



THE  
**JERE BEASLEY REPORT**

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

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

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# I. CAPITOL OBSERVATIONS

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## **SCHOOL VIOLENCE MUST BE STOPPED**

The senseless killings that have occurred in our nation's schools in recent years have parents all over the country greatly concerned for the safety and welfare of their children. Their concern is certainly justified and that concern is shared by all persons who have responsibility for the case of children. The most recent incidents in Pennsylvania and Colorado have brought the school violence issue to the attention of all Americans. Similar tragedies must be averted in the future if at all possible. These latest incidents—as horribly bad as they were—aren't the worst in U.S. history. Many Americans don't realize that the worst school attack in our nation's history was in 1927, when a man blew up a school in Bath, Michigan, killing 45 adults and children. There have been many other incidents over the years involving violence in our schools that resulted in multiple deaths. In recent years, however, things have gotten much worse. Obviously, steps must be taken to make our schools as safe as possible.

I have to wonder why our political leaders in Washington hadn't made the curbing of school violence a top priority for Congress long ago. President Bush has indicated that he will finally get things moving. He called a summit meeting to make plans. But Congress, at the request of the Bush Administration, had cut the safety funding for schools, which is absolutely incomprehensible. A congressional conference committee cut the budget for federal school safety funding by more than \$90 million. That came at a time when school security measures needed to be greatly increased and certainly not ignored. We spend hundreds of billions of dollars rebuilding Iraq, but for some reason, can't find the funds needed to protect our school children. A report available

to Congress revealed that there have been 16 school-related violent deaths, 44 non-fatal school shootings, and over 115 high-profile violence incidents since the opening of school in August. That should be enough to get the attention of all of the politicians in Washington, including the President, and prompt them to take immediate action. You can get more information about the school violence crisis at [www.schoolsecurity.org](http://www.schoolsecurity.org).

## **LAW ENFORCEMENT DESERVES THE SUPPORT OF ALL AMERICANS**

A Montgomery police officer was killed recently during a routine traffic stop, a tragic event that left our community in shock. This death of a brave young man made all of us realize how dangerous it is for law enforcement personnel on the streets today as they go about doing their most important work. We depend on the men and women who work in law enforcement to protect the public. Unfortunately, we don't always appreciate all that they do for us until a tragedy occurs. A friend of mine who serves as chief of police in a major Alabama city says that over 90% of the crime that occurs in his city is drug-related. I have heard similar comments from district attorneys from several Alabama counties. Without a doubt, the drug culture, which is like a cancer in our country, causes a great percentage of the criminal activity that affects every community in the U.S.

It's essential that we support law enforcement at every level of government. The obvious place to start is by increasing the funding. Salaries for officers must be increased, the numbers of officers increased—the officers must be properly equipped—all of which requires adequate funding. I believe that a fitting tribute to the fallen officer—Keith Houts—would be to make the adequate funding of law enforcement needs a top priority at the federal, state, and local levels of government.

## **COLLEGE DESEGREGATION CASE WILL COME TO AN END**

I am hopeful the state's college desegregation case is very close to coming to an end. This case has been in the courts for decades—so long that many Alabama citizens had forgotten all about it. U.S. District Judge Harold Murphy ordered the parties to present the proposed settlement to him by October 13<sup>th</sup>. A fairness hearing was to be set by the judge. As I understand it, the settlement—as proposed—will be good for all concerned. Under the settlement, Alabama students will be able to receive

## IN THIS ISSUE

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|        |  |    |
|--------|--|----|
| I.     | Capitol Observations . . . . .         | 2  |
| II.    | My Observations on Election . . . . .  | 5  |
| III.   | Court Watch . . . . .                  | 7  |
| IV.    | The National Scene . . . . .           | 11 |
| V.     | The Corporate World . . . . .          | 15 |
| VI.    | Congressional Update . . . . .         | 16 |
| VII.   | Product Liability Update . . . . .     | 19 |
| VIII.  | Mass Torts Update . . . . .            | 23 |
| IX.    | Business Litigation . . . . .          | 26 |
| X.     | Insurance and Finance Update . . . . . | 26 |
| XI.    | Predatory Lending . . . . .            | 30 |
| XII.   | Premises Liability Update . . . . .    | 30 |
| XIII.  | Workplace Hazards . . . . .            | 31 |
| XIV.   | Transportation . . . . .               | 33 |
| XV.    | Arbitration Update . . . . .           | 35 |
| XVI.   | Healthcare Issues . . . . .            | 35 |
| XVII.  | Environmental Concerns . . . . .       | 36 |
| XVIII. | The Consumer Corner . . . . .          | 38 |
| XIX.   | Recalls Update . . . . .               | 39 |
| XX.    | Firm Activities . . . . .              | 40 |
| XXI.   | Some Closing Observations . . . . .    | 42 |
| XXII.  | Some Parting Words . . . . .           | 42 |

financial aid from a \$10 million needs-based program included in the settlement. Also included in the settlement is \$25.8 million to Alabama State University for repairs and new programs and \$7.3 million to Alabama A&M for repairs at that campus. Judge Murphy issued an order on September 28<sup>th</sup> saying \$45.5 million in surplus education budget funds should be used to settle major issues in the case. As you may recall, the lawsuit stemmed from the U.S. Department of Education's 1979 finding that there were still traces of segregation in Alabama's college system. Obviously, that was over 26 years ago. It's difficult to understand why this case has hung around so long.

The federal government sued the State of Alabama in 1981 after university leaders failed to agree on a plan to correct the problem. According to the lawyers involved, the case should be resolved in a maximum of two months. Lawyers for the parties to the suit are presently working out a final version of the settlement. The settlement, if approved, will provide a five-year implementation period for changes to be made. I hope none of the proposed terms will need that much time. A fourth trial in the case had been set to start on October 10<sup>th</sup>.

Frankly, it's high time for this case to come to an end. The lawsuit was a prime example of a state not facing up to an obvious problem and then working out a satisfactory solution. Judge Murphy, who is based in Rome, Georgia, has been traveling to Birmingham for years to preside over the case. He was the judge in two of the three major higher education trials in the suit and has issued a number of significant rulings in the case. It's very clear that the judge wants this lawsuit to be over. Improvements have been made in increasing the number of black students in higher education and the number of black faculty members at white universities over the past ten years. Hopefully, this settlement will allow our state to move forward in the field of higher education.

### ***MANY FACTORS WILL DETERMINE WINNERS ON NOVEMBER 7<sup>th</sup>***

The national political picture seems to be undergoing a major shift, as the public is beginning to fully realize how badly the failed policies of the Bush Administration have hurt our country. When you factor in all of the corruption and scandals involving public officials and lobbyists in Washington, the terrific toll related to the occupation of Iraq, and the huge budget deficit, things couldn't be going much worse for the GOP. All national polls show that Americans still rank the Iraq War and terrorism as the biggest problems facing the country. Normally, the economy is a major factor in congressional races and in many instances it determines winners and losers. The polls reveal that Republican efforts to capitalize on what they claim to be good economic news will run up against strong voter pessimism on the issue. They simply don't believe the spin that the President and others are trying to put on the state of the economy. Most folks I talk with about the economy in my state tell me they certainly don't believe it's as good as some of the national politicians say it is. A recent *New York Times*-CBS poll found that 36% of respondents in the U.S. think the economy is getting worse, versus only 17% who see it improving.

Several factors could be causing the gloom over the economy—pessimism related to the war in Iraq, exploding health care costs, a moral decline that is becoming more dangerous than ever, and concern over threats of terrorist attacks. The sharp division between workers' pay and big boss salaries also contributes to the feelings. Voters are blaming Republicans for most of the problems. Even before the recent scandal involving Rep. Mark Foley, Democrats had a 14-point edge over Republicans on handling the economy. This comes from a recent poll done by the Pew Research Center. Another survey was done just before the full impact of the Foley scandal began to sink in with folks. A recent survey of potential voters nationally asked specifi-

cally which party's candidates would get their vote in Congressional races. Democrats had a 23-point lead over Republicans in every group of people questioned in the poll. This included voters, registered voters, and adults. It's highly significant that it shows the lead Republicans had a month before they took control of Congress in 1994 was less than half that number. It represents the largest margin among registered voters the Democrats have had since 1978. This poll was run before the Foley scandal and the perceived cover-up by the Republican leadership surfaced. I suspect that margin is much wider today.

Nevertheless, Republican strategists are working hard trying to paint Democrats as being weak on national security. So far, those efforts have fallen on deaf ears. Since the polls referred to above were run before the latest book by Bob Woodruff came out and prior to the Foley scandal—things have definitely become much worse for the GOP. When a party runs on family values, voters expect men and women elected under their banner to really understand what family values are all about. I believe most folks have had enough and will vote for change on November 7<sup>th</sup>.

Source: *Forbes* and *Associated Press*

### ***VOTERS FIRST PLEDGE IS A GOOD THING***

More than a dozen national and state organizations have sent out messages to their members about the "Voters First" pledge asking them to contact their federal representatives. These e-mails went out to millions of potential voters. The "Voters First" pledge and the Voters-FirstPledge.org Web site are the result of a joint effort by Public Campaign Action Fund, Common Cause, Public Citizen, and other national and state organizations.

Earlier this year, Public Citizen, Common Cause and Public Campaign Action Fund asked all candidates registered with the Federal Elections Commission to sign a pledge that, if adhered to, will go a long way toward removing

the corrosive influence of money in politics. Once this happens, we can clean up Congress. The pledge is called "Voters First" because by signing it, candidates promise to put the interests of voters ahead of corporate moneyed interests. As we all know, these are the interests that now pay huge sums of money to help congressional candidates get—or keep—their elected seats and pretty well control elections. Over 300 candidates have signed the pledge thus far. Their names can be found on a Web site, [VotersFirstPledge.org](http://VotersFirstPledge.org). By signing the "Voters First" pledge, the candidates agreed to support legislation that accomplishes three critical goals:

- First, to make elections fair through campaign spending limits and public funding for all candidates who agree to take no private contributions.
- Second, to restore accountability by passing and enforcing meaningful new restrictions on gifts and travel from lobbyists and other powerful interests for members of Congress; and
- Third, to require full disclosure on the Internet of all lobbyists' contributions and any fundraising help members of Congress receive from lobbyists.
- These three actions are critical to putting democracy back in the hands of all citizens.

Ordinary citizens should be able to run for office without having to sell out to big moneyed interests in order to get elected. Leveling the playing field is critical to holding elected officials accountable to all citizens and not just to the giants in Corporate America. People who share these views were urged to contact candidates who have not signed the pledge and ask them to do so. Hopefully, many people did just that.

The Web site contains an interactive map that allows interested citizens to search by state and party affiliation to learn which candidates have signed the pledge. The site also has information about each candidate. Signing the pledge and supporting these crucial

reform measures constitute a necessary first step in restoring faith and integrity in our democracy. Hopefully, all candidates will break the shackles that the special interests have on them and become free to represent all Americans. For more information about the pledge and which candidates have signed on, visit [VotersFirstPledge.org](http://VotersFirstPledge.org).

Source: Public Citizen

### ***THE PEOPLE RESPONSIBLE FOR "GIRLS GONE WILD" SHOULD BE PUT UNDER THE JAIL***

Without a great deal of fanfare, the sleazy outfit that produces "Girls Gone Wild" brought its traveling road show to Montgomery in late September. The group set up shop in a local bar, but for some reason there wasn't a great deal of media coverage of whatever went on while they were in town. That part was good because it meant they received no help selling their products. Apparently, few public officials even knew that this show was coming to town. But, the word went out in some fashion to a good number of people in this area. This type of show is certainly not something that parents should want their children exposed to or involved in. Fortunately, some public officials have been willing to be "politically incorrect" and have taken these folks on. Before the show, the mayor of Montgomery and our city council said they intended for all local laws to be enforced. I'm not sure that many people even realize what goes on when this traveling road show comes to a city. The videotapes that are made and then sold worldwide are pure fifth and disgusting.

We learned a great deal about this sorry outfit when our firm represented a family a few years ago whose teenage daughter had been victimized while on spring break in Florida. Based on what we learned, I can tell you that the companies involved shouldn't be allowed to do what they are doing. They are taking advantage of young girls and making big bucks in the process. The founder of the company that produces and sells these videos of young girls appearing in

sexual situations pleaded guilty to charges of failing to document the ages of the young girls engaging in sexual acts in the videos. As part of the plea deal, Joe Francis, who is 33 years old, agreed to pay a \$500,000 fine. A judge will decide whether to accept or reject the deal at a sentencing hearing scheduled for December 18<sup>th</sup>. In my opinion, the judge should require jail time—if that's possible—for this scoundrel. Apparently, it's undisputed that underage girls had appeared in the videos.

Santa Monica-based Mantra Films Inc., pleaded guilty earlier this month in U.S. District Court in Florida on similar charges. Mantra Films admitted to violating record keeping and labeling laws while producing and distributing the videos during all of 2002 and part of 2003. A second company owned by Mantra's founder, MRA Holdings LLC, entered into a deferred prosecution agreement on charges of improper labeling. Under the agreement with prosecutors, the charges will be dismissed after three years if MRA Holdings cooperates with future government prosecutions, admits wrongdoing, and pays fines. It must also hire an outside company to monitor its records and production facilities to ensure compliance with federal law.

Separate state charges in Florida alleging that two 17-year-old girls were videotaped by a "Girls Gone Wild" cameraman in sexual situations remain pending against Francis and Mantra Films. The courts should deal harshly with these defendants, and in my opinion a maximum jail term for Francis is clearly needed and appropriate. While stiff money fines should be imposed, that alone is not enough. Any person who would profit by producing and selling this sort of filth has no place in our society. It's a sad commentary on our times when profit-making by peddlers of pornographic materials pushes morality into a corner. Where have the churches been over the past few years on this disturbing moral issue? In my opinion, it's time for church leaders to come forward and join this fight!

## **COMMISSIONER SPARKS ELECTED TO NATIONAL OFFICE**

Commissioner Ron Sparks, who is seeking a well-deserved second term, has been elected Secretary-Treasurer of the National Association of State Departments of Agriculture (NASDA) for 2006-2007. This is quite an honor for Ron and is great exposure for Alabama. Our state has a strong voice in Ron Sparks when it comes to improving and protecting the agriculture industry. There are many exciting opportunities ahead in agriculture such as alternative fuels, improving nutrition for our children, and making sure there is adequate disaster relief for farmers and producers. Ron is being recognized again by his peers as a real leader, and that's good. But, the people of Alabama already knew that and appreciate Ron's outstanding work for our state.

West Virginia's Agriculture Commissioner Gus R. Douglass, a veteran member of NASDA and the Southern Association of State Departments of Agriculture (SASDA) since 1964, had this to say:

*I am very proud to see Ron's leadership and abilities recognized nationally. I have had the opportunity to see firsthand his service to his region in its time of distress to preserve the agriculture industry in the Gulf Coast and Southern states. He is now in line to assume more responsibility on the national level.*

Florida Commissioner of Agriculture and Consumer Services Charles Bronson added these comments:

*I am pleased that Commissioner Ron Sparks has been elected as Secretary-Treasurer of the National Association of State Departments of Agriculture. Commissioner Sparks has been a true friend to Florida agriculture. He understands the unique challenges that agricultural producers face in the south from pest and disease incursions to competition from ever increas-*

*ing imports to the devastating storm events we have seen the last two years. These experiences will enable him to bring a unique perspective to the NASDA Board of Directors. He will represent our region of the country well within this association.*

Ron will eventually be President of NASDA. The officers of NASDA first serve the organization as Secretary-Treasurer and then move up in position each year. This gives officers an opportunity to learn more about agriculture in other states and build relationships across the country. This type of partnership is invaluable for our state. Ron will serve as President of NASDA in 2009-2010. He served as President of the SASDA for 2005-2006. Alabama citizens are most fortunate to have a man like Ron Sparks speaking for and standing up for agricultural interests. He has done an outstanding job as Commissioner and will do even more over the next few years.

## **II. MY OBSERVATIONS ON THE GENERAL ELECTION**

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### **BOB RILEY WILL WIN A SECOND TERM**

In my opinion, Bob Riley will be reelected to a second term by a very large margin, which could be as much as an 18% difference. The Riley folks have run an almost perfect campaign and have been extremely well financed. All of the statewide polls done to date predict a healthy margin of victory for Governor Riley. While I can't see that changing, I must admit that I have never seen a race for governor in Alabama where voter interest has been so low. I have to believe that's because most folks had made up their minds early in the race. It may also mean that folks are tired of all the negative television ads. In any event, this lack of interest could

affect voter turnout, but I don't believe that even a low voter total will significantly affect the outcome.

### **A MAN OF THE PEOPLE FACES A WASHINGTON LOBBYIST**

It appears that Jim Folsom and Luther Strange will take the race for the number two spot down to the wire. Based on what I hear from around the state, I believe that Jim will edge Luther by a razor-thin margin. While I don't believe the people of Alabama are ready to elect a Washington lobbyist to the position of lieutenant governor, Luther has been able to haul in huge amounts of campaign money. I believe that his fund-raising ability will keep the race close. I was really surprised to see Luther's campaign go so negative against Jim so early. One of his anti-Folsom ads will rank as perhaps the worst ever used in an Alabama political race. It was downright mean-spirited and dirty and is very much like the "skunk ad" that was created by another out-of-state and highly paid political consultant. Several folks who told me they had intended to vote for Luther have changed their mind after seeing this ad and are now working hard for Folsom.

Because the office these two men seek has virtually no power over the activities of the Senate, and no duties outside the Senate, it's difficult to understand why the GOP and others have spent so much money in this race. Some political observers believe that it's tied to the presidential race in 2008 and that some of Luther's donors expect Governor Riley to be moving to Washington in 2009. Of course, that's pure speculation at this point. Nevertheless, it's the only reason that I can see to justify the millions that have been spent on Luther's campaign. It may also explain why Luther is trying so hard to hang onto the Riley coattails!

## **THE ATTORNEY GENERAL'S RACE**

From all accounts, Attorney General Troy King should win reelection. Troy has done an excellent job as Attorney General and has widespread support around the state. He is a good family man and that's important to most Alabamians. The good part about that is Troy really has legitimate family values and doesn't have to rely on a campaign consultant to mold his image. That's very much refreshing in the era of modern political races. Troy's tough stand on crime is absolutely needed during the times in which we live. If my information from around the state is correct, I predict a win for Troy by a margin of about 54% to 46%.

## **THE JUDICIAL RACES AT THE APPELLATE LEVEL**

The judicial races in Alabama at the appellate level have attracted a great deal of money, but very little voter interest thus far, and that is usually bad news for ordinary citizens. In fact, the Brennan Center for Justice at the New York University School of Law and the Justice at Stake Campaign, a nonpartisan, Washington, D.C.-based group that has been tracking spending in state Supreme Court races since 1993, project the race for Alabama chief justice as likely to be the most expensive court election in the nation this year. Obviously, the negative tone of the Nabers-Parker race in the GOP primary has left a bad taste with the public. In my opinion, that carry-over has had an effect on all of the judicial races on the general election ballot to some extent. I am convinced that folks are sick and tired of negative ads and mud-slinging by the candidates and really want to hear something positive for a change. The campaigns of the candidates who take that approach will likely be the winners. I am going to mention below a few of the races that will be on the November 7<sup>th</sup> ballot.

### **Supreme Court Races**

With the exception of the race for Chief Justice of the Alabama Supreme Court, all of the campaigns have been very quiet. In a big surprise to most political observers, the Nabers campaign went negative very early. Many felt that the American Taxpayers Alliance would do the dirty work for the GOP candidate in that race—as it did in the primary race against Tom Parker—but for some reason it came directly from the candidate himself this time. It may be that this group is afraid its funding sources if disclosed could be a big problem in that race. In any event, it will be interesting to see how voters react to that type campaigning from a sitting Supreme Court Chief Justice.

There are some very good candidates running for the other four slots whose names will be on the ballot on November 7<sup>th</sup>. Obviously, based on the polls, the Nabers-Cobb contest will be very close and many political observers believe that Judge Cobb will take that race. Champ Lyons, who is a very good example of what a good judge should be—fair, impartial, and honest—has no opposition and will return to the court. Justice Woodall, who fits the Lyons mold, deserves to be reelected and I believe he will be. Al Johnson, a well-respected circuit judge from Russell County, has run a very good race on a very limited budget. Many pollsters believe he has a good chance to win. Both Glenn Murdock and Judge John England have run very positive campaigns and have made a most favorable impression on folks I have talked with. However, neither of these candidates has been able to raise very much money to run on. There is no black person on the Supreme Court. Most Alabama citizens believe this lack of diversity is wrong and actually hurts our state's image. That belief may tip the outcome of this race to Judge England.

## **Court Of Appeals Races**

Both courts at this level—the Court of Civil Appeals and the Court of Criminal Appeals—are very important. The races for these courts have some very good candidates, but so far no candidate has attracted much attention. I recommend that our Alabama readers check into the candidates' prior experience and qualifications to sit out these courts and then decide who to vote for.

## **OTHERS RACES OF INTEREST**

### **The Race For State Treasurer**

One lower level race that has gotten more attention than any of the others is that for State Treasurer. In my opinion, that's because of the tremendous job that Kay Ivey, the incumbent, has done during her first term. Kay and my wife Sara have been very good friends for years. Sara tells me that Kay is a good person and a dedicated public servant. For that reason, I have kept up with Kay's work as Treasurer. In my opinion, this lady is a "winner" in every respect. I believe she will be reelected by a very large margin.

### **Ron Sparks Will Be Reelected By A Large Margin**

Ron Sparks has done a tremendous job as Commissioner of Agriculture and Industries. He is one of the most popular officeholders in the state. This race won't even be close for a number of reasons. A major factor is Ron's ability to draw GOP voters into his camp.

### **Legislative Races Around The State**

A record amount of money is being spent by the candidates in Alabama's legislative races this year. In fact, some of the individual Senate races will see well over one million dollars spent by both candidates. After November 7<sup>th</sup>, the public

should start demanding the early passage of strong campaign finance reform in 2007. That would be very good for the people of Alabama. There is absolutely no way to justify the wild spending that takes place in Alabama political races.

I will mention one Senate race that may have the worst negative ads that I have seen—other than those by the Strange campaign—and interestingly, they come from a female candidate who is challenging Senator Wendall Mitchell. Those ads are not only false in several aspects, but they are a little too dirty to suit me. Wendall has a conservative voting record in the Senate and has been a champion for education and agricultural interests. It will be interesting to see if the tactics used against him work. I believe too many folks know and like the Senator from Luverne to be fooled. But this type campaigning is said to work wonders for a well-financed candidate—we will see.

Based on what I am hearing, and information from the polls, I don't believe there will be many wins by the GOP legislative candidates unless they are already in office. After November 7<sup>th</sup>, there should still be a Democratic majority in both the House and Senate. Although the campaigns have been very negative in some of the races, people in the legislative districts know the incumbents and are knowledgeable about their accomplishments as well as their shortcomings. The 30-second sound bites on TV that cost the candidates huge sums of money just don't have the effect in local races that television ads have in statewide races. Legislative politics are still **local** in the scheme of things. In any event, it's difficult to justify the millions of dollars being spent in legislative races by both political parties. I hope strong campaign reform legislation will be one of the good things coming out of this political season.

### **AMENDMENT 2 IS IMPORTANT FOR ALABAMA'S PUBLIC SCHOOLS**

Amendment 2, which is on the November ballot, is a constitutional amendment to require local governments to collect at least 10 mills in property taxes for every school system in the state. This stable floor for school funding already exists in 101 Alabama School systems. A yes vote on Amendment 2 will bring the other 30 systems up to this bare minimum. A 10-mill tax amounts to \$10 for every \$1,000 in property value. Because of the way our state sets property value, a 10-mill tax amounts to only \$60 on a house with a market value of \$100,000. This is a good investment for the education of our children. I recommend a **yes** vote on Amendment 2 to help our schools. Our children deserve our support and I hope most Alabamians agree.

## **III. COURT WATCH**

### **JUDICIAL RACES MUST BE TAKEN OUT OF POLITICS**

Folks who are interested in politics probably don't pay as much attention to judicial races as they do to **regular** political races. There is one thing for certain when it comes to judicial races, however, and that is, contests for state judgeships around the country are getting more partisan, much nastier, and much more expensive. In most states where judges are still elected, big moneyed interests seeking to influence court decisions are spending tremendous sums this year to elect the candidates that they **like** and that they **want** to hear their cases. In fact, judicial races have become the most important political races for some of the large corporations whose conduct keeps them in our courts. Alabama is a prime example of that sort of thing. If there is ever a system of electing judges that needed to be changed, it's in Alabama.

It's most unfortunate that judicial

races are now being run just like campaigns for regular political office, and that's bad news for ordinary citizens and good news for the bad companies in Corporate America. The conduct of judicial elections in a number of states, including Alabama, point to the seriousness of the problem and its threat to judicial integrity, independence, and impartiality. Big money can't be allowed to dictate which candidates wind up serving as judges, but that's exactly what is happening now in a number of states.

Thirty-nine states still choose at least some of their judges by election, instead of by some form of nonelective merit selection system. Ethical boundaries needed to preserve public trust and the special role of a court as a neutral arbiter must be set and enforced. In 2004, spending on campaigns for state supreme courts increased to \$42 million nationwide, up from \$29 million just two years earlier. The spending in Supreme Court races for the general election will be even higher. The activities of the special interest groups seeking firm commitments on controversial issues from candidates who want to be judges have greatly intensified. For example, the sole purpose of the questionnaires being sent out to judicial candidates in Alabama the Christian Coalition of Alabama is to get those commitments. I suspect that's happening in all of the other states where judges are elected.

Judges around the country have become so concerned that the national Conference of Chief Justices, composed of the top jurists from all 50 states, voted recently to start an initiative aimed at changing the deteriorating culture of judicial elections. Obviously, there is no perfect way to choose a judge. But to undermine the whole purpose of the court system by allowing special interests to literally buy judgeships, or at least try to do so, is the worst system of all. Personally, I favor the election of judges, but with restrictions both on campaign donations and on spending by candidates. To make the

system work, however, third-party involvement of groups such as American Taxpayers Alliance must also be controlled. Those groups can give millions to benefit a candidate and never have to report it.

Source: *New York Times*

### **CAMPAIGN DONATIONS SHOULD NEVER INFLUENCE A HIGH COURT'S RULINGS**

There has been a great deal of speculation in Alabama over whether justices on the Supreme Court are influenced by their large campaign donors once they are elected. Recently, the *New York Times* ran an excellent investigative piece written by Adam Liptak and Janet Roberts that looked into judicial races, campaign money, and how that money affects court rulings. The reporters zeroed in on the state of Ohio. I would recommend that all of our readers obtain a copy of that story if at all possible and read it carefully before going to the polls on November 7<sup>th</sup>. There was a great deal of investigative work done by these reporters, tracking campaign money and later judicial actions in the form of court rulings. Some of their findings were shocking, to say the least.

Because 30 states are holding elections for seats on their highest courts this year, it's a good time to consider why so much money is being spent in these judicial races. The *Times* article gives us a good idea of how money given to candidates can affect court rulings. Spending in these judicial races is skyrocketing, with some judges raising millions of dollars for a single campaign. Alabama's race for chief justice is a prime example. As the amounts increase, questions about whether money is corrupting the independence of the judiciary are being raised across the nation.

An examination of the Ohio Supreme Court by the *Times* reporters found that its justices routinely sat on cases after receiving campaign contributions from parties who were actually involved in a pending case and from groups that filed briefs in support of a party. Some of the

funds came on average, they voted in favor of contributors 70% of the time, according to the *Times*. In the 12 years that were studied, the Ohio justices almost never disqualified themselves from hearing their contributors' cases. In the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times. If this is accurate, and I believe it is, the people of Ohio are getting a bad deal.

The *Times* article concluded that after a series of big-money judicial contests around the nation, the balance of power in several state high courts has shifted in recent years in favor of corporations and insurance companies. Judges are required by codes of judicial ethics to disqualify themselves whenever their impartiality might reasonably be questioned over financial or other conflicts. Apparently, there is an exception to this strict rule, and that involves campaign contributions.

Most legal experts believe that recusal over campaign donations should be the rule and not the exception. In 1999, the American Bar Association revised its Model Code of Judicial Conduct to require judges to disqualify themselves if they received campaign contributions of a certain amount from a party or its lawyer. But the bar association did not name an amount, leaving that decision to the states in the event they adopted the code. The *Times* article says no state has adopted it. Personally, I believe that campaign finance reform affecting judicial races would solve the recusal problem. That would limit the need for judges to have to recuse in cases because parties had given their campaigns money. Simply put, it would dry up the special interest money that now controls all judicial races in states like Ohio and Alabama.

Source: *New York Times*

### **DR. BRONNER SPEAKS OUT ON EXXON CASE**

Dr. David Bronner, one of the most respected men in Alabama, made some rather interesting comments recently concerning the State of Alabama's case

against ExxonMobil, which has been pending in the Alabama Supreme Court since April 27, 2004. Because our firm, along with the Cunningham Bounds firm in Mobile, tried this case in the fall of 2003, I know firsthand that liability in the case was very clear and the proof at trial that Exxon intentionally cheated the state was extremely strong. If our high court follows the law and evidentiary proof presented during the lengthy trial, the jury's verdict and the judgment in favor of the state will have to be affirmed. Here's what Dr. Bronner had to say about the current state of affairs:

*I personally believe the Alabama Supreme Court should be placed on a pedestal—beyond reproach. It must be "The Institution" that Alabama's citizens have total confidence in for fairness and justice. The Alabama Supreme Court must simply be above politics. Alabamians understand that elections make good people do and say almost anything to become elected. It is for this reason that most states do not elect their appellate court judges and justices. Alabamians should not want their judges and justices to receive campaign funds; that practice only fosters the image of "politics" as usual. Maybe someday Alabama will correct that shortcoming, but perhaps not.*

*Remember the Exxon Valdez oil tanker spill in Alaska in 1989? Exxon is a pro at stalling, and has yet to pay one penny of that jury award. ExxonMobil (they merged in 1998) tried to take advantage of our state too and got caught. In November 2003, a Montgomery jury awarded the state of Alabama \$103 million in compensatory damages and \$11.8 billion in punitive damages. The case was appealed and the punitive damages were reduced to \$3.5 billion. ExxonMobil appealed the case again to the Alabama Supreme Court which sent the*

*case to mediation. ExxonMobil walked out of the mediation and for two years the Alabama Supreme Court has done nothing!*

*It is past time for the Alabama Supreme Court to resolve this abuse of the people of Alabama.*

*Dr. David G. Bronner  
October 2006*

Dr. Bronner's comments have caused a great deal of media interest around the state. Many persons thought that the case had already been decided and that Exxon had paid what it owed the state. Unfortunately, that is not the case. We are still waiting for the court to set a date for oral arguments.

#### **NEWSPAPERS SEE A PROBLEM**

Several newspapers have commented on the Exxon case. The first to comment was the *Montgomery Independent* whose editor had a conversation with Jim Martin concerning the Exxon matter. Since then Phil Rawls of *Associated Press* wrote a very good piece on the case. The following is an editorial which appeared in the *Huntsville Times*.

#### ***Silence From The Court***

*The ExxonMobil case is one more argument for appointed justices. Intelligent people can disagree over whether Alabama's appellate courts ought to be elected, as they are now, or appointed, as they are in some other states - and as they are at the federal level. For the latest evidence supporting the appointed-judge-and-justice argument, one need look no further than the status in the Alabama Supreme Court of the state's lawsuit against ExxonMobil. Actually, the situation is better described as a lack of status. First, some background.*

*Back during the Administration of Republican Governor Fob James, who served from 1995-1999, the*

*state filed suit against ExxonMobil claiming the company had cheated the state out of \$1 billion in natural-gas royalties. Once the case was tried, the state won, and the jury awarded it \$11.9 billion— that's right, billion. The judge who heard the case decided the amount was excessive and reduced it to \$3.6 billion. Exxon-Mobil said it was still excessive and pursued its appeal anyway. (Even at \$3.6 billion, it was the highest award in state history.)*

*The case ended up in the Alabama Supreme Court three years ago, with the last brief filed more than a year ago. And still there is no word if the high court will even order oral arguments in the case.*

*With five of the nine justices up for election in November, it's not unreasonable to conclude that the court is in no hurry to deal with the matter before the election. Indeed, whatever the court decides will bring down harsh criticism. If the court upholds the verdict and the \$3.6 billion award, it will be accused of knuckling under to trial lawyers and people who would hurt the state's business climate. If the court overturns the verdict, it will be called a tool of big-business Republicans and an enemy of a state government that could do a lot of things with \$3.6 billion.*

*Such criticism will be the same before or after election, but that shouldn't matter. What gives? The justices themselves are not talking. It would be improper for them to do so. Candidates for the court are also saying little. The canons of judicial ethics apply to them as well as to sitting justices and judges. At a time when the Supreme Court has properly been lauded for its efficient and expeditious handling of cases, the Exxon Mobil delay stands out as a notable exception. Would an*

*appointed court have dealt with the matter by now? It's hard to say, but appointed justices would not have had election-day worries. They could have concentrated entirely on the gravity of the case and the serious issues it raises.*

*None of this is to suggest which way the court should rule. But rule it should. That's the court's role. While the day may never come when Alabamians will accept an appointed rather than elected court, they should expect the nine justices not to shirk their duty for fear of political fallout. Once the election is over, this case should move to the top of the docket, and the court should take steps to ensure that every case is handled as quickly as the circumstances and issues allow.*

#### **EXXON BACK IN COURT OVER 1989 VALDEZ SPILL**

As we all know, and as Dr. Bronner pointed out in his article, it's been over 15 years since the Exxon Valdez spilled 11 million gallons of crude oil along the Alaska coast in one of the country's worst environmental disasters. It's difficult to believe that a jury's \$5 billion judgment against the company is still tied up in the courts. But, having dealt with this politically powerful company, I'm not too surprised. ExxonMobil Corp.'s appeal of the Valdez verdict was to be heard for the third time recently in a federal appeals court in San Francisco. As we all know, the case stems from a 1994 decision by an Anchorage jury to award punitive damages to 34,000 fishermen and other Alaskans.

The residents claimed they were harmed when the Valdez struck a charted reef and spilled crude oil along about 1,500 miles of coastline. The captain of the Valdez was drunk and Exxon knew that he had a drinking problem. The jury found Exxon and the Valdez captain reckless in the accident.

Exxon argues it should have to pay no more than \$25 million in punitive

damages. The corporation, which reported third-quarter earnings of \$10 billion, says it has spent more than \$3 billion to settle federal and state lawsuits and to clean the Prince William Sound area. In two previous appeals, the U.S. Court of Appeals for the Ninth Circuit ordered U.S. District Judge H. Russel Holland of Anchorage, who was the trial judge, to reduce the judgment against Exxon, saying it was unconstitutionally excessive. Judge Holland complied in 2002, reducing the verdict to \$4 billion. Exxon appealed that decision. The trial judge was then ordered by the appeals court to revisit the decision. Judge Holland called Exxon's actions "reprehensible," and set the figure at \$4.5 billion plus the accrued interest. The appeals court has twice questioned the award, sending it back each time to the trial judge to reduce the verdict. Accrued interest could bring the total amount to around \$9 billion.

In the region itself, pockets of relatively fresh Exxon Valdez oil remain on shorelines as distant as Katmai National Park, about 300 miles from the site where the supertanker disgorged 11 million gallons of crude oil, according to government scientists who presented their studies at a conference last month in Anchorage. Jeff Short, a National Oceanic and Atmospheric Administration researcher, says:

*This stuff isn't changing at all. It's just the same kind of goo that got deposited there in 1989.*

According to the group that administers the settlement money paid by Exxon to the governments, only seven of thirty marine species, resources, or services have recovered to pre-spill levels. Whether the spill is to blame and whether remnant oil is causing harm remains unsettled. Prince William Sound residents are convinced that the spill triggered a cascade of environmental ills. As subsistence fishermen and hunters, they still see the effects of that oil spill on a daily basis.

### **U.S. SUPREME COURT TO HEAR SEVERAL IMPORTANT BUSINESS CASES**

The U.S. Supreme Court will consider several business cases during its upcoming term, including a case that could make it easier for consumers to hold insurers, banks, and other businesses liable for not notifying them when their credit rating changes. The case involves conflicting interpretations of the Fair Credit Reporting Act by lower federal courts in class action lawsuits against Geico General Insurance Co., Safeco Insurance Co. of America and others. The Act requires companies to notify consumers about rate increases that are based on information in their consumer credit reports.

There is a split of authority on this issue in the circuit courts of appeal. In most federal courts, consumers alleging business violations of the disclosure requirements must show that businesses knew they had violated the law when they failed to tell consumers that a change in their credit rating prompted a rate hike. The U.S. Court of Appeals for the Ninth Circuit ruled last year that consumers don't have to show the companies realized they were breaking the law. Instead, consumers need only to prove that companies ignored the law's requirements. That was the ruling by the Ninth Circuit in a series of class action lawsuits involving four insurance companies.

The Court also agreed to hear a case involving the False Claims Act that could clarify the ability of whistleblowers to sue private contractors for the misuse of federal funds. The Court declined, however, to address the constitutional concerns about that Act raised by some business groups. Some provisions of the False Claims Act allow citizens to file suit on behalf of the government against contractors who make false claims for payment. For instance, the provision was recently used by a former employee of Halliburton Co. subsidiary Kellogg, Brown & Root in an unrelated lawsuit claiming that KBR had charged the government for recreational services to U.S. troops that it never provided.

In the case before the Supreme Court, brought by Rockwell International Corp. and Boeing North American, Inc., the High Court agreed to clarify the definition of an "original source" in the False Claims Act. A person must be the original source of information about misspent funds to bring a claim under the Act. It will be interesting to see how this case winds up.

The Court will also hear a case that deals with the question of punitive damages. I suspect that issue will be widely written about before the court makes any ruling. The case before the Court, involving a verdict against Philip Morris, is extremely important and is being watched closely by the real villains in Corporate America. These companies want to take away the rights of a jury to punish a wrongdoer who has done an act that badly hurts its victim. They see placing a limitation of the ability of a jury to punish a wrongdoer as their main line of defense. These wrongdoers will pay compensatory damages, consider it a low cost of doing business, and keep on hurting folks without any slowdown. The case was set for argument before the Court on October 31<sup>st</sup>.

### **CALIFORNIA JUDGE REDUCES \$61 MILLION FEDEX VERDICT**

The California state court jury award against Federal Express, the national shipping company, was reduced by the trial judge to \$12.4 million. This case involved employment discrimination. In his opinion, the judge stated concern that the evidence failed to support the size of the initial verdict in a case, finding the jury's award to be excessive. The jury had ruled in favor of two Lebanese-American FedEx drivers who accused a manager of racial discrimination and harassment. The verdict of \$61 million was the largest single civil rights judgment to date under California's Fair Employment and Housing Act. The trial judge's handling of the issue was described as "deliberate and thoughtful," by the lawyer representing the employ-

ees. It appears from his comments that the trial judge “exercised what he thought to be in the best interest of justice.”

### **W.R. GRACE GETS WHAT IT DESERVES**

On October 11<sup>th</sup>, the U.S. Supreme Court let stand lower court rulings that require W.R. Grace & Co. to pay a \$54.5 million judgment for asbestos cleanup in a Montana mining town described by federal regulators as one of the nation’s most contaminated Superfund sites. The Environmental Protection Agency had sued Grace five years ago to recover the cleanup costs at a vermiculite mine in the town of Libby. Grace had appealed from an adverse ruling. The government is also pursuing a criminal case involving several former executives or managers of the mining company for allegedly concealing health risks at the mine. That trial will not begin until next year at the earliest.

The asbestos-laden vermiculite, laced into the mountains around Libby, was used as insulation in hundreds of thousands of U.S. homes and office buildings. The mine, which opened in 1939, was purchased by Grace in 1963. It produced about 80% of the world’s supply of the mineral at one time. Grace operated the mine until 1992, unleashing a “human and environmental tragedy” in the town. Nearly two-thirds of employees with more than 10 years of service tested positive for lung ailments, according to a company memorandum written in 1976 by one of the indicted men. The cleanup of the town continues, and some residents said the matter would wind up in court again because the ultimate cost of remediation would be much higher than the \$54.5 million at issue in this case.

In its appeals, the company argued that the EPA’s efforts in Libby amounted to a long-term rehabilitation of the area rather than an emergency cleanup. Under the law, toxic polluters can be forced to repay the EPA the full cost of cleaning up hazardous substances that pose an immediate risk to the public

but face more limited charges for such long-term “remediation” of the area. Grace argued that much of the agency’s work was actually remedial. Fortunately, the federal courts disagreed and ruled for the EPA. This obviously is a public health crisis that requires ongoing action. The U.S. Court of Appeals for the Ninth Circuit had stated in its ruling in December:

*The situation confronting the EPA in Libby is truly extraordinary. About 12,000 residents of Libby and nearby communities face ongoing, pervasive exposure to asbestos particles being released through documented exposure pathways. We cannot escape the fact that people are sick and dying as a result of this continuing exposure.*

The appeals court, based in San Francisco, had upheld the trial judge’s order requiring Grace to repay the EPA’s cost for the emergency cleanup. During its cleanup over the last several years, the EPA has used vacuum trucks and other equipment to remove vermiculate-laced soil. According to an EPA toxicologist, people in the Libby area experienced “the most severe residential exposure to a hazardous material this country has ever seen.” The criminal case involves the question of whether company officials knowingly failed to warn workers of the dangers of prolonged exposure to vermiculite. The 2005 indictments said the officials were criminally negligent.

Source: *Los Angeles Times*

## **IV. THE NATIONAL SCENE**

### **THE MASSIVE CORRUPTION IN OUR NATION’S CAPITAL AFFECTS ALL AMERICANS**

The widespread corruption in Washington that seems to be at record levels should be of concern to all of us. In fact, there is so much political corruption on

Capitol Hill that the FBI has had to triple the number of squads investigating lobbyists, lawmakers, and influence peddlers, according to a report in the *New York Daily News*. For decades, only one squad in Washington handled corruption cases because the crimes were seen as local offenses handled by FBI field offices in lawmakers’ home districts. But in recent years, the massive Jack Abramoff lobbying scandal and other abuses of power and privilege have prompted the FBI to assign 37 agents full-time to three new squads in an office near Capitol Hill.

Based on information that I have read, I am not sure only 37 agents can handle this job. The FBI wants enough agents in the Washington field office for a fourth corruption squad “because so much wrongdoing is being uncovered.” FBI Assistant Director Chip Burrus, who heads the FBI’s criminal division, says that the typical crimes involve lawmakers’ illegal interactions with lobbyists and “people who have a lot of savvy about how the congressional process works and appropriations.”

According to the report, two years ago only 400 agents worked on public corruption cases. Now, 615 agents nationwide are trying to nail public servants for betraying the public trust in 2,200 ongoing cases. That is highly significant and tells us that a crackdown on corruption is badly needed. I don’t believe the American people will put up much longer with all of the corruption that is being uncovered in Washington.

Source: *Washington Daily News*

### **REPORT FINDS ABRAMOFF AND ROVE HAVE BEEN PRETTY FRIENDLY**

I understand that the ramifications and fall-out from the Jack Abramoff scandal are far from over. There are a number of persons in Washington who probably wish that it was over. The Bush White House—and even the President himself—claimed not to know very much about Abramoff. They said the man had **limited** contacts at the White House. A bipartisan congressional report

has now documented hundreds of contacts between White House officials and this corrupt lobbyist and his partners. Interestingly, there were a number of direct contacts between Abramoff and Karl Rove, the man who runs the Bush political operations. The House Government Reform Committee report, based on e-mail messages and other records subpoenaed from Abramoff's lobbying firm, found over 500 contacts between Abramoff's lobbying team and White House officials from 2001 to 2004. Eighty-two of these contracts were with Rove's office.

The report suggests that Abramoff's lobbying resulted in actions by the Bush Administration that benefited Abramoff clients. Included were decisions to distribute millions of dollars in federal money to Indian tribes with large gambling operations. As the result of an aggressive lobbying campaign in 2001 and 2002 involving 73 contacts with White House officials, Abramoff took credit for an Administration decision to release \$16.3 million to a Mississippi tribe for jail construction. This came despite strong opposition from the Justice Department, according to the report. Frankly, I really wasn't at all surprised that Rove and Abramoff were friends. Nor was I surprised that the corrupt lobbyist would attempt to curry favor with Rove. In an e-mail message to a colleague, here is how Abramoff described Rove:

*He's a great guy. Told me anytime we need something just let him know through Susan.*

The message was referring to Susan Ralson, Abramoff's former secretary, who joined the White House in February 2001 as Rove's executive assistant. Ms. Ralson was lobbied scores of times by Abramoff and his partners, the report found, and she was instrumental in passing messages between Abramoff and senior officials at the White House, including Rove and Ken Mehlman. Mehlman, now chairman of the Republican National Committee, was then a senior White House political strategist.

Disclosure of the report's findings came as a federal judge in Miami agreed in late September to delay Abramoff's imprisonment, but not for as long as the Justice Department wanted. The Department asked that Abramoff, who has been sentenced to nearly six years in prison, not have to surrender for three months because of the need for his continued cooperation in the influence-peddling investigation in Washington. Judge Paul C. Huck agreed to allow Abramoff to remain free only until November 15<sup>th</sup>, saying "there comes a time when people have to pay the piper." You will probably recall that Abramoff pleaded guilty in Miami as part of an agreement with the Justice Department in which he confessed to corruption charges in Washington, and to fraud charges in Florida involving his purchase of a casino-boat fleet there. Since that time a number of powerful men have fallen, and sources in Washington say there will be lots more before it's over. My guess is that those who are sweating it out were glad to hear that Abramoff would be sentenced this month.

Source: *New York Times*

#### **FEDERAL GOVERNMENT PROTECTS THE POWERFUL OIL COMPANIES**

We all know how powerful the giant oil companies are and how much political clout they wield. It now appears that the federal government has no plans to try to recover \$1.3 billion in royalties that the government lost as a result of flawed oil and gas leases it signed in the late 1990s. Ms. Johnnie M. Burton, director of the Minerals Management Service of the Interior Department, made this shocking announcement at a forum held by Platt's, an oil industry newsletter. The Director said she did not want to force more than 50 companies to renegotiate offshore drilling leases that will allow them to **escape** as much as \$10 billion in royalty payments over the next decade.

Interestingly, more than half of the companies that hold these leases have

not even responded to the government's requests. According to Ms. Burton, the government told the companies that the Department "would really **appreciate** it" if they would change their contracts. Frankly, that weak approach by the federal government is impossible to comprehend. Even if the companies do agree to change their leases, Ms. Burton said that the government would not try to recapture the \$1.3 billion in royalty payments that the companies have already been able to escape. At issue are hundreds of offshore drilling leases for the Gulf of Mexico that were signed in 1998 and 1999 and that allow companies to extract up to 87.5 million barrels of oil per lease without paying royalties to the government. In what investigators believe was an unintentional error, the leases omitted a clause that would normally require companies to pay the full 12.5% royalty if oil prices climbed above about \$36 a barrel. I guarantee you that the oil companies involved knew exactly what they were doing.

A group of federal auditors have charged that the Interior Department blocked them from recovering underpayments by more than two dozen companies. In May, the House passed a proposal that would pressure companies to change their leases by prohibiting those that refuse to do so from acquiring additional federal leases in the future. But the measure has stalled because Republican leaders in both the House and Senate are opposed to it. Democratic lawmakers called for investigations into new allegations by three current federal auditors and one former federal auditor that the Interior Department had stopped them from trying to recover \$30 million in deliberate underpayments by oil companies. The allegations, disclosed by *The New York Times*, were made in lawsuits that the auditors filed under the federal whistleblowers act.

The four government auditors, whose job it is to monitor leases for oil and gas on federal property, say the Interior Department stopped their efforts to

recover millions of dollars from companies that were cheating the government. The auditors contend in the lawsuits that their bosses stopped them from pursuing more than \$30 million in fraudulent underpayments of royalties for oil produced in publicly owned waters in the Gulf of Mexico. Bobby L. Maxwell, who was formerly in charge of Gulf of Mexico auditing, stated:

*The agency has lost its sense of mission, which is to protect American taxpayers. These are assets that belong to the American public, and they are supposed to be used for things like education, public infrastructure and roadways.*

The lawsuits came to light as lawmakers, Democrats and Republicans alike, were questioning the Bush Administration's refusal to challenge the oil and gas industry. The Interior Department's inspector general, Earl E. Devaney, made a shocking statement to a House subcommittee. He said that "short of crime, anything goes" at the top levels of the Interior Department. Regardless of how you might feel about these lawsuits, it's certainly appears that the Interior Department during the Bush Administration has been much too friendly with the oil and gas companies. Under its business-friendly agenda, the Department has increased incentives for drilling in risky areas, has speeded approvals for drilling applications, and has campaigned to open more coastal areas for oil exploration.

Now it appears that the government is willing to allow the giant and politically powerful oil companies to avoid paying needed revenues at a time when the oil giants are making record profits. The Interior Department's own statistics indicate that revenue from auditing and enforcement took a nose dive after President Bush took office. From 1989 through 2001, according to a report by the Congressional Budget Office, auditing and other enforcement efforts generated an average of \$176 million a year. But from 2002 through 2005, according to numbers that the department pro-

vided lawmakers last May, those collections averaged only \$46 million.

Source: *New York Times*

#### **MURPHY OIL TO PAY \$330 MILLION IN KATRINA CLASS ACTION SUIT**

**Murphy Oil Corp.** will pay \$330 million to settle the class action lawsuit filed by Hurricane Katrina victims whose homes and businesses were damaged by floodwaters that carried over one million gallons of crude oil from a company storage tank. The refinery-tank spill in Meraux, La., a suburb of New Orleans, caused some of the worst environmental damage from the hurricane. Owners of about 6,200 homes and businesses in Meraux and adjacent Chalmette were involved in the suit against the company's Murphy Oil USA Inc. Terms of the settlement call for Murphy, based in El Dorado, Ark., to compensate affected home and business owners for property damage, the diminished value of properties damaged by the spill, and "mental anguish and inconvenience" resulting from the incident. In addition, Murphy will offer to purchase "at fair market value" as many as 600 homes and businesses in an area next to the refinery that was heavily affected by the spill.

A company-funded clean-up, which was already under way and is being supervised by federal and state regulators, will continue as part of the settlement. The settlement must be approved by a federal judge in New Orleans. Insurance will cover all settlement costs except for the purchase and remediation of damaged properties. That will cost an estimated \$55 million and will be incurred as a capital expenditure by the company. The oil came from a storage tank that floated off its foundation during the storm. The spill and debate over whether it was being properly cleaned up were the subject of an article in *The Wall Street Journal* in January. Murphy still faces a number of individual suits related to the spill. At least, this settlement is a step in the right direction.

#### **THE FOLKS WHO RUN MERCK ARE A TRICKY BUNCH**

Zocor and Mevacor have been used by millions of people to help lower their cholesterol. But Merck & Co., the manufacturer and seller of these drugs, also used the drugs to lower something else—its income tax bill. Thirteen years ago, Merck set up a subsidiary with an address in Bermuda, which is a tax-friendly haven for Corporate America, and has used this ploy to avoid paying taxes. A British bank was Merck's partner in this deal. Merck quietly transferred patents underlying the blockbuster drugs to the new subsidiary, and then Merck paid the subsidiary for use of the patents.

The arrangement in effect allowed a portion of the profits to disappear and allowed Merck to cut \$1.5 billion off its federal tax bills over roughly the next 10 years. Now, the complicated transaction — never publicly disclosed — has sparked one of the largest tax disputes ever involving a U.S. corporation. The Internal Revenue Service has challenged the tax benefits from the arrangement. Merck will most likely be ordered to pay the IRS over \$2.3 billion in back taxes, interest and penalties. The Merck arrangement, according to federal tax authorities, wasn't a real partnership with a foreign bank, but instead was just a well-disguised loan agreement, designed to avoid taxes by maneuvering between the tax laws of different countries, with no economic substance.

Merck is not the only corporation that is using this arrangement to dodge taxes. There are other partnerships involving Dow Chemical Co., General Electric, and others doing the very same thing that the IRS is challenging with Merck. The IRS is challenging what is often called "tax arbitrage." The IRS has formed a team to consider crafting new international treaties, as well as performing tax audits that would simultaneously look at a company's tax obligations in multiple countries. There are other ways that U.S. companies are avoiding paying their U.S. taxes. For example, technology and pharmaceutical companies are

shifting intellectual property assets to countries with far lower tax rates, such as Singapore and Ireland. It's pretty sad when you consider how ordinary citizens work hard, pay their taxes, and then read where companies like Merck and others dodge paying their taxes.

Source: *Wall Street Journal*

### **BP WAS WARNED BUT APPARENTLY DIDN'T LISTEN**

BP has already had a bad year, even by oil industry standards, and the year's not quite over. For starters, the company had the worst oil spill in the history of the North Slope. BP also had the worst U.S. refinery accident in more than a decade. It appears that BP's problems were profit-driven and caused by intense internal pressure to keep costs down. It has been reported that the company's budgeting often took precedence over routine maintenance and even over safety. Current and former employees have painted a pretty bad picture about the company's safety practices.

As we pointed out in a prior issue, BP had been warned in 2002 about the company's corrosion problems. Superiors in BP's corrosion, inspection, and chemical team were warned of a potential "catastrophe." These supervisors were told about "the larger lack of consistency and lack of standardization across the North Slope." Bill Herasymiuk, the man who wrote a very strong memo and still works for BP, has been called to appear before the grand jury in Anchorage. It appears that while doing very well financially BP elected to cut costs by 10%. This meant that things like corrosion control funding suffered as a result.

The problems in Alaska and Texas could have been avoided had BP's bosses heeded the warnings. At Texas City even money for painting and external corrosion control was tight - until leaks started appearing. There was an it-can't-happen-here mentality on the part of middle management. Constant turnover only worsened matters, as new

bosses would seek to beat the previous manager's numbers. BP appears to be a company that needs to straighten up and fly right!

Source: *Fortune*

### **REPORT OUTLINES BP'S INDIFFERENCE TO SAFETY**

Let's take a closer look at the explosion that occurred at BP's Texas City refinery last year. Raymond Skinner, the former area director of the federal Occupational Safety and Health Administration (OSHA), believes gross negligence and indifference to safety at BP led to the fatal explosion. The former director wrote in a report:

*It is my firm belief the clear and convincing evidence establishes not only that BP's negligence was the cause of the March 23, 2005, explosion and fire which killed 15 and injured hundreds more, but it's gross negligence as well.*

Mr. Skinner, who retired from OSHA in January 2004 after 30 years of service, was area director of the Houston South area office for the previous 12 years. In 1992, Mr. Skinner, while still at OSHA, warned Amoco, which owned the Texas City refinery at the time, that so-called blowdown drums and vent stacks—like the kind that exploded last year—were dangerous to the environment and workers and should be replaced or changed. That warning was clearly ignored.

The blast last year occurred as workers accidentally overflowed the refinery's F-20 blowdown drum and stack, which vented to the open atmosphere, while restarting a unit that had been shut down for a month. Hydrocarbons spewed from the stack and collected on the plant grounds along with a vapor cloud while workers were conducting their normal operations. The materials were ignited by an idling truck or other source, causing a series of explosions felt five miles away. In his report, Mr. Skinner says the company promised to make improvements to

blowdown drums and stacks as part of a settlement agreement in the 1992 case to prevent the dangerous materials from venting to the atmosphere, but failed to do so. The report contained the following findings:

- The oil company proceeded with conscious indifference to the rights, safety and welfare of those who were killed or injured; and
- BP was grossly negligent for continuing to operate its blowdown drums and stacks with knowledge of at least 19 documented incidents involving hydrocarbon leaks, vapor releases and/or fires involving blowdown drums and stacks, including F-20.

As you will recall, BP merged with Amoco in 1999. Numerous violations of federal health and safety regulations occurred, including some not included in OSHA's final report released a year ago. OSHA fined BP a record \$21.4 million after finding more than 300 violations. This is obviously a company that doesn't make safety a top priority. Unfortunately, they aren't the only ones to put profits over safety.

Source: *Houston Chronicle*

### **FEDERAL GOVERNMENT NEEDS TO SECURE LAPTOPS WITH SENSITIVE INFORMATION**

It appears that the federal government needs to do a much better job of securing laptop computers that contain personal information of U.S. citizens. The Commerce Department has lost more than 1,100 laptop computers since 2001, most of them assigned to the Census Bureau. The Census Bureau, the main collector of information about Americans, lost 672 computers. Of those, 246 contained some personal data. A half-dozen other federal agencies or departments have reported data thefts and security breaches involving personal information in the last six months. Back in May, the Veterans Affairs Department suffered the biggest loss with the theft of a laptop and external drive containing information for 26.5

million veterans and active duty troops.

Other government departments reporting the loss of computers with personal information include the departments of Agriculture, Defense, Education, Energy, Health and Human Services, and Transportation. The Federal Trade Commission also has lost laptops with sensitive data. Clearly, the federal government needs to do a better job of securing laptop computers that contain personal information of U.S. citizens. Thus far, at least to the public's knowledge, no real damage has been done. But the potential for harm to innocent people because of the government's lapses is certainly there.

Source: *Associated Press*

## V. THE CORPORATE WORLD

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### **FORMER RENAISSANCERE HOLDINGS LTD. EXECUTIVES CHARGED WITH SECURITIES FRAUD**

The Securities and Exchange Commission (SEC) has brought securities fraud charges against James N. Stanard and Martin J. Merritt, the former CEO and former controller, respectively, of RenaissanceRe Holdings Ltd. (RenRe) and also against Michael W. Cash, a former senior executive of RenRe's wholly-owned subsidiary, Renaissance Reinsurance Ltd. The complaint, filed in federal court in Manhattan, alleges that Stanard, Merritt, and Cash structured and executed a sham transaction that had no economic substance and no purpose other than to smooth and defer over \$26 million of RenRe's earnings from 2001 to 2002 and 2003. The Commission also announced a partial settlement of its charges against Merritt, who has consented to the entry of an antifraud injunction and other relief.

This is another case arising from the SEC's ongoing investigation of the misuse of finite reinsurance to commit securities fraud. The investing public

relies upon senior executives of public companies not to engage in fraudulent transactions designed to misstate their companies' financial statements. It appears that intentional fraud was committed by these executives. The field of reinsurance and so-called finite insurance appears to be an area where companies have little regard for the law.

### **PEDIATRIX SETTLES FALSE BILLINGS CLAIM**

Pediatrix Medical Group Inc., whose network of affiliated physician groups provides medical services in various hospital neonatal intensive care units in 32 states and Puerto Rico, has agreed to pay the federal government over \$25 million to settle government claims under the False Claims Act. Pediatrix improperly billed Medicaid, TRICARE, and the Federal Employees Health Benefits Program for neonatal care provided by their doctors. The investigation leading to the settlement was a joint effort between federal and investigators from several states. In commenting on the settlement, U.S. Attorney Rod J. Rosenstein of the District of Maryland made this observation:

*Some health care providers 'upcode' their reimbursement claims and falsely represent that they are entitled to reimbursement for more expensive treatment than they actually provided. In this case, Pediatrix billed the government for critical care services when in fact the infants were not critically ill. Substantial recoveries such as this one protect the integrity of federal health care programs.*

It took a joint effort—because of the complexity of the case—to achieve this settlement. The combined efforts in the investigation brought this case to a successful resolution. Pediatrix must now pay back money it never should have been paid. According to the settlement agreement, from January 1996 through December 1999, Pediatrix improperly applied CPT billing codes to neonatal services that did not accurately corre-

spond to the medical condition of the infant or the services provided. Specifically, Pediatrix admitted infants to hospital neonatal intensive care units using a CPT code for admission of critically ill infants, when as many as one-third or more of those infants were not in fact critically ill. Pediatrix used critical/unstable and critical/stable CPT codes for subsequent days of treatment, when as many as 50% or more of those infants were not in fact critically ill. Pediatrix also used critical/unstable and critical/stable CPT codes on discharge days, when as many as 85% or more of those infants were not in fact critically ill.

The settlement also resolves a lawsuit originally filed on behalf of the United States by Daniel M. Hall, M.D., a Board Certified neonatologist, under the qui tam provisions of the federal False Claims Act. Although these cases were settled, there is no telling how much actual fraud goes on undetected in connection with federal programs. Based on what all is being uncovered, it's got to be massive in scope. In any event, this sort of thing can't be tolerated. It's good to see the various agencies involved in the Pediatrix investigation doing their job.

Source: *Insurance News*

### **OMNICARE SETTLES MICHIGAN CASE FOR \$52.5 MILLION**

Omnicare Inc. and Specialized Pharmacy Services, Inc., a Livonia-based subsidiary, will pay about \$52.5 million to settle a civil case related to Medicaid fraud allegations in Michigan. This is the largest Medicaid fraud settlement in that state's history. Criminal charges are pending against the president of the subsidiary. Specialized Pharmacy Services Inc. provides pharmacy services to long-term care facilities. Omnicare has operations in 47 states.

Specialized Pharmacy filed Medicaid claims for drugs that weren't used and for patients who died. The investigation began in 2003 and covered a period from 1999 through 2005. The civil settlement includes about \$17 million in Medicaid reimbursement. The company will pay

about \$34 million in penalties, \$1 million for public service announcements about drug pricing, and \$300,000 to reimburse the state's investigation costs. The parties also reached an agreement requiring the company to reimburse or pay \$3.5 million related to hospice claims. Companies that cheat the government at any level must be punished severely. Providing pharmacy services under federal programs to long-term care facilities is important and costly. As I have stated on many occasions, fraud committed against the federal government that costs the taxpayers' hard-earned money can't be tolerated.

Source: *Associated Press*

### ORACLE SETTLES PRICE-GOUGING CLAIM

Database giant Oracle Corp. has agreed to pay \$98.5 million to settle claims pending in a Maryland federal court that PeopleSoft Inc., a software maker it acquired last year, had overcharged the government by providing false pricing information to the General Services Administration. A new task force targeting procurement fraud was also announced by the Justice Department. The task force, established by the Department's Criminal Division, would detect and prosecute fraud associated with increased contracting activity for national security and other government programs.

The settlement with Oracle resolved allegations that PeopleSoft understated to the GSA the discounts it provided to commercial customers. GSA regulations require that a vendor disclose its commercial pricing policies during negotiations for a single contract that can give a vendor access to hundreds of government purchasers. As a result of the defective disclosures, the government alleged, federal purchasers buying through the GSA program paid inflated prices for software and maintenance services for many years. Oracle inherited the liability when it acquired PeopleSoft, which was based in Pleasanton, California.

The 1997 contract resulted in about \$127 million of software sales and \$77

million in maintenance sales before it was cancelled by Oracle in September 2005. James A. Hicks, a former employee of PeopleSoft's federal sales office in Bethesda, Maryland, filed the case in 2003 under seal in federal court. Apparently, Mr. Hicks was fired in 2000 after he repeatedly raised the issue of fraud with senior company officials. The government later took over the case, which had been filed under the False Claims Act and the case was settled.

Source: *Washington Post*

### THE \$100 MILLION CEO CLUB

Although most of the big bosses of U.S. corporations are already doing very well financially, some are doing even better than the rest. More than 30 CEOs for this latter group of companies have fully vested stock options worth \$100 million or more. That's in addition to their regular pay checks. Until 2004, companies didn't have to treat options as an expense, so they could parcel them out on executives without hurting corporate earnings per share. It is said that some companies didn't even realize how huge the pot would grow if they kept doling out options. Nevertheless, that's exactly what's happened. The stock options are just a form of additional compensation for corporate bosses who are already being paid very handsomely by their companies.

As you know, stock options give recipients the right to buy shares in the future at the current price, known as the "strike" or "exercise" price. The higher the stock rises, the richer executives can become. Generally, the strike price is set as the closing price on the day options are granted. But many firms, particularly during the dot-com boom, consistently granted options when the stock hit a monthly or yearly low, suggesting they chose the grant date with the benefit of hindsight. Backdating itself isn't illegal, but failing companies that don't disclose it properly risk the wrath of the Securities and Exchange Commission and the Department of Justice.

Source: *Associated Press*

## VI. CONGRESSIONAL UPDATE

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### *IT'S TIME FOR A CHANGE IN WASHINGTON*

I firmly believe that the American people need and deserve a change in Washington. It's quite obvious, based on their record, that Republican leaders in both the House and Senate have sold out completely to the giants of Corporate America. The flow of large corporate donations to candidates and to 507 committees that work for politicians has the effect of allowing these powerful corporations to actually control politics in our nation's capital. As a result, individual voters have no say-so on how the members of Congress vote once elected.

Because of the huge sums spent to elect members of Congress, the public is shut out of the political system. If you want to find out where the special interest money goes, check [www.cleanup-washington.org](http://www.cleanup-washington.org). In my opinion, the stakes have never been higher for our nation than in this election. The opportunity for change has never been greater. On November 7<sup>th</sup>, the voters will have the opportunity to send America in a new direction and elect leaders who will bring the positive change our country so desperately needs.

The governing philosophy of the Republicans leading America today is best described as **divide and conquer**. Time after time, when faced with critical opportunities to bring Americans together in common purpose, the Republican leaders in Congress chose instead to exploit **wedge issues** that **divide America, foster fear, and promote insecurity**. Now the voters have the opportunity to put an end to this cynical philosophy of governing. But doing that requires electing a Democratic Congress. The Democratic Party in my state, for some unknown reason, failed to run real strong candidates against Republican incumbents. As a result, there won't be any changes in

our congressional delegation. That is not the case in other states where changes will take place.

The GOP has sought to paint itself as the only party with morals and strong family values. But, no single group of people has a monopoly on morality. The recent scandal involving Rep. Foley is proof of that. Neither does one party have the best ideas on how to keep America safe. It's most interesting to see GOP candidates in a great number of states trying to distance themselves from President Bush.

A very few people have a monopoly on power in our government. Without a doubt, they have used that monopoly to prevent a true debate on how to expand the economy, how to clean up and reform the political process, and how to really protect our nation. When Bill Clinton left office, he left our finances in very good condition and our government in overall excellent shape. The former President, who is still very popular, had this to say recently about the upcoming elections:

*Democrats have fresh ideas, progressive solutions, and a new direction for America. Expanding health care, making college education an opportunity for everybody, energy independence, and a raise in the minimum wage - when you hear talk of a "new direction," this is what we're talking about. But none of those things will become reality without a Democratic majority. The American people are tired of hearing leaders sing the praises of an economic recovery that doesn't feel like one. They are tired of a government that gives more to those who already have the most. They are disheartened by leaders who have put personal gain before the public good. They know that America can be better. And they are looking for Democrats to lead the way.*

American citizens—regardless of their political party affiliation—have a vested interest in what happens on November

7<sup>th</sup>. All citizens must get involved and not only vote, but work during the few days remaining to elect good candidates. On Election Day, we can usher in a better day for this nation. In my opinion, a failure to bring about real change will be a tragic mistake. We must break the stranglehold that the powerful special interests currently have in Washington. The place to start is in Congress.

#### **LAWMAKERS ARE ASKED TO RENEW "TRUE-BLUE REFORMER" STATUS**

All of the politicians talk about honesty, morality, ethics, and reform during the political season, but few of them really mean all that they say. There are exceptions. Most of them, however, just parrot what some highly paid political consultant tell them to say. In November 1995, Public Citizen bestowed "True-Blue Reformer" credentials on 143 House members—43 Republicans and 100 Democrats—who voted for bills banning gifts and improving lobbying disclosure, while voting against five amendments that would weaken the measures. Certain of these named "Reformers" continue to celebrate their True-Blue Reformer status. For example, Rep. Tom Davis (R-VA) cites the credential on his member Web site and on that of the House Committee on Government Reform, which he chairs.

Public Citizen sent renewal notices to the 68 members of the 1995 Reformer class who remain in Congress. Only those members who agree to sign a Voters First Pledge—a promise to support clean elections and lobbying reform—will retain their status as "Reformers." The pledge, which Public Citizen, Common Cause, and Public Campaign Action Fund sent to federal candidates in June, includes three critical reforms to address the root causes of corruption in Washington. Persons who sign the pledge promise to:

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

- Restore Accountability - Pass and enforce meaningful new restrictions on gifts and travel from lobbyists and other powerful interests for members of Congress.

- Protect Voters' Right-To-Know - Require full disclosure on the Internet of all lobbyists' contributions and any fundraising help members of Congress receive from lobbyists.

At press time, more than 300 candidates for federal office had signed the pledge. Members of the 1995 "Reformers" group who hadn't signed the pledge by October 15th have had their True Blue credentials revoked. You can find out which candidates have signed the pledge by going to [www.Voters-FirstPledge.org](http://www.Voters-FirstPledge.org).

Source: Public Citizen

#### **THE PUBLIC SHOULD DEMAND THAT THE CONGRESSIONAL REVOLVING DOOR STOP TURNING**

One of the biggest ethical problems in Washington concerns the revolving door that currently exists in our nation's capital. The American people need to find out about this door and how it affects taxpayers. When they do—what they find, they won't like. Persons can go from working for the government to working for well-connected lobbying firms—and make a killing in the process. An example is Letitia White. Within two years, this former congressional receptionist's lobbying fees had grown to over \$3.5 million. The secret for Ms. White's success is not too hard to figure out. Her last job on Capitol Hill was as a top aide to Rep. Jerry Lewis (R-CA), chairman of the powerful House Appropriations Committee. This is the committee that the disgraced lobbyist and confessed criminal Jack Abramoff used to call the "favor factory." As a lobbyist, Ms. White became very good overnight at getting her clients "earmarks"—government funds directed by lawmakers to specific projects or specific contractors. I wonder what special expertise this former aide suddenly

acquired that made her such a successful lobbyist.

This is Congress, better known lately for corruption than legislating. A broken process has allowed lobbyists to channel campaign funds from their clients to lawmakers. In return, lawmakers earmark money to projects that benefit those clients. The losers are the taxpaying public, which gets stuck with the costs of these special favors. Well-connected industries and companies will hire persons who work for a senator or member of Congress and then put them to work with large salaries as lobbyists. Many Appropriations Committee staffers who become lobbyists, lobby their former committee and find immediate financial rewards. You have to wonder about their loyalties before entering the revolving door.

At the beginning of this year, GOP congressional leaders pledged to curb influence-peddling, including the use of earmarks. Their sudden interest and newly-found zeal was fueled by the Abramoff scandal, the bribery case involving Rep. Randy “Duke” Cunningham (R-CA), and a few other scandals. Perhaps the latest chapter of the Abramoff saga was when Rep. Bob Ney (R-OH), agreed to plead guilty to federal corruption charges. I understand there will be more to come from the Abramoff investigation in the near future.

Source: USA Today

#### **VOTERS HAVE WAY TO GAUGE HOW BIG BUSINESS MONEY INFLUENCES LAWMAKERS**

Public Citizen has released some vital information to voters that will help them gauge whether their members of Congress represent them or the interests of Big Business. Information is now available detailing the amount of contributions from lobbyists, the value of privately funded travel accepted by the lawmakers, the amount of contributions from out-of-state donors, the percentage of contributions from donors who give \$200 or less, and the amount of contributions from political action committees.

It's very important because of the corrosive influence money has on politics.

Campaign cash from Big Business and major industries flows into campaigns and into 527 committees working for candidates. The results have been downright shocking. One member of Congress—Randy “Duke” Cunningham of California—was jailed for corruption, and another—Bob Ney of Ohio—has entered a guilty plea to conspiracy to commit fraud and lying on disclosure forms about gifts received from Jack Abramoff. At press time, Rep. Ney was still in Congress. Former House Majority Leader Tom DeLay (R-TX) is under indictment. Interestingly, DeLay is still being featured on right-wing radio talk shows pushing the GOP agenda. The FBI is reportedly closing in on Rep. William Jefferson (D-LA), in whose freezer agents found \$90,000 in “cold cash.”

Most folks believe when lobbyists give members of Congress money, the lobbyists expect something in return. When the lawmakers take large sums of money, lawmakers have to know that. Obviously, many of them deliver—to the detriment of the public—and therein lies the problem. The reason that Congress didn't do anything to ease **sky-rocketing gas prices** is because a great number of members are beholden to the oil and gas industry. Do you wonder why we now have Medicare prescription drug legislation that won't allow the government to **negotiate** the lowest possible price for medications? Do you ask why members of Congress get a **raise** while efforts to raise the **minimum wage** fails? The flow of money is directly responsible when efforts to pass **consumer-friendly** legislation get nowhere in Congress.

In addition to campaign finance reform, we need real lobbying and ethics reform in Washington. So far, this Congress has refused to pass meaningful reform to clean up its act despite public outrage over the scandals from Capitol Hill from the leadership down. Reform has not been enacted because this Congress is totally controlled by corporate interests and they won't allow anything of consequence to get

through both the House and Senate. Public confidence in the federal elections must be restored and for that to happen, the flow of big money must be stopped. I hope being able to get information about the candidates will adequately inform potential voters about who they should vote for on November 7<sup>th</sup>. Time is short—so get informed!

Source: Public Citizen

#### **SHAME ON JOE BARTON**

The refusal of House Committee on Energy and Commerce Chairman Joe Barton (R-TX) to move the Combating Autism Act (S.843) from his committee and bring it to the floor for a vote before the pre-election recess was a devastating blow to children with autism and their families. But, the fight for passage of this critical legislation continues. In his unwillingness to act on a bill meticulously crafted over 18 months and unanimously passed by the Senate, Rep. Barton has put **politics** before the **welfare** of the children who badly need this legislation. Hundreds of senators and members of the House of Representatives—from both sides of the aisle—have met with families impacted by autism. These legislators signed on in support of the Combating Autism Act. Rep. Barton, on the other hand, showed no concern for the millions of Americans whose struggles with autism are their everyday reality. His actions simply can't be justified and his motives have to be questioned.

Autism is an epidemic that now affects one in every 166 of our children, yet federal funding for autism remains woefully insufficient. The Combating Autism Act would begin to address this inequity by authorizing \$920 million over five years toward treatment and research into the causes—genetic, environmental, or otherwise—of the country's fastest-growing childhood developmental disorder. If you agree that the fight must continue, let Chairman Barton know how you feel! Call him at 202-225-2002 and let him know that it is unacceptable for an elected

official to put personal political interests ahead of the needs of families with autistic children.

The Combating Autism Act of 2006 builds on the provisions of the Children's Health Act of 2000 and would authorize approximately \$920 million in federal funds over five years to combat autism through research, screening, intervention and education. It should be noted that Speaker of the House Dennis Hastert (R-IL), who now has his own set of problems, has refused to intervene on the children's behalf. On his Web site, this is what the Speaker says: "At home we put children first, and Republicans are doing just that in the House." Based on what we know now, that's not at all true. After the Foley episode, I wouldn't be surprised to see a change in the Speaker's Web site. In any event, call the Speaker at 202-225-0600 and ask him to back up his statement and put S.843 on the House suspension calendar! He should do what's right for a change. A good place to start is by helping children with autism.

## VII. PRODUCT LIABILITY UPDATE

### ***DODGE DURANGO FUEL FED FIRE CASE SETTLED***

Our firm has been representing the family of a driver of a 2002 Dodge Durango who was tragically killed in a motor vehicle accident. As a trial date approached, we were able to settle the case for an amount, that is confidential. Our driver was involved in a one-vehicle accident when the 2002 Dodge Durango veered off the road and collided with a tree. He suffered minor injuries in the collision, but ultimately died as a result of a post-collision fuel fed fire.

Our experts established that the fuel filler tube for the Dodge Durango was defective and unreasonably dangerous because it lacked the necessary flexibil-

ity to prevent the tube from being exposed to accident forces during a collision. Our fuel system design expert, who had designed fuel systems for General Motors, established that the Durango fuel filler tube was too rigid, causing it to punch through the body of the vehicle as it rolled over on its side. When the vehicle rolled over and the fuel filler tube was exposed, the fuel cap was knocked off, allowing fuel to escape from the vehicle. The driver was trapped inside the vehicle and was unable to escape, even through persons at the scene tried their best to save him.

Our experts established that a more flexible fuel filler tube design like the ones used in the Durango's sister vehicle, the Dodge Dakota, would have prevented the fire from spreading as fast as it did in this accident. Our experts also established that DaimlerChrysler used the safer fuel filler tube design in other vehicles such as the Jeep Grand Cherokee and the Jeep Wrangler.

A defective ball joint assembly in the front wheel of the vehicle also contributed to the accident. In late 2004, DaimlerChrysler issued a recall for the ball joint assembly on a variety of Dodge Durangos, including the 2002 model. The recall investigation, conducted by the National Highway Traffic Safety Administration, established that a design and manufacturing flaw in the upper ball joint assembly of the Dodge Durango allowed lubrication to be evacuated from around the ball joint assembly because of water entering the assembly. This defect allowed the ball joint to separate during operation of the vehicle. DaimlerChrysler's recall notice informed owners of the Durango that the defect could cause loss of control of the vehicle. But, the recall notice was not sent out until after our client's accident.

Ben Baker was the primary lawyer from our firm who represented the family in this case, and he did an outstanding job for his clients. The family we represented paid a price no family in the U.S. should ever have to face because of a defective product. I hope

DaimlerChrysler learned a valuable lesson from this case and will do a better job on safety in the future.

### ***GRAHAM ESDALE SETTLES VEHICLE ROLL-OVER LAWSUIT***

Our firm recently settled a case involving a Firestone Wilderness AT tire and GMC Sonoma pickup truck. On April 27, 2005, Jimmy Ray Townsel and his brother-in-law, Thomas Foster, were traveling north on Interstate 65 when the left rear Firestone Wilderness AT tire on the truck suffered a tread belt separation. This caused the vehicle to lose control and overturn in the roadway, rolling several times. Mr. Foster was ejected and died at the scene. Mr. Townsel, who was properly belted, suffered severe cervical fractures when the roof of the vehicle crushed down on him. As a result of the cervical fractures, Mr. Townsel was rendered a complete quadriplegic. Although initially discharged after several months' hospitalization, Mr. Townsel was readmitted to the hospital in October of 2005 and remains hospitalized for his condition.

You may remember that the Firestone Wilderness AT tire, in the P23575R15 size, was recalled by Firestone back in 2000. But, the recall was limited to Wilderness AT tires manufactured at the Decatur, Illinois plant before May of 1998. The tire involved in this case was manufactured at Firestone's Aiken, South Carolina plant in 1999.

Ford disagreed with Firestone's decision to limit the recall to Wilderness AT tires made at the Decatur, Illinois plant before May of 1998. Based on the data Firestone provided to Ford, Ford believed that Wilderness AT tires manufactured after May of 1998 and manufactured at plants other than Decatur, still posed significant risks of failure, and as a result, still posed a significant safety risk to its customers. As a result, Ford, at its own expense, attempted to recall Wilderness AT tires made after May 1998 at plants other than Decatur. You will find a letter to John Lampe, Chairman and CEO of Bridgestone/Firestone

from Ford Motor Company President and CEO Jacques Nasser to be quite interesting and revealing. The following is the text of the Nasser letter:

*As you know, Ford has for many months been engaged in an intensive effort to determine the root cause of the tire failures that led to last summer's Firestone tire recall, and to prevent such failures in the future. Throughout this process, Ford has shared its findings and worked closely and cooperatively with NHTSA and with Firestone's technical team.*

*Based on our work to date, we are concerned that the performance of certain Wilderness AT tires not included in last summer's recall is not at a level consistent with the performance of similar usage tires from competitive manufacturers. This concern rests significantly on data supplied by Firestone and NHTSA, which shows that failure rates for many of the Wilderness AT tires are already worse than competitive standards and may deteriorate further in the future. Our own laboratory and vehicle tests confirm these results. Although we have discussed our concerns with Firestone technical and management personnel, nothing we have learned has changed our view that the tires may present a risk to our customers' safety.*

*Accordingly, we intend to announce an owner notification program to replace all Wilderness AT tires for our customers at no cost to them. This action is preventative in nature since we believe the significant risks are largely in the future. However, the data leave us convinced that this action is necessary to assure the safety of our customers, an objective that I know you fully share.*

*As the replacement effort goes forward, let us work cooperatively*

*to serve our customers and, most importantly, keep their safety as our highest priority. I hope this is a goal on which you can agree.*

Ford tried to recall the tire made the basis of this accident. The problem with Ford trying to recall Firestone tires is that Ford only has the ability to track Ford's vehicles and notify the owners of the recall. Unfortunately, tires which still exhibit good tread wear are swapped on and off vehicles in the used car business. That is apparently how this Wilderness AT tire ended up on Mr. Townsel's GMC pickup truck. Mr. Townsel had just acquired the GMC pickup several weeks before this accident occurred.

Although the detread of the tire set this accident in motion, the roof crush was the actual mechanism that caused Mr. Townsel's injuries. The roof on this vehicle crushed approximately 10 inches. Our biomechanical expert, who is also an M.D., testified that had the roof crush been limited to just a few inches, Mr. Townsel would not have suffered a paralyzing injury.

Unfortunately, the GMC Sonoma is not the only vehicle on the road with a weak roof. Historically, roofs have become weaker rather than stronger. Vehicles built in the 1930s and continuing into the early 1960s had stronger roofs than those built today. Current Federal Motor Vehicle Safety Standards (FMVSS) allow for weaker roofs. The current version of FMVSS 216 only requires one portion of a vehicle roof to withstand 1.5 times the weight of the vehicle or 5,000 lbs., whichever is less. The current 216 test is administered by a press-like fixture called a platen. The platen slowly applies pressure to only one side of the vehicle. This test allows the forces to be distributed across some of the stronger roof support structures of the vehicle. Also, this test allows the windshield to provide additional roof support and strength. In short, the current version of this test is inadequate and does not represent real world crash conditions.

In August, 2005, the National Highway Traffic Safety Administration proposed a

revision to FMVSS 216. This revision, according to the agency's own estimates, would only prevent about 44 of the 10,000 fatalities occurring in rollover accidents each year. The new proposed change would require a vehicle roof to withstand 2.5 times the unloaded weight of the vehicle. The GMC Sonoma in this case had a strength to weight ratio of 2.27. It is easy to see that even the new proposed standard is inadequate. Volvo's internal standard requires a roof to withstand 3.5 times the vehicle weight. However, the biggest flaw in the newly proposed standard is that it does not require a dynamic rollover test, does not include occupant injury evaluation, and provides immunity to a vehicle manufacturer that meets this inadequate standard. The Government and the auto manufacturers can and should do better. Certainly, Jimmy Ray Townsel deserved better. Graham Esdale represented Mr. Townsel and did an outstanding job for him. Our client's needs will be taken care of as a result of Graham's hard work.

#### **NHTSA ORDERS ROLLOVER PREVENTION TECHNOLOGY**

As you will recall, on September 18th, National Highway Traffic Safety Administration (NHTSA) published a notice of proposed rulemaking to require that all passenger vehicles under 10,000 pounds be equipped with electronic stability control (ESC). ESC is an expansion of antilock brake technology that combines independent braking with vertical rotation (yaw) sensors to help prevent loss-of-control accidents, and particularly rollover. Preliminary studies show promising statistics on ESC's ability to reduce the likelihood that a driver will lose control of a vehicle, as well as its ability to mitigate the severity of single-vehicle accidents, reducing the number of fatalities due to such accidents.

ESC will primarily help to prevent single-vehicle accidents that result in loss of control of the vehicle. Studies by NHTSA and the Insurance Institute

for Highway Safety have shown that ESC has a strongly positive effect in preventing single vehicle accidents, particularly rollover in SUVs. ESC works by correcting for disparity between the intended line of travel and the trajectory that a vehicle is actually taking. All ESC systems incorporate antilock brakes along with sensors to monitor steering input and intended line of travel. When the ESC system senses that a driver is about to lose control, the independent brakes engage to correct for rotation about the vertical axis. A study done by NHTSA shows that ESC reduces single vehicle crashes in passenger cars by 34% and 59% for SUVs. The rollover prevention statistics are even more encouraging—71% for passenger cars and 84% for SUVs. Preventing rollover accidents is the first line of defense in preventing deaths resulting from rollover, of which there are more than 10,000 per year. NHTSA has proposed a phase-in of ESC, mandating that:

- 30% of vehicles have ESC as standard equipment by September 2009
- 60% by September 2010
- All newly manufactured vehicles by September 2011

NHTSA believes that because many manufacturers are already including ESC as standard equipment on SUVs, manufacturers may comply with the rule before the mandated date. The agency has more faith in this industry than I do, but I really hope they are correct on this one.

Although it is important that vehicles be equipped with ESC to help prevent rollovers from happening, there is still much to be done about protecting passengers when vehicles do roll over. NHTSA's proposed rule for roof crush did little to protect passengers—70% of vehicles already meet the proposed standard. Also, seat belt failure presents a significantly higher risk of ejection in a rollover crash. NHTSA reports that in 52% of rollover crashes, passengers were partially or completely ejected. A 2003 NHTSA study showed that 50% of

partially ejected occupants were wearing seat belts. Addressing protecting passengers in the event of a rollover crash is also important; therefore, although ESC is an important addition to promote vehicle safety, there is still much to do to promote safety in the event of a crash.

#### **NEW RULE ON CRASH DATA STILL LEAVES PUBLIC IN THE DARK**

The National Highway Traffic Safety Administration (NHTSA) issued a final rule August 28<sup>th</sup> on event data recorders (EDRs). Although the rule takes necessary steps to standardize EDR data collection, it completely fails to mandate these important safety devices in all new vehicles. EDRs record information about a vehicle's performance during a crash or near-crash situation, which is defined by events such as airbag deployment or sudden changes in vehicle velocity. Typically, EDRs only capture a few seconds of information, and through this collected data investigators can reconstruct what happened during the crash event. EDRs offer important benefits for highway and vehicle safety development and also offer opportunities to dramatically improve emergency response to crashes. The unprecedented access to objective, real-world crash data that EDRs provide offer numerous safety benefits including:

- Increased understanding of crash causation and injury sources, which would provide insights for engineering safer vehicles.
- Better data on defect trends by allowing the Office of Defect Investigations (ODI) to more effectively target investigations. When used in conjunction with the early warning database, EDR data would enable ODI to expeditiously identify defect trends.
- Safer highway designs by assisting the Federal Highway Administration (FHA) in determining dangerous road designs.
- Improved emergency response to

crashes. When combined with an automatic collision notification (ACN) system, EDRs would improve emergency response time. EDR data, in combination with ACN, would also improve the effectiveness of emergency responses to crashes, as data on crash forces and belt use would provide emergency personnel with clues as to the type of injuries to expect.

NHTSA estimates that 64% of new vehicles have EDRs, but the greatest safety benefit potential for EDRs will be achieved only if they are included in all new vehicles. Only with full fleet penetration will EDR data offer the most accuracy and utility to crash and defect investigators, thereby leading to better safety improvements. In the new rule, NHTSA states that it intends for auto makers to eventually include EDRs in all vehicles; but, without a mandate, nothing will prevent auto manufacturers from halting EDR inclusion in order to avoid standardization costs. NHTSA's new EDR rule also fails to require data collection on key safety issues, such as passenger seatbelt usage, and only requires data recording to occur for a paltry 5 seconds.

Furthermore, NHTSA is not currently collecting EDR data in its Fatality Analysis Reporting System (FARS), which undermines the data's effectiveness and squanders a valuable opportunity to learn more about real-world crash prevention. EDRs should be used to fully maximize their safety benefits. Groups such as Public Citizen will continue their advocacy efforts with the Department of Transportation to address the numerous shortcomings of the new EDR rule.

#### **SIDE AIRBAGS SAVE LIVES**

Driver deaths in side-impact collisions dropped by more than half in sport utility vehicles equipped with head-protecting side airbags. Side airbags offering head protection could save the lives of about 2,000 drivers a year if every

vehicle on the road had the equipment, the Insurance Institute for Highway Safety estimated in a study released in October. The Institute does valuable work and its research is recognized by safety experts worldwide.

Although the benefits for SUVs with head-protecting airbags were higher, the study found the risk of death still dropped 30% in side collisions involving SUVs with side airbags that only offer protection to the chest and abdomen. In passenger cars struck on the driver's side, the risk of a driver being killed declined 37% in vehicles with side airbags offering head protection, and fell 26% for cars with side airbags providing chest and abdomen protection. Anne McCartt, the institute's vice-president who authored the study, observed:

*We found lower fatality risks across the board — among older and younger drivers, male and female drivers, and drivers of both small cars and larger passenger vehicles.*

First introduced on vehicles in the mid-1990s, side airbags are credited with helping motorists escape serious injuries and death when struck along the vehicle's doors. While a head-on crash allows the vehicle's front-end structure to absorb much of the impact, there's little protection for a motorist struck in the side without the airbags. Side-impact crashes continue to be a concern for auto safety advocates. In 2004, the government estimated that 9,270 people were killed in side crashes, accounting for nearly 30% of all traffic deaths. Automakers pledged in 2003 to install side airbags as standard equipment by the 2010 model year, and many vehicles currently offer the protection. About four out of every five new cars, and SUVs have head-protecting side airbags as standard or optional equipment. The airbags typically cost between \$500 to \$700 (euro400 to euro550) as an option. The study was based on federal crash data involving 1997-2004 model year cars involved in crashes from 1999-2004 and 2001-2004

sport utility vehicles involved in crashes from 2000-2004.

Source: *Insurance Journal*

### **CONFIDENTIALITY ORDERS AND THE FIGHT AGAINST ANTI-SECRECY AGREEMENTS**

Over the years our firm has handled a great number of lawsuits involving defective products that have either badly injured or killed innocent people who were using those products. During discovery in these cases, we have obtained many documents that were extremely damaging to the manufacturers. The defendants in the cases don't want those documents to be revealed to the public. Increasingly, manufacturers have sought restrictive protective orders to bar or limit disclosure of these documents that are breathtaking in scope.

Manufacturers and large corporations recognized that victims' lawyers have begun sharing their knowledge with each other in an effort to combat the advantage the manufacturers and corporations have over them because of their vast financial resources. The manufacturers perceive this coordinated effort by lawyers who represent victims as a threat. In an effort to combat that threat, manufacturers seek highly restrictive and secretive protective or confidentiality orders from the court. The companies' lawyers seek provisions in protective orders that:

- prevent attorneys from discussing documents with other attorneys involved in similar litigation against the same manufacturers;
- restrict an attorney's right to use the same documents and testimony in other similar cases he may have;
- prevent the media from informing the public about the content of trial evidence; and
- prevent clients from discussing their cases with legislatures or the public to inform consumers of the danger of these products.

These types of protective orders are basically gag orders that keep evidence of wrongdoing secret. The manufacturers succeed in keeping their wrongdoing secret so that they can continue to lead naive legislators and constituents to support tort reform. As lawyers, we have a duty to not only fight for our clients against these types of secrecy orders, but we also have a duty to expose corporate wrongdoing to the public.

Information sharing among lawyers is the only way to achieve full, accurate, and complete disclosure from these manufacturers. Because defendants possess infinitely superior knowledge and resources, the need for cooperation among plaintiffs' attorneys is great. The sharing of information among attorneys representing victims has four main goals:

- to minimize the advantage of the defendant and allow the plaintiff to adequately prepare his case;
- to enhance the speed and efficacy of the discovery process;
- to provide a mechanism for verifying the accuracy of a manufacturer's or corporate defendant's response to discovery requests; and
- to reduce the cost of preparing each case. Hare, Gilbert & Ellenberger, Confidentiality Orders in Product Liability Cases, 13 Am.J.Advoc. 597 (1989).

Fortunately, numerous courts have recognized the plaintiffs' need to share information in the preparation of complex product liability cases. Most courts that have considered the legality of a restrictive confidentiality order in a defective product case have refused to uphold such orders if they restrict the attorneys from discussing the contents of discovery materials with other counsel in similar cases. The American Bar Association has recommended that courts permit disclosure of information to government agencies and other victims' lawyers when the information reveals hazards to other people.

Despite the recognition by numerous courts, legal scholars, and commentators across the country of the need for less restrictive protective orders, this has not stopped corporate defendants and manufacturers from continuing to seek very restrictive orders. The manufacturers seek to take advantage of their superior knowledge and resources by striving to prevent the plaintiffs from establishing any cooperative discovery mechanism. In other words, they seek to isolate individual lawyers so that they can take full advantage of their large financial resources and so that there can be no way for an individual to insure the defendant is making truthful and complete disclosures.

Fortunately, there is a small but growing movement among states to prohibit these types of secrecy agreements. Florida has enacted sunshine laws, which prohibit secrecy in settlement amounts and court filings. California has considered a similar law. The needs of the victims of defective products should be first and foremost when addressing and weighing the need for a protective order. The law is on the consumer's side and victims' attorneys should fight vigorously against secretive and restrictive protective orders.

#### **VERDICT IN SUDDEN-ACCELERATION CASE**

A South Carolina jury awarded \$15 million recently to a 17-year-old girl who was paralyzed when a faulty cruise control system caused her Ford Explorer to speed out of control and roll over four times on the highway. The jury awarded another \$3 million to the girl's aunt, who was killed in the crash. But, the jury didn't award punitive damages. Following a three week trial, jurors concluded that the cruise control on the 1995 Ford Explorer XLT was defective, but rejected the plaintiff's argument that faulty seatbelts caused both the two women to be ejected from the SUV. At trial, Ford argued that the accident was caused by driver error, claiming that sudden acceleration is a discredited accident theory.

The wreck occurred on December 11, 1999 when Sonya Watson was driving her grandmother to an eye appointment. She was accompanied by her aunt and other relatives. While driving along the highway on cruise control, the SUV suddenly "took off," according to evidence presented at trial. The vehicle suddenly accelerated and the pedal went to the floor. The speed of the SUV got up to about 80 mph. When Ms. Watson couldn't slow the vehicle down by pumping the brakes, she reached down to try and grab the accelerator. That's when her seatbelt came undone and she lost control of the Explorer, which careened off the highway and rolled over four times. The driver and her aunt, who was sitting in the back seat behind the driver, were thrown from the SUV. The aunt, who was nearly cut in half, died at the scene. Ms. Watson was paralyzed by a broken neck, and attended the trial in a motorized wheelchair. The other passengers, who remained inside the vehicle, walked away from the wreck without injury.

At trial, the plaintiffs contended that the Explorer's cruise control system was "unreasonably susceptible to sudden acceleration, failing to disengage, sticking, locking and/or failing to deactivate itself when braking or turned to the off position." The vehicle involved in the accident had previous problems with the cruise control with sudden acceleration, and Ms. Watson's father had brought it in for repairs.

*Source: Lawyers Weekly USA*

## **VIII. MASS TORTS UPDATE**

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### **OUR FIRM SETTLES ANOTHER EPHEDRA-RELATED DEATH CASE**

Our firm recently settled the last of many ephedra-related death cases that we have investigated over the past few years. This case involved the death of a

24-year old Alabama woman. She died while participating in correction officer training exercises after taking an ephedra- and caffeine-containing dietary supplement. We have previously written about other similar settlements in cases, the most notable of which was featured in People magazine and involved the death of a mother during an afternoon run after ingesting a Nutraquest ephedra product. That victim died while her children looked on.

In fact, Nutraquest, a company which made millions off its ephedra-based products, filed for bankruptcy in 2003 as a result of the numerous personal injury and wrongful death actions filed against it. That bankruptcy is only now—years later—being finalized with a plan to settle all of those cases for a total of \$34.5 million. The creditors of the debtor are expected to approve the plan to resolve the bankruptcy in the next few days. Our firm played a large role in seeing through the resolution of these cases, due in large part to our readiness to try a case involving the death of an Army Master Sergeant who died during his daily basketball match after taking a Nutraquest ephedra-containing product.

A common denominator in each of these cases, regardless of the manufacturer or distributor, is the complete disregard for the safety of consumers. Not a single one of these companies adequately tested or researched the safety of their products. It was all about marketing and profits in the most recent case, which was brought against a contract manufacturer, distributor, and contract packager. Not only was the product not tested by any defendant, but each defendant was adamant that it had no responsibility regarding the safety of its ephedra-containing product. At least two of the defendants admitted they were aware of injuries and deaths that had been reported from people ingesting ephedra products.

It is frightening to learn that the regulation of food supplements, such as ephedra, is grossly inferior to that of pharmaceutical products, despite the

fact that many herbal products have properties similar to pharmaceuticals. In fact, current regulations don't even require food supplement manufacturers to test their products before **marketing** them. The public would be shocked to learn that the FDA has little control over the herbal supplement industry. Thus, many of those products pose potential health risks of a grave nature. In the case of ephedra products, the pharmaceutical properties of the ephedra alkaloids have been well known by scientists. Unfortunately, companies in the U.S. marketed those dangerous products to the detriment of consumers. It is amazing to learn that many of the companies were started by individuals with absolutely no training or experience in either medicine or science. In our last case, the main defendant was a pipe layer and yard worker who had no experience in herbal supplements. Nevertheless, this man started producing multi-vitamins and eventually the ephedra product that killed our client.

Ephedra-containing products have been banned by the FDA as a result of the numerous injuries and deaths resulting from the sale these products. Our firm is proud to have been a part of litigation that led to the ultimate ban of this extremely dangerous herb. Unfortunately, a lot of people died as a result of ingesting ephedra-containing supplements, including a beautiful, 24-year old young lady whose life—full of promise and happiness—was cut way too short. Roger Smith from our firm, along with David Miceli of Carrollton, Georgia, and Christy Crow of Union Springs, Alabama, represented the family and did an outstanding job.

#### **FOOD AND DRUG ADMINISTRATION UNDER CLOSER SCRUTINY**

As we all know, the federal Food and Drug Administration (FDA), which is responsible for products that account for a quarter of all consumer spending, has been the subject of much criticism lately. The recent outbreak of E. coli infections

linked to spinach has uncovered weaknesses in the regulation of food safety. A federal advisory group, the Institute of Medicine, recently issued a report claiming the FDA is unable to protect consumers from unsafe prescription drugs. The report focuses mainly on lapses in monitoring approved drugs. Serious gaps were found in the way the FDA monitors these drugs for potentially fatal side effects.

These problems should not come as a surprise. The agency is under-funded and understaffed. For most of the Bush presidency, the FDA has been under acting commissioners. Although they are generally capable leaders, the acting chiefs usually lack the power to make major changes. An internal analysis found that funding for food and drug safety responsibilities has not kept up with the rising personnel costs, and the number of staff in the food division has decreased by several hundred within the past couple of years.

The FDA, according to the report, focuses too much of its resources on reviewing new drug applications and not enough in tracking post-approval safety. The number of scientists who follow post-approval safety should be increased, and pharmaceutical companies should also be compelled to carry out additional tests on approved drugs. Consumer safety should be top priority.

*Source: The New York Times and L.A. Times*

#### **BAYER HID THE RESULTS OF A STUDY FROM THE FDA**

German drug giant **Bayer** failed to tell the U.S. Food and Drug Administration (FDA) of a study that connected a controversial heart surgery drug to dangerous side effects and death. The FDA had convened a panel of experts to evaluate the drug's safety. The company notified the FDA only after it was asked to do so by the scientist conducting the study. Bayer claims it "mistakenly" failed to tell the FDA about the evaluation of 67,000 hospital records regarding the drug Trasyolol, which is used to prevent bleeding during open-heart surgery. According to

a Public Health Advisory from the FDA, the new study linked Trasyolol to increased risk of death, serious kidney damage, congestive heart failure, and strokes. William Hiatt, the University of Colorado vascular medicine specialist who chaired the panel, observed:

*Why this wasn't made available at the panel meeting a week ago, I have no idea. It seems irregular.*

It is much more than irregular, it's very much the wrong thing to do. There is a growing movement to improve drug safety in the United States by enhancing the FDA's powers. Failures to provide critically important information from studies is a major problem. The report from the influential Institute of Medicine concerning the FDA and its lack of adequate powers to prevent disasters like the recall of Vioxx by **Merck** two years ago is more evidence that the system isn't working.

As of December 2005, Trasyolol accounted for sales of \$300 million at a cost of \$1,400 per dose. It's impossible to say from current data how many patients might have been adversely affected. On January 26th, a paper in the New England Journal of Medicine from researchers at the Ischemia Research and Education Foundation in San Bruno, California, made a case that Trasyolol increased the risk of kidney problems, heart attacks, and strokes.

On September 21<sup>st</sup>, the FDA's panel of medical experts met to consider that data and voted 18 to 0 that Trasyolol didn't need a new safety label. The FDA was not informed of the new study until Wednesday, September 27<sup>th</sup>—6 days after the panel's vote. Trasyolol already carries a "black box" on its labeling, which warns doctors that it can cause kidney problems. Bayer's failure to report the results of this study may be the straw that broke the camel's back, and Congress may finally be forced to act.

*Source: Forbes*

## **GUIDANT SETTLES DEVICE SUIT**

The Guidant Corporation, the maker of implanted heart devices, has settled a fraud suit over its recalled defibrillator for an undisclosed amount. The trial in the civil suit, brought by two plaintiffs, Beatrice O. Hinojosa and Louis E. Motal, was scheduled to begin last month in a Texas state court. The plaintiffs in the case claimed the company failed to warn them that their implanted heart devices might fail. Guidant recalled thousands of defibrillators, which use electrical shocks to correct abnormal heart rhythms, in June 2005. The Boston Scientific Corporation, Guidant's parent company, has said it expects as many as 3,000 product liability claims related to the defibrillators. The settlement is confidential.

## **U.S. APPEALS COURT REINSTATES REZULIN LAWSUIT**

A federal appeals court in New York has reinstated a lawsuit filed against Pfizer Inc. unit Warner-Lambert by people who took the diabetes drug Rezulin. A three-judge panel for the U.S. Court of Appeals for the Second Circuit wrote that a lower court judge had **wrongly concluded** that federal law **preempted** claims made under a Michigan state product liability statute. The lawsuit, filed by residents of Michigan who said their various injuries were caused by Rezulin, had been dismissed by U.S. District Judge Lewis Kaplan in 2005.

As you will recall, Rezulin was pulled from the market in March 2000 at the request of the U.S. Food and Drug Administration after about 100 people who took the medicine needed liver transplants or died from acute liver failure. Pfizer, which acquired Warner-Lambert some three months after Rezulin was withdrawn, has defended thousands of lawsuits that claim that Warner-Lambert failed to inform the public of the drug's liver toxicity risks. This ruling by a federal appeals court on

the preemption issue, while not unexpected, is still extremely significant.

Source: Reuters

## **A BRIEF RUNDOWN ON THE VIOXX LITIGATION**

There has been a great deal of activity on several fronts in the ongoing Vioxx litigation. We are getting ready to try another case in the MDL in New Orleans. Fortunately, people are now becoming aware of how truly bad Merck has been. The following are a few of the highlights relating to the Vioxx litigation.

### **Merck Files Appeal In Texas Case**

It's been more than a year since Merck and Co. lost the first Vioxx trial. Now Merck has appealed the court judge's judgment that awarded \$26.1 million to the plaintiff. Merck filed a notice of appeal in a Texas state court in the case of Robert Ernst, who died in 2001, and who won a much larger jury verdict. Under Texas law the amount was reduced. The company claims that there was insufficient evidence that Mr. Ernst suffered an injury due to Vioxx and that it was improper to allow certain testimony.

A jury initially awarded the plaintiff \$253.4 million, with \$229 million of it being for punitive damages. But, Texas law sets caps on punitive damage awards. As a result, the court reduced the amount to \$26.1 million. Mr. Ernst, a 59-year-old Walmart store produce manager, who ran marathons and taught aerobics classes on the side, died after taking Vioxx for about 8 months. I believe that Merck will have a very difficult time overturning the court's judgment.

### **Jury Returns A Verdict For Merck In Vioxx Lawsuit**

A federal court jury in New Orleans ruled in favor of Merck in the latest Vioxx lawsuit to be tried. The jurors found that there was not enough

evidence to link the drug to the plaintiff's heart attack. Robert Garry Smith, who was in his mid-fifties, tried to prove that Vioxx had contributed to a heart attack he had suffered in 2003. Mr. Smith had taken Vioxx for knee pain for about four and a half months, but said he did not realize at the time of the heart attack that Vioxx might have been a cause for concern. This was a case that under the system in place in the MDL was selected by Merck for trial. It was a relatively weak case both on causation and damages.

### **Merck Will Face 10 Vioxx Plaintiffs In New Jersey**

Judge Carol Higbee, the New Jersey judge managing about 15,000 Vioxx lawsuits, has ordered lawyers to pick 10 cases they'd like to present to jurors at a group trial in January. Judge Higbee told the lawyers to pick the cases from a list of 39 she chose in July for pre-trial preparation. The judge will say later whether she wants all 10 cases to go to a single jury at the next trial, which will start on January 16<sup>th</sup>. In my opinion, Judge Higbee's plan to present multiple plaintiffs at her next trial is good for all concerned. Lawyers for plaintiffs will have a week to prepare their list of 10 cases and Merck will have three or four days to object.

The first phase of the next trial will determine whether Merck failed to warn physicians of the risk of Vioxx and whether the company engaged in consumer fraud. Mark Lanier, who is one of the victims' lawyers in these cases, stated:

*Merck's clear intent is to try as few cases as possible. Merck objects to anything that causes cases to be tried. They cannot offer the judge or anyone any reasons why it's not fair. It's done all the time in mass torts around the country.*

Judge Higbee's action is the first step in accelerating the resolution of plaintiffs' cases in various courts. One would think that's what both the victims and Merck would want. But, the company doesn't want to resolve the 30,000 claims it now faces. Merck's strategy is to spend its money paying lawyers and experts and in the process attempt to discourage good lawyers from representing worthy Vioxx victims because of the expenses required and the protracted litigation prospects. Merck has set aside about one billion dollars for defense costs, but not one dime for victims. Eventually, I believe their defense strategy will fail Merck's shareholders.

## IX. BUSINESS LITIGATION

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### **HEALTHSOUTH AND INVESTORS REACH SETTLEMENT OF FRAUD CLAIMS**

A final settlement between HealthSouth Corp. and investors has been reached. This will bring to an end class action lawsuits arising from the massive fraud at the health services company. The total settlement is for \$445 million. Under the agreement, which has to be approved by the court, the Birmingham-based company will pay \$215 million in cash, stocks, and warrants. Insurance companies will pay the remaining \$230 million of the settlement. The final version of the agreement was virtually identical to a preliminary settlement reached in February.

### **JUDGE APPROVES QWEST SHAREHOLDER SETTLEMENT**

A \$400 million settlement from Qwest Communications International Inc. has received final approval from a U.S. District Court judge. Last November, Denver-based Qwest announced it had reached a settlement in its share-

holder lawsuits. The settlement covers shareholders who bought Qwest stock between May 24, 1999, and July 28, 2002. In the lawsuits, shareholders allege Qwest executives deliberately inflated the company's earnings, resulting in an accounting scandal that forced the Denver-based Baby Bell to restate about \$3 billion in revenue. Former Qwest CEO Joe Nacchio pleaded not guilty to 42 counts of insider trading late last year. The Securities and Exchange Commission alleges that Nacchio and other former Qwest executives perpetrated financial fraud on investors.

Source: *Denver Business Journal*

### **RYAN'S SETTLES SHAREHOLDER LAWSUIT**

Restaurant-chain operator Ryan's Restaurant Group Inc. has agreed to settle a shareholder lawsuit involving the pending acquisition of Ryan's by Buffets Inc., owner of the Old Country Buffet and other restaurant chains. Buffets agreed to acquire Ryan's in July for about \$876 million, including assumed debt. On July 28<sup>th</sup>, a class action lawsuit was filed in a South Carolina court. The suit named Ryan's and its directors, and alleged the purchase price didn't result from a fair and open process. The lawsuit said the company breached its fiduciary duty to shareholders and sought to stop the deal. Ryan's said the claims in the lawsuit are without merit, but agreed to the settlement to "avoid the expenses and distractions associated with litigation."

In a filing with the Securities and Exchange Commission, the company detailed events leading up to the proposed acquisition by Buffets, including the fact that it retained its financial adviser, Brookwood Associates LLC, without interviewing other firms. Ryan's said Brookwood contacted several possible buyers, and weighed offers from three companies including Caxton-Iseman Capital Inc., an investment partnership that owns Buffets. All three companies offered to buy Ryan's for \$15.25 per share. Initially, Ryan's

selected an unnamed company's offer, but Buffets increased its offer to \$16.75 and eventually reached an agreement to buy Ryan's. The deal is expected to close in the fourth quarter.

Source: *Associated Press*

### **HOMEOWNERS AWARDED \$3.3 MILLION IN CASE AGAINST DEVELOPER**

A jury has awarded a Vermont homeowners' association \$3.3 million after finding a developer and Winhall Real Estate Inc. violated the Vermont consumer fraud act. The homeowners' association filed suit in 2001 contending that the developer and the company built the Piper Ridge development in Winhall, Connecticut, on land that was totally unsuitable for building purposes. The suit alleged that some of the units were built on a dump filled with rotting logs and stumps. Some of the units had substandard roofing and siding. It was proved that the defendants misrepresented the conditions of the units. An engineer found the building was sitting on stumps and boulders. The owners had to spend about \$500,000 to move the building. All of the problems in the development were later fixed by the management company. TPW Management of Manchester, which began taking care of the Piper Ridge development in 1998, did an engineering evaluation of the buildings and found that many of the buildings had structured issues, including a great deal of rotted wood. One of the buildings had already started to settle rapidly.

Source: *Insurance Journal*

## X. INSURANCE AND FINANCE UPDATE

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### **MORE ON "DEATH SPIRAL" HEALTH INSURANCE CLAIMS**

Often times, health insurance companies will shuffle unhealthy policyholders from one risk group to another in an

effort to “price out” unhealthy policyholders from coverage. This practice is commonly referred to as a “death spiral.” For many years, our firm has represented policyholders who were forced out of their health insurance coverage because of constant and exorbitant price hikes in premiums. Through discovery in these cases, we learned that some health insurance providers engage in what is known as “death spiraling.” This practice involves a complicated process in which companies move their unhealthy policyholders from their original risk group to another risk group that has all or a greater number of unhealthy policyholders, thus justifying higher rate increases based on higher risk. The company will continue to pull the healthy policyholders to another group, keeping them out of the “unhealthy group” all in an effort for the company to “price out” and rid itself of the unhealthy policyholders, so they insure only healthy people who file small or a few claims.

This insidious practice has left thousands of people throughout this country without health insurance because they can’t afford the artificially inflated premiums. Our firm was one of the pioneers in this area of insurance law, and we continue in that leadership role as we continue to file these cases throughout the country.

A similar fraudulent practice has occurred involving the sale of nursing home policies, home healthcare policies, and long-term care policies to the elderly. But these policies involve more of a “bait and switch” method. These policies are sold at “actuarially defective” prices (too low a premium to sustain the policy) and then the premium is increased so high in the following months and years that the policyholders can’t afford the policies any longer. Often times, a company will greatly increase the premium on an elderly person’s policy at a time when that person needs the policy the most. This fraudulent practice results in a large cash flow to the companies in the early years of the policies and an elimination of risk to the company when

they price these loyal paying consumers out of the policies.

The following are the companies that we have filed suits against involving the theories of liability mentioned above: Conseco Insurance Company; American Travelers; Pioneer Life Insurance Company; American Medical Security/North American Life Insurance Company; North American Insurance Company; Congress Life Insurance Company; UnumProvident & Accident Insurance Company; and Liberty National Life Insurance Company.

The Alabama Supreme Court recently affirmed a class action settlement involving the death spiral theory against American Medical Security and North American Life Insurance Company. Our firm, as lead counsel, obtained relief for some 30,000 policyholders who had been victims of tiering, which is a practice very much like the death spiral theory.

#### ***INSURANCE BAD FAITH LITIGATION***

Our firm has represented hundreds of clients who have had insurance claims wrongfully denied by their insurance companies. Some of these claims involved a cause of action known as bad faith. Bad faith is simply a cause of action against an insurance company that has intentionally denied the payment of a properly submitted insurance claim for no debatable reason. Bad faith claims can involve health and life insurance, accidental death insurance, disability insurance, automobile, property, and cancer insurance.

Our firm has successfully represented a tremendous number of clients in bad faith actions. We continue the tradition of representing clients who have been wrongfully denied benefits by their insurance companies. We are currently pursuing a number of cases against UNUM/Provident and Accident Insurance Company concerning disability policies, with specific attention on the “own occupation” disability policies. Our independent investigation of the company’s practices in evaluating and

refusing to pay some of these claims has revealed shocking information. Further discovery has unveiled a boardroom decision to engage in a nationwide scheme to wrongfully deny benefits to policyholders, all in the name of profit.

We are currently pursuing cases concerning the tort of “bad faith” against a number of companies—other than UNUM/Provident & Accident Insurance Co.—and some of them are: Allstate Insurance Company; State Farm Insurance; Alfa Insurance; Farmer’s Insurance Group; Conseco Services LLC; Paul Revere Insurance Co.; Metropolitan Life Insurance Company; and Guardian. We will continue to update our Web site with new developments as they arise in these cases.

#### ***FORMER GENERAL RE AND AIG EXECES INDICTED FOR ALLEGED REINSURANCE FRAUD***

We have tried to keep our readers up to date on matters relating to the pending litigation our firm is handling for the Tennessee Insurance Commissioner. But, things are happening so fast that it’s pretty hard to keep our reports current. Recently, four former senior executives of Berkshire Hathaway’s General Re Corp. and a former senior executive of American International Group Inc. were indicted on charges they participated in a scheme to manipulate AIG’s financial statements. The indictment alleges that the defendants engaged in a fraudulent scheme to make it appear as if AIG — which, as you know, is one of the world’s largest insurance companies — increased its loss reserves, a key financial indicator to analysts and investors.

At issue are two reinsurance transactions between AIG and Gen Re that were initiated by an AIG senior executive in an attempt to stop criticism by analysts of an approximate \$59 million reduction in AIG’s loss reserves in the third quarter of 2000. The phony transactions made it appear as though AIG had increased its loss reserves by \$500 million, according to authorities. The conspiracy, using phony contracts and a secret side deal,

was designed to make it appear that AIG's loss reserves were growing, in order to inflate the company's stock price in 2000 and 2001.

The Connecticut indictment says there were additional unnamed coconspirators, including senior level executives at AIG and Gen Re. Last year, two senior Gen Re executives, John Houldsworth and Richard Napier, pleaded guilty to conspiracy to falsify Securities and Exchange Commission (SEC) filings and are awaiting sentencing. A trial in the criminal case has been scheduled for March 1st of next year.

Source: *Business Insurance Journal*

### **MORE ON STATE FARM AND KATRINA-RELATED LITIGATION**

There has been a great deal of activity concerning lawsuits pending against State Farm Insurance Co. arising out of Katrina and related matters. I will mention two of the more important events below.

#### **Company Sues State Farm Whistle Blowers**

In our last issue, we wrote on the activities of the Rigsby sisters. Now, a company that contracts with State Farm Insurance has sued the two former employees who are helping to build cases against the insurer for denying claims after Hurricane Katrina. E-A Renfroe and Company, a Birmingham-based insurance adjusting firm, alleges in its lawsuit that Cori and Kerri Rigsby broke the law when they turned over reams of internal State Farm records to lawyers who represent State Farm policyholders.

As you will recall from our previous issue, the Rigsby sisters were assigned by Renfroe to help adjust claims for State Farm. According to the sisters, the documents show that State Farm manipulated engineers' reports on storm-damaged homes so that policyholders' claims could be denied. The sisters have

resigned from Renfroe. The Rigsbys turned over copies of the documents in question to state and federal authorities. Renfroe's lawsuit, filed earlier this month in a federal court in Birmingham, Alabama, accuses the sisters of violating the Alabama Trade Secrets Act and breaching confidentiality agreements with the company.

Lawyers for the policyholder plaintiffs hope to prove that State Farm management elected to deny all policyholder claims where Katrina left only slabs or pilings. In denying slab claims, the company has relied on policy exclusions that say water damage is not covered. State Farm is also claiming that there is no coverage for wind damage when water contributes to the damages. State Farm's officials contended that the company individually investigated each claim and paid for damage covered under its policies. The first Hurricane Katrina cases to be tried in U.S. District Court in Gulfport will, at the judge's direction, involve wind versus water claims against State Farm, Nationwide, and Allstate insurance companies. Six cases have been scheduled, two involving each company, to begin January 29th of next year.

Source: *Associated Press*

#### **State Farm Employees Are Targets Of Katrina Probe**

State Farm has now confirmed that at least two of its employees are targets of a criminal investigation of the insurer's handling of policyholders' claims arising out of Hurricane Katrina. Lawyers for State Farm had asked a judge to protect four employees, including Alexis "Lecky" King and Lisa Wachter, from being questioned under oath by lawyers in civil cases while they are under investigation by Mississippi Attorney General Jim Hood. The Attorney General's office has now informed a lawyer for both King

and Wachter that these two employees are targets of the investigation.

U.S. Magistrate Judge Robert Walker already has ruled that Drain, King, Wachter, and a fourth employee, David Randel, can be questioned under oath by lawyers representing State Farm policyholders. State Farm has asked Judge Walker to reconsider his ruling. The company says the employees would risk incriminating themselves if they are compelled to testify in civil cases while facing possible criminal probes.

Source: *Associated Press*

### **MORTGAGE FRAUD IS AT AN ALL-TIME HIGH**

As many of you know, over the past several years, mortgage interest rates have been at historical lows. These low interest rates have allowed many consumers to save great sums of money and lower their monthly mortgage payments. Better yet, some people have been allowed to take part in the "American Dream" by purchasing a home for the very first time. Unfortunately, as many new people enter the home buying market, and as mortgages become easier to obtain, more individuals find themselves becoming victims of a growing type of criminal activity known as "mortgage fraud." The FBI has recently reported that mortgage fraud is at "epidemic" proportions. Losses associated with mortgage fraud increased to over \$1 billion last year alone. According to the FBI, the losses associated with mortgage fraud are increasing.

I must point out, however, that mortgage fraud is nothing new. Our firm has been handling these type of claims for over a decade. Traditionally, the cases we handled involved primarily elderly, minority, or first-time home buyers who were promised a certain deal, but arrived at closing only to receive an entirely different and more expensive deal. Another common scam lawyers in our Fraud Section have seen over the years involves people being talked into

a mortgage that has a temporary, low monthly payment that is based on a short-term interest rate and/or an adjustable interest rate. Often the temporary nature of this rate was not properly disclosed. When the interest rates inevitably changed, the monthly payments rose to a point where the consumer could no longer afford them and lost the home. Another common mortgage fraud case involves instances in which mortgage brokers falsify mortgage applications and get consumers approved for bigger loans that they otherwise can afford. Often the mortgage broker is only interested in making a slick sales pitch for the bigger loan amount so that he or she can make a larger commission on the larger mortgage.

But, as mortgage products become more diverse, and as more people enter the home buying market, we have seen more elaborate scams. One such scam is the marketing of land deals as investments and using mortgages to finance them. The scam can take on many facets and generally starts by inviting consumers with good credit to join an "investor's club." The consumers are told that they can participate in the "red hot housing boom" without risk of losing money. They are told they don't even have to put up any money to participate in the investment. Instead, they are told that their good credit rating will be used to help secure the properties, without actually buying them. It is then explained that once the properties are sold, they would get a check from a portion of the sale.

Unfortunately, after a consumer discloses all of his or her personal information, he finds out he has been scammed. Sometimes the scam is simply to get the consumer's personal financial information so that the crooks can steal their identity and rip off other vendors and credit card companies. But, the more complicated scams involve getting the consumer to sign documents that allow the broker to take out actual mortgages on other pieces of property, without the consumer's actual knowledge. When

those other properties are sold, the mortgage broker or financial advisor pockets the full amount of the proceeds. Another version of the scam involves the mortgage broker setting up a phony mortgage and receiving a brokerage fee from the bank. Only months later does the consumer realize that they have been used to purchase another property and the person responsible has skipped town. The worst cases are when people are tricked into giving their own home as collateral for these additional purchases and are forced to file bankruptcy or lose their entire life savings to get out of these scams.

For most American families, their home is the largest asset they own. Therefore, all of us should follow the advice of honest financial advisors when they suggest not using our home as collateral for our other investments. Another good recommendation is to never do business with a person until you have had an opportunity to check that person out. Always ask the mortgage brokers for names and references of customers they have helped in the past. The mortgage broker may tell you that he or she can't give you that personal information. If they really want to help you, however, other clients will be made available as references. If a broker is not willing to do this, then you should be very wary and consider taking your business elsewhere.

Source: *New York Times*

#### **WAL-MART EMPLOYEES AWARDED \$78 MILLION FOR UNPAID WORK**

A jury in a Pennsylvania court has determined that Wal-Mart should pay workers at least \$78.5 million for refusing to pay its employees for extra hours they worked and for requiring them to work during rest breaks. The class action suit was brought by 187,000 current and former employees who worked for Wal-Mart between 1997 and 2006. The jury awarded about \$2.5 million for the extra unpaid hours and about \$76 million for the lost rest break

time. Apparently, Wal-Mart created a system that encourages off-the-clock work for its hourly employees. Wal-Mart will appeal the ruling. It is possible that an additional \$62 million in damages may be awarded against Wal-Mart, since the jury found that the retail giant had acted in bad faith. It will be interesting to see how this case winds up on appeal.

Source: *Business and Legal Reports*

#### **ALLSTATE—THE GOOD HANDS INSURANCE COMPANY IS FOUND GUILTY OF BAD FAITH**

After a long and drawn out battle, a jury found that Ted K. Fields was in **bad hands** with Allstate and awarded the Indiana man \$20 million. The jury found that Allstate acted in bad faith against its customers. Hopefully, this verdict will send a message to Allstate and other insurers that they have to treat their customers fairly. Allstate has had a policy for the past decade that gives its policyholders two choices: they can either accept a poor settlement or face a long, drawn out legal fight.

While insurance companies traditionally pay out 70 cents on the dollar for claims, Allstate pays 52 cents on the dollar in order to make more money. Mr. Fields, who is now retired on disability from his job as a steelworker, suffered spinal injuries in a 1995 crash. After the insolvency of the insurer for the driver involved in the collision who was at fault and caused the crash, Allstate became responsible under Mr. Field's uninsured motorist coverage contained in his policy. Mr. Fields had \$7,000 in medical bills and suffered \$18,000 in lost wages. It's hard to believe, but Allstate actually kept Mr. Fields tied up in courts for almost 10 years. While many people would fold their tent and surrender to Allstate's litigation tactics, this man refused to quit.

A doctor and psychiatrist testified during the two-week trial of this case that the stress caused by Allstate's actions contributed to Mr. Fields' rise in blood pressure, which led to heart problems and a stroke. According to reports,

all that Mr. Fields ever wanted was to get his car fixed and his bills paid, but as Mr. Fields describes it, Allstate turned his “claim into World War III.” The \$20 million verdict is the largest bad faith verdict ever rendered against an automobile insurer in Indiana.

When Mr. Fields was hurt by an uninsured motorist and had a valid policy with Allstate that covered the incident, he really believed that he was in **good hands**. But the man soon realized Allstate’s hands were in reality pretty bad. Policyholders of any insurance company have a right to have their valid claims paid in full, and anything less is just flat wrong. When I see the television ads by Allstate claiming to be so available and responsible in handling claims—and knowing how the company really operates—it makes me pretty upset. Lots of folks buy Allstate’s marketing tactics and really believe Allstate is a “good hands” company that promptly pays valid claims. That is far from the truth and Mr. Fields found out how the company really operates. Fortunately, he stayed the course and a jury was able to find out how truly bad Allstate is. I hope Allstate learned a lesson.

Source: *Northwest Indiana Times*

## XI. PREDATORY LENDING

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### **PENTAGON WARNS AGAINST PAYDAY LOANS**

The payday loan companies are finally coming under fire from the federal government and for good reason. The Pentagon is quite correct when it says that these companies prey on military personnel and need to be watched closely. As previously reported, payday loan outlets are popping up around military bases, including locations in Alabama. The business model for the industry indicates they like to locate around military installations. That has been a practice since the start of these companies. Obviously, a lot of their customer base is located in those locations.

Military families are prime targets for these predatory lenders. Payday lending is a growing business in east Alabama because of Fort Benning, which as you probably know, is located outside Columbus, Georgia. Because of Georgia’s tougher laws against predatory lenders, the lenders set up shop in Alabama. The payday lenders have a growing reputation for taking advantage of military personnel and their families. Considering how most folks strongly support the military, it’s impossible to understand how the payday lenders could possibly feel good about taking advantage of military families.

The payday loan business is known for its sky-high interest rates. The Pentagon asked Congress to cap the lending rate for military personnel at 36% and Congress was forced to respond. More will be said on that development in the Arbitration Section. As you may know, Payday loans have already been outlawed in many states, including Georgia. They are regulated in Alabama, but in a very weak fashion. In fact, what Alabama did really isn’t true regulation. Most consumer groups say Alabama’s law was an industry-sponsored measure that does little for persons who get loans from payday loan operations. There was some relief in Congress, and I will write on that in the section on arbitration.

## XII. PREMISES LIABILITY UPDATE

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### **LAWSUIT FILED AGAINST BAYER AFTER EXPLOSION AT TEXAS PLANT**

Twenty-two workers were injured in an explosion in September at a Bayer MaterialScience plant near Houston, Texas. Nineteen of those employees have filed a lawsuit charging the company with practicing lax safety standards at the plant. The explosion, which occurred at a plant in Baytown, Texas, shut down one of the facility’s two toluene diisocyanate production lines.

Toluene diisocyanate is used to manufacture flexible polyurethane for use in items like upholstery, mattresses, and car seats. Bayer MaterialScience AG is a division of the German conglomerate Bayer AG. It is contended in the lawsuit that the explosion happened when toluene diisocyanate was mixed with another toxic chemical. If appropriate safety measures were in place, this explosion wouldn’t have happened.

More time has been requested to inspect the Bayer facilities. This is necessary to protect any potential evidence from being altered or destroyed. A temporary restraining order was issued by the trial judge on September 30<sup>th</sup> and the court will be asked to issue a subsequent order allowing lawyers for the employees to examine, photograph, and film the Bayer MaterialScience plant. It is expected that Bayer will make a strong effort to settle these cases very soon.

### **LAWSUIT FILED IN CHICAGO FIRE THAT KILLED SIX CHILDREN**

A lawsuit has been filed by the parents of six children who were killed in an apartment fire in Chicago. The suit alleges that the building’s owner was at fault. It is contended that the landlord failed to keep the building in reasonably safe condition and that the apartment where the fire occurred in September had no smoke detectors. The children who were killed ranged in age from 3 to 14. The children’s mother was also injured in the fire. The apartment hadn’t had electricity since May, and it appears candles were being used by the family. If the apartment had no smoke detectors, it would be a violation of the safety codes.

Source: *Associated Press*

### **SETTLEMENT REACHED IN WOMAN’S DEATH AT PARKING GARAGE**

The family of a woman who died when her car fell from the fifth floor of a parking garage in a mall located in Washington has reached a settlement with the owners. The settlement was between the family and Safeco Insur-

ance, which insures the garage. The woman died on April 8<sup>th</sup> after her car fell from the fifth floor of the structure onto the entry ramp below. She was driving slowly at the time, so speed was not a factor. The mall officials will strengthen the mall's parking garage by attaching steel rods and plates to outside-facing walls. The owners' dedication to making improvements in the garage was a significant factor in reaching the settlement. River Park Square is owned by the Cowles Co., which incidentally owns *The Spokesman-Review* newspaper.

Source: *Insurance Journal*

### **FAMILIES LOOK TO CIVIL LAWSUIT IN NIGHTCLUB FIRE FOR ANSWERS**

The criminal case stemming from The Station nightclub fire in Rhode Island has come to an end. Now, the families of some of the 100 people killed in the blaze are looking to the civil courts for accountability. The lawsuit, filed in a court by nearly 300 people who were injured or lost loved ones in the fire, names a good number of defendants, including the rock band Great White, whose pyrotechnic display sparked the fire. Many of the families felt that the criminal system didn't follow through and hold all of those responsible whose actions contributed to the fire and loss of life. They hope that the civil system will assign responsibility to everyone who contributed to the tragedy.

The fire at the West Warwick, R.I., nightclub was sparked by pyrotechnics that ignited the foam during a concert by Great White on February 20, 2003. It was the fourth-deadliest nightclub fire in U.S. history. The lawsuit alleges that carelessness and negligence by the defendants was to blame for the 100 deaths and more than 200 injuries. Many family members of those killed in the fire are unhappy with the plea deal entered into by the nightclub owners. In exchange for no contest pleas to involuntary manslaughter charges, one of the owners will receive four years in prison, while the other will avoid prison altogether. Former Great White tour manager Daniel

Biechele, the only other person charged criminally, was sentenced to four years in prison after pleading guilty to involuntary manslaughter.

Now that the criminal cases are over, the defendants can be compelled to answer questions in the civil case because they will no longer face criminal liability. No longer can they refuse to answer questions based on their constitutional right under the 5<sup>th</sup> Amendment. The two owners are still defendants in the civil case, even though they are shielded from paying damages above their insurance coverage after filing for bankruptcy protection. Prosecutors have promised to share evidence with the families now that the criminal case is over. Hopefully, the civil case will allow the families to get answers and put this sad episode in their lives behind them.

Source: *Associated Press*

### **SETTLEMENT REACHED OVER HOG FARM SMELL**

Large corporate hog farms have been in the news lately. Anyone who has lived near one of these large operations can tell you that they can be a real problem. In September, three families reached a \$4.5 million settlement involving a hog farm stench that caused a nuisance. After a trial, a jury found the defendant, Premium Standard Farms, Inc., owed plaintiffs \$4.5 million in actual damages, along with an unspecified amount of punitive damages. The plaintiffs decided to settle for the total amount of actual damages and agreed to drop the claim for punitive damages.

Premium Standard has 2,200 employees and is the second largest pork producer in the United States. It is owned by ContiGroup Cos. Inc., but is currently being sold to the second largest pork producer in the world, Smithfield Foods. Although the companies admitted to past environmental problems, Premium Standard argued that they spent millions of dollars to control odors and waste, and claim to be continuing the search for new technologies to

alleviate any problems. The plaintiffs rightfully wanted the freedom to enjoy their own property. It is important to note that the company had 350,000 hogs on this one location. More than 50 similar cases like this one are still pending.

Source: *Kansas City Star*

## **XIII. WORKPLACE HAZARDS**

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### **FAILURE OF WORKERS' COMPENSATION PROGRAMS NATIONWIDE EXPOSED**

A new report released on September 20th by the consumer rights group Center for Justice & Democracy (CJ&D) reveals that workers' compensation programs throughout the country have been devastating for injured workers, leaving them to contend with an adversarial bureaucracy and inadequate benefits that render many destitute. The report, "Workers' Compensation - A Cautionary Tale," calls the workers' compensation system a "colossal failure." The report correctly concludes:

*The real winners are insurance companies, which continue to boast record profits as workers' benefits are declining.*

The report closely analyzes the progressive deterioration of the workers' compensation system since its inception in the early part of the last century, highlighting disturbing trends in several states. CJ&D lawyer and policy analyst, Amy Widman, the report's author, observed:

*Workers' compensation is an unfortunate example of how a seemingly fair program can be manipulated by political forces into a nightmare for those it was originally meant to help.*

The release of this report came shortly after the fifth anniversary of September 11th, where the plight of many

clean-up workers who are being denied even meager workers' compensation benefits for their illness and injuries, illustrates many of the problems workers face in getting claims paid. The CJ&D Report also brands workers' compensation a "cautionary tale" about the pitfalls of administrative compensation programs that take away people's right to trial by jury, such as proposed "health courts" for medical malpractice victims. Citing problems with workers' compensation, the CJ&D Report warns against this concept, stating:

*Once political forces take over a statutory system, and they always do, it is merely a matter of time before a pro-victim proposal for no-fault compensation is turned into a fault-based, bureaucratic nightmare for the injured person.*

Alabama's worker's compensation laws are written to benefit corporate employers and are among the weakest in the country. I have often wondered why a strong push to revise our laws hasn't been made by consumer and labor groups. Maybe this report will prompt somebody to take action and attempt to get some changes in the worker's compensation laws in the several states.

Source: Center for Justice & Democracy

#### **WORKER KILLED IN SOUTH CAROLINA TEXTILE PLANT**

A textile worker who was killed while operating a large machine at Delta Woodside Industries' Beattie Plant in Fountain Inn, S.C. Melvin Stafford, who was 62-years-old, was operating a bale press—a machine large enough for an adult to walk into—when he became entangled in it. An autopsy was performed, but the cause of Stafford's death was still pending at press time. There were 60 to 70 workers in the plant at the time of the incident and no one else was injured. The Occupational Safety and Health Administration is investigating the death.

Source: Insurance Journal

#### **WORKPLACE ELEVATOR DEATH BEING INVESTIGATED**

A contractor faces \$63,000 in federal workplace safety fines for an accident in Pittsburg, Pennsylvania, which a subcontractor's employee was decapitated by an elevator. The federal Occupational Safety and Health Administration (OSHA) proposed the fine against Massaro Corp. of Pittsburgh, involving the April 13th death of James Neely. Mr. Neely, who was 44 years old, was working for subcontractor Mariani & Richards Inc. when he was struck by a passing elevator car. The worker had looked through a panel in a freight elevator shaft door. OSHA investigators found that Massaro Corp. willfully violated workplace safety rules by not covering glass panels that had been broken or removed from the doors leading to the elevator shaft.

OSHA also proposed a total of \$21,500 in fines against Mariani & Richards and six other subcontractors for lesser safety violations. The accident happened at a former warehouse that is being converted into apartments for students at the Art Institute of Pittsburgh. The elevator operator says he did not know that Mr. Neely was looking into the shaft. OSHA found that the buttons used to summon the elevator were not working. Workers at the site used walkie-talkie-type phones to communicate with each other.

Source: Insurance Journal

#### **CEDAR SPRINGS PLANT FINED FOR SAFETY HAZARDS**

The Occupational Safety and Health Administration (OSHA) has fined Georgia-Pacific's Cedar Springs, Georgia, facility for safety hazards related to a fatal accident in April. Jerry Leslie Winder, a 59-year-old employee, died from head injuries received on the job. Mr. Winder fell 30 feet from a catwalk when a vacuum pressure release device released steam and paper stock. He was on the catwalk to act as a fire watchman while another employee was welding.

According to OSHA, the discharge from the device pushed Mr. Winder against a guardrail that gave way. OSHA issued five citations and assessed penalties of \$63,000. This is the second time in two years the facility in Cedar Springs, has been fined in relation to a fatality. GP says it has addressed the safety issues cited by OSHA and is working to ensure that safety is a top priority at its facilities.

Source: Associated Press

#### **OSHA FINES ALABAMA FIRM FOR DEATH OF WORKER IN TRENCH COLLAPSE**

An Alabama company whose worker died in a trench collapse has been hit with the most severe citation that The Occupational Safety and Health Administration (OSHA) can hand down. Federal officials cited Big Warrior Corp. of Cleveland, Alabama, for a willful violation and seven serious violations in the wake of the worker's April 27<sup>th</sup> death. The agency has proposed fines totaling \$78,100 for failure to follow standard safety precautions. The 20-year-old worker died when an 8- to 10-foot trench collapsed while he and two co-workers were digging under a sewer line.

The company disregarded its own safety manual requirements and federal safety regulations with tragic results, according to OSHA. They knew they needed to use trench boxes or trench shields, shore the trench up, or slope it back. OSHA imposes a willful citation when a company has shown an intentional disregard of or plain indifference to OSHA regulations. The other citations allege the company failed to provide a safe way to enter and exit the excavation, failed to provide safety training for the workers, put excavated materials too close to the edge of the trench, and failed to conduct soil analysis.

## XIV. TRANSPORTATION

### **BUS OPERATOR IN EXPLOSION CASE IS CONVICTED OF CRIMINAL CONSPIRACY**

In a recent issue we discussed the tragic bus accident that killed 23 people outside of Dallas, Texas, during the Hurricane Rita evacuation. The company that operated the bus that exploded was convicted last month on criminal charges of conspiring to falsify logs and two other safety violations. James Maples, the owner of the company, Global Limo Inc., was found not guilty of conspiracy, but was convicted of poorly maintaining his fleet and not requiring drivers to fill out vehicle inspection reports. Global Limo was convicted on those same charges. It should be noted that none of the charges were directly related to the bus explosion. The judge prohibited prosecutors from mentioning the accident, saying it fell outside the scope of the charges and would prejudice the jury.

Global Limo faces a \$500,000 fine on the conspiracy count and a \$200,000 fine on each of the two other convictions. Mr. Maples faces up to a year in federal prison and a \$100,000 fine on each of his two convictions. Sentencing is set for December 14<sup>th</sup>. The trial stemmed from a federal investigation into the Global Limo bus that exploded and burned while held up in traffic on September 23, 2005, killing 23 elderly patients too frail to escape. The patients' oxygen tanks exploded as the flames engulfed the bus. Victims and relatives of victims had previously reached a satisfactory settlement with Global Limo and BusBank, the travel broker that hired the company. The settlement avoided a civil trial in those cases.

Source: Associated Press

### **VICTIMS FILE LAWSUIT IN NEW YORK BUS CRASH**

Fifteen victims of a deadly bus crash that occurred in northern New York

have sued Greyhound Lines Inc., claiming the driver fell asleep before the New York-to-Montreal bus flipped in the highway median and killed five passengers. The 52-year-old bus driver was also killed. There were 48 survivors. The suit was filed in Dallas, Texas, against the Dallas-based company. Officials said the bus flipped on the evening of August 28th on a remote stretch of Interstate 87 in the eastern Adirondack mountains. The lawsuit claims the driver frequently talked on his cell phone and listened to an iPod-like device with headphones while driving that evening. The lawsuit also claims the driver did not get enough rest before starting the trip and drove faster than necessary. It is alleged that Greyhound should have known the driver was unfit to drive.

Source: Associated Press

### **PARENTS GROUP DON'T LIKE THE ATV CAMPAIGN BY THE CPSC**

Although adult-sized all-terrain vehicles (ATVs) should never be used by children, manufacturers know that they are being used by children as young as 8 to 10 years old. The Consumer Product Safety Commission (CPSC) currently has a safety campaign in place. The CPSC says it is promoting safety when it comes to the campaign. But, a group of parents who have lost children to ATV accidents have accused the CPSC of engaging in nothing more than a "pure public relations" campaign. Concerned Families for ATV Safety say the CPSC has weakened safety regulations at the request of the ATV industry. Sue Rabe, a co-founder of the group, says:

*The CPSC's campaign is not going to save one child riding on an adult-sized ATV.*

In May 2002, Ms. Rabe lost her son Kyle when his adult-sized Arctic Cat ATV rolled over and crushed him to death. Her group wants the CPSC to pass a rule that would prohibit the sale of adult-sized ATVs for use by children under 16 years of age. Instead, the CPSC brought in famous race car drivers—

including one of my favorites, Richard Petty — to promote what the CPSC called "a major campaign to educate riders, young and old, on the safe use of ATVs." But Ms. Rabe said that when a child looks at Richard Petty, it makes the child "want to race an ATV." That, in her opinion, is "counterproductive." Ms. Rabe, who believes the new campaign will undermine safety because the CPSC is weakening the rules on youth-sized ATVs, observed:

*Right now, the ATV industry and the CPSC have a golden rule—no one under 16 riding an adult-sized ATV. That means no child under 16 on anything larger than a 90 cc vehicle. But the CPSC and the industry want to change that so that children 12 to 16 can ride vehicles that are larger than 90 cc—anywhere from 125cc to 175 cc. They are changing the definition of 'adult-sized ATVs.' This will lead to more children dying on ATVs. It's a huge step in the wrong direction. No child under 16 should be on an adult-sized ATV—meaning anything over 90 cc.*

The number of four-wheel ATVs in use in the United States has increased over the past 10 years from just over 2 million to more than 6.9 million. From 1982 through 2004, there were nearly 6,500 deaths involving ATVs. In 2004 alone, an estimated 136,000 people were treated in hospital emergency rooms for ATV-related injuries, many of them life-threatening. In 2003, an estimated 740 people died nationwide in ATV incidents. It's significant that about 30% of all deaths and injuries involve children younger than 16. That should speak loudly to both the manufacturers and the CPSC.

It now seems that the battle for ATV safety is shaping up as one between parents who have lost children to ATV accidents, pediatric physicians, neurosurgeons, and trauma nurses on one side, against the powerful ATV industry and the CPSC on the other side. I believe that all states should pass a law

prohibiting the use of an adult-sized ATV by a child under 16 years of age. The CPSC should join with Ms. Rabe and the groups aligned with her and correctly define adult-sized ATVs. Safety has to be a top priority and the CPSC has an obligation to make that a reality.

Source: *Corporate Crime Reporter*

### **PROBLEMS IN A TEXAS AFFECT CITIZENS IN OTHER STATES**

Based on a series that appeared recently in the *Dallas Morning News*, it appears that the State of Texas has been doing a very poor job of regulating the trucking industry. As a result, trucks from Texas can create safety hazards when these trucks travel into other states. It should be noted that over the past several years the trucking industry in the U.S. has grown at a rapid pace. Similar growth has also been the case in the Lone Star State. The trucking industry's growth seems to have overwhelmed law enforcement agencies in Texas. The problem is especially acute in that state. It's where U.S.-based trucks pick up loads at the Mexican border and then transport them across the country to make deliveries. As we have previously reported, U.S.-Mexico trade has more than doubled since the North American Free Trade Agreement was implemented in 1994. About 68% of truck traffic from Mexico enters this country at the Texas border, according to federal data. That puts a tremendous responsibility on Texas officials.

*The Dallas Morning News* concluded a seven-month investigation dealing with trucking companies in Texas and wrote a series that was most informative. Their investigation found that:

- The trucking companies hire illegal immigrants who struggle to read road signs and communicate in English with police and emergency personnel;
- They hire felons, drunks, and drug addicts;
- They make only cursory checks of

work history and driving records, then put the new hires behind the wheel of rigs with the destructive potential of guided missiles;

- When accidents occur, trucking companies defend their drivers and often blame the other vehicles—and in many cases the dead occupants—regardless of the evidence.
- They typically fight any release of information about their drivers and vehicles, and wage protracted legal battles to avoid blame.
- Beyond that, the companies suffer few consequences, in part because the soaring number of trucks on Texas highways are overwhelming regulators and law enforcement officers.

More than 5,200 people died in accidents involving large trucks in the U.S. last year. The most comprehensive national study, released in March by the U.S. Department of Transportation, found that truck drivers were at fault in at least 44% of all accidents between cars and big trucks. The American Trucking Association, which represents the industry's largest companies, claims that trucks cause only about 25% of fatal accidents involving cars. According to records, when trucking companies are to blame, it's because truckers drive too fast, don't pay attention, work too many hours, or take to the road in poorly maintained equipment—sometimes with the knowledge and encouragement of their employers. This is why we have seen an increase in highway crashes involving large trucks in the U.S.

In Texas, the number of interstate carriers based in that state increased by about 43% in the past five years. The number of registered large trucks in the U.S. increased 24% from 1994 to 2004. U.S. trucking companies reported a record financial year in 2005, generating \$623 billion in revenue while hauling almost 70% of the nation's freight. With all of that being said, the public should be entitled to expect all trucks on the road to be safety operated by well-

trained drivers who obey safety rules, regulations, and statutes. When a state like Texas is lax on its responsibilities relating to regulation of the trucking industry, and those trucks travel across state lines, the citizens of those other states are put at risk. As mentioned above, it's an especially serious problem in Texas because of the state's proximity to Mexico. I hope the excellent reporting by the *Dallas Morning News* will get the attention of public officials in Texas. If that happens, and the state officials respond, travelers on the highways of other states will be safer as a result. Interestingly, the American Trucking Association is now asking truck manufacturers to make their trucks so that the speed can not exceed 68 mph.

Source: *Dallas Morning News*

### **MAN PARALYZED IN SKYDIVING PLANE CRASH FILES SUIT**

A fourth lawsuit against a Connecticut-based engine-maker has now been filed by a paralyzed survivor of a skydiving plane crash that killed six people in eastern Missouri. Steve Parrella, who is from St. Louis, was one of only two survivors of the July 29<sup>th</sup> crash. The crash rendered Mr. Parrella paraplegic and he is still hospitalized because of his injuries. The lawsuit, which contends that engine failure caused the crash, names engine-maker Pratt & Whitney; Quantum Leap Skydiving Center of Sullivan, Missouri; and the pilot, who is a Quantum Leap co-owner, among others, as defendants. The crash occurred soon after takeoff from the airport at Sullivan, which is located about 70 miles southwest of St. Louis. The parents of three other crash victims had already filed suit. The National Transportation Safety Board is investigating, but a final report won't be available until early next year.

## XV. ARBITRATION UPDATE

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### **VICTORY FOR MILITARY CONSUMERS AND AGAINST ARBITRATION CLAUSES**

I mentioned in a prior section that the Pentagon was putting pressure on Congress to take action to protect military personnel and their families. That pressure and an outcry from the public prompted swift action by a Congress that had heretofore ignored the problem. As you may know, amendments to bills in Congress don't have to relate to the subject matter of the bill being amended. That's not the case in most state legislative bodies. But, that unusual rule in Congress has now paid dividends for consumers at least this once. An amendment was offered by Senator Jim Talent (R-MO) to the Department of Defense appropriations bill that has now become law. It will protect military personnel and their families against the predations of payday lenders.

This will not only protect members of the military, which is obviously unbelievably important in its own right, but it will provoke needed debate on broader issues of consumer protection. Congress has finally **recognized** that **binding mandatory arbitration provisions** are **unfair** as applied to all members of the military who deal with these loan sharks. How does that correlate with the claim made by Corporate America that binding arbitration is fairer, cheaper, and better for consumers who deal with lenders? It should be undisputed that mandatory, binding arbitration is unfair in any type consumer transaction between a consumer and a large corporation. So now, Congress has passed one of the most important pieces of consumer legislation in the few past decades. The law's highlights include:

- An **Interest Rate Cap** that prohibits any lender from imposing an annual percentage rate of interest of more than 36% on loans to members of the

armed forces stationed anywhere in the world and/or their dependents. Interest is defined to include all extra charges and fees of any kind, including the sale of related products like credit insurance. This requirement complements existing federal law, which requires lenders to lower interest rates to 6% on loans that Service members open before they enlist.

- A **prohibition** on lenders from basing loans to Service members on the writing of checks without adequate funds in the bank to cover the check, or on electronic account access or wage allotments that allow lenders priority access to bank accounts or military pay. Loans secured by title to the Service member's vehicle (Car Title Loans) are also prohibited.
- A **prohibition** against **Binding Mandatory Arbitration Clauses** and any other type of waiver of any other right to seek legal recourse.

Obviously, the first two items are extremely important, but the most significant feature deals with arbitration. Prohibiting arbitration is a major victory for consumers. For anyone interested in the bill, it can be found at: <http://naca.net/MilitaryPaydayLoanLaw.pdf>.

## XVI. HEALTHCARE ISSUES

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### **DRUG OVERDOSES KILL INFANTS**

Three premature infants in Indiana died after being accidentally given an adult-sized dose of blood thinner medication at a hospital in that state. An adult dose of heparin, a drug routinely given to premature babies, was given to the babies. They were given the drug, which is often used to prevent blood clots that could clog intravenous tubes, after a pharmacy technician accidentally stored adult doses in the neonatal unit's drug cabinet. Two other babies who also received too-strong doses

were in critical condition at press time because they are premature, but were not considered in danger from the overdoses.

The hospital offered to pay for family counseling and provide restitution to all six families affected. Since the overdoses, the hospital has taken steps to ensure the mistake does not happen again. The hospital will no longer keep certain doses of heparin in inventory. All newborn and pediatric critical care units at the facility will require a minimum of two nurses to validate any dose of heparin. This was a tragic occurrence that was easily preventable. I hope it will serve as a wake-up call for that hospital and others who learn of what happened.

Source: *Associated Press*

### **ILLINOIS DENTIST SUSPENDED AS A RESULT OF CHILD'S DEATH**

State regulators have suspended the license of an Illinois dentist whose 5-year-old patient fell into a coma in his office and later died. The dentist's practices were said by the Illinois Department of Financial and Professional Regulation to pose an "imminent danger to the public." The dentist failed to properly monitor the child's blood pressure, pulse, and respiration during her treatment at his storefront clinic. The state agency's complaint said the dentist recorded that the child was "alert and responsive" on discharge, although her mother claims to have found her "comatose" in the dental chair.

The child later died at Children's Memorial Hospital in Chicago. She had been on life support for four days after her visit to Little Angel Dental to have some teeth filled and others capped. The 40-year-old dentist faces up to \$10,000 in fines for each of four violations, which include making false or fraudulent representations, professional incompetence, and gross malpractice. State regulators said the child received two injections of diazepam or Valium within five minutes, followed by oral Valium, lidocaine, several other medications, and nitrous oxide. The combina-

tion of the drugs at the dosages given was inappropriate for the 35-pound girl.

Source: *Associated Press*

### **FDA SAYS GLAXO ANTIDEPRESSANT MAY BE LINKED TO BIRTH DEFECTS**

GlaxoSmithKline PLC's antidepressant drug Lamictal may cause birth defects in babies exposed to the drug during the first three months of pregnancy. This comes from a notice found on the U.S. Food and Drug Administration's (FDA) Web site. Babies exposed to the drug in early pregnancy may have a higher chance of being born with a cleft lip or cleft palate, a gap in the upper lip or roof of the mouth, according to the document. Lamictal is an antidepressant that is used to treat patients that experience seizures or bipolar disorder, which the FDA notes are serious conditions that require treatment, even during pregnancy. The report was based on preliminary findings by the FDA, which said more research is necessary before a final conclusion is reached. Until now, Glaxo, based in London, had listed far less severe side effects that could result from taking the drug, including dizziness, headache, blurred or double vision, lack of coordination, sleepiness, nausea, vomiting, insomnia, and rash.

Source: *Wall Street Journal*

## **XVII. ENVIRONMENTAL CONCERNS**

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### **OUR FIRM CONTINUES TO HANDLE A NUMBER OF MESOTHELIOMA CLAIMS**

Every year over 2000 new cases of mesothelioma are diagnosed in the United States. Our firm has been actively investigating mesothelioma claims around the country for a good while. We currently represent a number of persons with these claims. Mesothelioma is a relatively rare but extremely aggressive form of cancer that attacks the mesothelium or lining

of internal organs. The disease is typically found in the lining of the lungs (known as pleural mesothelioma), but it may also be found in the lining of the heart (pericardial) and the lining of abdominal cavity (peritoneal). Shortness of breath, cough, and pain in the chest caused by an accumulation of fluid in the pleural space are often symptoms of pleural mesothelioma. Although a small percentage of mesothelioma cases are difficult to trace to a specific source, the only known cause of mesothelioma is exposure to asbestos.

As a result, it is almost certain that if you have mesothelioma (also sometimes referred to as "asbestos cancer"), you were exposed to asbestos. Although mesothelioma can occur in both men and women, it is more likely to occur in men as a result of exposure in the workplace decades ago. Most people who develop mesothelioma have worked on jobs in which they inhaled asbestos particles, or are exposed to asbestos dust and fiber in other ways, such as by washing the clothes of a family member who worked with asbestos, or by home renovation using asbestos cement products. There is no known association between mesothelioma and smoking.

Typically, from the time of exposure to asbestos to the first symptoms of mesothelioma, the disease can take 20 to 40 years to fully develop. Unfortunately, because of the highly aggressive nature of the cancer, the time from diagnosis to death is usually less than 24 months. Because asbestos was widely used in various industrial and consumer products, relating the disease to a specific asbestos exposure is often difficult and time-consuming. Frequently the conclusion is that a case of mesothelioma is the result of cumulative exposure to many different asbestos products. Simply put, the continual exposure to asbestos overwhelms the ability of the body to fight back. But, sometimes it is possible to relate exposure to a specific source and time. In either situation, we are interested in investigating potential cases anywhere

in the country and are dedicated to aggressively pursuing claims arising out of exposure to such a dangerous product. Mike Andrews in our firm is the primary lawyer handling these claims. If you want more information concerning this litigation, you can contact him or go to our Web site.

### **CANCER RISK FOR ALABAMIANS**

Pat Byington, the former Vice-Chairman of the Alabama Environmental Management Commission, recently wrote about an important topic in state newspapers that you may not have seen. Mr. Byington, who served as Chairman of the Commission's Strategic Planning Committee, contends that because of an Alabama policy decision, a person is more likely to get cancer in our state than in many of our neighboring states. In 1991, the Alabama Environmental Management Commission adopted a cancer-risk level to use in regulating the water quality of rivers and streams in Alabama. The Commission was asked to make a decision that all Alabamians should find important: "How many people does the state find acceptable to get cancer as a result of the toxic pollution that industries discharge in water under permits issued by the Alabama Department of Environmental Management?"

Mr. Byington contends that, despite being given the opportunity by the U.S. Environmental Protection Agency to adopt a more stringent risk level, the Commission, with the support of the Alabama Department of Public Health, adopted a cancer-risk level that was the least stringent. At present, while Alabama still has the same 1 in 100,000 cancer-risk level it adopted fifteen years ago, Mississippi, Florida and Georgia have all adopted the 1 in 1,000,000 cancer-risk level.

In order to get better information, Mr. Byington met with a UAB professor emeritus in epidemiology. This professor taught risk assessment for twenty years and served on the Agency for Toxic Substance and Disease Registries Board of

Scientific Counselors, a federal agency that studies the health effects of pollution. The two discussed cancer and pollution, and Mr. Byington was reminded that—along with Alabama’s cancer-risk level—many of our environmental and health standards do not address sufficiently chronic diseases such as birth defects, asthma, and diabetes. The standards also do not adequately take into account the cumulative health impacts of toxic pollution.

Last July, the Environmental Management Commission’s Strategic Planning Committee unanimously recommended a new draft Environmental Management Strategic Plan for the state. One of the cornerstone goals within the plan is to “ensure regulatory standards are most protective of health and environment in the nation based on science and ecological conditions.” This goal was developed by two committee members, Dr. Kathleen Felker and Ken Hairston. Dr. Felker, a radiologist, is a passionate advocate for breast cancer awareness. Mr. Ken Hairston, General Counsel for Alabama A&M University, has been a champion within the Commission on behalf of environmental justice.

By the time you read this, the Environmental Management Commission will have had an opportunity to move forward with the strategic plan and the “most protective” goal to set into motion a re-evaluation of Alabama’s health-based environmental policies, standards, and regulations. If adopted, the result will be fewer cancers, cleaner air, land and water, and, most importantly, overall healthier Alabamians.

You may have read earlier where some business groups, such as the Business Council of Alabama, have opposed certain parts of this strategic plan. I don’t know about you, but it is hard for me to understand how any group would put their personal business interest above the health of Alabama citizens. If you know someone who has cancer, which I am sure you do, then you will understand why this strategic plan is so important. By the way, Pat Byington, who did great work while on

the Commission, wasn’t reappointed when his term expired. In my opinion, that was Alabama’s loss and industry’s gain. We need folks like Pat Byington in state government and especially on boards and commissions that deal with environmental issues and concerns.

#### ***CREATIVE LOAN OFFERINGS DESTROYING MANY BORROWERS***

Now that the housing bubble has burst, about 20% of homeowners are in for a rough ride. Between 2003 and 2006, as housing prices soared, lenders became increasingly creative with their mortgage options. The results of this creativity are such products as Teaser ARMs (adjustable rate mortgages), Subprime ARMs, Option ARMs and Interest Only loans. As long as home values steadily increased, homeowners were all right. But now that values have leveled and in some cases decreased, the results will be devastating to many homeowners.

Many of these mortgage products have been around for a long time, but were reserved for wealthy sophisticated borrowers. This all changed during the superheated bubble market. Borrowers saw home values skyrocketing and easy financing available, and jumped aboard with little awareness of the consequences. The Teaser ARM offered an incredibly low initial interest rate that allowed homebuyers to stretch themselves into more house than they could otherwise afford. Now as those teaser periods end, interest rates of as low as 1% to 2% are resetting at market rates. Homeowners are now shocked as their mortgage payments on a \$200,000 home jump from \$725 per month to \$1,340 per month.

The most dangerous and misunderstood of these products is the Option ARM. This highly complex loan offers borrowers a choice of payment options. Borrowers can pay the traditional principal and interest, just the interest, or a minimum payment that is less than the monthly interest. The deferred interest left when the borrower pays the minimum is added to the loan balance.

Once the loan balance grows to a certain point, the full principal and interest is due on a now larger loan. Many people purchasing Option ARMs do not understand the loan. They make the minimum payments every month and are confused to see the loan increasing. They also believed the loans were fixed for a longer period of time and are stunned to see their rates resetting at much higher numbers. Flat housing prices and prepayment penalties have left many borrowers trapped in these loans.

The shame is that these complex loans were offered to unsophisticated borrowers, and borrowers were not properly and carefully informed of the true nature of the loan. Option ARMs were very attractive loans for brokers and lenders. Brokers were often paid more to sell Option ARMs than traditional mortgage loans. Lenders were allowed to claim the full monthly payment as revenue on their books even when borrowers were only making minimum payments. These were huge incentives to lenders to push Option ARMs and keep borrowers in the dark as to their unsuitability.

#### ***CHICKEN FARMS POLLUTE WATER AND AIR***

Residents in Tahlequah, Oklahoma, are complaining of the contaminated water of the Illinois River. The residents allege that companies like Tyson Foods, which as you know is based in Arkansas, are dumping chicken waste that contains hazardous chemicals into the river. Following a recent trend, states and localities are suing polluters outside their jurisdiction to stop water and air contamination that respects no borders. In this case, Oklahoma blames Arkansas for its pollution troubles. Because federal laws and regulations are few, the farms in Arkansas and Oklahoma are seeking federal guidance. Existing laws do not currently apply to those who buy poultry waste for fertilizer.

Oklahoma state poultry officials blame Bentonville and Fayetteville, Arkansas for the pollution. The officials

claim those cities are the fastest growing poultry producers, and those industries create their own runoff in the river. In recent months, many states are complaining that out-of-state pollution is hurting their tourist industry. A recent example is Kentucky, which claims its tourist industry will be injured if Virginia votes to allow Consolidation Coal Company to discharge water from its mining operations that would pollute the reservoir Fishtrap Lake. Because of the lack of air and water regulation at the state level, many states are turning to the federal government to provide stricter regulations concerning poultry waste and water runoff.

Source: *The Washington Post*

## XVIII. THE CONSUMER CORNER

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### **ALL AMERICANS SHOULD BEWARE OF ONLINE PHARMACIES**

Congressional investigators started looking into Internet-based pharmacies a few years back and for good reason. In 2000 the Governmental Accountability Office (GAO) located less than 200 of the online drug outlets. In 2004, the GAO found that these sellers of drugs via the Internet had grown to 1,400. The online pharmacies will sell anybody prescription drugs regardless of their prior health history or their current situation, and regardless of what other drugs they may be taking. I am sure that some of these outlets are legitimate, but others are at least suspect. The risks are so great that all who use the online pharmacies are putting their health and perhaps their lives on the line.

An interesting bit of information involves a doctor in Rockingham, North Carolina, who told the North Carolina Medical Board that he had treated 244,000 patients in only 8 months. He had been approving questionnaire requests for medications and had never seen a single one of the patient's who were getting the drugs. The doctor was

working for RX Medical, an online pharmacy, and was getting \$3 for each patient.

My advice is to stick with a local pharmacist to fill your prescriptions. That means your doctor, who knows you and your medical history, and has an opportunity to see and examine you, will give you a prescription to have it filled. You then can go to a drug store, and your pharmacist will make sure that the drug is one that you can safely take. If you want to roll the dice and maybe save a little money, then online drugs are fine for you. But remember to consider the consequences when you take that route.

### **PRESCRIPTION MIX-UP KILLS ELDERLY CUSTOMER**

Walgreens must pay \$31 million to the family of a 79-year-old man who died after being given the wrong prescription by a Walgreens pharmacist. Leonard Kulisek slipped into a coma a day after taking the wrong medication and suffered through a series of illnesses over the next 22 months before he died. The pharmacist who gave the wrong prescription admitted he'd been popping OxyContin and hydrocodone for eight years. He was stealing the pills from the Walgreens stock he managed and was responsible for. After the trial, jurors said they believed the pharmacist was under the influence on the day he gave Mr. Kulisek the wrong medication.

Mr. Kulisek, retired from International Harvester, was a volunteer tutor at a local elementary school. He had a history of health problems, but hadn't suffered any major illnesses in the years just before the mistake. He also suffered a stroke before his November 2002 death. Mr. Kulisek was supposed to get a pill for gout, but the pharmacist instead gave him an insulin pill that dropped his blood-sugar levels dramatically, putting him into a coma and causing him kidney troubles. Mr. Kulisek filed his lawsuit while he was still alive. It was continued after his death by his family.

The pharmacist went through drug rehabilitation and was fired by Wal-

greens. He continues to work as a licensed pharmacist and is allowed to dispense medication on a probationary license. The company plans to appeal the verdict. Jurors said they believed Mr. Kulisek's deteriorating health was caused by the wrong prescription and contributed to his death. Walgreens' failure to catch the pharmacist's thefts and signs of addiction played a role in their verdict. The pharmacist admitted that he stole 86,000 pills during the time he worked for Walgreens.

### **DR. PHIL AND DIET PILL MAKER SETTLE LAWSUIT**

A settlement has been reached in a class action lawsuit involving Dr. Phil of TV fame. Buyers of diet products endorsed by "Dr. Phil" McGraw, the TV psychologist, will be eligible for cash refunds or replacement vitamin supplements under terms of a \$10.5 million settlement of a lawsuit alleging that the products didn't work as advertised. The Shape Up products, which are no longer distributed or sold, included shakes, bars, and multi-vitamins made by CSA Nutraceuticals of Irving, Texas. Dr. Phil got into the lucrative weight-loss market in mid-2003 with a campaign that included advice books, a prime-time TV special, and the Shape Up products. Facing a Federal Trade Commission investigation into allegations of false advertising, CSA Nutraceuticals stopped making the products in early 2004.

The class action lawsuit, filed a year ago in state court in Los Angeles, alleged that Dr. Phil made false and misleading claims in marketing the supplements. The plaintiffs, who bought the Shape Up products, alleged that instead of losing weight, they lost money. The regimen required the user to take 22 pills daily at a cost of \$120 a month. Under terms of the settlement, class members can receive a cash refund of \$12.50 for every box of Shape Up they bought, up to four boxes. If they don't want that, they can elect to receive two bottles of Nutrilite Daily Multivitamin/Multimineral supplements for each

box of Shape Up, up to eight bottles. Since his liability insurance carrier will pay the cash involved in the settlement, Dr. Phil will not be personally liable for paying any of the settlement funds. The class includes more than 100,000 people. Class members must file a valid claim by January 22, 2007. Details of the agreement can be found online at <http://www.shapeupsettlement.com> or toll-free at (888) 212-5570.

Source: *LA Times*

### **CREDIT CARD COMPANIES PREY ON STUDENTS**

There is a tremendous need for a nationwide ban on credit card marketing on college campuses. College students tend to have less financial experience than older adults, making them more vulnerable to the hard-sell marketing tactics of credit card companies. Although credit card marketers have aggressively solicited students for years, the activity has intensified. Some companies solicit by phone or e-mail, and others flood students' mail boxes with credit card applications. Marketers even set up tables in heavily traveled areas on college campuses offering free sandwiches or pizzas to students in order to get them signed up for credit cards.

Unfortunately, many students leave college with a tremendous amount of credit card debt. This has caused a great deal of misery for young people just starting out in the real world of work. Colleges should draw the line and restrict access to the credit card companies. Instead, many colleges are earning up to millions of dollars each in annual fees by giving banks the right to market credit cards on their campuses. It appears that Bank of America is one of the worst offenders. That bank has deals with about 700 colleges nationwide, which is a result of its acquisition of MBNA. Even some alumni associations make billions in return for giving banks exclusive access to solicit alumni and students. It's time to take action to protect college students from the credit card companies. The colleges should do

this without being forced to do so. But, that probably won't happen. So Congress and state legislative bodies should get involved.

Source: *USA Today*

### **ATTORNEYS GENERAL SETTLE CASE AGAINST JEWELRY COMPANY**

A jewelry company that signed people up for credit insurance without their consent must stop the practice and repay their customers, according to an agreement reached last month with the Attorneys General of Alabama and 17 other states. Under the settlement, Friedman's Jewelers will have to provide clear disclosures of extra insurance charges to customers who apply for credit. This was a case of fraudulent conduct, which took advantage of low income people by a company that has about 420 stores nationwide. The suit was filed in Texas against Friedman's in December 2004.

The company had routinely sold credit, property and disability insurance to low-income customers who applied for credit to buy jewelry. The charges for credit insurance sometimes exceeded \$100. Even though the customers didn't request or approve the coverage, they paid the charges. Some customers were paying for credit insurance even though they hadn't signed the section of the purchase contract that authorizes the coverage. Customers who noticed the insurance charges and complained were falsely told the coverage was mandatory to get credit from the store.

Alabama customers can apply for restitution through the Attorney General's office but must do so by January 11, 2007. Customers in other states should apply through the Attorney General's office in their state. Other states included in the settlement were: Arkansas, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, South Carolina and Tennessee and Texas.

Source: *Associated Press*

## **XIX. RECALLS UPDATE**

Each month, I attempt to mention some of the product recalls that we believe to be significant. The following recalls fall in that category:

### **Mitsubishi To Recall 27,367 Minivans**

Japan's Mitsubishi Motors Corp. will recall more than 25,000 minivans over an airbag defect. Mitsubishi Motors, Japan's fourth-largest automaker, will be recalling 27,367 "i" minivans due to a defect in how passenger-side airbags were packed that could prevent them from inflating fully. The minivans affected by the recall were produced between December 25, 2005, and July 22, 2006, all sold in Japan. Mitsubishi will also implement a service program to repair a gear shift defect in 11,610 "i" minivans free of charge. The vehicles involved were produced from January 10th to April 4th of this year. All were sold in Japan.

### **Mitsubishi Will Repair Sensor Defect**

In a service program, the Tokyo-based Mitsubishi will repair a sensor device defect in activating airbags in 16,954 Outlander sport utility vehicles and sold in Japan, as well as about 120 units sold abroad. The service program will also be implemented in exporting countries, according to the respective country's safety rules. The Outlanders were produced between October 9, 2005, and March 4, 2006.

### **Ford Recalls 140,000 Vehicles Over Faulty Doors**

Ford Motor Co. is recalling over 145,000 vehicles in the United States for a range of problems from defective latches to faulty drivetrains. The recall involves 139,537 2005 model-year Five Hundred and

Montego sedans and 2005-2006 model-year Freestar minivans because the side door latches may let in water. This may cause the latch mechanism to freeze in cold weather, and the door could open while the vehicle is moving.

Separately, Ford is also recalling 6,164 Escape hybrid sport utility vehicles from 2006 model year because a drivetrain shaft may fracture. If a fracture occurred, it could cause the vehicle to move, even in the park position, the National Highway Traffic Safety Administration (NHTSA) said. Ford dealers will inspect the drivetrain shaft and replace it if necessary.

You can get more information on these recalls by going to NHTSA's Web site, which is [www.nhtsa.gov](http://www.nhtsa.gov).

### **Playskool Toy Bench Recalled After Deaths Reported**

Toymaker Playskool and the U.S. Consumer Product Safety Commission (CPSC) issued a recall in September of about 255,000 of its "Team Talkin' Tool Bench" toys following the deaths of two young children. Playskool, a unit of Hasbro Inc., said it had received reports that a 19-month-old boy from Martinsburg, W.Va., and a 2-year-old boy from League City, Texas, suffocated when oversized, plastic toy nails sold with the tool bench toys became lodged in their throats.

The company said it is recalling the product even though the toy nails are not considered a small part, and the toys are intended for children age 3 and older. According to CPSC spokesman Scott Wolfson, the packaging for the toy did not have a choking hazard warning because none of its parts is considered to be a "small part" as classified by the agency. The typical measurement for a small toy part is 2-1/2 inches in length and 1.75 inches in width, or smaller. The Team Talkin' Tool

Bench is a 20-inch tall plastic toy tool bench with an animated red toy saw, a yellow toy drill and a blue toy vice. The toy talks and makes various sound effects. The product also includes a toy hammer, screwdriver, two 2-1/4-inch plastic screws, two 3-inch plastic nails and pieces to build a small toy plane. The red Playskool logo is on the front of the brown surface of the tool bench.

The toy was sold at Toys R Us, Wal-Mart, Target, KB Toys stores and various other stores nationwide from October 2005 through September 2006, priced at about \$35. The CPSC said consumers should immediately take the two toy nails away from children and contact Playskool to get information on returning the nails for a \$50 certificate for another Playskool product. For additional information, consumers can call Playskool at 800-509-9554 or go to the company's Web site at <http://www.playskool.com>.

### **Segway Recall Scooters**

There has been another scooter recall by Segway. The company's calling back more than 23,000 of its Personal Transporters because of a software glitch that could throw the wheels into reverse, causing riders to fall off. The Consumer Product Safety Commission has told people to stop using the self-balancing scooters immediately. It says Segway has received six reports of people suffering head and wrist injuries. The company is offering a free software upgrade to fix the problem. This is the second time the scooters have been recalled since they first went on the market in 2002.

### **The Battery Recalls Continue**

The tremendous number of laptop battery recalls may leave some customers feeling confused as to what is going on. So far, companies that

have issued recalls include Dell Inc., Apple Computer Inc., Lenovo Group Ltd., Toshiba Corp., Fujitsu Ltd and Panasonic. The batteries in all of these cases, with the exception of Panasonic, are manufactured by Sony Corp., and may pose a fire hazard from small particles causing the battery to short circuit.

## **XX. FIRM ACTIVITIES**

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### **EMPLOYEE SPOTLIGHTS**

#### **Cole Portis**

Cole Portis serves as Section Head of our Product Liability Section. He and his staff have successfully handled 34 cases that were tried or resolved on behalf of clients for more than one million dollars. Cole believes it is important to use the gifts God has given him in our community. Thus, as an attorney, he feels compelled to participate in legal organizations. He is a past president of the Montgomery County Bar Association (2002). Additionally, Cole served as President of the Alabama Young Lawyers Association (2000-2001), President of the Montgomery County Trial Lawyers Association (1999), and President of the Auburn University Bar Association (1999). He is also an active member of the Trial Lawyers for Public Justice.

Cole is an active member of Morningview Baptist Church, where he serves as chairman of the Deacons. In addition, he teaches the College/Career Sunday School class and sings in the choir. Last year, Cole served as President of the Jimmy Hitchcock Award, a prestigious award honoring Christian student-athletes in Montgomery. He is a member of the Advisory Board at Auburn University-Montgomery. He is a member of the board of directors for Trinity Presbyterian School and Character at Heart, an organization that implements character education in our schools. Finally, Cole recently completed his tenure on the

Board of the Alabama Head Injury Foundation, a dedicated group established to raise money for those who suffer traumatic brain injuries.

Cole is married to the former Joy Mikell of Millbrook and they have two daughters and two sons. Their most recent addition to the family is a three-year-old boy adopted in China. Cole is a very good lawyer who cares deeply for his clients and works hard for them. He also treats the lawyers and support staff in his section fairly and respects them as individuals with value and worth. To put it simply—in dealing with people, Cole follows **The Golden Rule!**

#### **Keith Scott**

Keith Scott, who came to work for the firm as an Investigator in June of 2001, currently works in our Personal Injury/Products Liability Section. He also helps out with any other investigative needs for the firm. Needless to say, because of our caseload volume, the investigators have a busy schedule. An important part of their work involves helping the lawyers work up product liability cases. Often, Keith and the other investigators have to locate vehicles and parts for use during trials. Serving subpoenas on a daily basis is also part of their work. Keith previously worked for the Montgomery Police Department, spending 14 years in the Detective Division before his retirement. Keith graduated from Troy State University with a degree in Criminal Investigation. He is also a graduate of the Police Academy.

Keith and his wife, Marion, have two children. Their 18-year-old daughter, Meredith, is a freshman at Auburn University. Their son, Cy, who is 14 years old, attends 9<sup>th</sup> grade at Prattville High School. Keith and his family are active members of Prattville United Methodist Church. Away from work, Keith enjoys hunting and fishing. Keith is an excellent employee and we are fortunate to have him with us.

#### **Kay Cox**

Kay Cox, who has been with the firm for over three years, serves as Legal Secretary for JP Sawyer in our Products Li-

ability Section. Kay stays very busy helping JP deal with clients and preparing their cases for trial. Kay is married to Jeff, who is employed with Honeywell International as an Account Executive, and they have twin girls, Erin, who is in 7<sup>th</sup> grade at Prattville Jr. High School, and Jessica, who is in 6<sup>th</sup> grade at Daniel Pratt Elementary. Kay and Jeff are extremely proud of their girls.

Kay graduated from Prattville High School in 1982 and then from John M. Patterson State Technical College in 1983. During 1993, she attended a continuing education course at Auburn University at Montgomery (AUM) and received her Legal Assistant certificate as a result. In 1998, Kay attended a course, "Partners in Policymaking of Alabama," which gave her the skills needed to advocate for her daughter, Jessica, who has cerebral palsy. This program involves and empowers individuals with developmental disabilities and their families in the policymaking arena. It also educates the participants about current local, state and federal issues; and equips them with the knowledge of the policymaking process. Kay previously served on the Mayor's Council on Disabilities established by Prattville Mayor Jim Byard, which brought awareness to the City concerning the special needs of individuals.

Kay enjoys going to Prattville football games and University of Alabama games whenever possible. She really likes to spend time with family and friends and spends as much time as possible outdoors, whether it be walking/jogging or just working around the yard. Kay is a very good employee and does exceptional work for the firm and the clients JP represents in product liability cases. We are fortunate to have her with the firm.

#### **SHAREHOLDER SERVES ON FAMILY SUNSHINE CENTER BOARD**

Rhon Jones joined the firm in 1994 and now manages the Toxic Torts Section of the firm. He also maintains an active practice in both business and predatory

lending fraud litigation. Rhon is currently involved in toxic exposure cases in Colorado, Minnesota, New Jersey, Florida, Georgia, and Alabama, as well as the investigation of a toxic exposure claim in Canada. In addition to his legal work, Rhon is active outside the firm. He currently serves on the Executive Board of the Family Sunshine Center. He and his wife, Deanne, are actively involved in the Sunshine Center and regularly donate their time and money to help this worthwhile organization.

Each day, at least three children die of abuse or neglect. Domestic violence is the number one killer of women. The Family Sunshine Center exists to end family violence and foster hope and healing in seven Alabama counties: Autauga, Butler, Chilton, Crenshaw, Elmore, Lowndes, and Montgomery. One of the Center's strategies is to provide life-saving information via their Web site, [www.familysunshine.org](http://www.familysunshine.org). You can find more information about what to do if you or someone you know is a family violence victim on this Web site.

#### **BEASLEY ALLEN HOSTS SEMI-ANNUAL BLOOD DRIVE**

Our firm held its semi-annual Blood Drive on September 21<sup>st</sup> with LifeSouth Community Blood Center. The event attracted a good number of donors from the firm. All donors received a free T-shirt and cholesterol screening. LifeSouth is a primary blood supplier for Montgomery, Autauga, Elmore, and Crenshaw Counties. LifeSouth supplies 100% of the blood supply for Baptist Medical Center East; 99% to Jackson Hospital and 96% to Baptist Medical Center South. We consider participating in the blood drive to be our civic responsibility.

#### **EMPLOYEES SUPPORT NATIONAL FUNDRAISING CAMPAIGN**

In honor of Breast Cancer Awareness Month, our firm's employees participated in the eleventh annual Lee National Denim Day<sup>®</sup>. Lee Jeans invites companies and organizations nation-

wide to participate each year by allowing their employees and members to wear denim in exchange for a \$5 donation to the Susan G. Komen Breast Cancer Foundation. On October 6<sup>th</sup>, people all over the country joined together in an effort to raise awareness and funds for the fight against breast cancer. Because the event was held on a Friday and our firm already allows employees to wear jeans on Fridays, we allowed our folks to wear their denim on a Monday. We had a good number of employees who participated, wearing their pink-ribbon pins and their denim. The firm collected a considerable amount for the most worthwhile cause.

## XXI. SOME CLOSING OBSERVATIONS

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This year congressional elections around the country are more critically important than ever. The individuals who have made up the Republican leadership in both the House and Senate since the so-called Republican take-over, have become so controlled by powerful special interest groups that they have been almost totally ineffective insofar as issues that affect the American people are concerned. In my opinion, it's high time for a change in Washington. The failed policies of the Bush Administration, combined with the domination by lobbyists who control Congress, have placed our nation on a downhill slope. Over our history, we have been a great nation—respected and even feared when fear became necessary—and that greatness can now be restored. However, the current group in charge in Washington has proved that they are not up to the challenge. Hopefully, we will have a new direction in Congress and in the country after November 7<sup>th</sup>.

The elections on the state level are also very important. That is especially true when it comes to judicial elections. Ordinary citizens are entitled to a level playing field in the courts, and that has

not been the case in some of our appellate courts around the country. The powerful special interests representing oil, insurance, and others in Corporate America have literally taken over in some of these courts. When you see courts in a state like Alabama with not a single African-American serving on any of the three appellate courts, something is badly wrong with the system. Special interest domination of our appellate court system in Alabama is very bad for our state and its people. We have some very good judges who serve on our appellate courts and who try hard to be fair and impartial. But, those judges have become victims themselves of a broken system. When you get down to it—all a person should expect from a judge is to have a level playing field with the rules and law being followed by that judge in a fair and impartial fashion. We must get the big money that is being spent in judicial elections out of the system. Judicial elections should not be required to run as Democrats or Republicans. Neither should we allow the candidates to be attacked by shadow groups—funded by special interest groups—which don't have to disclose the source of their funds. In Alabama, we must fix a badly broken system of electing judges, but that's for another day.

In the short term, the elections on November 7<sup>th</sup> must be addressed. Find out all you can about the candidates who are running for judicial offices, including where their money comes from and what groups are supporting them. Look past the television ads, which may or may not reflect the real views of a candidate, to learn who those candidates really are, and then select qualified persons who don't have **agendas** to serve as judges in our court system.

Finally, I want to mention an old friend who has had a few bad things to say about me recently. Skip Tucker, who is a hired gun for a politically active group in Alabama, wrote all of the newspapers in Alabama and had some pretty rough things to say. A few of the papers even printed his remarks. I suspect the

folks who pay Skip well expected me to respond in kind. I can't say that the thought never crossed my mind. Instead, I would simply ask those of you who will to pray for Skip. Even though I didn't like what he wrote, I realize he believes that, in order to stay on their payroll, he has to write whatever his bosses tell him to write. That's sort of sad, but I forgive him and am totally at peace with Skip regardless of his motives or those of his bosses.

## XXII. SOME PARTING WORDS

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I continue to get a good number of responses to things written in this part of the Report. An example of one response from a reader reminded me of a prayer that is displayed at Duquesne University Law School in Pittsburgh, Pennsylvania. I recommend this prayer to all of our readers who are lawyers or law students and even to judges. In fact, starting any journey in life asking for God's guidance should be the rule and not the exception:

*Almighty God, the Giver of Wisdom, without whose help resolutions are vain, without whose blessings study is ineffectual, enable me, if it is Thy will, to attain such knowledge as will qualify me to direct the doubtful and instruct the ignorant, to prevent wrongs and terminate contentions, and grant that I may use the knowledge which I shall attain to Thy glory and my own salvation. Amen.*

*Samuel Johnson's Prayer Before the Study of Law*

I can't think of a better way for any person connected in any manner to the law to start out on their initial journey! It's also a good prayer for even an "experienced" lawyer like me to start each day with. It will keep us on the right track

and that's vitally important.

Another Bible verse was sent in me by a fellow lawyer, who like me, represents people who have problems of some sort. I thought about sending it on to some of my friends in the Legislature and to others who hold public offices, but decided against it. Instead, I will pass it on to all of our readers.

*Woe to those who enact unjust statutes and who write oppressive decrees, depriving the needy of judgment and robbing my peoples' poor of their rights, making widows their plunder, and orphans their prey.*

*Isaiah 10:1-2*

As we travel along the many paths that life takes us, at times we all tend to get so busy or distracted that we don't always have our priorities in order. Many of us, and that certainly includes me, are willing to serve God, but only if it fits into our schedule or doesn't take too much effort or time. I must confess that I haven't always put God first in my life and I certainly haven't given him my best. God really expects our best and can't be satisfied if we only assign Him second or third place on our priority list. Regardless of the circumstances, God never asks for more than we can readily give. But He does ask for the very best that we have and can give. That is just as certain as the sun rising in the east each morning and then setting each night on schedule in the west. Let's

take a look at what the Bible tells us:

*"A son honors his father, and a servant his master. If then I am the Father; Where is My honor? And if I am a Master; Where is My reverence? says the Lord of hosts to you priests who despise My name. Yet you say, 'In what way have we despised Your name?'"*

*"You offer defiled food on My altar, but say, 'In what way have we defiled You?' By saying, 'The table of the Lord is contemptible.'*

*And when you offer the blind as a sacrifice, is it not evil? And when you offer the lame and sick, is it not evil? Offer it then to your governor! Would he be pleased with you? Would he accept you favorably?" says the Lord of hosts.*

*You also say, 'Oh, what a weariness!' And you sneer at it," says the Lord of hosts. "And you bring the stolen, the lame, and the sick; thus you bring an offering! Should I accept this from your hand?" says the Lord.*

*"But cursed be the deceiver Who has in his flock a male, And takes a vow, but sacrifices to the Lord what is blemished— for I am a great King," says the Lord of hosts, "And My name is to be feared among the nations.*

*Malachi 1:6-8, 13 & 14.*

When we really put God first in our lives and then follow up on that priority, we will receive blessings over time that are beyond my ability to describe. It is good to reflect back on what Jesus had to say concerning our relationship with the Father. The following verses say it well:

*"You shall love the Lord your God with all your heart, with all your soul, and with all your mind." This is the first and greatest commandment.*

*Matthew 22:37, 38*

There doesn't seem to be any place for less than our best if we truly follow that commandment. But for some reason, we all seem to add a little bit to it, and when we do, that's when the trouble begins. On all too many occasions, we surely don't like to be put to the test. But when we truly give God the place of highest honor in our hearts, we will then put Him first in our everyday lives. We will then offer Him the best we have without ever having to be reminded. We can find joy in serving our Lord and that's really what this life is all about!

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MONTGOMERY, ALABAMA 36103-4160

(334) 269-2343

TOLL FREE

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