case for the plaintiffs in the cases against Dollar General.

### **OSHA ASKED TO HELP WORKERS**

It appears that federal officials have done little to protect popcorn workers and others exposed to butter flavorings. A group of scientists, doctors and union leaders have called for the federal government to shield workers from a potentially lethal lung disease. They asked for the publication of an unreleased Environmental Protection Agency study that might provide insight into whether consumers who eat microwave popcorn could be at risk. The International Brotherhood of Teamsters and the United Food and Commercial Workers International petitioned the U.S. Occupational Safety and Health Administration to take an emergency action to limit the amount of diacetyl, a chemical found in butter flavoring, in workplace air. LaMont Byrd, director of safety and health for the Teamsters, says:

*We cannot expect employers to voluntarily take the necessary steps to protect exposed workers.*

A group of 42 doctors and scientists, many experts in occupational health and some former OSHA officials, have also sent a letter to the Secretary of Labor calling for immediate action. "This is a tragic example of the failure of the public-health regulatory system," according to David Michaels, the leader of that effort and director of George Washington University's Project on Scientific Knowledge and Public Policy. He says that evidence is abundant that flavorings lead to illness, even death, but the government has left any protection in the hands of industry. In a typical response, OSHA, the agency that governs worker safety, issued a written statement that said it is evaluating whether specific protections to reduce exposure are in order.

A popcorn study by EPA is going through internal review and will be submitted for publication as soon as this fall. But when it is released, apparently, it won't say anything about exposure to consumers and what, if any, harm it causes. The study is looking only at how much of the chemical is released when

someone pops a bag. Since it isn't a health effects study. It isn't going to tell us anything. Harm caused by butter flavoring first became a significant concern nationally in 2002, when federal health officials issued a warning about a potential link between diacetyl and fixed-obstructive lung disease in popcorn plant workers. The National Institute for Occupational Safety and Health investigation of the link included an analysis of worker health and air quality at Marion's ConAgra Snack Foods plant. In Marion, the institute found an abnormally high number of people with respiratory problems including lung disease similar to that found in other popcorn workers. The agency recommended that ConAgra make changes to protect its employees. ConAgra, based in Omaha, Neb., is the world leader in microwave-popcorn production.

Several workers at its Marion plant filed suit against the manufacturer of the butter flavoring, saying it sickened them. Their case is scheduled for trial in Cincinnati this month. Workers in the popcorn plants may not be the only potential victims. According to Jackie Nowell, director of occupational health and safety for the Union of Food and Commercial Workers, the health and safety of all people who make any product with butter flavoring such as frosting, cookies, cheese, snacks, and dog food, should be considered. Ms. Nowell added that doctors continue to identify new cases of lung disease in popcorn workers.

Source: Associated Press

### **JURY RETURNS \$10 MILLION VERDICT IN ASBESTOS SUIT**

Buddy Jones, who died from lung cancer at age 60, had worked at Northrop Grumman Newport News for four years. He came home every work day covered in asbestos dust from his job making gaskets and sealing pumps. A wrongful death lawsuit was filed by his widow. A Newport News jury awarded Ms. Jones \$10.4 million in the

suit against three companies that manufactured the shipbuilding materials. The verdict is considered a landmark because a third of the judgment will come from a company, John Crane Inc., that made sealing products with asbestos. To date, that company hasn't agreed to settle any asbestos cases. However, the company says it will appeal this verdict.

Thousands of shipyard workers were exposed to asbestos before the shipyard stopped using the fibrous mineral in the mid-1980s. John Crane is a unit of British manufacturer Smiths Group plc. The company stopped making products with asbestos in the 1980s. The judgment is split with two other companies: Denver-based Johns Manville Corp. - a unit of Berkshire Hathaway that makes roofing, insulation and other industrial materials - and Garlock Sealing Technologies, a Palmyra, New York, unit of EnPro Industries Inc. in Charlotte, North Carolina. Mesothelioma - caused almost exclusively by asbestos—can lie dormant for 20 to 50 years. Consequently, some shipyard workers who are Buddy Jones' age are just realizing the effects of their asbestos exposure.

One doctor, John C. Maddox, who practices in Newport News, testified at the trial of the Jones case that he has seen about 500 mesothelioma patients in his practice at Riverside Regional Medical Center. After Jones' four years at the shipyard, he went back to college and became a computer programmer in Richmond, Virginia. When he suddenly got sick in late 2004, his doctor thought it was pneumonia. Then he found the tumors in Jones' lungs. The Joneses had never heard of mesothelioma and didn't believe four years of exposure in the 1960s could be affecting him years later. He died within a year of his diagnosis. The disease almost always kills in less than 24 months. When Jones went to work at the shipyard in 1963, asbestos shavings littered the floor and floated in the air, sifting down through metal grates from where workers chiseled and filed above him. He never gave the dust a second thought - not even when

asbestos became synonymous with lung disease in later decades. He liked his job despite the 12-hour shifts, according to his widow. He had followed all the safety precautions, including wearing safety goggles, steel-toed boots and a hard hat. None of the workers wore dust masks because they didn't realize that a hazard existed.

### **OSHA PROPOSES \$143,000 IN FINES FOR ALABAMA PLANT**

The federal government has proposed \$143,000 in fines for Gold Kist for allegedly exposing workers to serious and repeated safety hazards at its Russellville, Alabama, poultry processing plant. In announcing the fines, Roberto Sanchez, the Birmingham-area director for the Occupational Safety and Health Administration, stated:

*When employers shirk their responsibility to keep workplaces free of hazards, the results can be tragic for workers and their families.*

Gold Kist was cited for 21 serious violations totaling \$90,000 in fines for unsafe floor conditions, inadequate personal protective equipment and insufficient machine guarding. The company also received two repeat citations, with a fine of \$50,000, for not keeping conveyor belt work areas free from fall hazards and other unsafe conditions. OSHA issued one other citation, with a fine of \$3,000, for not complying with required record-keeping procedures.

Source: Associated Press

### **THREE DEATHS INVESTIGATED BY OSHA**

The Occupational Safety and Health Administration has issued three citations—two classified as “serious” and the other as “willful”—against a bridge-painting company that lost three employees to falls this year. The citations stem from an incident in February of this year in which an employee of Thomas Industrial Coatings, Inc., fell to

his death in the Mississippi River. The worker fell from a temporary work platform on the Jefferson Barracks Bridge in south St. Louis County. In addition, the local OSHA office is currently investigating the deaths of two other company employees. Those workers died in falls from the Lexington Avenue bridge in northeast Kansas City that occurred in May and July respectively.

Source: *St. Louis Post-Dispatch*

## XV. TRANSPORTATION

### **FEDERAL AVIATION ACT DOES NOT PREEMPT ALL AVIATION SAFETY ISSUE**

A U.S. district court has correctly ruled that the Federal Aviation Act does not preempt the field of aviation safety. A four-passenger plane struck a bird, causing structural damage to the aircraft, and the plane crashed. The pilot and an occupant were killed. Survivors of the plane's occupants sued the manufacturer of the aircraft. It was alleged that the defendant failed to warn of the danger posed by the structural damage that can result from bird strikes. The suit also claimed defective design and manufacture of the aircraft. The defendant contended that the Federal Aviation Act and its amendments, 49 U.S.C. §§ 40101 et seq., preempt all state law claims related to aviation safety.

Denying the motion, the court examined whether the FAA constitutes a fatal preemption of state law claims. The court held that the defendant's argument that case law supports such a conclusion was misguided. It was noted by the court that neither the U.S. Supreme Court nor the Court of Appeals for the Fifth Circuit has ever made such a broad finding. While some courts have made narrow preemption findings, the court observed, those decisions related specifically to issues such as noise control and the adequacy of warnings given to commercial passengers, not to the entire field of aviation safety.

Similarly, the court found that legisla-

tive history does not support the conclusion that Congress intended the FAA to entirely preempt state tort claims. While there is evidence that the FAA was intended to federally regulate aviation safety, that intent does not extend to completely precluding suits under state tort law. The defendant contended that the three-step certification process for new aircraft demonstrates Congress's intent to completely preempt state defective design claims. The court rejected that argument, holding the regulations requiring the certification do not set forth specific design or safety standards, just broad minimum requirements. The lack of specific regulations concerning bird strike standards for the model of aircraft at issue involved in the case suggest a similar conclusion, the court held. William O'Neil Angelley, a New York lawyer, represented the plaintiffs in the case.

Source: *ATLA Law Reporter*

### **SAFETY BOARD SAYS ETHAN ALLEN CAPSIZING CAUSED BY TOO MANY PASSENGERS**

The National Transportation Safety Board has determined that the probable cause of the capsizing of the Ethan Allen on New York's Lake George last October was the vessel's insufficient stability to resist the combined forces of a passing wave or waves, a sharp turn, and the resulting involuntary shift of passengers to the port side of the vessel. The vessel's stability was insufficient because it carried 48 persons where post-accident stability calculations demonstrated that it should have been permitted to carry only 14 passengers, according to the report. Contributing to the cause of the accident was the failure to reassess the vessel's stability after it had been modified because there was no clear requirement to do so, NTSB added.

On October 2, 2005, the Ethan Allen, a tour vessel carrying 47 passengers and one crewmember capsized in Lake George, New York. As a result of the accident, 20 passengers died. NTSB Acting Chairman Mark V. Rosenker stated:

*This tragic accident highlights the need for clear requirements to verify a vessel's stability after any modifications are made to the vessel.*

In 1964, the Ethan Allen, a 40-foot fiberglass excursion vessel operating under a different name, was certified by the U.S. Coast Guard to carry 48 passengers and two crewmembers. In 1979, the boat was purchased by Shoreline Cruises, Inc. and relocated from Connecticut to New York where it came under the jurisdiction of the state. New York state officials established the same load restrictions for the vessel as the U.S. Coast Guard. In 1989, an all-wood canopy with Plexiglas windows was installed on the Ethan Allen. The state's file on the vessel contains no record of inspections and/or stability assessments relating to modifications to the boat's canopy between 1979 and 1991. As a result of its investigation the NTSB made several recommendations:

- That the U.S. Coast Guard provide guidance to the states on standards for and assessment stability of small passenger vessels.
- That New York State address safety deficiencies identified in the investigation and issue technical guidance to vessel owners on the inspection requirements for modified vessels, stability assessment and criteria, means for determining maximum safe load conditions, drug and alcohol testing, manning, and safety briefings.
- It further recommended that the state discontinue the use of capacity plate data associated with the U.S. Coast Guard's non-commercial boating standards for determining passenger loading on public vessels that carry more than six passengers and adopt the Coast Guard small passenger vessel inspection standards.

A synopsis of the board's report is available on the Board's website, <http://www.nts.gov/publicn/2006/MAR0603.htm>. The board's full report will be available at a later date.

### **JURY AWARDS DAMAGES IN CARBON MONOXIDE DEATH CASE**

Relatives of a Joplin couple killed by carbon monoxide at the Lake of the Ozarks have been awarded \$11 million by a St. Louis jury. Lois and Randy Anderson and two friends died in 1999, when a corroded exhaust pipe on a 40-foot cabin cruiser's generator leaked carbon monoxide into the cabin. The Andersons family sued Kohler Co., the generator's manufacturer and an Oklahoma marina owner. Relatives of the other victims had settled their lawsuits prior to the trial.

Bratco Inc., the owner of an Oklahoma marina had worked on the boat before it was moved to the Lake of the Ozarks. It was proved that they should have discovered the problem at that time. Bratco settled the case minutes before the jury came back with a verdict. Jurors awarded \$6.5 million to relatives for each death, but that amount will be reduced by fault assigned to the Andersons under that state's law and the earlier settlements in the case. In 2003, a different St. Louis jury awarded the family members more than \$500,000 in compensatory damages and \$25 million in punitive damages. However the trial judge in that case ordered a new trial which negated the verdict. The new trial resulted in the \$11 million verdict.

### **EMPLOYER RESPONSIBLE IN DRUNK DRIVER CASE**

Two innocent people were stopped at a red light when their car was struck from behind by an electric company vehicle driven by an employee, who was intoxicated. The car was then propelled through the intersection, striking a tractor-trailer that was crossing the intersection. One of the victims, a 24-year-old female, who was on the way home from the hospital, where she had undergone breast cancer surgery, suffered a bulging disk and annular tear at L5-S1, requiring a laminotomy and discectomy. She also suffered complications from her earlier breast cancer operation, requiring multiple surgeries

to treat. This victim incurred about \$140,000 in medical expenses. Since this victim was not working at the time of the incident, she didn't claim lost income.

The other victim, a 52-year-old male, suffered back, leg and ankle injuries. He incurred about \$7,000 in medical costs. This man, a real estate agent earning between \$50,000 and \$100,000 annually, was out of work for about six months and lost income of about \$56,100. The two victims sued the driver of the vehicle and the electric company. The employee of the electric company was driving while intoxicated. A breath alcohol analysis taken two hours after the collision showed the driver's blood alcohol content at .09, which is above the legal limit in Alabama. The claim against the electric company was based on respondeat superior liability. The defendants claimed that the driver had consumed only two beers, was not intoxicated and simply took his eyes off the road to reach for his cell phone, which he claimed had fallen to the floorboard of the vehicle.

After hearing the evidence, the jury awarded the plaintiffs a total of \$2.67 million, including \$2 million in punitive damages. The parties settled after trial for about \$2.21 million, with the electric company contributing the entire amount. The female victim received \$1.76 million and the male victim received \$441,000 from the settlement. Andrew T. Citrin, a very good lawyer from Daphne, Alabama, represented the plaintiffs and did an outstanding job for his clients.

### **TEXAS BUS FIRE IS FOCUS OF SAFETY HEARINGS**

You will recall the bus fire that occurred last year near Wilmer, Texas, that killed 23 nursing home residents during the hurricane evacuation. Investigators studying that incident have found that such fires are far more frequent than federal records indicate and that regulation at best is spotty. The National Transportation Safety Board

held two days of hearings into the Wilmer fire last month. One concern is that buses are becoming more vulnerable for fires because newer ones have been built with flammable materials like fiberglass and plastic instead of metal. Another concern is that the magnitude of the problem may be grossly understated. It's significant that these fires are not reported as transportation accidents. As a result, they don't get into any kind of national database.

According to the *New York Times*, one bus operator that started counting fires in its fleet after the Wilmer accident has recorded 50 fires in the last year. As you may recall, the bus that is the subject of the hearings was carrying nursing home residents from Bellaire, Texas, out of the expected path of Hurricane Rita. After 14 hours on the road, bearings in the right rear wheel overheated, which started the fire. The bus pulled to the side of Interstate 45. An interesting question is whether the bus driver who was involved spoke English well enough to cope with the situation. Reports at the time emphasized that oxygen canisters carried onboard for some passengers made the fire worse, but it now appears that the fire would have been severe even without the oxygen. The limited mobility of the elderly passengers clearly contributed to the death toll. Fortunately, in most bus fires, passengers are able to get out safely if they aren't incapacitated for some reason.

Among the issues the board considered is whether the standard for emergency exits is sufficient. Most American buses have only one door. Windows that can be pushed out in an emergency require 60 pounds of force to open, and they must be held open while people escape. Each bus must carry a five-pound fire extinguisher, which is not adequate for a bus fire. The standard should be updated since buses are now being built using more flammable materials.

It should be noted that in the months before the fire at issue, which was on September 23, 2005, the State of Texas had inspected the bus operator and the

bus. Numerous problems were found at that time, but the bus remained in service and available for use. The Federal Motor Carrier Safety Administration also conducted an inspection, but it's possible that they might have been unaware of the state's findings. In any event, this bus should not have been in service.

Source: *New York Times*

### **THE RISKS OF BACKOVER DEATHS OF CHILDREN MUST BE ADDRESSED**

Since 1994, at least 500 children have died from being backed over by a vehicle. The safety group Kids and Cars estimates two are killed each week. Safety advocates are working to reduce backover injuries and deaths. While that goal is shared by many, there's disagreement about how best to reach it. Some advocates are pushing for rear-view cameras with video screens in all cars and trucks. But others question the effectiveness of cameras and prefer to focus on education.

Legislation pending in Congress would require the National Highway Traffic Safety Administration to set a standard for rear visibility that all vehicles must meet. Larger rear-view mirrors, rear sensors that sound a warning beep or cameras are among the options. Because the number of backover fatalities is steadily increasing, the problem can't be ignored. It is estimated by Kids & Cars that 50 children are backed over every week. In about 70% of cases, the child is backed over by a parent, grandparent, or neighbor. NHTSA will have to include these non-traffic deaths in its federal fatality database by 2009. It is believed by safety advocates that the number of deaths and serious injuries are going to be much higher than even NHTSA expects.

Studies of rear cameras conducted by Consumer's Union about three years ago showed they were "extremely effective" for preventing backovers, according to senior product safety counsel Sally Greenberg. Ms. Greenberg believes that education is "not nearly as effective as making design changes." She says it's

much safer to design the danger out of the products. Her belief is that the use of cameras is a technology whose "time has come." NHTSA expects to complete work on a study of backover technology within the next few months. The study will look at how effective the systems are and how they are used by drivers. I believe that cameras and perhaps beepers should be requested by NHTSA on all vehicles, including passenger cars. However, education of drivers must also be a part of any safety program.

Source: *USA Today*

### **TRAFFIC DEATHS ON RISE IN THE U.S.**

Traffic deaths in the United States have reached their highest levels since 1990. The increase in fatalities was reported by the National Highway Traffic Safety Administration. It is disturbing to read that 43,443 people were killed on the highways last year in this country, up 1.4% from 42,836 in 2004. It was the highest number of fatalities in a single year since 1990, when 44,599 people were killed. The fatality rate also grew slightly to 1.47 deaths per 100 million miles traveled, an increase from 1.45 in 2004.

## **XVI. NURSING HOME UPDATE**

### **BAD NURSING HOME CARE IS COMMON**

Despite what most people believe, poor treatment and care of nursing home residents is common throughout the country. An analysis of state inspections for some 16,000 homes nationwide found that not-for-profit nursing homes generally provide better care than those operated for profit. Also, independent nursing homes, according to the study, tend to provide better care than those managed by companies that run numerous nursing homes. *Consumer Reports*, which is published by Consumers Union, says that those con-

clusions are based on its evaluation of recent state inspection reports for the nursing homes. A grant from the Commonwealth Fund was used to compile a list of the facilities in each state that rank in the best or worst 10% on at least two indicators of quality. Researchers reviewed the three most recent inspection reports for each home.

Only a fraction of nursing homes, regardless of whether they were a for-profit or non-profit, met *Consumer Reports'* standards for a quality nursing home. With for-profits, only about 2% were classified as likely to provide good care. The non-profits fared a little better at 7.3%. One reason the independently owned facilities might do better than those run by a chain is that they tend to have more staff. The magazine found they also are more likely to use registered nurses. *Consumer Reports* issued several recommendations for family members who want to improve their prospects for finding a good nursing home. Those recommendations include:

- Get a list of local facilities from your nearest agency on aging, as well as contact information for the local ombudsman, a government official whose job is to investigate nursing home complaints and advocate for residents.
- Check the ownership. A resident's chances of getting good care are better at an independent, not-for-profit home.
- Don't depend on the federal website at the Centers for Medicare and Medicaid Services. "Our comparison of the information on that site and the state inspection reports on which it is based show that you'll probably get an incomplete and possibly misleading picture."
- Visit the homes under consideration unannounced. Drop in between 9:30 and 10 a.m., for example, to see how many people are still in bed. Homes with too few staff members don't get people out of bed until later in the day, if at all. Also visit at dinner time. If 75% of the residents are eating in

their rooms, that's not a good sign.

Our experience in nursing home litigation has been that the worst nursing homes are in fact those run by large chain operations. Those facilities are generally understaffed and often lack real good quality control systems. The advent of binding arbitration in nursing home admission forms has resulted in even worse care of residents in Alabama. When there is no fear of being held accountable in court for wrongdoing, the level of care and attention to residents drops significantly.

#### **FORCED ARBITRATION IN ALABAMA NURSING HOMES IS BAD FOR RESIDENTS**

It's most unfortunate that nursing homes operating in Alabama don't have to worry about the level of care they provide for their residents. Since the Alabama Supreme Court has authorized the use of mandatory, binding arbitration clauses in nursing home admission forms, the operators have no fear of having to defend bad conduct on substandard care in a court of law. In my opinion, that has resulted in an even worse situation for nursing home residents in our state. Before the court handed down its arbitration ruling, the courts were at least open to victims. The nursing home operators understand fully how arbitration shields them from liability as a practical matter in all situations. Nursing home residents are being forced into accepting arbitration as a condition of admission to an Alabama nursing home. That is wrong and I don't really see how it can be justified.

## **XVII. HEALTHCARE ISSUES**

#### **WARNING IS ISSUED ON DRUG FOR LEUKEMIA**

According to a recent study, Gleevec, the pill that transformed cancer treatments by offering an easy way to aim at

a deadly type of leukemia, may cause serious heart damage. Researchers found evidence that the treatment caused heart failure in 10 patients who took Gleevec, which is made by Novartis, the Swiss drug maker. However, the researchers cautioned that patients should not stop taking the drug, known generically as imatinib, but instead should be watched closely for heart damage. Other drugs in the same class, tyrosine kinase inhibitors, may also damage the heart, the researchers reported in the August issue of the journal *Nature Medicine*. Dr. Thomas Force, who led the study, said in a statement:

*Gleevec is a wonderful drug, and patients with these diseases need to be on it. We're trying to call attention to the fact that Gleevec and other similar drugs coming along could have significant side effects on the heart and clinicians need to be aware of this. It's a potential problem because the number of targeted agents is growing rapidly.*

When Gleevec came to the market in 2001, it made headlines because it stopped a difficult type of cancer, chronic myelogenous leukemia, or C.M.L., in most patients. Studies show it keeps 80% to 90% of C.M.L. patients cancer-free for at least five years. Unusually, the patients die in about half of the 4,600 new C.M.L. cases diagnosed each year. Gleevec, sold in Europe as Glivec, is also approved for gastrointestinal stromal tumors, a rare type of stomach cancer. It stops the activity of a protein called Bcr-Abl, which causes the out-of-control behavior of white blood cells in C.M.L.

Source: *New York Times*

#### **THREE COMPANIES ARE TOLD TO STOP MAKING UNAPPROVED DRUGS**

The Food and Drug Administration has told three companies to stop mass-producing and distributing unapproved medicines to treat asthma, bronchitis

and other breathing disorders. The companies, who said they were working under a practice known as "compounding" in which pharmacists customize formulations for specific patients, sold thousands of doses of inhaled drugs nationwide. The FDA allows compounding if a doctor prescribes something that meets a medical need and is unavailable in an approved product. A pharmacist, for example, could crush a tablet and mix it into a liquid for someone with trouble swallowing pills, or provide a version without a preservative that could cause an allergic reaction. The three companies - Rotech Healthcare Inc, CCS Medical and Reliant Pharmacy Services - produced large quantities of unapproved drugs that did not provide benefits over approved medicines, according to the FDA. A statement issued by the FDA states:

*Compounded inhalation drugs are not reviewed by the FDA for safety and effectiveness, often are not produced according to good drug manufacturing practice, and typically are not sterile. This may expose patients to unnecessary risk.*

The FDA said the products were inhaled drugs for treating asthma, emphysema, bronchitis and cystic fibrosis. Each of the conditions has FDA-approved treatments. The medicines were distributed through mail order, websites and companies that sold devices used to inhale the medicines. The FDA has urged patients to talk with their doctors and pharmacists to make sure they did not unknowingly receive some of the unapproved products.

Source: *Reuters*

#### **PROBE FAULTS PRESCRIPTION DRUG DIRECTORY**

A federal prescription drug directory fails to list more than 9,000 medications but catalogs tens of thousands more that are no longer on the market, according to a recent report. The Food and Drug Administration directory is

neither complete nor accurate, according to the Inspector General of the Department of Health and Human Services. The omissions and errors limit the usefulness of the directory, which is meant to help the FDA and other government agencies in handling recalls, identifying medication errors and controlling imports, the IG's report said. Interestingly, the FDA generally agrees with the report. The agency says it is working to fix the problems the report identified. The FDA says it will make it easier for companies to submit listing information. Federal law requires pharmaceutical companies to list with the FDA the prescription drugs they make. As of February 2005, the FDA's National Drug Code Directory listed 123,856 prescription drug products.

However, the review found it missed about 9,200 prescription drugs, while continuing to include about 34,200 other drugs either no longer sold or listed in error. Most of the omissions and inaccuracies are related to the failure of drug companies to comply with mandatory listing requirements, the report found. While unlisted drugs are considered "misbranded" as of August 2005, the FDA had not subjected any manufacturer to criminal or regulatory action solely because it failed to list a product, according to the report. The directory has more than tripled in size since 1990, when it listed just 39,000 prescription drugs.

Source: *Associated Press*

### **FEMA TRAILERS MADE KATRINA VICTIMS SICK**

It has been reported that the FEMA donated trailers could be making Hurricane Katrina victims sick with the smell of toxic formaldehyde. Formaldehyde is a human carcinogen, and has been found in concentrations as high as 0.34 parts per million in FEMA trailers since April. In some cases, the levels of formaldehyde are so high they equal what a professional embalmer would be exposed to on the job. The residents complain of ongoing health problems from headaches and runny noses, to res-

piratory problems and nosebleeds. This is bad news and it comes almost one year after Katrina struck the Gulf Coast.

A class action lawsuit has been filed in Louisiana against the federal government and trailer manufacturers alleging that "the temporary housing is unsafe and presents a clear and present danger to the health and well being of plaintiffs and their families." Even with test results to prove the high levels of formaldehyde, FEMA guarantees the safety of the trailers and suggests that residents should simply ventilate their trailer. But with no indoor quality air standards, the Sierra Club is making a push for Congress to create such standards through the EPA and the National Institute for Occupational Safety (NIOSH).

An industrial hygienist in Washington has studied the formaldehyde issue and suggests that the above average formaldehyde readings in FEMA trailers could be a result of the rush to manufacture the trailers after Katrina's devastation. The plywood used in the trailers contains formaldehyde, but usually the wood is baked at 130 degrees to rid it of glues and the toxic smell of formaldehyde. Researchers believe that the baking process never occurred because the trailers were made so quickly. Also, the increasing smell of formaldehyde could be attributed in part to the high heat and humidity of the Gulf Coast.

One Mississippi couple was forced to get out of their trailer after repeated health problems and the health problems of their pet cockatiel. The couple complained to FEMA about their "formaldehyde" trailer, and received another trailer covered in mold. After the second replacement, the couple lived in their truck and then spent \$50,000 in savings to buy a fifth-wheel trailer, money that was going to be used on a new home. This is just another horror story related to the problems caused in the post-Katrina era.

Source: *MSNBC.com*

## **XVIII. ENVIRONMENTAL CONCERNS**

---

### **ENVIRONMENTAL WORKING GROUP**

All of our readers who are interested in protecting the environment should become familiar with the Environmental Working Group (EWG), a non-profit organization, based in Washington D.C. Presently, EWG is not well known to the public, which is understandable. However, they do good work. Environmental investigations have been a specialty at EWG since it was created in 1993. A team of scientists, engineers, policy experts, lawyers and computer programmers at EWG pores over government data, legal documents, scientific studies and its own laboratory tests to expose threats to public health and the environment. The EWG does very good and useful work. Importantly, EWG works to find solutions. Research by EWG brings to light unsettling facts that all citizens have a right to know. This gets the attention of polluters and their lobbyists. It also rattles the cages of politicians and helps to shape policy. The good work of EWG persuades bureaucracies to rethink science and strengthen regulation. It provides practical information that can be used to protect families and communities. EWG investigations and interactive websites tend to make news and that gets the attention of the politicians. It also keeps the public informed.

Members of the EWG Board of Directors are: Kelsey Wirth of Cambridge, MA serves as Chair; David Baker, Community Against Pollution, Anniston, Alabama; Charlotte Brody, Commonweal, Bolinas, California; Sandy Buchanan, Ohio, Citizen Action, Cleveland, Ohio; Kenneth Cook, Environmental Working Group, Washington, DC; Drummond Pike, Tides Foundation/Tides Center, San Francisco, California; Cari Rudd, Washington, DC; and Joan Swift, Ketchum, Idaho. I encourage our readers to learn more about EWG and its work. You can go to

its website, [www.ewg.org](http://www.ewg.org) for additional information.

### **ALABAMA POWER WINS IN EPA SUIT**

A federal judge has ruled that Alabama Power Co. did not violate the law when it upgraded four old, coal-fired power plants. The U.S. Environmental Protection Agency sued Alabama Power over five plants in 1999, accusing the utility of illegally expanding and upgrading the plants without adding modern pollution controls. U.S. District Judge Virginia Hopkins ruled that the utility had complied with the Clean Air Act. The EPA is considering an appeal of the court's order.

Source: *Birmingham News*

### **PIPELINE CORROSION TESTS**

The recent corrosion problems that BP is experiencing with its Alaska pipelines has put in focus an important safety issue. Neither state nor federal regulators require any specific measures to find or limit corrosion on low-pressure oil pipelines like the one that caused BP to begin shutting off oil deliveries from the nation's biggest oil field. That loophole leaves pipeline operators to apply whatever anti-corrosion measures and corrosion-damage testing they want on what is estimated to be several thousand miles of low-pressure crude-oil pipeline in the USA. Corrosion is the biggest cause of pipeline leaks, according to government data. Corrosion forced BP to initially shut the Prudhoe Bay, Alaska, line, starting in early August. It now plans to replace 16 of 22 miles of pipeline. A BP spokesman acknowledges that the company's corrosion maintenance measures were inadequate.

The regulatory gap has prompted additional federal concern about pipeline safety. Representative John Dingell (D-MI) has called on Congress to apply maintenance laws for other types of lines to the low-pressure lines. He is asking for improvements in the law to be a top priority when Congress recon-

venes this month. Federal regulators, who already were working on rules for low-pressure pipelines, have also promised to accelerate the process because of BP.

Federal rules say that operators of high-pressure lines have to check them for internal corrosion every five years by sending a device called a "smart pig" through the lines. It measures the thickness of pipeline walls. The requirements don't apply to low-pressure lines. Concerns about corrosion appear to predate the latest incident and one in March on another part of BP's Prudhoe Bay line. There have been prior complaints over BP's actions. Concerns that BP was skimping on use of a chemical to prevent corrosion to hold down costs had been addressed in 1999. In an internal 2004 survey, posted on BP's website, employees raised concerns that corrosion problems might be overlooked.

Source: *USA Today*

## **XIX. TOBACCO LITIGATION UPDATE**

### **JUDGE FINDS THAT TOBACCO FIRMS DECEIVED SMOKERS**

A federal judge has ruled that the nation's top cigarette makers conspired for decades to mislead the public about the health hazards and addictive nature of smoking. Unfortunately, for taxpayers, the judge says there's not much she can do to make them pay. U.S. District Judge Gladys Kessler ruled for the government in its seven-year-old civil racketeering case against the tobacco industry. However, the judge rejected a bid by the Justice Department to make tobacco companies pay billions of dollars in remedies. After the nonjury trial, the judge said she was barred by an appeals court ruling that remedies must be designed to prevent future wrongdoing and not to punish bad behavior. As a result, no damages were awarded.

Judge Kessler rejected a government

proposal to impose fines on the industry if youth smoking rates fail to drop in the coming years, despite finding that the companies marketed to teens and lied about it. The judge did order the companies to stop labeling cigarettes as "low tar," "light," "ultra light" or "mild," saying they have used those terms to mislead consumers. In her order, Judge Kessler wrote:

*They distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting. They suppressed research. They destroyed documents. They manipulated the use of nicotine so as to increase and perpetuate addiction.*

This is the first time the tobacco industry has been found guilty of violating the racketeering statute and that's significant. The government filed the civil case under a 1970 racketeering law, commonly known as RICO, used primarily to prosecute mobsters in cases in which there had been a group effort to commit fraud. The tobacco companies—except for one defendant, Liggett Group Inc.—were ordered to pay the government's cost for pursuing the lawsuit, estimated by the Justice Department at more than \$140 million. The suit was filed in 1999 during the Clinton Administration. In a fashion, the Bush Administration pursued the case after receiving early criticism for openly discussing the case's perceived weaknesses and attempting unsuccessfully to settle it. It was quite evident where the Bush Administration landed in this case and it clearly wasn't on the side of the public.

The defendants in the federal lawsuit were: Philip Morris USA Inc. and its parent, Altria Group Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Corp.; British American Tobacco Ltd.; Lorillard Tobacco Co.; Liggett Group Inc.; Counsel for Tobacco Research-U.S.A.; and the now-defunct Tobacco Institute. The only cigarette maker excluded from Judge Kessler's ruling was discount manufacturer Liggett, which the judge credited with

coming forward in the 1990s to admit smoking causes cancer and for being helpful to state and federal officials pursuing claims against the tobacco industry.

Source: Associated Press

## XX. THE CONSUMER CORNER

---

### **ALABAMA TOP SECURITIES REGULATOR ISSUES LETTER OF CONCERN**

It's most unfortunate that senior citizens find themselves being targets for many companies which prey on them. It has been said that the current landscape facing senior investors is littered with slick schemes and broken dreams. Sadly, individuals from 60 and older—who make up 15% of the nation's population—account for 30% of fraud victims. With "Baby Boomers"—like Presidents Bush and Clinton—turning 60 this year, securities regulators are deeply concerned that investment fraud among seniors could grow significantly in coming years. As Alabama's top securities regulator, Joseph P. Borg, is on top of this area of concern. Joe has prepared a 525-word opinion article outlining the steps that state securities regulators nationwide are taking to ensure that Seniors' golden years are not tarnished by investment fraud. In his capacity as Alabama's top securities cop, Joe made this observation:

*Con artists have emerged from the side streets and back alleys to Main Street where older investors live. They know that retirees are living longer and are facing greater responsibility for their financial security. As a result, Seniors are being flooded with pitches for investment seminars; many of them promising a free meal along with "little or no risk and higher returns." Unfortunately, in many of the cases that we see, it's just the opposite: high*

*risk and no returns, just disastrous losses.*

*The current landscape facing Senior investors is littered with slick schemes and broken dreams. A survey by the North American Securities Administrators Association (NASAA) shows that nearly half of all investor complaints received by state securities regulators come from Seniors and one-third of enforcement actions taken by state securities regulators involves Senior investment fraud.*

I encourage all our readers to get a copy of Joe's opinion. Alabama citizens are fortunate to have a dedicated person such as Joe Borg heading up our state's regulatory agency. In turn, Joe is also blessed to have an outstanding staff working with him and that's good news for Alabama citizens. To learn more about how to protect yourself or a loved one from senior investment fraud, you can visit the online Senior Investor Resource Center at [http://www.nasaa.org/Investor\\_Education/Senior\\_Investor\\_Resource\\_Center](http://www.nasaa.org/Investor_Education/Senior_Investor_Resource_Center).

### **THE CONSUMER FEDERATION OF AMERICA**

The Consumer Federation of America (CFA) provides consumers a well-reasoned and articulate voice in decisions that affect their lives. Since 1968, CFA has been in the business of working for consumers. CFA's professional staff gathers facts, analyzes issues, and disseminates information to the public, policymakers, and to others in the consumer advocacy movement. The size and diversity of its membership—some 300 nonprofit organizations from throughout the nation with a combined membership exceeding 50 million people—enables CFA to speak for virtually all consumers. In particular, CFA looks out for those who have the greatest needs, especially the least affluent and that's extremely important in today's society.

CFA is an advocacy, research, education, and service organization. As an

advocacy group, it works to advance pro-consumer policy on a variety of issues before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. Its staff works with public officials to promote beneficial policies, to oppose harmful policies, and to ensure a balanced debate on important issues in which consumers have a stake. Let's take a look at how CFA works:

- As a research organization, CFA investigates consumer issues, behavior, and attitudes using surveys, polling, focus groups, and literature reviews. The findings of such projects are published in reports that assist consumer advocates and policymakers as well as individual consumers. This research also provides the basis for new consumer initiatives, public service advertising, and consumer information and education efforts.
- As an education organization, CFA disseminates information on consumer issues to the public and the media, as well as to policymakers and other public interest advocates. Conferences, reports, books, brochures, news releases, a newsletter, and a website all contribute to CFA's education program.
- Finally, as a service organization, CFA provides support to national, state, and local organizations committed to the goals of consumer advocacy, research, and education. Some of these organizations are consumer advocacy, education, or cooperative organizations that belong to the federation.

CFA services other organizations through its website, newsletter, publications, resource centers, and special events. The website, [www.consumerfed.org](http://www.consumerfed.org), supplies free information about CFA work on a good number of issues.

### **SUITS ARE FILED AGAINST CREDIT BUREAUS**

The nation's three top credit bureaus are being sued by consumers who

allege that the agencies are severely damaging their credit worthiness. A growing number of lawsuits challenging credit-report errors and low credit scores are pending in several states, including California, Louisiana, Michigan, Mississippi, New Mexico, South Carolina and Virginia. Consumers allege that Equifax, TransUnion and Experian are engaging in a practice that artificially lowers their credit scores, and that they are ignoring pleas to remove inaccurate information from the reports. People who have been hurt are fighting back and suing credit bureaus and information furnishers. It appears that only by filing lawsuits can people get any real relief against the credit bureaus.

In recent years, consumers have been spotting mistakes on their credit reports because they've been checking them more often. This has come about largely because of identity-theft fears. With free credit reports now available in all states, mistakes aren't hard to miss. Also, "credit-freeze" laws enforced in 22 states that bar lenders, or anyone, from reviewing a person's credit history prevent identity thieves from opening fraudulent accounts. A tainted credit report or a low credit score that is unjustified can really hurt a person's ability to get a loan, buy a house or a car, or maybe even get a job. That's why the credit bureaus have to do right and follow the law.

Many credit bureaus are shirking their responsibility to maintain accurate records and thoroughly investigate cases involving false information. It should be noted that this is required under the Fair Credit Reporting Act (FCRA) in many cases. The Court of Appeals for the Fifth Circuit issued a ruling on July 24<sup>th</sup>, in a case styled *Morris v. Equifax Information Services*, that the credit bureaus are ultimately responsible for the reinvestigation of disputed information in their systems, and cannot avoid that responsibility by blaming another group for the false information.

Source: *National Law Journal*

### **NHTSA INVESTIGATES TOYOTA SCION TC**

The National Highway Traffic Safety Administration is investigating the 2005 and 2006 Toyota Scion tC following nine reports of shattered moonroofs. According to NHTSA, fragments of the shattered moonroofs fell into the vehicle's passenger compartment. In seven incidents, the glass fell from retractable glass panel sections and in two incidents the glass in stationary panels shattered. Some reports indicate that breakage occurred while the vehicles were being driven, according to NHTSA. One complaint reported cuts from the broken glass.

Toyota recalled several models of the Scion tC last year because of consumer complaints that a glass wind deflector located near the moonroof might shatter when struck by road debris. That recall involved about 71,000 Scion tC coupes in the U.S. that were also from the 2005-06 model years. The current recall is being conducted in cooperation with the U.S. Consumer Product Safety Commission (CPSC).

### **NHTSA INVESTIGATING EVENFLO EMBRACE INFANT SEAT FAILURES**

The National Highway Traffic Safety Administration is investigating 5 consumer complaints that the handle on the Embrace rear facing infant car seat designed for children between 5 and 22 pounds unexpectedly fails. The Embrace infant seat is manufactured by the Evenflo Company, Inc. and is sold online, at Wal-Mart and by other independent retailers. The Embrace infant seat is equipped with a carry handle and may also be used outside of a vehicle as an infant carrier. The NHTSA Office of Defects Investigation has received 5 reports of problems with the infant seat handle latch. In four instances the handle "unexpectedly unlatched." One complaint reports the handle release lever fell out of the handle on one side. NHTSA has reported that a review of Evenflo's submission of early warning reporting data has identified field reports of handle latch problems on Embrace seats.

### **DOCTORS WANT BETTER SHOPPING CART DESIGN**

Most folks don't consider shopping carts as being dangerous. However, more than 24,000 U.S. children were treated for shopping cart-related injuries last year. That's a pretty high number and doesn't include minor injuries that aren't reported. The American Academy of Pediatrics is now calling for better designs and want stricter government regulation. Most injuries occur when children aren't strapped in and fall while standing in carts. But many shopping carts are designed with a high center of gravity, making them prone to tipping over even when children are properly placed in the seating area, according to Dr. Gary Smith. He was chairman of an academy committee that wrote the new policy.

Falls onto hard grocery store floors can result in head and neck injuries, and fractures also are common, according to the policy published in the August edition of *Pediatrics*. Many injuries involve concussions and are life-threatening, according to Dr. Smith, an emergency room physician at Children's Hospital in Columbus, Ohio and director of the Center for Injury Research and Policy there. The lack of a standard that adequately addresses the major mechanisms of injury is a major problem.

According to the academy, about 23,000 U.S. children are treated in emergency rooms for shopping cart-related injuries each year. Last year the total was about 24,200, including 20,700 injuries in children younger than 5. Dr. Smith reports that injury experts have been aware of the problem for at least 30 years, but no industry standard was adopted until 2004. Since the standard is only voluntary, you can figure out how effective it is. The standard doesn't require specific designs and lacks "clear and effective performance criteria" to address cart stability and prevent falls and tip-overs, the academy policy says. State and federal laws should be enacted to require minimum safety standards for shopping carts, according to

the policy. In the meantime, pediatricians are asked to warn patients and parents about the dangers. In May, the U.S. Consumer Product Safety Commission issued a similar safety alert.

Source: *Associated Press*

### **CAR PURCHASERS BEWARE**

If you are getting ready to purchase an automobile, it is important for you to understand how many automobile dealerships handle the financing of the vehicles they sell. When a consumer goes to an automobile dealer to purchase a vehicle, and requests the dealer to arrange financing, the actual loan is usually not made by the dealer. Normally, the dealer acts as an originator between the customer and a lender. There are numerous lenders in the American automobile business, including banks and finance companies owned by automobile manufacturers. These lenders are called “captives”.

When a customer requests financing from the dealer, typically the dealer faxes the consumer’s credit application to a lender, who determines an approved interest rate by examination of the consumer’s credit history. The lender then communicates the approved interest rate to the dealer and authorizes the dealer to “mark up” the interest rate, without informing the consumer. The dealer and the lender then usually split the “mark up”, as additional profit. Thus, “mark up” is the additional charges added to the consumer’s approved interest rate and then split between the dealer and the lender. The practical effect of a “mark up” is that it increases the cost of credit to the consumer. Once again, the “mark up” is only added after the lender determines an approved interest rate, based on the consumer’s credit history. This obviously results in a more expensive rate, which the consumer ultimately has to pay.

Generally, the consumer is not told about the “mark up.” Often times, the lender authorizes the dealer to add the “mark up” to the approved rate, but prohibits the dealer from telling the consumer the original approved rate, or that

the approved rate has been marked up. Most often, the consumer does not know about the “mark up,” never knows their approved rate and does not realize that their interest rate has been increased without their knowledge. “Mark up” is not disclosed on any document given to the customer by the dealer or the lender. However, both the dealer and the lender know exactly how much the consumer has been “marked up,” and has records containing information about the “mark up.” This is where a perspective buyer needs to take affirmative action. As a buyer, one should specifically ask the dealer and the lender if their loan has been “marked up.” Additionally, the consumer needs to request any documentation regarding their loan interest rate, and the “mark up.”

The bottom line is very simple. Automobile dealers and lenders want to make as much money off of a loan as they can. Therefore, in most transactions, where financing is part of the purchase, there is a “mark up.” Consumers need to know about the “mark up” before purchasing a vehicle. They can then negotiate for the price of the vehicle, and for the best possible loan, with this information in hand.

### **WALGREENS SUED FOR RECKLESS DISREGARD OF PUBLIC SAFETY**

A trial against Walgreens was scheduled to start on September 7th in Cook County, Illinois, over a misfiled prescription. However, the suit has taken on a much more important perspective. The suit alleges that a Walgreens Pharmacy Manager mislabeled and misfilled a prescription, which led to the death of Leonard Kulisek, an elementary school tutor. Evidence will be presented at trial showing that the Walgreens Pharmacy Manager had been secretly using narcotics confiscated from Walgreens. It is alleged that this ultimately led to the victim’s death.

Walgreens, the nation’s largest pharmacy chain, admits that its Pharmacy Manager negligently misfilled the prescription. It also admits that the Phar-

macy Manager took narcotics from its inventory “without permission and without payment.” Further, in charges which are not denied by Walgreens, the lawsuit alleges that the Pharmacy Manager was using the narcotics while on duty. Apparently, Walgreens’ internal controls failed to uncover the more than 80,000 narcotic pills taken from Walgreens’ inventory over a period of seven years. Despite these facts, it is very hard to understand Walgreens’ defense to the case. Walgreens claims it adequately supervised and monitored the Pharmacy Manager. That will be hard to prove in my opinion.

The lawsuit, first filed in January of 2002, states that the customer was filling a common prescription to treat a case of gout. Instead, he was given a prescription that is used as an anti-diabetic insulin substitute. It is alleged that Kulisek’s health went downhill quickly, as he developed acute renal failure, which led to kidney dialysis, eventually a stroke and death. Walgreens new CEO, has stated that “safety is our number one concern,” at Walgreens. I have always felt that the independent drug stores—because of the relationship between their pharmacists and customers—were the best choice for a place to have prescriptions filled. The chains operate on a high-volume basis and that carries a certain amount of risk in filling prescriptions. This case is an example of how that increased risk can prove to be a big time problem for customers.

## **XXI. RECALLS UPDATE**

### **FORD RECALLS 1.2 MILLION TRUCKS, SUVs AND VANS**

Ford Motor Company has recalled 1.2 million trucks, sport utility vehicles and vans amid concerns of potential engine fires, expanding on one of the largest vehicle recalls in history. Ford said the recall was tied to cruise control speed. The speed control deactivation switch system, could corrode over time, over-

heat and catch fire. The recall involves vehicles fueled by gasoline or natural gas and equipped with speed control, including the 1994-2002 F-250, F-350, F-450 and F-550 F-Super Duty trucks, 2000-2002 Excursion SUVs, 1994-1996 Econoline vans and 1996-2002 E-450 vans, and 1998 Explorers and Mercury Mountaineers. The recall does not involve similar vehicles fueled by diesel. Last September, Ford recalled 3.8 million pickups and SUVs from the 1994-2002 model years, including the top-selling F-150 pickup, because of the concerns over engine fires. It was the fifth-largest auto industry recall in U.S. history.

In January 2005, the company recalled nearly 800,000 pickups and SUVs from the 2000 model year because of similar issues. The National Highway Traffic Safety Administration has closed a nearly two-year investigation into the cause of the fires. The agency has received 1,472 complaints connected to the problems, including 65 reports of fires. While NHTSA says there have been no confirmed deaths or injuries, lawsuits have been filed over three deaths in Iowa, Georgia and Arkansas involving vehicle fires.

Ford said last year its review found that brake fluid could leak through the cruise control's deactivation switch into the system's electrical components, leading to corrosion. That could lead to a buildup of electrical current that could cause overheating and a fire. Dealers installed a fused wiring harness to the cruise control deactivation switch to prevent the risk of fire if the switch leaked. NHTSA investigators found the switch overheated in vehicles where the switch was placed in an upright position or at an angle and where there was excessive vacuum pressure in the brake system. According to NHTSA, it doesn't expect any additional recalls. About 20 million of the switches are used in vehicles, but thus far—again according to NHTSA—similar problems have not been found in non-Ford vehicles.

In a letter to NHTSA, Ford said that

through April, it had identified about 250 incidents alleging fire or smoke tied to the switch in the affected vehicles, with about 60 related to smoke. The company said there have been no allegations of serious injuries or fatalities. Ford says about 40% of the vehicles under the previous recalls have been fixed. Owners of the newly recalled vehicles can get Ford dealers to install a fused wiring harness. Customers can contact Ford at 1-888-222-2751.

Until September, Ford had disputed that the systems were malfunctioning and sparking fires. But in a reversal that came amid a growing federal investigation and numerous lawsuits, the automaker said it believed that brake fluid might leak from the switch that deactivated the cruise control once the driver stepped on the brake. That fluid can drip onto the cruise control's electrical component, cause corrosion and ignite a fire. In its review, which began in November 2004, the safety administration found that several factors, including the position of the switch and the level of suction created when a driver taps the brakes, contributed to the likelihood of fires. So far, NHTSA has received 1,472 complaints about malfunctioning cruise controls. It has confirmed 65 vehicle fires, but no fatalities. Several families, however, have filed wrongful death lawsuits against Ford.

#### **CHRYSLER RECALLS JEEP LIBERTY SUVs**

Chrysler Group has recalled more than 800,000 Jeep Liberty sport utility vehicles because of the potential loss of steering control. DaimlerChrysler AG says that the front suspension lower ball joint could experience excessive wear and looseness, leading the ball joint to separate. The recall affects 832,000 Liberty SUVs from the 2002-2006 model years. The automaker says it has received 111 complaints about the problem and reports of three injuries. In many of the complaints, the ball joint failed, dropping the vehicle's front end onto one or both of the front tires.

The liberty has had problems before

with the front suspension. The automaker recalled more than 300,000 2002-2003 Liberty vehicles in November 2003 because of problems with the ball joint, but some of the parts were damaged during the shipping process or installation. Earlier this year, NHTSA opened an investigation of the 2004 Liberty after receiving complaints about the ball joint separating. The regulatory agency said the alleged separations happened on Liberties with 25,000 miles to more than 67,000 miles. The vehicle has since been redesigned and the automaker believes the ball joint part will not experience the same wear patterns. Owners should have started to receive notices about the recall. The ball joints will be replaced at no cost.

#### **FIRESTONE RECALLS "DESTINATION" PASSENGER TIRES**

The National Highway Traffic Safety Administration ordered a new recall of Firestone passenger tires several weeks ago because of a manufacturing flaw that could lead to tread separation, causing a crash. Firestone Destination A P265/75R16 passenger tires made between January 29 and February 4, 2006 may have been produced with a damaged inner liner because of an improper machine tool set up. It appears that a small area on the inside of the tire could have no inner liner coverage at all. The flaw can cause the tread to separate over time resulting in rapid air loss in tires Firestone manufactured with the flaw. Firestone has notified tire owners of the problem. Hopefully, all of the tires will be taken off of vehicles since the recall involved a major safety issue.

#### **DELL RECALLS BATTERIES FOR PC's**

Dell, the world's largest PC maker, is recalling 4.1 million notebook computer batteries because they could erupt in flames. This will be the largest safety recall in the history of the consumer electronics industry, according to the Consumer Product Safety Commission. The lithium-ion batteries were

made by Sony and were installed in notebooks sold by Dell from April 2004 to July 18 of this year. The recall raises broader questions about lithium-ion batteries, which are used in devices like cellphones, portable power tools, camcorders, digital cameras and MP3 players. The potential for such batteries to catch fire has been acknowledged for years, and has prompted more limited recalls in the past. But a number of recent fires involving notebook computers, some aboard planes, have brought renewed scrutiny.

Dell has reported to the CPSC that it documented six instances since December in which notebooks overheated or caught on fire. Apparently, none of the incidents caused injuries or death. The problems, according to Dell, were a result of a manufacturing defect in batteries made by Sony. The federal safety agency said the batteries' problems were not unique to Dell, meaning that other companies using Sony batteries might also have to issue recalls. I understand that Sony has sold its batteries to most of the major computer makers. The recalled batteries were used in 2.7 million Dell computers sold in the United States and 1.4 million sold overseas. The total is about 18% of Dell's notebook production during the period in question. Depending on how many of the batteries are still in use, the cost of the recall could exceed \$300 million. Sony has admitted that its batteries were responsible and is "financially supporting" Dell in the recall.

Lithium-ion batteries pack more energy in a smaller space than other types of batteries. They are the cheapest form of battery chemistry and are increasingly being used in more types of consumer products. What that means, according to the CPSC, is "more batteries, more likelihood for quality-control problems and for design problems." The CPSC says it expects "more incidents and more recalls of these batteries." The federal safety agency has negotiated 10 recalls of lithium-ion batteries used in notebook computers since 2000 and another 12 battery recalls for other elec-

tronic products, including a Disney-brand children's DVD player.

The current recall leaves many questions unanswered on how Dell, as well as the product safety commission, deals with information about fire-damaged notebooks. Although Dell told the agency that only six incidents had occurred, a reporter viewed almost 100 photos of melted notebooks that were returned to the company between 2002 and 2004. The photos, which came from a Dell database, were supplied by a former Dell technician who said such damage "was more of a common thing than they (Dell) are letting on." As many as several hundred a year were returned, according to this source.

## XXII. FIRM ACTIVITIES

---

### *EMPLOYEE SPOTLIGHTS*

#### **Andy Birchfield**

Andy Birchfield manages our firm's Mass Torts Section and does an excellent job in that capacity. Under his leadership, Andy's Section is now recognized as a national leader in pharmaceutical litigation. Andy is a regular speaker at national, regional and state seminars pertaining to mass tort litigation. His work in Vioxx litigation has received nationwide acclaim. Prior to joining the firm in 1996, Andy was a partner in a very good Montgomery law firm where he litigated personal injury and civil rights cases.

Andy grew up in Pell City, Alabama, where he met his wife, the former Tanya Payne. Andy and Tanya have two children, Dow and Beth. The family is actively involved at First Baptist Church of Montgomery where Andy serves as Deacon Chairman and Chairman of the Prayer Committee. Andy is active in a number of legal organizations. He has served as President of the Alabama Young Lawyers, President of the Montgomery County Young Lawyers, and currently serves on the Character and

Fitness Committee of the Alabama State Bar. Andy has served on numerous other committees and programs in an effort to improve the legal profession. Andy, who graduated from Samford University in 1988 and later graduated from Jones School of Law, is a credit to the legal profession.

#### **Dee Miles**

Dee Miles joined the firm in 1991. When they were fairly young associates, Dee and Tom Methvin pioneered consumer fraud litigation for the firm. While Tom focused on consumer finance fraud, Dee focused on insurance "bad faith litigation" and life insurance litigation, with specific attention given to so-called "vanishing premium" cases. Dee now manages our Consumer Fraud Section and oversees the cases being litigated in this section. On a national level, Dee is currently serving as lead counsel in a number of extremely important cases. He is currently heavily involved in the State of Alabama's case against 79 pharmaceutical companies.

In the past, Dee has spearheaded several national global settlements concerning "opt out litigation" against a number of top Fortune 500 companies. Nearly all of these settlements involved confidentiality and can't be discussed publicly. In my opinion, Dee's leadership in the consumer fraud and commercial litigation area of law is unprecedented.

Dee is presently a Sustaining Member and a member of the Executive Committee for the Alabama Trial Lawyers Association and past President of the Montgomery Trial Lawyers Association. He is also an active member of the Trial Lawyers for Public Justice. In the recent past, Dee was named "Boss of the Year" by the Montgomery Association of Legal Secretaries.

Dee and his wife, the former Sandra Turnblad, have four children, two girls and two boys. They are active members of The Holy Spirit Catholic Church in Montgomery. In 2003, the Roman Catholic Church honored Dee and Sandra by inducting them into the Equestrian order of the Holy Sepulchre of Jerusalem. The Order is responsible

for promoting Christianity within the Middle East and protecting the holy shrines in that region of the world. Dee is also a volunteer for the Montgomery County YMCA, and Dee has coached several soccer teams as well as volunteer for a fundraiser for the Boy Scouts of America. Dee also serves on the Advisory Board of the Wynlakes Country Club.

#### **Susan Harding**

Susan Harding, who has been with our firm for five years, came to work as a clerical in the Business Litigation Section, now known as the Toxic Torts Section. She currently works as legal secretary to David Byrne and Alyce Robertson. In this position, Susan helps to prepare documents under the direction of the lawyers, files documents with the Courts, coordinates all the lawyers' court docketing, and handles their scheduling and travel arrangements. Susan and her husband, Jack, have three children: Erik, 28; Ryan, 21; and Sarah, 19. Erik, who is married to Mari, is an environmental/civil engineer in California and is working on the first pilot desalination study with Pacific Ocean water in Santa Cruz. Ryan works in the family business, and Sarah, who attends AUM, plans to be a nurse practitioner. The Hardings attend Destiny Christian Center in Prattville. Susan is a very good employee who is dedicated to her work. We are fortunate to have her with the firm.

#### **Taylor Thomas**

Taylor Thomas, who has been with our firm for almost five years, started out as a medical records coordinator in Mass Torts. She moved over to the Information Technology Section as an administrative assistant before moving back to the Mass Torts Section as a Litigation Assistant for Vioxx cases. Taylor serves as part of a team that helps prepare Vioxx cases for trials. She has a bachelor's degree in Early Childhood/Education and taught 5<sup>th</sup> and 6<sup>th</sup> graders before coming to the firm. Taylor is married to Scott Thomas, Director of Technology for the firm, and they have two children, Matthew and Destiny. Taylor is a very

good employee who has contributed greatly to the firm.

#### **LARRY GOLSTON NAMED SHAREHOLDER**

Larry Golston was recently named a Shareholder in the firm. Before coming to work for the firm, Larry worked for Judge Sue Bell Cobb of the Alabama Court of Criminal Appeals. Prior to that time, Larry had also worked for Judge James P. Smith, who at the time was a circuit judge in the 23rd Judicial Circuit. Judge Smith is now serving with distinction as a U.S. district judge.

In the past, Larry's area of practice has included Business Litigation. Specifically, Larry has represented entrepreneurs, investors, businesspersons and corporations in civil litigation. In September 2002, he tried a case filed by England Logging Co. against John Deere Construction Equipment Co., Inc., which resulted in a \$1.785 million dollar verdict in favor of his business client. His current focus is now in Consumer Fraud, Employee Rights, and White Collar Fraud Litigation.

Larry was elected President of the Capitol City Bar Association in July of this year. He is also Chairman of the Alabama Trial Lawyers Association Minority Caucus and serves on the ATLA Board of Governors. Larry is married to Danielle Golston and they have two children, a daughter Lauren and a son Larry Kyle. The Golstons are members of More Than Conquerors Faith Church in Birmingham. Larry is a very good lawyer and works hard for his clients. We are fortunate to have him with the firm and we are pleased that he has become a shareholder in the firm.

## **XXIII. SPECIAL RECOGNITIONS**

#### **LABOR DAY IS A VERY SPECIAL DAY**

By the time this issue is received Labor Day will likely have come and

gone. Hopefully, it was a day in all parts of the country when working men and women were honored properly. Labor Day, the first Monday in September, is a creation of the labor movement and is dedicated to the social and economic achievements of American workers. It constitutes a yearly national tribute to the contributions workers have made to the strength, prosperity, and well being of our country.

The character of the Labor Day celebration has undergone a number of changes over the years. I am afraid that many American citizens have forgotten why we celebrate Labor Day. We should all be reminded that the vital force of labor added materially to the highest standard of living and the greatest production the world has ever known. It has brought all of us closer to the realization of our traditional ideals of economic and political democracy. It is appropriate, therefore, that the nation pay tribute on Labor Day to the creator of so much of the nation's strength, freedom, and leadership—the American worker. This is what Samuel Gompers, founder and longtime president of the American Federation of Labor, had to say about Labor Day:

*Labor Day differs in every essential way from the other holidays of the year in any country. All other holidays are in a more or less degree connected with conflicts and battles of man's prowess over man, of strife and discord for greed and power, of glories achieved by one nation over another. Labor Day...is devoted to no man, living or dead, to no sect, race, or nation.*

In my opinion, it's highly appropriate for all of us to pay tribute to American workers. There are no better in the entire world and I am very much appreciative of their efforts. If you didn't celebrate Labor Day for its real meaning this year, I encourage you to take a few minutes to reflect on what the labor movement has meant for you and your family and to our country.

The Alabama Head Injury Foundation (AHIF) was founded by professionals and families in 1983 to increase public awareness of Traumatic Brain Injury and to stimulate the development of supportive services. AHIF is now among the largest state brain injury associations in the nation with model programs and statewide services. I hope all Alabama citizens appreciate the need for AHIF and also understand and appreciate the very good work the group does.

Whether a head injury is mild or severe the life of the injured person and their family is changed forever. The impact can be both emotionally and financially devastating. AHIF provides the information to help clients and families understand the results of injury. AHIF helps access available resources and provides services and programs which meet the unique needs of individuals with traumatic brain injury as well as spinal cord injury in certain programs. These are some relevant Traumatic Brain Injury Facts:

- Every 21 seconds one more person sustains a Traumatic Brain Injury in the United States.
- Every year, over 1.5 million Americans sustain a Traumatic Brain Injury.
- 5.3 million citizens (2% of U.S. population) live a life with a disability due to a traumatic brain injury.
- In Alabama, over 1,500 people are disabled due to traumatic brain injury each year.
- Major causes of brain injuries are motor vehicle crashes 50%, falls 21%, assaults and violence 12%, sports and recreation 10%.

I encourage all of our readers to become familiar with the good work being done by AHIF and all of its many programs and connections. You can obtain more information by going to [www.AHIF.org](http://www.AHIF.org).

Gibson Vance, a shareholder in our firm, was elected to a one-year term as Treasurer of the Association of Trial Lawyers of America, the world's largest trial bar. Gibson was elevated to the post during ATLA's 60<sup>th</sup> annual convention in Seattle, Washington. Gibson served as parliamentarian last year. At ATLA, Gibson serves on the Public Affairs Committee and is the state chairman for the Leader's Forum Committee. Additionally, he served on the Board of Directors for Trial Lawyers for Public Justice, a national organization designed to promote a fair and impartial judicial system. He has served as President of the Montgomery County Bar Association and is currently Vice President of the Alabama Trial Lawyers Association.

With about 65,000 members worldwide, ATLA promotes justice and fairness for injured persons, defends the constitutional right to trial by jury and strengthens the civil justice system through education and disclosure of information critical to public health and safety. The association provides lawyers with the information and professional assistance they need to serve clients successfully and protect the democratic values of the civil justice system. ATLA is dedicated to preserving the civil justice system and making sure that powerful special interests are held accountable when they engage in wrongdoing or other misconduct.

## XXIV. SOME CLOSING OBSERVATIONS

### **THE POLITICAL RACES WILL HEAT UP SOON**

I suppose we can all look forward to the next two months for a number of reasons. One very good reason is that college football games are already being played with promising seasons projected this fall for several state schools. High school football is also very big in

our state. Another reason—I suppose—is the official coming of the fall political season. Now that Labor Day has passed, things will surely heat up on that front in the coming weeks. Thus far, I must confess that there has been very little interest in anything political. In fact, I am reasonably sure that few people around the state—with the exception of the candidates and their staff personnel and consultants—have given politics a second thought. That is bound to change in the next few weeks. In any event, I will write more on the political scene next month.

### **SOME INTERESTING POLL RESULTS**

Even though people don't seem too excited about politics at present, the pollsters have been hard at work. A recent poll surveying the beliefs of Alabama Citizens relating to the affairs of government at both the state and national levels was most revealing. Sixty percent of the people polled said they would vote a **split ticket** in the fall. Eighteen percent plan to vote a **straight** Democratic ticket and 15% indicated they would vote **only** for the Republican slate in November. Only 6% said they didn't know at this point what they would do.

Another interesting response dealt with candidates for the Alabama Supreme Court. People were asked if a justice on the Alabama Supreme Court received substantial campaign funding from big oil companies—while the court had a large oil company case before the court—would it affect their voting. Sixty-eight percent said they would not vote for that candidate. Only 20% said it would likely **make them vote** for such a candidate.

Another important issue, campaign finance disclosure, was also polled. Eighty-nine percent of those surveyed said they supported a proposal to require a **complete disclosure** by candidates of the **source** of all campaign funds. This was the strongest response on an issue of all issues polled. Interestingly, the second highest response dealt

with proposals to find alternative sources of fuel. This reflected the feelings of Alabama citizens on the **high costs** of gasoline.

There were a number of other most interesting revelations from this professionally done survey. The response dealt with such things as how Alabama citizens feel about the direction the state is headed in. The same question was asked about the nation's direction. The responses revealed a marked difference in how Alabamians view these directions. I suspect that if the Republican Party leaders polled this issue, they wouldn't be bringing Cheney and Frist back to the state. More will be discussed about the survey results next month.

#### **CHRISTIAN COALITION ATTEMPTS TO AVOID THE SMELL OF GAMBLING MONEY**

The Christian of Coalition of Alabama has jumped ship and left the Christian Coalition of America. John Giles, who serves as Alabama President, claimed the Alabama political organization left because the national group was moving "to the left." The state organization, which is up to its ears in Alabama politics, has been tainted by its connections to Ralph Reed and gambling money. I suspect that had to be on John's mind when the decision to distance themselves from the **mothership** was reached.

Interestingly, a lawsuit with the Internal Revenue Service was settled by the national group last year. The settlement allowed the Christian Coalition to maintain its **tax-exempt status** and keep publishing voter guides. However, the terms of the settlement required the voter guides to meet specific guidelines. Under those guidelines, state affiliates had to submit their candidate surveys to the national organization for review and approval before publishing them in a voter guide. Following the guidelines and maintaining the tax-exempt status is **critical** for getting the voter guides **distributed in churches**. The national organization apparently learned that the Alabama group had distributed a politi-

cal questionnaire without submitting it to the national organization for review. If you haven't read the questions asked of candidates who will be on the ballot this fall, you should. It's as political as anything you will ever read.

John told the news media outlets on August 23<sup>rd</sup> that the relationship between the state affiliate and national organization began to "deteriorate" in 2003 when the national group "endorsed Governor Riley's \$1.2 billion tax plan." He also claimed that there was a dispute over the national organization addressing **environmental** and **economic** issues. Believe it or not, one problem was that the national group wanted to increase the **minimum wage**. It would appear to me that minimum wage should be a Christian issue just as should the excessive cost of gasoline and obscene profits made by companies like Exxon.

I really believe that the real reason for the split was the receipt by the Alabama group of the Choctaw Indian tribe money. If I remember correctly the tribe gave \$850,000 to a group and that group sent it on to the Christian Coalition of Alabama. Considering the defeat of Ralph Reed in Georgia, with corruption being a major issue in his race, I don't guess I could blame John and his group from "cutting and running." It's hard to justify dealing with the likes of Ralph Reed, who was closely tied to Jack Abramoff, and have the label Christian attached to your political group.

The Christian Coalition claimed that the tribe's money didn't violate its policy against taking money from gambling interests because the group didn't know the origin of the money. That is sort of hard to believe, but maybe it's true. If the group is taking in so much money that \$850,000 in one payment can get lost in the shuffle, the Coalition must be doing pretty well financially. The best way to clear the air is for the organization to disclose the **sources** of its funding, the amounts received, and how they **spent** it. That would be the right thing to do.

Source: *Associated Press* and *Birmingham News*

## XXV. MY PARTING WORDS

---

Andy Birchfield and Leigh O'Dell have spent many weeks in New Orleans this year because of our firm's involvement in the Vioxx MDL litigation, which is being held in a New Orleans federal court. I have also been there on these cases, but on a much more limited basis. Based on what I have seen, and what I have heard from Andy and Leigh, I can say without reservation that the people of New Orleans and the Gulf Coast are really hurting—physically, emotionally and most importantly, spiritually. So many people in New Orleans need a personal relationship with Jesus Christ. Even those who already know the Lord are in deep need of encouragement and revival. Unless a person has actually visited New Orleans and spent time there, I don't believe anybody can really appreciate what that city and its people have gone through. The reports we get from the media—and from the politicians—have failed to tell the real story. In fact, the extent of the devastation and the obvious inability to rebuild are difficult to describe even when you have seen all of this first hand. There is a tremendous need for a spiritual revival in New Orleans. I believe that it has started.

Anne Graham Lotz was invited to have a **Just Give Me Jesus Revival** in New Orleans during the weekend of August 25-27<sup>th</sup>. She accepted the invitation and headed to the city with her team. Under normal circumstances, local churches and individuals would have shouldered the primary responsibility for underwriting such an undertaking. In this instance Anne, having been taught well by her father, felt that it would not be appropriate to ask for donations locally. Instead she has asked previous revival cities to support this badly needed effort in New Orleans. While talking with a member of Anne's team during the week of August 21<sup>st</sup>, Leigh O'Dell learned that funds and per-

sonnel were still needed. As expected, Anne trusted the Lord to provide all of the resources that were needed and He is coming through. Lots of folks who really love Jesus and have a heart for His people—especially those who are hurting and in need—pitched in to help out. Being a Christian requires more than just attending church on Sunday and getting involved in other church-related events during the week. The commitment of a Christian requires **giving** and **helping** others who are in **need**. Anne and her ministry stepped out in faith for New Orleans and did so without a great deal of attention or fanfare. Leigh O'Dell, who had worked

for the ministry on a full-time basis before returning to our firm, volunteered to work as a part of the team. Leigh knows Anne's heart and eagerly headed back to New Orleans because she knew God had sent Anne to a real mission field.

Of all the relief efforts that can be accomplished in New Orleans, I am convinced that the most important **rescues** will be those that are **spiritual** in nature. The focus of the big meeting by Anne's team on Saturday and the 110 Bible studies that followed during the weekend served to **glorify** Jesus and **teach** people who are **hurting** to hear **God's voice** through His Word and

**trust** him to **provide** for them. If you want to help defray some of the expenses involved by Anne's team, send your check to AnGeL Ministries and show as a donation for New Orleans. If you can't send a check, you can pray for the people in New Orleans and those who are still trying to get back home. The address for checks or words of support is 5115 Hollyridge Drive, Raleigh, NC 27612. God will bless all who helped out in any manner in this worthwhile ministry. The revival is something that has started and must continue for weeks and months to come. It's an important **calling** in my opinion.

***To view this publication on-line, add or change an address,  
or contact us about this publication,  
please visit our Website: [BeasleyAllen.com](http://BeasleyAllen.com)***

218 COMMERCE STREET (36104)

POST OFFICE BOX 4160

MONTGOMERY, ALABAMA 36103-4160

(334) 269-2343

TOLL FREE

(800) 898-2034

TELECOPIER

(334) 954-7555

WEB PAGE

[www.BeasleyAllen.com](http://www.BeasleyAllen.com)

RETURN SERVICE REQUESTED

PRESORTED  
STANDARD  
U.S. POSTAGE  
**PAID**  
MONTGOMERY, AL  
PERMIT NO. 275



*BeasleyAllen.com*

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.