



THE  
**JERE BEASLEY REPORT**

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

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# I. CAPITOL OBSERVATIONS

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## *REFLECTIONS FROM THE NATIONAL SCENE*

As predicted, Democrats will now control both the House and Senate in Washington for the next two years. I hope this story doesn't turn out to be like that of the dog who finally caught the big truck after chasing it uphill for a number of years and then wondered what to do next. Although I don't believe that will happen, folks who turned the leadership over to the Democrats on November 7<sup>th</sup> expect a plan and real results. Frankly, I believe the Democrats will work to move our country in the right direction and correct the many problems that are holding us back as a nation in so many areas of concern.

A tremendous challenge faces the new Congress and the American people expect that challenge to be met. We can no longer allow the political agendas of Vice-President Cheney and Karl Rove to hold our nation back. All of the corruption and self-dealing that have become common place in Washington must be brought to a halt and some sanity restored. The American people voted for a new day and they clearly deserve it.

## *SPIT TICKET VOTING RULED THE DAY*

Several months prior to November 7<sup>th</sup>, I wrote about the results of a poll that revealed Alabama voters intended to vote a split ticket in the general election this year. That certainly turned out to be an accurate prediction, as was reflected by the vote in statewide races. When you look at the overwhelming win by Governor Riley at the top of the ticket, the results in down-ballot races are an example of split ticket voting at its best. While lots of folks were predicting a Republican sweep because of Riley's popularity, I really didn't see that happening. I have never believed that any governor could carry other candidates on his coattails and this year's results

confirmed that belief. The voting patterns also are proof that voters in Alabama are much smarter than the out-of-state political consultants and even some of our state politicians believe them to be. Hopefully and prayerfully the next four years will be good ones for Alabama.

## *THE BIG WINNERS IN ALABAMA*

There were a number of candidates who came out of the general election in great shape from a future political perspective. Obviously Governor Riley was the big winner and heads that list. He will likely be a major factor on the national scene during the next few years. It's believed that the governor will be a candidate for president in 2008. Others who obviously have promising political futures in Alabama are: Troy King (Attorney General), Sue Bell Cobb (Chief Justice), Kay Ivey (Treasurer), and Ron Sparks (Agriculture Commissioner). You could also make a strong case to add Jim Folsom (Lieutenant Governor) to that list even though his win has to be attributed in large part to the ineptness of his opponent's campaign handlers. In any event, it will be most interesting to see how these individuals perform in office over the next four years, leading up to the governor's race in 2010. While their wins this year will give each of them a real boost, their performances in office will actually determine their political futures. That's as it should be. It will be most interesting to watch how this all plays out.

## *THE TWINKLE AND TURNHAM SHOW*

I have to admit that Twinkle Andress Cavanaugh and Joe Turnham are two of my favorite people in the political world. As you know, they serve as the "bosses" of their respective political parties. In my opinion, each has done an outstanding job during their tenures. Twinkle originally said that she would run for another two-year term as the Republican Party's leader. However, for some reason she changed her mind and

announced on November 22<sup>nd</sup> that she wasn't going to seek reelection. I had thought that Twinkle was virtually certain to seek and win a second term.

Twinkle and Joe have appeared together on TV and radio shows on a regular basis to talk about Alabama politics. One Montgomery TV station bills their appearances as "Twinkle and Turnham." Their appearance during the Fall campaign season were well worth watching. Perhaps they should turn to a career in television. They do an excellent job and certainly have the resume.

While he hasn't announced, I believe that Joe will seek another term as

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Democratic Party Chairman. Joe did an outstanding job in promoting Democrats this year, winning five statewide races and picking up numerous offices in county courthouses around the state. His performance was even more impressive considering the mess he inherited when he took over the party's reins. The landslide victory by Governor Riley at the top of his party's ticket made the Democratic wins even more special.

The State Republican Executive Committee meets February 10th in Montgomery to elect a party chairman. Rep. Mike Hubbard and newly elected State Senator Scott Beason have indicated that they will run for the post. I suspect that Mike will prevail due to his close ties to Governor Riley. Alabama's new presidential primary is in February and that will make the state a major player for a change in national politics. In past years when Alabama was at the end of the presidential primaries, our state was totally ignored. Rumor is that there will be a serious candidate from Alabama in the presidential sweepstakes for 2008. That should make things very interesting.

The State Democratic Executive Committee will meet in January to elect a chairman. In my opinion, Joe should lead the party in 2007 and hopefully that will be the case. He is not only an effective leader, Joe is a good family man and that is very important. By the way, I don't think Joe is "too liberal for Alabama!"

#### ***JURY VERDICT AGAINST FED EX IN CALHOUN COUNTY***

A jury in Anniston, Alabama awarded a \$4,208,000 verdict to two workers who were injured while working at a Fed Ex terminal in Ohatchee, Alabama. The incident giving rise to the lawsuit occurred when the two men, Daniel Olive and Jeffrey McWilliams, were installing a satellite dish on the roof of the terminal. One of the workers, Mr. Olive, stepped backwards and fell through a skylight which was camouflaged because of the exposure to the sunlight and weather. The other employee, who was on the ground floor, attempted to catch Olive

before he hit the concrete floor. Both men were injured in the incident.

Fed Ex knew that the skylight panels presented a dangerous hazard that exposed persons who had to be on the roof to an unnecessary risk. Two workers had previously fallen through a skylight on the same building about one year prior to this incident. Under OSHA regulations the skylight should have been guarded by a standard skylight screen or a fixed standard railing on all exposed sides. Fed Ex created a highly dangerous condition by failing to install a screen or a railing. The jury found that Fed Ex discarded the need to protect workers who were expected to be on the roof.

The evidence at trial clearly showed that the Fed Ex corporate architect inspected the building three times prior to Mr. Olive's fall and made no recommendations for skylight guards of any kind. Fed Ex knew that its own employees, as well as vendors and maintenance people would have to be on the roof on a regular basis. The Fed Ex corporate office had knowledge of the prior falls, but still refused to make changes or install skylight screens. The case was tried by Mike Crow from our firm along with Mark Andrews of the Dothan firm of Morris, Cary, Andrews.

#### ***OIL REFINERY EXPLOSION CASE IN TUSCALOOSA IS SETTLED***

On May 13, 2001, which was Mother's Day, Terry Williams was severely injured in an explosion at the Hunt Oil Refinery in Tuscaloosa, Alabama. Terry sustained 45% total body surface burns, including full thickness burns to his entire head, face, ears and neck. His medical expenses exceeded two million dollars and he has undergone over thirty medical procedures and skin grafts. Terry's burns have left him permanently and totally disabled. He lost his ears and some of his fingers, and is permanently disfigured. Although Terry sustained his injuries over five years ago, his recovery and rehabilitation needs will continue into the foreseeable future.

Terry had been a dedicated employee at the Hunt Oil Refinery since 1969. The

three defendants responsible for the explosion, Conex International, DHEC, and Zeeco Inc., settled with Terry. We had reached a partial settlement with Zeeco and DHEC in December of 2005. Conex finally settled their part in October prior to the case going to trial. Kendall Dunson and Cole Portis from our firm handled the case for Terry and his wife and did a very good job for them. The amount of the settlement is confidential at the request of the defendants. I will discuss more about this case in the Courts Section.

#### ***THE STATE SUFFERS A LOSS***

Martha Brewer, the wife of former Governor Albert P. Brewer, died last month after a long illness. Mrs. Brewer was a great lady in every respect and was truly an "Alabama Treasure." She was a loving and faithful wife, mother and grandmother and will be missed by all who knew her. Our prayers have been with Governor Brewer and his family. May God bless the Brewer family and may He give them the peace and comfort that only He can supply in times like these.

## **II. LEGISLATIVE HAPPENINGS**

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#### ***DEMOCRATS MAINTAIN CONTROL OF STATE LEGISLATIVE BODIES NATIONALLY***

While the national congressional races got most of the media attention, there were a number of hotly contested legislative races around the country at the state level. The Democrats now control the legislatures in more states than they have since 1994. According to the National Conference of State Legislatures, Democrats control both houses of the legislature in 24 states, Republicans in 16, and nine are split. As you probably know, because Nebraska's legislature is nonpartisan, that state isn't included in the tabulation. Before the election, Republicans controlled 20 state legislatures, Democrats 19, and 10 were split.

You can get a complete rundown by going to <http://www.ncsl.org/statevote/StateVote2006.htm>.

### **THE ORGANIZATION OF THE ALABAMA LEGISLATURE**

Even though Democrats control both the House of Representatives and the Senate in Alabama, there is a full-blown fight going on over how the Senate will be organized. The House will be organized by Democrats with Seth Hammett being reelected as Speaker and with Democrats holding all key positions. Democrats earned the right at the ballot box to organize that chamber. While the Republicans—led by Rep. Mike Hubbard—will be in the minority, they will have a definite say-so in what legislation passes or fails to pass in the House.

While things in the House are stable, the situation in the Senate is much different. Organization issues are still very much up in the air in that chamber. Shortly after November 7<sup>th</sup>, twelve Republicans and six Democrats formed an alliance of sorts—which if maintained—would give Republicans complete control over Senate business. Obviously, that development came as a surprise to most political observers. Nevertheless, I believe that things will eventually be worked out by the Democrats and that a Democratic President ProTem will be elected in the organizational session. But, I don't believe his or her name will be Barron. It would help matters greatly if Lowell would not seek reelection to the position. For the good of the people of Alabama, the fight in the Senate must be resolved quickly. Governor Riley and Lieutenant Governor-elect Folsom can play key roles in bringing this about. In my opinion, they have an obligation to the public to do so. However, at press time, things in the Senate were still unsettled. Hopefully, by the time you receive this issue the fight will have been resolved. It's certainly the right thing to do.

## **III. COURT WATCH**

### **JUDICIAL ELECTIONS SHOULD BE DIFFERENT**

Alabama citizens have just experienced one of the most expensive and perhaps the nastiest judicial races that our state has ever seen. Most Alabama citizens were turned off by the tenor of the race for chief justice, which was set very early by the Republican candidate. The Democratic candidate kept her campaign on a high level throughout and I believe that was a significant factor in the outcome of that race. Highly-paid political consultants have convinced their candidate clients that because only negative television ads supposedly sway voters, such ads have to be used almost exclusively. Unfortunately, since their clients are candidates for judicial office, that approach makes for a nasty and extremely costly situation. As a result, the accusations from the candidates fly fast and furious and most of the time without any real basis in fact. During the campaigns, we hear constantly that judicial candidates are soft on crime, are bought and paid for by one or more special interest groups, are too liberal, or are out of step with mainstream values. In our state some of the candidates were said not even to have Alabama values—can you believe it?

This might sound like business as usual in America's congressional campaigns, or even in presidential or gubernatorial races, but it's also increasingly defining the new politics of judicial elections around the country. A new analysis from two national public interest watchdogs indicates that Americans are seeing an increasing escalation in the negativity of state Supreme Court campaigns. James Sample, counsel at the Brennan Center for Justice at NYU School of Law, observed:

*While court campaigns have been getting increasingly strident for the past several years, 2006 may set a new low for how these campaigns are being conducted. Campaigns of this sort only further erode public trust in America's*

*courts, while supplying voters with very little useful information on which to base their decision.*

Some of the ads contain accusations that make ads seen in legislative races or executive campaigns seem relatively tame. Clearly, that is not the way judicial races should be run. Millions of dollars from special interests are being poured into judicial races. In my opinion, that's a by-product of the sorry mess we currently have as the result of a broken system. When it comes to electing judges, the money goes not only to the candidates, but to the political parties and to groups like the American Taxpayers Alliance (ATA). Those groups then use the money to fund attack ads which are run against candidates. It's most significant that a group like ATA doesn't have to account for their spending or where their money comes from. Bert Brandenburg, executive director of the Justice at Stake Campaign, observed:

*The new politics of judicial elections is driven by interest groups who care more about hardball than the rule of law. These groups want to make judges accountable to them, but Americans want judges to be accountable to the law and the Constitution.*

The American people are sick and tired of judicial campaigns being run out of the gutter with tens of millions of dollars being spent in the races. I know that's certainly the case in Alabama. In Alabama, it will be up to Governor Riley and the new legislature to put a stop to all of this by passing some meaningful reform legislation. A complete reform of how we elect judges in Alabama is badly needed. We can no longer afford to put off dealing with this problem in our state. Of course, the overall problem is national in scope. Judges in all states should be fair and independent of any outside influences, and political party affiliation shouldn't play any role. It's time to fix a broken system and that can't be denied. If you agree let your elected officials know that reform must be a priority in 2007.

## **POLITICIANS SHOULD NOT BE ALLOWED TO CONTROL JUDGES**

A recent poll confirms what I have always believed and that is people don't want the politicians from any party to control judges. Despite the complaints by some Republican politicians about judges having too much power, two-thirds of Americans don't believe elected officials should have any more control over federal judges. According to the recent CNN poll, sixty-seven (67%) percent of the people surveyed by Opinion Research Corp. said federal judges—and the decisions they make—should not be subject to more control. Interestingly, only thirty (30%) percent said more control was needed.

In recent years, we have seen more and more criticism by politicians aimed at judges. Most of it—interestingly enough—was clearly not justified. Instead, it came from politicians and primarily from those in the Republican Party who were simply trying to sell their warped brand of conservatism. In my opinion, the judicial branch of government should never have to fear the ratings of some political hack who just happens to be an elected official. It appears a great majority of the American people feel the same way.

Forty-one (41%) percent of poll respondents said federal judges were “about right” in their decisions. Thirty-four (34%) percent said they are too liberal, and twenty (20%) percent said they are too conservative. It's my opinion that a strong and independent judiciary is critically important to the welfare of our nation. This doesn't mean, however, that citizens lose their right to complain or to criticize court decisions. But that right doesn't give politicians any authority to control the courts.

During the recently concluded judicial races in Alabama, at least one of the Republican candidates branded his opponent as “too liberal for Alabama.” Fortunately for ordinary citizens, we know how that race came out! The executive, legislative, and judicial branches of government were created in a manner demanding that each branch be independent of the others. We have allowed that concept to be

damaged because of the way the judicial branch has been politicized. It's time to correct that and put things back like our forefathers intended for government to work. Nobody should want political leaders controlling the judicial branch. It's time for the judicial branch to become totally independent and that will require a change in how we select judges.

Source: CNN

## **ALL NEW JUDGES IN ALABAMA SHOULD ATTEND THE NATIONAL JUDICIAL COLLEGE**

The National Judicial College (NJC) in Reno, Nevada is recognized as the premier institute for providing training to the judiciary. Unfortunately, because of a financial crisis in state government in Alabama, funds for judicial education have not been made available. As a result, since 1988 the Administrative Office of Courts has been unable to appropriate funds to send new state court trial judges in Alabama to the NJC. In an effort to address this situation, the Alabama State Bar, under the leadership of then-President Bobby Segall, accepted a recommendation from the Judicial Liaison Committee (JLC) to create a judicial scholarship program for Alabama judges to attend the NJC. Sam Franklin and I served as co-chairman of this committee, and I can attest to the fact that all committee members worked very hard. The judicial scholarship program was one of the things that resulted from that work.

The implementation of this program is now being carried out by President Boots Gale, through the JLC. Starting in January of next year the Bar will begin a one-time fundraising effort to support this program. Presently, the JLC is sending letters to all state bar members soliciting contributions. All funds collected will be managed and distributed by the Alabama Judicial College. Teresa Minor, a committee member who incidentally is a very good lawyer from Birmingham, has worked extremely hard on this project. She is currently spearheading the fundraising effort and it appears that it will be successful.

The Alabama State Bar program is

modeled after a program implemented by the Birmingham Bar Association in 2002. Presiding Judge J. Scott Vowell of the Tenth Judicial Circuit, who has been very supportive of the Jefferson County program, observed:

*All of our eligible judges have attended the ten-day General Jurisdiction court and have given it high marks... In so many ways, hearing how judges in other states address our common issues is very important to judicial education.*

All of the judges in the Jefferson County who have been able to take advantage of the scholarship program of the Birmingham Bar Association have offered praise for the training offered by the NJC. In my opinion, all new judges in other circuits should be given the opportunity to attend the NJC. I believe any lawyer who has been elected or appointed to a judgeship would benefit greatly from the educational opportunities offered by the NJC. I encourage all lawyers to join with the Bar's effort to provide this type of outstanding training to all trial judges in Alabama. It will be a very good investment in my opinion.

## **HIGH COURT REVISITS PUNITIVE DAMAGES**

The U.S. Supreme Court is again considering the issue of punitive damages. This will be the first time since the State Farm Insurance Company case that this issue is before the Court. The Court will face the question of allegedly excessive punitive awards in a case involving the death of a plaintiff—a longtime smoker who died of lung cancer. It's noteworthy that the conduct of the tobacco company in not telling the public about the health risks of smoking was described by a state supreme court as so egregious that the court twice allowed a punitive damages award nearly 100 times the amount of actual damages. The case, now before the Court involving Phillip Morris, will allow the justices to review the punitive damages award for excessiveness. The justices are also being asked to set out clearly how judges and juries, who will be considering punitive damages in the

future, are to weigh harm caused by the defendant's conduct to others who are not parties to the litigation. State courts must have the authority to deter conduct that harms and even kills citizens. That has always been the legal basis for the awarding of punitive damages. Some observers say this challenge has the potential to be the most important punitive damages case in the Supreme Court to date. The case has been argued and submitted.

At oral argument the justices appeared to place the greatest emphasis on the trial court's charge to the jury. Interestingly, the court seemed to virtually ignore the ratio issue. In *State Farm*, the court emphasized that the single most important indicator of the reasonableness of a punitive award is the degree of reprehensibility of the defendant's conduct. The court laid out five factors to consider in measuring reprehensibility. It appears that the case before the Court is one to justify a tremendous amount of punitive damages. The question is—how much?

The current term of the court ends in June of next year. While I don't know how quickly the Court's ruling will come down, I believe a decision will be announced in the Spring of 2007, but that's just a guess. There are all sorts of speculation as to what the Court will do. I will simply wait for the decision to be announced.

#### **THE ANATOMY OF A LAWSUIT**

Terry Williams' case, which was discussed in the Capitol Comments Section, required a great deal of work on the part of our firm before it was ready to be settled. It was a complex case involving a most serious injury to our client. I thought it might be good to let our readers know more about how a complex case like this is developed. I am going to describe what happened that resulted in the explosion at the Hunt Oil facility in Tuscaloosa. The facility produces petroleum coke, asphalt, gas oil, diesel, gasoline, butane, propane, ethane, and methane. Hunt Oil processes naphtha into gasoline and other products. As you know, naphtha is

a very unstable and volatile base material used to make gasoline. A unit at the facility called the naphtha fractionator heats the naphtha to extreme temperatures until the gaseous vapors separate from the liquid naphtha to go overhead and downstream. The vapors travel through the plant through pipelines and vessels until they reach vessels called the upper and lower knockout drums. From there the vapors travel to the flare stack. The flare stack has a flame that burns off the vapors as they are released into the atmosphere.

Repairs and upgrades at Hunt Oil have to be made during times of operation as needed; however, major projects cannot take place during the actual operation of a unit. Major repairs or upgrades are performed while a particular unit is shut-down. These periods of shut down are called a "turnaround." Hunt Oil, which hires outside contractors to perform the turnaround work, scheduled a turnaround for April-May of 2001. Conex, a Texas company, was hired to be the general contractor. Zeeco, another Texas company, was selected to supply a new flare tip. DHEC was the original designer of the crude unit.

During the turnaround immediately preceding the explosion involving Terry Williams, numerous projects were planned. Vessels, including the naphtha fractionator and the upper and lower flare knockout drums, were scheduled to be cleaned. Before a vessel is cleaned, it must be blinded. All inlets into the vessels are physically blocked with a pancake blind to eliminate the entry of dangerous vapors or chemicals while inhabited by workers. All instruments are removed from the vessel to prevent damage. Conex was responsible for cleaning the naphtha fractionator and the upper and lower knockout drums.

Once the turnaround was complete the facility began start-up. Soon after start-up, the controls in the DCS room were reporting incorrect readings. These incorrect readings caused the control room operator to believe that there was less naphtha in the tower than there needed to be. Based on that belief, the operator charged more

naphtha into the tower. The level controller, LIC 304, was sending incorrect readings because the air supply going to the instrument was not properly connected during the turnaround. Conex was responsible for removing and replacing LIC 304 and its associated connections. Conex's failure to properly reconnect the instrument was the initiating factor leading to the explosion, causing liquid naphtha to travel downstream to the knockout drums and flare stack, vessels reserved for vapors.

In addition to the improper readings attributable to the level controller, the flare flame went out at the flare stack. The flame went out because the new flare components, installed during the turnaround, were defective. Hunt requested a flare tip assembly with pilot orifices sized at  $\frac{7}{64}$ " in diameter, but Zeeco supplied pilot orifices sized  $\frac{3}{64}$ ". Since the pilots supplied by Zeeco were too small, an unbalanced system resulted. On the day in question, the flare flame was extinguished. The unlit flare was a significant contributor to the incident and also to the severity of the incident. The shift superintendent called Terry Williams to the flare stack to monitor vapor releases with a handheld meter checking for flammable vapors in the atmosphere. Two other Hunt employees who were injured in the explosion were attempting to drain and restart a compressor. While all three employees were in the vicinity of the flare, Terry was closest to the unit.

Immediately before working on the compressor, a Hunt employee attempted to drain the lower knockout drum, but he was unable to drain the drum because a gasket was leaking heated naphtha. The drum could not be drained without exposing the employee to a dangerous hot chemical. The gasket was incorrectly installed during the turnaround by Conex. Additionally, DHEC designed the drums to be drained manually. An automatic pumping system would have circumvented these problems. Because the knockout drums could not be drained, they filled and the liquid Naphtha was forced downstream to the flare stack. The explosion occurred when a surge of pressure

pushed liquid naphtha from the upper knockout drum out of the top of the flare stack. Once the naphtha hit the ground, the vapors floated to a nearby heater. The heater ignited the vapors, resulting in a vapor cloud explosion.

A great deal of investigation and research was required in the case. Discovery, which included a number of critically important depositions, took place. As you can readily see, this was a complex case that required years of hard work, including difficult discovery and intense trial preparation. We were extremely grateful to have been able to resolve this case on behalf of Terry and his wife. Although his life has been significantly altered, Terry's spirit and attitude are an inspiration to all who meet him. Terry and his wife now volunteer their time to help burn victims cope with the changes that come with this type of injury. Their attitude and willingness to help others in the face of their own problems is a testament to their faith and kindness.

## IV. THE NATIONAL SCENE

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### **PRESIDENT BUSH IS NOW STANDING ALONE**

Now that Australia's leader says he wants to consider an international carbon trading system to fight global warming, President Bush is standing alone in his refusal to acknowledge the dangers of global warming. Prime Minister John Howard recently made global warming part of the mainstream debate in Australia. The prime minister leader, after years of playing down the issue, now says he is willing to consider the trading system to limit greenhouse gas emissions.

Australia, the world largest coal exporter, and the United States are the only major industrialized countries to reject the 1997 Kyoto Protocol, which commits 35 nations and the European Community to reducing greenhouse gas emissions by five (5%) percent below 1990 levels by 2012. Hopefully, Presi-

dent Bush will see the light—break away from the powerful oil industry—and join in the fight to address global warming. Our president is now standing along—surrounded only by his buddies in the oil industry—in his “ostrich approach” to a most serious international problem.

### **HIGH COURT TAKES UP THE GLOBAL WARMING ISSUE**

The U.S. Supreme Court has a case before it that will have an effect on global warming. The case involves the Environmental Protection Agency and its refusal to regulate greenhouse gases from new vehicles. It's most significant that this is the first case about global warming to reach the High Court. Twelve states and 13 environmental groups want the justices to make the federal government act, saying the country faces grave environmental harm. Predictably, the Bush Administration says EPA regulation could have a significant economic impact on the United States since eighty-five (85%) percent of the U.S. economy is tied to sources of greenhouse gas emissions.

The White House says the EPA was right not to act given “the substantial scientific uncertainty surrounding global climate change.” That is absolutely astounding considering the mounting scientific evidence available that tells a different story. The Clean Air Act requires the EPA to regulate any “air pollutant” if it endangers public health or welfare. That should be the deciding factor in this case. The case has been argued and all who want the EPA to join the fight to combat global warming hope that the Court will rule for the plaintiffs and do so promptly. The court should tell the EPA to do its job!

Source: Associated Press and USA Today

### **THE IRS SHOULD INVESTIGATE THE U.S. CHAMBER OF COMMERCE**

Public Citizen has filed a complaint with the IRS against the U.S. Chamber of Commerce and the Institute for Legal Reform (ILR), which is an affiliated

entity. It's alleged that the two entities failed to report millions in taxable spending from 2000 to 2004 intended to influence state-level attorney general and Supreme Court races, as well as federal races around the country. Public Citizen also asked the IRS to investigate whether the U.S. Chamber and ILR, which are said to be two separate legal entities, combined funds in a shared bank account to hide accurate reporting of investment or interest income for tax avoidance.

Court records, internal corporate documents, and media reports indicate that the Chamber and the ILR engaged in a massive campaign to affect the outcome of state and federal races through direct expenditures and grants made to organizations that carried out the Chamber's wishes. Public Citizen President Joan Claybrook observed:

*The Chamber is playing an elaborate shell game to conceal its gambit to stack the courts with hand-picked pro-corporate judges. The IRS should promptly investigate its dubious tax reports and address any abuses that it finds.*

All 501(c) groups are required to report political expenditures on Line 81 of the IRS Form 990. Despite its own assertions of millions of dollars spent on electioneering, the Chamber and ILR failed to report any political spending from 2000 to 2003. Public Citizen has asked the IRS to investigate whether the failure of the two groups to report political expenditures and to provide accurate accounting of their grants to outside organizations resulted in tax avoidance and a violation of disclosure requirements.

In 2000, the Chamber claimed it spent \$6 million on judicial races and bragged about credit for winning 15 out of 17 state Supreme Court contests. In 2002, the Chamber said it planned to spend \$40 million on political campaigns, divided equally between congressional and state-level attorneys general and judicial races. As I understand it, none of these activities were reported on their tax returns from 2000 to 2003. In 2004, the first year since at least 2000 which

the Chamber and the ILR reported political expenditures, according to reliable sources, both organizations appear to have underreported their spending. They reported a combined \$18 million, but in a "President's Update" memo released the day after the November elections, Chamber President Thomas Donohue claimed the group had spent up to \$30 million in races around the country. I am not sure that he wasn't being very conservative with that number.

The Chamber and ILR also failed to report grants and allocations to outside groups as required by Line 22 of IRS Form 990. Both organizations reported no grants to outside groups from 2000 to 2004. But in a 2005 deposition, a Chamber official acknowledged that the Chamber had partnered with at least six outside groups to advance its agenda to avoid garnering unwanted critical attention. At least two 501(c) organizations, the Washington, D.C.-based American Taxpayers Alliance and the Columbus, Ohio-based Citizens for a Strong Ohio, reported receipt of large contributions from the U.S. Chamber. We know what ATA did in Alabama judicial races. Taylor Lincoln, research director of Public Citizen's Congress Watch division, stated:

*The Chamber's efforts are fundamentally a campaign to reduce corporate accountability in the courts and slam the courtroom door on consumers. Given the egregious corporate scandals of the past five years, the Chamber should prioritize cleaning up its own house before attempting a hostile takeover of the courts.*

It will be interesting to see how the IRS reacts to Public Citizen's request. Clearly, the matter should be thoroughly investigated and appropriate action taken. The Chamber of Commerce has no business being a political organization, in my opinion. Even if that role is appropriate, at least they should follow the law.

Source: Public Citizen

### **THE PRESIDENT SHOULD WITHDRAW SUSAN DUDLEY'S NOMINATION**

I agree with Public Citizen that the nomination of Susan Dudley as the country's next regulatory czar should be withdrawn by President Bush as a display of bipartisan cooperation. Public Citizen wrote the President in November and made that request as the U.S. Senate began hearings on her nomination. Ms. Dudley was nominated to head the Office of Information and Regulatory Affairs (OIRA), which is a part of the White House Office of Management and Budget. Although OIRA is little known to the public, it has tremendous power to weaken, delay, and eliminate hard-won regulations designed to protect the public in the workplace, on the highways, and in their homes. The agency reviews protections instituted by such health, safety and environmental agencies as the National Highway Traffic Safety Administration, the Food and Drug Administration and the Environmental Protection Agency—everything from auto safety standards to limits on industrial chemicals and air and water pollutants come before OIRA.

This nomination is far too important an issue to have a lame-duck Congress consider Ms. Dudley's qualifications. There is nothing in her background that leads me to believe she should be confirmed. Throughout her career, Ms. Dudley has consistently fought against government safeguards and advocated a radical, hands-off approach to regulating corporations. Her record is one of being very much against consumer interest and very much tied to big business interests. I am hopeful those who are pushing Ms. Dudley won't prevail and the president will pull her nomination.

Source: Public Citizen

### **ORDINARY PEOPLE SHOULD HAVE A VOICE IN GOVERNMENT IN 2007**

Since Republicans took control of the U.S. House in 1995, Corporate America has had a relatively easy run in Washington. But with Democrats in charge when the 110<sup>th</sup> Congress comes to work in January, that should definitely change. It

should bring about a new day for ordinary citizens in this country. Nancy Pelosi, who will be Speaker of the House, made this interesting observation just before November 7<sup>th</sup>, concerning the way Corporate America operates:

*In 100 hours, the top five oil companies will take in \$4.3 billion in profits and the top ten pharmaceutical companies will gain \$2.6 billion in profits and the top CEOs will earn an average of \$2 million each.*

It's evident that the ultra-rich have pretty much had their way with the Bush Administration and Congress over the past six years. But, their control over a Republican-led Congress goes back even further. It started with Newt Gingrich and his so-called contract with America. Looking back, Newt's contract had nothing in it of substance for ordinary citizens. K-Street was born and the lobbyists took over the operations of government to a greater degree than ever before. Hopefully, that will now change and the people will again have a voice in Washington. Some see the next two years as a battle not unlike that of the epic biblical battle involving David and Goliath. A good place for that battle to start is with drug companies and the oil industry over their excessively high prices. These industries have virtually owned Congress, with the assistance of the White House, but hopefully those days are over. With the middle class in America being slowly destroyed, and the bosses in Corporate America becoming stronger and stronger, a strong voice in Congress for ordinary citizens is a must.

Source: *Fortune*

### **BUSINESSES SEEK PROTECTION ON LEGAL FRONT**

Before November 7<sup>th</sup>, the Bush Administration was planning to take action designed to give Corporate America almost complete protection from laws and regulations that previously had been enacted to protect the public. This plan would have given companies and accounting firms insulation from lawsuits by investors and the government.

Corporate America—with the active encouragement of the White House—had their plan ready to enact.

With corruption cases like Enron, WorldCom, and numerous others falling off the nightly news, two influential industry groups with close ties to Administration officials had plans to undo nearly all of the progress that has been made since the Enron scandal first exposed how badly some in Corporate America were operating. Proposals were drafted to provide broad new protections to corporations and accounting firms from criminal cases brought by federal and state prosecutors as well as to provide a stronger shield against civil lawsuits from investors. Rules and policies that have been on the books for decades would have been rolled back. I hope with the Democrats in control of Congress, those plans won't come to fruition.

The new leadership in Congress must make sure that the government doesn't go back to the days where corrupt men were in charge of many large corporations and literally raped their own companies and their shareholders—as well as the government—as the companies' bosses raked in hundreds of millions of dollars in salaries, bonuses, and other perks each year. The American people gave the new leadership in Congress a mandate for change. Clearly, the kind of change described above won't fly.

Source: *New York Times*

### **JUDGE REFUSES TO DISMISS "GRAND THEFT AUTO" CLAIMS**

A federal judge has refused a request from Take-Two Interactive Software Inc. to dismiss some claims in a lawsuit accusing the company of selling "Grand Theft Auto" video games containing sexually explicit images under the wrong content label. The lawsuit, filed in July 2005 seeking class action status, alleged that Take-Two's alleged misconduct violated consumer protection laws in all 50 states and the District of Columbia. Since then a number of cases making the same claim were consolidated in a Manhattan federal court. Take-Two and its subsidiary, Rockstar Games Inc.,

wanted to restrict the rights to file claims only in the states where they resided, but not all 50 states. But a U.S. District Judge denied Take-Two's motion and said she would reconsider her ruling if class action status was granted later in the case.

The best-selling "Grand Theft Auto: San Andreas" was found to have hidden sex scenes in 2005. The explicit scenes, known as "Hot Coffee" allowed players to engage in virtual sex acts. When the scenes were discovered, the video game ratings board slapped a restrictive "adult" rating on the game. Take-Two had to pull the games off store shelves and repackage them with the "adult" rating, which crimped sales and disrupted the company's operations. It will be interesting to follow developments in this case. We simply can't continue to allow fifth like this to be sold in this country.

Source: *Reuters News*

### **GOVERNMENT DEFENDS 1998 ANTI-PORN LAW**

The 1998 Child Online Protection Act was designed to criminalize material deemed "harmful to children." Free speech advocates and Web site publishers are challenging that law. Salon.com, Nerve.com and other plaintiffs, who are backed by the American Civil Liberties Union, have filed suit over the law. The ACLU and the publishers believe this law restricts legitimate material they publish online—exposing them to fines or even jail time. I hope the court will find the Act constitutional and enforceable. Courts need to come down hard on the violators of this Act. Restricting garbage and fifth seems quite appropriate and hopefully the High Court will agree with that position.

I agree with the position taken by the Justice Department that it is easier to stop online pornography at the source than to keep children from viewing it. The law, signed by then-President Bill Clinton, requires adults to use some sort of access code, or perhaps a credit-card number, to view material that may be considered "harmful to children." It would impose a \$50,000 fine and six-

month prison term on commercial Web site operators that publish such content, which is to be defined by "contemporary community standards." Unfortunately, the law has yet to be enforced. The evidence at trial reveals that a shocking amount of pornography slips through filters to children. The case is being tried before U.S. District Judge Lowell Reed without a jury.

Source: *Associated Press*

## **V. THE CORPORATE WORLD**

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### **SETTLEMENT IN ANOTHER AWP CASE**

There has been a settlement in a case in a Boston Federal Court that appears to be very important with a national significance. If it receives final approval, the settlement would roll back the price mark-up on thousands of prescription drugs. The settlement, reached with First Databank, a unit of Hearst Corp., in U.S. District Court in Boston, centers around lists of what is called **average wholesale prices** for branded drugs published by First Databank, a unit of Hearst Corp. It is estimated that the settlement, which has been given a preliminary finding of fairness, will save consumers and insurers billions of dollars.

In an order dated November 15<sup>th</sup>, U.S. District Judge Patti B. Saris wrote that "on a preliminary basis, the settlement is fair." But, at press time, the judge had not yet entered an order granting final approval of the settlement. Lawyers were to provide additional information related to certification of the class of plaintiffs in the case. Under the settlement, First DataBank would cut average wholesale prices for thousands of drugs on its benchmark list by about four (4%) percent and eventually stop publishing the average wholesale price. Consumers and third-party payers would receive no monetary damages, but could save an estimated \$4 billion in drug costs in one year alone under the settlement. Benefit plans typically reimburse drug stores based on a formula that uses average

wholesale price for a drug, less a negotiated discount, plus a dispensing fee. A big change in the average wholesale price could mean renegotiating the discount or dispensing fee. Based on our firm's work in this area, I can say with certainty that the drug companies have manipulated the AWP and have benefited greatly as a result.

Several retiree and worker funds filed the lawsuit against First DataBank and McKesson Corp., a major drug wholesaler, alleging they worked together to inflate the mark-up on numerous prescription drugs. In 2002, First DataBank suddenly raised prices on its "average wholesale price" list, a benchmark used in setting prices for prescription medicines. Many but not all average wholesale prices had a twenty (20%) percent mark-up from the wholesale acquisition cost. Most drugs on the average-wholesale-price list were increased to a twenty-five (25%) percent mark-up. Although McKesson played a key role in the rise of the benchmark prices that First DataBank published, that company was not involved in the settlement will apparently go to trial.

Source: *Dow Jones News*

### **THE NEW YORK TIMES MAKES A GOOD POINT**

There has been a continuing outcry from Corporate America over the past several years relating to what is claimed to be an over-regulation by the federal government of business. The corporate bosses say there is too much control by government and too much regulation. That myth has been sold effectively by corporate lobbyists to the politicians in Washington. Personally, I don't believe that government has done its job when it comes to regulating industries such as the oil and drug industries. The *New York Times* made some interesting observations recently concerning the current state of affairs in Corporate America. Some points, which I consider valid, were made in an editorial concerning what the writer labeled a "Corporate End Run." I am including this editorial in its entirety for your consideration. Take a look and see if you agree with the writer.

*Corporate profits are at record levels. The Dow, too, has climbed past its high-water mark from the dot-com era. Executives reap bigger and bigger paydays, even as wages have stagnated. Meanwhile, the widening investigation into stock-option backdating reminds us that the corporate malfeasance era was much more than just a couple of bad apples like Enron and WorldCom.*

*It seems almost unbelievable, then, that corporate America would pick this moment to beg for relaxed regulation and enforcement, as well as more protection from investors' lawsuits. But as Stephen Labaton reported recently in *The Times*, industry groups are seeking broad new protections for corporations and accounting firms, not through legislation but from the Bush administration through agency rule changes. The rationale is that the high cost of complying with the corporate governance law, the Sarbanes-Oxley Act, along with runaway lawsuits have scared foreign companies away from American stock exchanges. The timing is particularly odd given that the compliance costs associated with the much-reviled Section 404 of Sarbanes-Oxley—which requires audits of companies' internal financial controls—fell last year, as did the number of investor lawsuits, for the second year in a row.*

*What has actually happened is that opponents of regulation believe that the coast is clear. The law's namesakes, Paul Sarbanes and Michael Oxley, are retiring. Kenneth Lay of Enron is dead. The time appears ripe for rollbacks. Advocates of big business like to point to a sharp decline in the United States' share of global initial stock offerings between 2000 and 2005, hoping that everyone will infer that the cause was the passage of Sarbanes-Oxley in 2002. In fact, that share had been declining since 1996, even before the Asian finan-*

*cial crisis. It hit bottom in 2001 and has risen since.*

*United States markets lost their dominance of initial stock offerings for numerous reasons that had little to do with regulation. Some of last year's biggest deals were Chinese and French privatizations. Markets elsewhere are bigger and more liquid than they once were. There are also intangibles, such as America's recent unpopularity, increased barriers for visa seekers and extraordinary budget and trade deficits, which might make an issuer think twice about a dollar-denominated stock. The London Stock Exchange, one of the leading beneficiaries of the American decline, commissioned a study showing that underwriting fees in London are just three (3%) percent to four (4%) percent of a transaction, compared with an average of six point five (6.5%) percent to seven (7%) percent in the United States.*

*When workers confront globalization, they are told to adapt, take their pink slips and go to night school. It is the harsh downside of an integrated world economy that has on balance significantly enriched the country. When financiers feel the pinch from competition in Hong Kong and London, they run to the Bush administration for rule changes. America's investor protections and corporate regulations have made it a nation of share owners, with almost 57 million American households owning stocks either directly or through mutual funds. The Securities and Exchange Commission has already signaled that it will smooth the implementation of Sarbanes-Oxley, especially for smaller companies. And abuses of the private litigation system like pay-to-play should be stopped. There is room for reform. But overall, the system is working. It may need tweaks, but it does not need a revamping.*

*The New York Times, November 12, 2006*

## **SEC INVESTIGATES MUTUAL-FUND FIRMS**

A few weeks ago, the Securities and Exchange Commission (SEC) launched an investigation of 27 mutual fund companies that the agency says have accepted kickbacks totaling hundreds of millions of dollars in recent years. The investigation centers on alleged arrangements in which independent contractors agreed to pay rebates to mutual fund companies in order to win lucrative contracts for jobs like producing shareholder reports and prospectuses. The probe stems from a \$21.4 million settlement the SEC reached in September with Bisys Fund Services Inc., an administrative services provider owned by Bisys Group Inc., which is based in Roseland, New Jersey. According to regulators, Bisys paid a total of \$230 million in kickbacks between July 1999 and June 2004 as part of an effort to win work from mutual funds.

This investigation comes as the fund industry is trying very hard to rebuild its reputation after a series of trading scandals that triggered regulatory crackdowns and fines totaling more than \$1 billion. The mutual fund industry has been dogged by scandals in recent years. In 2003, it came under fire after revelations that a number of big companies let favored clients conduct short-term trading, earning profits at the expense of ordinary shareholders. The following year, regulators cracked down on fund companies that used stock-trading commissions, which are deducted from shareholder accounts, to pay for marketing activities the companies would otherwise have had to cover themselves.

Source: *Wall Street Journal*

## **OMNICARE SETTLES WHISTLEBLOWER SUIT FOR \$49.5 MILLION**

Omnicare Inc., one of the nation's leading suppliers of pharmaceutical services to the elderly, will pay \$49.5 million to settle large-scale Medicaid fraud claims. Lawsuits had been filed in U.S. District Court in Chicago by the federal government and two whistleblowers, who formerly were employees

of Omnicare, based in Covington, Kentucky, charging the company with fraudulent acts. The lawsuits charged that Omnicare gave Medicaid patients Ranitidine capsules, instead of less expensive tablets of the same drug; Fluoxetine tablets rather than cheaper Fluoxetine capsules; and two 7.5 milligram Buspirone tablets instead of the less costly, single 15-milligram tablets. Switching the form of the drugs enabled the company to increase the amounts it charged Medicaid by millions of dollars. For your information, Ranitidine is generic Zantac, Fluoxetine is generic Prozac, and Buspirone is generic Buspar.

The \$49.5 million settlement amount will be divided between the federal government and 42 states. As you know, Medicaid is a joint state and federal program to provide health care services to low-income Americans. In some states, however, the federal government pays as much as eighty-three (83%) percent of the Medicaid bill, federal officials said. How much each state will receive depends on what proportion of Medicaid the state government provides. The government's lawsuit was based on a wide-ranging investigation involving state officials in Illinois, Massachusetts, Ohio, Pennsylvania, North Carolina, and Florida. The role of corporate insiders, who blow the whistle on companies that cheat the government, is critically important.

Source: *Chicago Tribune*

## **AMERIGROUP MUST PAY \$144 MILLION TO THE U.S. GOVERNMENT**

Amerigroup Corp., which manages government health plans for the poor, must pay at least \$144 million in damages for wrongfully denying coverage to pregnant women eligible for Medicaid. The jury awarded the plaintiffs, which included the federal and Illinois governments and a former employee, a total of \$48 million. Under the applicable federal law, that amount will be tripled. The company may also be liable for a total of as much as \$199 million in penalties for more than 18,000 instances of fraud found by the federal court jury in Chicago. The

bottom line is that Amerigroup was getting paid for serving people they weren't in fact serving. That surely sounds like corporate fraud to me.

Amerigroup contracted with the state of Illinois to provide services to Medicaid patients. After he was fired, Cleveland Tyson — who was in charge of government relations for the company in Illinois — filed suit four years ago. The former employee accused the company, which has operations in nine states and the District of Columbia, of maximizing its profit by keeping pregnant women and others with expensive medical conditions off its rolls. The case was filed under the federal False Claims Act and a parallel state law. This is an example of how this law allows the government to protect taxpayers and punish corporations that commit fraud against the government.

Source: *Bloomberg*

## **FEDERAL JURY AWARDS \$48 MILLION IN FALSE CLAIMS SUIT**

In another case involving Amerigroup Corp., a federal jury recently found the Medicaid managed care organization, and its Illinois subsidiary, liable for \$48 million in damages in a false claims suit. That amount will be tripled to \$144 million under the False Claims Act (FCA) and the Illinois Whistleblower Reward and Protection Act, making it the largest FCA jury verdict ever. The jury agreed with prosecutors' claim that Amerigroup violated the FCA when it discriminated against pregnant women in its enrollment process.

In 2003, Cleveland Tyson, who worked as a lobbyist for Amerigroup Corp, filed the qui tam lawsuit against the company. Tyson provided prosecutors with internal emails and documents that revealed that Amerigroup had discriminated against pregnant women. With this information, prosecutors alleged that Amerigroup violated the law because it falsely promised not to discriminate in order to induce the State to enter contracts. The false claim occurred when the enrollment forms of pregnant women were wrongfully denied.

To further emphasize the extent of the damages, the jury found that the company filed 18,130 false claims with Medicaid. The court will impose penalties from \$5,500 to \$11,000 per claim. In addition to the monetary cost, the company may also be excluded from participating in Medicaid and Medicare. If Amerigroup's request for a new trial is denied, the company plans to appeal to the U.S. Court of Appeals for the Seventh Circuit.

Source: Atlantic Information Services, Inc.

### **MEDCO SETTLES FRAUD CHARGES FOR \$155 MILLION**

Medco Health Solutions, the nation's largest pharmacy benefits manager, has agreed to pay \$155 million to settle long-standing fraud allegations brought by a trio of whistleblowers and the federal government. The settlement brings to a close a seven-year investigation by the U.S. Attorney in Philadelphia, who charged the Franklin Lakes, New Jersey-based company with destroying and canceling valid patient prescriptions; paying kick backs to health plans to obtain business; and soliciting kickbacks from drug makers — including its former parent, Merck — to favor their drugs. As part of the settlement, Medco also entered into a so-called corporate integrity agreement, which requires the company to employ a compliance officer, create a code of conduct for its employees, and provide training about federal anti-kickback laws, among other things. The agreement runs five years. The PBM industry is a relatively new industry and the government felt there were "relatively significant fraud issues that needed to be addressed."

I don't believe most folks have a clue what pharmacy benefit managers are or what these entities do in the health care field. They act as middlemen by purchasing huge quantities of medicine at a discount on behalf of clients such as government agencies, corporations, and unions. Medco, which buys medicines for some 60 million Americans, also operates a mail-order pharmacy. The allegations were closely watched

because the litigation provided a glimpse into the highly complicated world where medicines are bought and sold. The charges also came at a time when the public and government agencies began focusing on this behind-the-scenes process because of the soaring cost of prescription medicines. There is one thing for certain, and that is, the PBMs are making a financial killing under the new federal law.

This isn't the first settlement Medco has reached stemming from the allegations. Two years ago, Medco paid \$30 million to 20 states to settle charges of unfair business practices and for a partial settlement of the government's lawsuit. At the time, Medco was required to make changes at its mail-order pharmacy to prevent prescriptions from being mishandled. I don't believe most Americans even know what a PBM is and even fewer realize how much money they are hauling in.

Source: Star-Ledger Staff

### **GRASSO APPEALS RULING IN COMPENSATION CASE**

Most Americans probably don't even recognize the name Richard Grasso and those who do probably have forgotten about his litigation problems. Grasso, the former New York Stock Exchange (NYSE) chairman, has appealed a New York State Supreme Court judge's ruling that ordered him to pay back \$100 million in compensation to the NYSE. If the lower court's ruling stands, Grasso will have to return the money he received as part of his Supplemental Executive Retirement Plan (SERP) package.

In 2004, New York Attorney General Eliot Spitzer sued Grasso and former NYSE director Kenneth G. Langone, accusing them of illegally manipulating the board of directors to ensure Grasso's \$187.5 million pay package, which was granted in 2003. Spitzer accused the NYSE of violating New York's laws governing not-for-profit corporations by paying Grasso "compensation that was not 'reasonable' and 'commensurate with service performed.'" In his ruling, the trial judge

granted partial summary judgment to in favor of the Attorney General. The judge called Grasso's argument that he was ignorant of the value of his SERP package "shocking." In that regard, the judge wrote:

*That a fiduciary of any institution, profit or not-for-profit, could honestly admit that he was unaware of a liability of over \$100 million, or even over \$36 million, is a clear violation of the duty of care. The fact that it was a liability to an insider is even more shocking and a clear violation of the duty of loyalty.*

In addition to disgorging more than \$80 million in SERP benefits, Grasso must pay back substantial sums that were advanced to him as part of the lump-sum payment he received in 2003, and pay interest on \$36 million in illegal, interest-free loans he took from the NYSE. It will be interesting to see how this appeal turns out.

### **GEORGIA DOCTORS AND HOSPITAL SETTLE MEDICARE LAWSUIT**

Northside Hospital, which is located in Atlanta, Georgia, and two medical groups have agreed to pay \$6.37 million to the federal government to resolve allegations in a whistleblower lawsuit. The suit alleged that the hospital and doctors groups violated the false claims act by submitting claims to the Medicare program that were tainted by improper financial and referral relationships. Northside agreed to pay about \$5.72 million and two doctor-owned entities, Blood and Marrow Transplant Group of Georgia (BMTGA) and Atlanta Blood Services, agreed to pay \$650,000. The U.S. agreed to dismiss the lawsuit in exchange for the payment.

The whistleblower suit was filed in February, 2004, by two former BMTGA employees, who contended that BMTGA and Atlanta Blood Center entered into multiple financial transactions with Northside Hospital that violated certain Social Security Act provisions known as the "Stark Law." That law prohibits a doctor from making a

referral to an entity for the furnishing of certain health services if the doctor has a financial relationship with the entity that does not meet one of the law's exceptions.

Source: *Insurance Journal*

### **TYSON SETTLES RACIAL DISCRIMINATION LAWSUIT IN ALABAMA**

Tyson Foods Inc., the world's largest meat producer, has settled a lawsuit brought by a group of current and former workers. The settlement, which is for about \$1 million, involved a racial discrimination lawsuit involving actions at the company's Ashland, Alabama, poultry plant. Tyson will designate a corporate human resources executive to ensure all Ashland employees are trained on Tyson's anti-discrimination policies, and to handle the company's response to any discrimination or harassment complaints. The company also will pay a total of \$871,000 collectively to the 13 workers.

## **VI. CAMPAIGN FINANCE REFORM**

### **THE URGENT NEED FOR CAMPAIGN FINANCE REFORM**

Now that the general election is finally over, both Democrats and Republicans should be able to agree on at least one major item of business to be taken up in Congress at an early date. It's quite evident that the American people want a total reform of the current system of financing political campaigns. They are tired of "politics as usual" in the halls of Congress and want reform and change. Campaign finance reform on the federal level is badly needed, but don't expect anything to take place before the new Congress takes over. But, when the new Congress comes to work, this reform item must be a top priority.

The massive amounts of money spent in national and state elections can no longer be justified and will no longer be tolerated by the American people. When

a losing candidate can spend over \$1.5 million in a single state senate race in Alabama, it's very clear that our political system is broken and badly in need of repair. Over the past year, we saw record amounts spent by candidates all over the country in both state and national elections with this money coming almost totally from powerful special interest groups. Ordinary citizens are shut out of the process as a result.

Currently, there are so many ways to get around the weak laws that govern campaign financing. Consequently, there are no real controls and few checks and balances in place. The American people demanded reform of the system by their vote on November 7<sup>th</sup>. In my opinion, they won't put up with any further delays or excuses. The Democrats who will now be in charge in Congress must take the lead and make sure reform is a real priority. I believe that Republicans will have to support real reform—for a change—or face the wrath of voters in 2008.

Because a presidential race looms on the horizon, Republican lawmakers will have no choice but to jump on board the "reform train." If real campaign finance reform becomes a reality it will be the very best thing that could possibly happen for the American people. Once that is accomplished, progress can then be made in other areas of major concern. Obviously, it will require a bipartisan effort involving both Democrats and Republicans for reform to happen. Hopefully that will take place at an early date in the next Congress.

### **MINE DEATHS BLAMED ON COMPANY RUN BY MAJOR GOP CONTRIBUTOR**

The following will give you a good reason why campaign finance reform is an absolute necessity. Big money in political campaigns clearly influences the actions or inactions of public officials on important issues such as safety. West Virginia state mining officials have concluded that a fatal mine accident in January could have been prevented, placing blame on a huge coal company run by Don Blankenship, one of the country's biggest Republican donors. It

has been reported that Blankenship, who is chairman, CEO, and president of the Massey Energy Company of Richmond, Virginia, has spent millions of dollars to promote Republican candidates and causes in this year's election.

The report on the fatal mine accident cites "168 notices of violations" in Massey Energy's Aracoma Mine that led to the deaths of two miners, according to the investigation issued by the West Virginia Office of Miner's Health, Safety and Training. The scathing report came just days before Election Day on November 7<sup>th</sup>. It was reported that Blankenship played a major role in this year's elections. According to state election records, in September and October alone, he spent \$2,041,510 of his own money to place television commercials, billboards and newspaper advertisements on behalf of Republican candidates in West Virginia. Norm Steenstra, the executive director of the Mountain State Education and Research Foundation, a non-profit group that advocates campaign reform measures, had to say about Blankenship and his contributions:

*Blankenship has a company that has killed people, hurts people and is using political power to try to line up friendly judges and a friendly legislature.*

It should be noted that Blankenship's extraordinarily large expenditures are legal under West Virginia and federal election laws. This is because his money is run through a group called "And for the Sake of the Kids," a non-profit group established by Blankenship. This sort of thing illustrates one of the real problems in American politics. Blankenship backed more than 40 candidates in this year's election, almost all of whom are considered to be anti-consumer and he spent lots of money in doing so.

The state mine safety report underscores warnings that Massey employees were aware of dangers, including a fire sparked by a malfunctioning conveyor belt that consumed the mine in thick black smoke and carbon monoxide. The report concluded the miners died of asphyxiation. Inoperable fire hoses and sprinkler systems, reverse ventilation, a broken fire alarm, and inaccurate mine

maps given to rescuers were also cited as causes of the miners' deaths. Cecil Roberts, the President of the United Mine Workers of America, made the following observation relating to safety at the mine:

*The mine was set up to be a death trap. It should be obvious that Massey knew it and had they taken the action to protect the miners and comply with the law, we wouldn't have had these two fatalities.*

No person, corporation, or other entity should be able to buy influence in government by way of campaign contributions. We need campaign finance reform nationwide both at the federal and state levels. If you agree, let your state and federal elected officials know how you feel and demand that they take action to correct the current situation.

Source: *The Blotter*

## VII. CONGRESSIONAL UPDATE

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### **THE DEMOCRATS FINALLY CAUGHT THE TRUCK**

Now that Democrats have taken control of Congress a tremendous challenge faces them. How they perform over the next two years will certainly shape our country's future. No person can dispute that we are facing many serious problems in our country with much to be done in Congress. In order to correct the failed policies of the Bush Administration, and the related failures of Congress, there are a few issues that must take top priority. The following are a few items that must be taken up in Congress in 2007 as soon as possible:

- Prompt passage of campaign finance reform;
- Legislation to reduce the power of special interest groups in Washington; and
- Breaking the strong link between lob-

bysts and legislation. Reform designed to control lobbyists and limit their power must take place.

Public Citizen and other good government groups have asked the Democratic leadership to create an Office of Public Integrity to administer new ethics rules and investigate violations. I believe that is needed since it's hard to get politicians—once they are in office—to do the job when ethical issues are involved. As you know, the Republican leadership has refused to even allow votes on key lobbying and ethics reform proposals. This was because of the control special interests and their lobbyists have enjoyed in Congress.

With the new leadership in January, there must be new openness and stronger support for strengthened ethics and reform legislation. The voters have given the new Congress a mandate for change. Folks are outraged by congressional scandals—sex scandals, money laundering, travel junkets, lobbyist abuses, and ethical lapses. The days of Jack Abramoff and his buddies calling the shots should be over. New legislation to cure the ills of the past is badly needed. It is time for the 110<sup>th</sup> Congress to stand up for the American people and do what the 109<sup>th</sup> and previous Congresses have refused to do.

If there was one message sent to the politicians on November 7<sup>th</sup>, it was that the voters are completely fed up with what has gone on in Washington. The American people want action and won't stand any longer for excuses and delays. If the Democratic majority fails to bring about the needed reform there will likely be a voter rebellion in 2008. They caught the truck—so now the Democrats must carry out a plan to correct how that truck has been operating in Congress for the past 12 years.

### **DRUG MAKERS POUR BIG BUCKS INTO KEY REPUBLICAN RACES**

It appears that the powerful U.S. drug industry took a real beating in the elections on November 7<sup>th</sup>. During the general election, drug companies poured millions of dollars into congress-

sional races, with most of it going to Republicans. In the process, the industry itself—because of its past performance and its spending—became a campaign issue. For example, Pennsylvania Republican Rick Santorum, who lost his bid for reelection, was a big beneficiary of the industry's funding push. Not coincidentally, this Senator was a leading proponent of the 2003 law that gave seniors Medicare coverage for prescription drugs. He helped write the new law in ways that clearly benefited the drug industry. In return, the Senator's campaign received tremendous sums of money from pharmaceutical interests and their employees, according to the Center for Responsive Politics, a nonpartisan research group.

The new Congress should rewrite the prescription drug benefit to take away the advantages it handed over, with the help of the White House, to pharmaceutical companies. The most obvious change needed is to give the government the authority to negotiate prices. When I tell folks that the government doesn't have that authority, they are shocked and ask how can that be? If the Democrats fail to make reform of the new drug law a legislature priority, the folks who gave them their majority in both the House and Senate will be greatly upset.

Source: *Wall Street Journal*

## VIII. PRODUCT LIABILITY UPDATE

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### **NHTSA INVESTIGATES FORD ESCAPE SUV FIRES**

The National Highway Traffic Safety Administration has opened an investigation into reports of fires in some Ford Escape and Mazda Tribute small SUVs. As you may know, Ford Motor Co. owns a controlling interest in Mazda. The Escape and Tribute are actually different versions of the same vehicle. The vehicles involved in the investigation are from model years 2001 to 2003. The Mercury Mariner is another version of

the same small SUV, but it has not been named in the investigation by NHTSA. The Mariner was not introduced until the 2005 model year. NHTSA started an official investigation after receiving eight separate complaints of fires in the engine compartments of Ford Escape SUVs. Two other complaints alleged “fire-related phenomena,” such as sparks, melted electrical connectors, or smoke, in the same area of the vehicles.

The fires originated in or near the anti-lock braking system (ABS) control module. Thus far no injuries or deaths have been reported as a result of the fires, which occurred when the vehicles were parked. Actually, the ABS control module is powered at all times, even when the vehicle is parked. Although a similar module was the subject of earlier recalls of large Ford trucks and SUVs, it appears that the Ford Escape and Mazda Tribute SUVs use a different module. It will be interesting to see how this investigation develops.

Source: *CNNMoney.com*

#### **CALIFORNIA SUPREME COURT REFUSES TO REDUCE VERDICT AGAINST FORD**

Recently, the California Supreme Court refused to review a ruling that will require Ford Motor Co. to pay \$82.6 million in damages to a person injured in an Explorer rollover. In June of 2004, a San Diego jury awarded Benetta Buell-Wilson more than \$368 million in damages after she was paralyzed when her Ford Explorer rolled over on an Interstate highway. Of that amount, \$246 million was awarded for punitive damages. The jurors found that Ford had acted reprehensibly and had taken no steps to correct design flaws that made the Explorers prone to rollovers.

The trial court judge subsequently reduced the overall award to \$150 million. Subsequently, the Court of Appeal for the Fourth District reduced it to \$82.6 million. Ford argued on the appeal to the California Supreme Court that the trial court judge had made an error in computing punitive damages. Ford complains that the trial judge refused to let Ford present evidence that would have shown the Explorer

was one of the safest sport utility vehicles on the road. Ford’s petition to the High Court was supported in amicus curiae briefs filed by Nissan Motor Co., DaimlerChrysler Corp., American Honda Motor Co., Hyundai Motor Co., Mercedes-Benz USA, the Alliance of Automobile Manufacturers, the Product Liability Advisory Council, the California Chamber of Commerce, and the Chamber of Commerce of the United States of America. Comparing a product’s safety or design features with those of competitors simply isn’t relevant. Ford knew the Explorer was defectively dangerous. The company could have done something about it and failed to do so.

Source: *The Recorder*

#### **JUDGE REDUCES \$26.2 MILLION AWARD AGAINST FORD**

A New Jersey Superior Court judge has found a \$26.2 million jury verdict against Ford to be excessive and reduced it to \$17.38 million. The judge did not alter the liability percentages determined by the jury, which found Ford seventy (70%) percent responsible and Garden State Engine and Equipment of Somerville, New Jersey thirty (30%) percent at fault. As we reported previously, Michael Boyle, who was 22 at the time of the 2002 accident, was commuting from home to his job as an ironworker in New York City when his 1994 Ford Taurus ran into the back of a 1998 Ford F-800 truck. As a result, Boyle’s face was dislocated from his skull and he suffered injuries to the frontal lobe of his brain. Although doctors rebuilt Boyle’s face, he continues to suffer from double vision, no sense of smell or taste, and increased processing time to think.

Ford was sued for failing to include an under-ride guard or instructions for how one should be attached to the frame of the truck. Federal safety regulations did not require the manufacturer to include the guard or provide such instructions when producing “incomplete chassis cab vehicles,” which are converted by “final-stage manufacturers” for various uses. This is a weakness

in the current standards. In this case, the truck was converted by Garden State to carry a boom on the flatbed, and an under-ride guard was installed at the time. Garden State was sued for installing a guard that was “poorly designed and doomed to fail.”

Source: *Lawyers Weekly*

#### **JURY VERDICT AGAINST FORD IN A TULSA FEDERAL COURT**

A federal jury in Tulsa returned a \$15 million verdict against Ford Motor Co. last month in a product-liability lawsuit brought by the parents of a teenager who died in a crash of a 1995 Ford Explorer Sport. Kevin Moody and Veronica Moody filed the lawsuit after their son, 18-year-old Tyler Moody, was killed in a single-vehicle rollover crash that occurred back in 2003. The family won their case in a hotly contested trial.

Tyler Moody lost control of the sport utility vehicle while he was passing another vehicle on a curve. The SUV left the road and rolled at least 1 1/2 times, coming to rest on its roof. The parents alleged in their lawsuit that “because the defective vehicle had an inadequate roof-crush tolerance,” their son was trapped inside the Explorer “and his neck was pushed into his chest by the intruding roof at a precipitous angle.” Testimony at trial revealed that the teenager was wearing his seat belt and sustained no physical injury beyond a 5-inch contusion on the top of his head. However, his airway was impeded to such an extent that he died of “positional asphyxiation.” It should be noted that the roof of the Explorer collapsed when the vehicle went through a relatively slow, easy roll. The part that gave way during the wreck was described as being made of “spindly little pieces of metal engineered down to an unacceptable level to save money.”

An accident reconstruction expert testified during the trial that Tyler Moody was traveling at approximately 67 mph through the curve. The speed of the Explorer was irrelevant to the issue of whether the roof on the SUV was defective or unreasonably dangerous. What happened to this young man was

“foreseeable and preventable.” Ford engineered the 1995 Ford Explorer’s roof in such a manner to cut costs and save money.

Tyler Moody was a senior at Jenks High School, where he excelled in both athletics and academics. He was a National Merit Scholar finalist, a Distinguished Graduate and an Advanced Placement Scholar with Distinction. He also was the French Club president, a Jenks Chemistry Olympiad representative, an Adventure Club leader and a letterman in both cross-country and track. Besides his achievements in school, he was an American Red Cross Local Hero award recipient. Tyler received that honor and the Boy Scouts of America’s highest award for lifesaving for a late-night rescue of a rock climber in 1998, when he was 14. He later became an Eagle Scout. The young man had planned to attend Stanford University. All of that ended back in 2003 because Ford cut costs in the design and manufacturing of the vehicle he was driving. The roof—in simple terms—was defective and dangerous.

Source: *Tulsa World*

### **NHTSA’S PROPOSED ROOF CRUSH STANDARD IS NOT GOOD**

As we have reported, over 10,000 people die each year in rollover accidents. In addition, some 16,000 are catastrophically injured each year in this type accident. NHTSA’s proposed rule for roof strength (FMVSS 216), whose purpose is to “reduce deaths and injuries due to the crushing of the roof in rollover accidents,” will save no more than 44 lives of the 10,000 that die annually in rollover related accidents. Some estimates put the number of lives to be saved more lower. As reported, this pathetically weak standard is expected to be finalized in August 2007. It should be noted that NHTSA has added a special preemption clause to the proposed rule which will set up the following conditions:

*If the automobile manufacturer meets this minimum standard and a person is killed or cata-*

*strophically injured by the roof in a rollover accident, the manufacturer cannot be sued.*

If this rule becomes final, the automakers will get complete immunity from lawsuits if the courts agree on the preemption argument. Structural, mechanical and biomechanical engineers are coming together from all over the world for an Emergency World Summit—People Safe in Rollovers—to expose the weak U.S. government standard that has led to more than three decades of unnecessary fatalities and catastrophic injuries in rollover accidents and to offer real, simple, inexpensive solutions which will save thousands of lives and prevent so much misery. Hopefully, Congress will not allow NHTSA to continue doing the bidding of the powerful automobile industry.

### **S-10 BLAZER NOT SAFE IN A ROLL-OVER**

Our firm is currently handling a lawsuit against General Motors involving a 1998 S-10 Blazer. It’s quite evident that the front passenger seatbelt in this vehicle is defective. Our clients lost their son when he was partially ejected through the passenger window during a rollover event despite his wearing the seatbelt. There is no dispute that the young man was properly seated and was properly wearing the seatbelt. This tragic death illustrates once again the danger of SUVs, but even more amazing, it shows that General Motors and the other auto manufacturers have refused for many years to design and test SUVs to assure they are safe in rollovers.

I have written on numerous occasions about the dangers of SUVs like the S-10 Blazer and their propensity to rollover. Clearly, General Motors and the manufacturers have been aware of this danger for decades. One of the tragedies about rollover accidents is that most SUVs on the road today were not designed and tested to be crashworthy and to protect it’s passengers in an actual vehicle rollover. If designed properly, an SUV rollover should not cause

serious injury or death. If a vehicle’s structure and restraint systems are designed so that the occupant compartment and safety cage remain intact and the passenger remains in the vehicle, that passenger should survive. Remarkably, in our case, GM and its experts admit that the seatbelt system in the 1998 S-10 Blazer was not designed to prevent a partial ejection which could cause serious injury or death in a rollover.

Since GM’s knowledge that rollovers are foreseeable is well documented and since rollovers account for numerous deaths, the automakers conduct is inexcusable. Studies conducted in the early to mid 1990’s found that while rollovers comprised 12.4% of the towaway crashes, these crashes were responsible for 26.4% of the serious and fatal injuries. In most SUVs on the road today, the seatbelts are only designed and tested to assure some protection in a frontal collision. GM defends its design and its failure to conduct meaningful tests on the basis that the Federal Motor Vehicle Safety Standards (FMVSS) offers them an option to perform either frontal tests or rollover tests. Sadly, the company chose to perform the frontal tests only. FMVSS 208 §5.3, in part, sets forth:

***Rollover.*** *Subject a vehicle to a rollover test in either lateral direction at 30 mph under the applicable conditions...of this standard with a test dummy...placed in the front outboard designated seating position on the vehicle’s lower side as mounted on the test platform. The test dummy shall meet the injury criteria of §6.1 of this standard.*

Section 6.1 sets forth that “All portions of the test dummy shall be contained within the outer surfaces of the vehicle passenger compartment.” In other words, there shall be no partial ejection of any part of the dummy much less the [occupant’s] head which could lead to fatal injury. When you incorporate GM’s own admissions concerning the seatbelt in the S-10 Blazer it is obvious as to the reasons why GM does

not test the S-10 Blazer and other SUV's pursuant to §5.3 of FMVSS 208. It can't afford to do so. The S-10 Blazer and other SUV's would violate this Federal Motor Vehicle Safety Standard and this could prevent the sale of these vehicles. GM's knowledge of the dangers associated with the design is obvious. Their seatbelts are not meant to protect occupants from partial ejections which result in deadly consequences.

Even more amazing than GM's failure to test the S-10 Blazer for rollover safety, is the automaker's knowledge of how to prevent partial ejection in rollovers. Since the 1960's GM has been aware of alternative seatbelt designs which could prevent partial ejections in rollovers. Their vehicles utilized some of these designs in Europe since the 1980s. The tragedy in our case could have been prevented. It's high time that GM and other manufacturer's begin meaningful testing to assure that the design of SUVs and restraint systems in those popular vehicles are safe in rollovers

#### **DEATH CASE INVOLVING A DEFECTIVE BULLET-PROOF VEST SETTLED**

The widow of a police officer who was murdered has settled her lawsuit against the manufacturers of his bullet-resistant vest for \$2.27 million. Interestingly, this settlement came after nearly three years of litigation. The amount of the settlement is slightly less than the \$2.5 million a jury awarded to back in September. Of the total, \$1.7 million of the settlement funds will go to the widow and \$567,000 to her son.

The 27-year-old police officer was killed in June of 2003, during an exchange of gunfire with a felon, who shot the officer 13 times. The shooting occurred during a traffic stop in the parking lot of the Navy Federal Credit Union on a city street in Oceanside. The felon had drugs in his car and killed the officer because he feared he would be returned to prison. He was convicted of murder and is on death row in a state prison awaiting execution. The suit, filed in November 2003, accused the companies of making a defective product that allowed a bullet to penetrate the soft-

body armor and fatally wound the officer in the chest.

The jury found Second Chance Body Armor Inc., which made and sold the vest, and Toyobo Co. Ltd., the Japanese producer of the Zylon synthetic fibers that made the vest bullet-resistant, partially liable for the officer's death. In 2004, Michigan-based Second Chance filed for bankruptcy and Armor Holdings Inc. acquired most of the non-Zylon related assets. A new company was created with the name Second Chance Armor Inc. That company was not a party to the litigation. The jury found that the companies had failed to warn the rookie officer about potential defects with the vest and ordered them to pay \$2.5 million in damages.

Source: *Union Tribune*

#### **FAMILY WINS THEIR WRONGFUL-DEATH LAWSUIT**

The family of a man who was killed when his lawnmower exploded has been awarded \$6 million in a wrongful death lawsuit. The jury agreed with the claims of the family of Dale Smith that Jacobsen Division of Textron Inc., a Charlotte equipment company, was responsible for the faulty mower that killed the 36-year-old man. The family was awarded \$2 million for pain and suffering. In addition, \$4 million was awarded to the decedent's mother and father, to be shared equally.

The riding lawnmower exploded as Mr. Smith was cutting grass at his father's business in Laurinburg back in April of 2003. Smith, who suffered burns to forty-six (46%) percent of his body, died four days later. The lawsuit, filed in 2005, alleged that the lawnmower - a Bobcat Zero Turn Radius model - was dangerous and defective. During the trial, the company claimed that operator error caused Mr. Smith's death. The jury was shown incidents involving similar accidents with the company's equipment. After hearing all of the evidence, the jury found the mower to be defective and the defendant to be at fault.

Source: *The Robesonian*

#### **JURY AWARDS \$36 MILLION IN LAWSUIT AGAINST LUFKIN INDUSTRIES**

A jury awarded \$36 million to a California woman in her lawsuit against Lufkin Industries. The case arose from a 2003 motor vehicle collision involving an 18-wheel tractor trailer unit built by the company. Kelleigh Falcon, a 25-year-old California resident, was severely injured in the 2003 incident. This case involved what is referred to as an "underride accident." The Ford Taurus Ms. Falcon was riding in as a passenger struck the side of the 18-wheeler, sending it underneath the trailer. The 18 wheeler had pulled out in front of the Taurus. Ms. Falcon suffered severe head injuries from the accident, which later resulted in brain damage. Ms. Virginia Walker, the driver of the Taurus, was severely injured and died five days after the incident. While Ms. Falcon's two children riding in the back of the car received only minor injuries, they lost their mother.

U.S. governmental regulations require some type of underride protection that prevents smaller vehicles from going underneath tractor trailers. It was shown at trial that Lufkin Industries has never equipped its vehicles with underride protection. Since the government has not mandated the regulation, the company refused to equip any of its vehicles with the needed protection. It is universally recognized by safety experts that underride protection is needed. The jury found the Lufkin Industries-manufactured trailer was defectively designed and that the U.S. governmental regulations were inadequate to protect the public from unreasonable risks of injury or damage. The jury awarded an additional \$2.5 million to the family of Ms. Walker, the driver of the Taurus, who died as a result of her injuries.

Source: *Lufkin Daily News*

# IX. MASS TORTS UPDATE

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## **BAD NEWS FOR ORTHO EVRA BIRTH CONTROL PATCH**

The popular contraceptive patch, Ortho Evra, has been in the national spotlight lately, and unfortunately not for good reasons. You may recall that Ortho Evra, first introduced in 2002, was the first skin patch approved by the Food and Drug Administration (FDA) for birth control. The FDA has now updated the labeling for the product, warning women of higher levels of estrogen than most birth control pills. According to the FDA, women who use Ortho Evra are exposed to sixty (60%) percent more estrogen than those who use a birth control pill. The FDA has received numerous reports of women suffering blood clots, strokes, deep vein thrombosis (DVT), pulmonary embolisms and even death while using the patch. The FDA also found an increased risk of birth defects in women who wore the patch while pregnant.

Although Ortho Evra has not been removed from the market, there are some within the medical community who believe it may happen. Johnson & Johnson and Ortho McNeil, the manufacturers of Ortho Evra, have yet to step forward and accept any responsibility for failing to adequately warn consumers of the risks involved with the use of this patch.

The FDA reports that the label changes are due to two studies that were conducted to evaluate the risk of serious side effects associated with the patch. One of the studies concluded that using the patch carried the same risks as patients who used an oral contraceptive. However, the second study confirmed the FDA's concerns, showing a two fold increase in the risk of venous thromboembolism (VTE) and an increase risk of blood clots. As previously reported, there have been a number of lawsuits filed against Johnson & Johnson and Ortho McNeil. Many of them involve young women who have been seriously harmed from

the use of the Ortho Evra patch. We will keep you advised on developments as they occur.

## **AN UPDATE ON PREMPRO/PREMARIN LITIGATION**

Jennie Nelson began taking Wyeth Pharmaceutical's popular hormone therapy drug, Prempro, for treatment of her menopausal symptoms in 1996. After taking the drug for five years, she was diagnosed with hormone fed breast cancer and had both breasts removed. On October 4, 2006, Mrs. Nelson and over 8,000 others involved in the Hormone Therapy litigation received some encouraging news. A Philadelphia, Pennsylvania jury, consisting of five men and three women, found that Prempro was a cause of Mrs. Nelson's breast cancer. The jury awarded Mrs. Nelson and her husband \$1.5 million in compensatory damages.

In a rather unusual move, the judge granted Wyeth's request that the jury first rule on whether the cancer was caused by Prempro before deciding whether the company was negligent. The trial was then to move into a second phase in which the jury was to decide whether Wyeth adequately warned of the dangers of Prempro. But, the judge granted (without explanation) Wyeth's motion for a mistrial. Unfortunately, Mrs. Nelson and her family must now go through another trial. Nevertheless, it's most significant that a jury, after hearing evidence from both sides, has found that Prempro is a cause of hormone positive breast cancer.

In further good news for plaintiffs, Wyeth entered into a confidential settlement agreement with another plaintiff, Carol McCreary, in Reno, Nevada. This is believed to be the first such settlement and it came on the same day as the Philadelphia verdict referred to above. It was just days before the McCreary trial was to start. Mrs. McCreary was diagnosed with hormone fed breast cancer after taking Prempro for almost three years. Unfortunately, the cancer has now spread to the bones, liver, and lungs, and her condition is terminal. As it has in all cases, Wyeth denied that its drug is a

cause of Ms. McCreary's hormone fed breast cancer.

As far back as 1942, Wyeth began marketing and selling its hormone therapy drugs, unaware of the risk of breast cancer. No menopausal woman had reason to know of this risk before the results of the landmark Women's Health Initiative study (WHI) were announced in July, 2002. The study revealed that combination hormone therapy substantially increases the risk of breast cancer, heart attacks, strokes, blood clots, dementia, non-Hodgkin's lymphoma, asthma, and a myriad of other major health maladies, while providing no cardiac or cognitive benefits, as Wyeth had repeatedly claimed.

Clearly, Wyeth should have known of these risks, as well as the lack of benefits from taking the drug. Certainly, it should have known much earlier than it did. Wyeth never conducted any long-term tests to determine whether Premarin caused cancer or any other health ailment. The sales of Premarin remained stagnant until 1966 when a book called *Feminine Forever* was published by a doctor with close ties to Wyeth. The book essentially told menopausal women they could reverse the aging process and become vibrant again by taking estrogen supplements. As expected, Premarin sales skyrocketed. But within 10 years, something else skyrocketed, the incidence of endometrial cancer. In 1975, publications in two respected medical journals noted that the spike in endometrial cancer correlated directly with the surge in Premarin sales.

In danger of losing its number one drug product, Wyeth began promoting the sale of estrogen with an opposing hormone, progesterone, to protect women's reproductive systems. Although the combination of Premarin and synthetic progesterone or progestin (brand name "Provera") did appear to overcome the endometrial cancer scare, many scientists feared the combination product could negatively affect the breast. Yet, Wyeth never studied the combination product to determine whether the product actually harms the breast. But, Wyeth did promote the product as a woman's number one protection against heart disease, actually

claiming a fifty (50%) percent reduction in cardiovascular deaths. The FDA repeatedly told Wyeth that such representations were unfounded. Wyeth also promoted combination hormone therapy for the prevention of Alzheimer's disease, despite the FDA rejecting its promotional efforts. Eventually, Wyeth combined the two pills into a single product called "Prempro" and continued to tout the illusory cardiac and cognitive benefits, while downplaying the breast cancer risk, despite Wyeth having studied none of its claims.

The advent of combination hormone therapy was associated with substantial increases in hormone receptor positive breast cancer. Yet, Wyeth still conducted no long-term studies on this potential effect. Indeed, were it not for the initiative of the National Institutes of Health, we might still be unaware of the deadly consequences of combination hormone therapy use. The NIH sponsored the WHI study, which, in July, 2002, confirmed the breast cancer risk while negating the fictional cardiac and cognitive benefits. When the news hit, Prempro sales plummeted. Significantly, as we have recently learned, so did the incidence of new breast cancers.

A number of jury trials are scheduled around the country for 2007. Two trials begin in Philadelphia in January 2007. Other trials will take place in Arkansas, Nevada, Texas, Pennsylvania, New Jersey, and Minnesota. Our firm has a November trial scheduled in Minnesota. Hopefully, we will have others set during this year. We believe that Wyeth will eventually do the right thing in all of these cases—as it did in the McCreary case—and settle them.

#### **GLAXO SETTLES PAXIL LAWSUIT**

GlaxoSmithKline has agreed to pay \$63.8 million to settle a lawsuit accusing it of promoting its antidepressant Paxil for use by children and adolescents while withholding negative information about the drug's safety and effectiveness. Because the lawsuit was a class action, residents of the U.S. who bought Paxil or Paxil CR, a controlled-release version of the drug, for their

children could receive full refunds if they have records of their purchases. The settlement was approved by an Illinois Circuit Court judge.

A fairness hearing will be held on March 9th to decide whether the settlement is fair and should be approved. As part of the settlement, GlaxoSmithKline, which is based in London, was allowed to deny the lawsuit's claims, including one that consumers paid too much for the drugs. Actual payments to consumers will depend on the number of claims. If there is not enough money to pay all the claims, consumers will receive partial payments.

Source: *New York Times*

#### **DRUG MAKER MUST PAY \$6.8 MILLION FOR WOMAN'S AMPUTATION**

As the result of an appellate court ruling, Wyeth and Co. must now pay nearly \$6.8 million to a Vermont woman whose arm had to be amputated after she was injected with one of its drugs. The Vermont Supreme Court upheld a lower court's ruling in the case, which is being hailed as a major victory, not only for the victim, but for consumers generally. In its opinion, the court cited an FDA rule saying drug companies can issue sterner warnings than required by regulators if the drug makers believe it's necessary.

In this case, Diana Levine had gone to the Health Center in Plainfield, Vermont, in 2000 complaining of nausea stemming from migraine headaches. She was initially given an injection of Phenergan at the center. Ms. Levine returned later and received more of the drug by intravenous injection in a technique called "IV push." An inadvertent injection of Phenergan into an artery occurred in the second injection. As a result, the artery was severely damaged, causing gangrene. After several weeks of deterioration, Ms. Levine's hand and forearm had to be amputated. The jury returned a verdict in Ms. Levine's favor, awarding nearly \$6.8 million in damages.

A company spokesman testified at trial Wyeth had sought to strengthen the label warnings, but that the FDA rejected the request. Ms. Levine's suit

against the Health Center was settled prior to trial for an undisclosed sum. However, Wyeth elected to go to trial, arguing that a suit under state law was preempted by the FDA's approval of the warning label the company had issued with the drug. The appellate court's majority opinion stated that federal labeling requirements "create a floor, not a ceiling" for state regulation, noting that FDA regulations allow drug companies to go beyond warnings required by the agency. Justice Denise Johnson, writing for the court, stated:

*When further warnings become necessary, the manufacturer is at least partially responsible for taking additional action, and if it fails to do so, it cannot rely on the FDA's continued approval of its labels as a shield against state tort liability.*

This case is another rejection of efforts by the drug industry, the Bush administration and the FDA to preempt state regulation of prescription drugs. When a drug company knows that a stronger warning is needed, it must make the information available to the medical community and consumers in the drug's label. Drug companies have the opportunity, and when indicated, the responsibility, to offer stronger warning labels than those required by the FDA.

Source: *Business Insurance*

#### **AGENCY FOUND TO BE LAX IN SUPERVISING ORGAN TRANSPLANT SYSTEM**

The United Network for Organ Sharing (UNOS) is a little-known organization that has a major responsibility. UNOS is charged with ensuring safety and fairness in the nation's organ transplant system. During the past year, it appears that UNOS has done a poor job of monitoring the centers it oversees. It appears that UNOS routinely fails to detect or correct problems at derelict hospitals, even when patients are dying at excessive rates, according to the findings of an investigation by the *Los Angeles Times*. According to the *Times*, when it does act, UNOS routinely keeps

findings of its investigations secret, leaving patients and their families unaware of the potential risks, according to interviews and confidential records. Still, its penalties usually amount to little more than a wrist-slap.

A series of problems at transplant centers in California has raised serious questions about the nation's regulatory system. The *Times* investigation found that UNOS's failure to act in those cases is part of a larger pattern. Responsibility ultimately rests with the federal government. But since 1986, the government has contracted with UNOS to oversee everything from how organs are harvested to where they end up. UNOS now regulates 259 transplant centers and 58 regional groups that procure and distribute organs. The competition for scarce organs is growing. Because the stakes are so high—life, death, prestige, and millions of dollars for hospitals—the temptations for transplant centers to bend or break the rules are ever-present. Even though UNOS has the power to issue public rebukes and urge the government to close troubled programs, it hasn't been an aggressive enforcer. Often, the nonprofit organization has seemed more intent on protecting hospitals than patients and that's impossible to justify.

According to the *Times*, UNOS has never even recommended that the government close an active transplant program. Since 2000, the organization has considered revoking the "good standing" of at least 15 transplant centers, but, with the exception of only one case, failed to follow through. Even after programs log high death rates, it has taken UNOS years before it takes meaningful action. In fact, it takes years for UNOS to even order an inspection. The organization often backs down after being challenged, or even defied, by medical centers that it is supposed to regulate. The bottom line is that UNOS appears to be doing a very poor job of fulfilling its responsibility.

Source: *Los Angeles Times*

### **FDA MAY CHANGE HANDLING OF SAFETY ISSUES**

Over the past several years, I have been highly critical of how the federal Food and Drug Administration (FDA) has dealt with safety issues relating to public health. I believe that criticism was justified. It now appears that the agency is due credit for doing a good thing. The FDA plans to revamp how it handles safety issues with the stents, pacemakers, implantable defibrillators, and other medical devices it regulates. As it does so, the FDA plans to utilize data-mining techniques that could give the agency early warning of potential problems. This is an FDA effort to improve the agency's response to safety concerns. How the FDA handles safety issues with the products it regulates has been under intense scrutiny. The agency is expected to receive even more attention from Democrats now that they are the majority party in Congress.

The new plan calls for reorganizing the FDA's Center for Devices and Radiological Health to allow better sharing of safety information. It also calls for streamlining and improving the now-disjointed way the agency collects reports of possible problems from multiple sources, including manufacturers and doctors. Proposals include expansion of a pilot program that collects safety reports in real time from hospitals, as well as tapping into medical device data amassed by the Department of Veterans Affairs, the Department of Defense, and Centers for Medicare and Medicaid Services.

The FDA also wants all medical devices marked with a unique number, which would allow them to be better tracked in a recall. While that seems to be an excellent proposal, opposition is coming from medical device companies. Their association wants this feature to be optional. Hopefully, the FDA will make it a mandatory requirement. We know what happens to safety in many cases when drug companies are given the option of doing something.

Source: *Associated Press*

### **THE NEW JERSEY VIOXX TRIALS**

As of September 30, 2006, more than 15,000 individual personal injury lawsuits had been filed in New Jersey against Merck and Company, the manufacturer of Vioxx. In January, 2007, Judge Carol Higbee will preside over a consolidated trial with eight plaintiffs involved from five different states. The court's present trial plan has three phases:

- Phase One consists of the presentation of evidence concerning the science and uniform marketing materials associated with Vioxx and other communications directed at physicians. The jury can determine whether plaintiffs have rebutted the presumption of adequacy for the FDA label.
- In Phase Two, the jury will hear evidence concerning each of the plaintiffs, their treating physicians, and the Merck sales representative that promoted Vioxx to those physicians. At the conclusion of Phase Two, the jury will determine the adequacy of the warning to each of the plaintiffs prescribing physicians, whether Vioxx was a substantial contributing factor in causing plaintiffs' injuries, compensatory damages, and whether there was an ascertainable loss of money as a result of consumer fraud.
- Phase Three will be devoted to punitive damages. All of the plaintiffs or their decedents suffered a myocardial infarction while on Vioxx. The amounts of punitive damages to be awarded will be determined in this Phase.

It appears that Judge Higbee has developed a very good plan for the handling of the Vioxx litigation in New Jersey. Hopefully, the cases there will be tried successfully under her plan.

### **FEDERAL JUDGE DENIES REQUEST FOR A NATIONAL CLASS**

Judge Eldon Fallon, who as you know is overseeing the federal Vioxx lawsuits, has denied a request by lawyers for class-action status. Judge Fallon felt that

the difficulties in class management would overwhelm any efficiency that could be secured though a class-wide approach. Thus far, about 24,000 lawsuits have been filed by former users of Vioxx. Most folks would be surprised or shocked to learn that Merck has already spent \$1.28 billion so far to cover its litigation expenses, but has elected not to settle any of the victims' cases. When you consider that Merck has only been to trial in a relatively small number of cases, that is a very high number per case. Eventually, the company's stockholders will wake up to what Merck's big bosses are doing with all that money.

## X. BUSINESS LITIGATION

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### **A RECORD JURY VERDICT RETURNED IN CITGO FIRE**

On November 6th, a Cook County, Illinois, jury awarded Citgo Petroleum Corp. a record \$387.4 million judgment against the Babcock & Wilcox Co. (B & W), a parts manufacturer. Citgo claimed that the company was responsible for a 2001 fire at Citgo's Romeoville refinery. Citgo filed the lawsuit in 2003 against Babcock seeking \$548 million to cover the cost of repairs and lost profit from the blaze, which occurred when 650-degree oil spewed from a defective pipe fitting and burst into flames. A subsequent investigation of the fire found that the fitting from B & W was made of the wrong kind of metal to withstand the corrosive chemicals in petroleum.

The jury in Cook County Circuit Court found B & W was forty-five (45%) percent responsible for the accident. Jurors held Unocal, the previous owner of the refinery, which had been brought in as a co-defendant by B & W, forty (40%) percent responsible for the fire. The jury assigned Citgo fifteen (15%) percent of the blame. Under Illinois law, because B & W was assigned twenty-five (25%) percent or more of the blame, they will have to pay the entire amount of the verdict.

This was the largest jury verdict in Cook County history, surpassing the \$127 million judgment awarded in 1991 against a pharmaceutical company. I wonder if the bosses of Corporate America consider this to have been just another frivolous lawsuit. This is what Citgo had to say about the courts when it was a victim of wrongdoing:

*We appreciate that the judicial system ruled in our favor in this important case.*

B & W, a unit of publicly traded McDermott International, Inc., will appeal the verdict. According to a spokesman, B & W said that in 1982 the company told Unocal that the fitting was defective and needed replacement. Unocal is said to have replied to B & W officials that the part had been inspected and appeared to be working well. In 1997, when Unocal sold the refinery to Citgo, the sales contract stipulated that Citgo accepted all responsibility for the plant.

Source: *Chicago Tribune*

### **SETTLEMENT IN CHICAGO SUN-TIMES LAWSUIT APPROVED**

A shareholder lawsuit against a group of former Hollinger International, Inc. directors has been settled. The defendants will pay \$50 million Sun-Times Media Group Inc. The settlement will be paid by executive and organization liability insurance policies. Hollinger is the predecessor to Sun-Times Media Group, which publishes the Chicago Sun-Times as well as community newspapers around Chicago.

Cardinal Value Equity Partners LP filed the suit on behalf of Hollinger shareholders in 2003, alleging a group of directors were wrong to have approved transactions involving the sale of newspaper operations for as little as \$1. After an internal investigation, Hollinger pushed out a number of senior executives, including chief executive Conrad Black, who is to go to trial in March on fraud and racketeering charges for allegedly stealing millions of dollars from the company. The settlement which has now been approved by the

court will bring the civil case to a close. Interestingly, the former directors who agreed to the settlement included former Secretary of State Henry A. Kissinger and former Illinois Governor James R. Thompson. The Delaware court also approved a \$2.8 million settlement with former company executive Peter Y. Atkinson.

Source: *Insurance Journal*

### **BAYER SETTLES PRICE-FIXING CASE**

Bayer AG has agreed to pay \$18 million to settle claims it conspired with other manufacturers to inflate the price of certain plastics. This is the second multi-million dollar settlement the company has made this year regarding its polymer operation. A U.S. District Judge in Kansas City, Kansas, approved the settlement, which covers the company's sales of polyester polyol-based products between January 1, 1998, and December 31, 2004. The agreement also requires Bayer, which as you know is headquartered in Germany, to cooperate with lawyers representing the plaintiffs' lawyers as they continue their class action lawsuit against former co-defendants Uniroyal Chemical Co. and Chemtura Corp., formerly known as Crompton Corp. The court also agreed to dismiss defendants Rhein Chemie Corp. and Rhein Chemie Rheinau GmbH, subsidiaries of Lanxess Corp., which spun off from Bayer last year.

In August, the same court approved a \$55.3 million settlement by Bayer in a separate case involving the sale of polyether polyol. In that case, Bayer also agreed to help plaintiffs' lawyers against former co-defendants BASF Corp., BASF AG, the Dow Chemical Co., Huntsman International Holdings LLC, and Lyondell Chemical Co. Bayer disclosed in March that it had been subpoenaed by the Justice Department to provide information about its manufacture and sale of polyurethane products called MDI and TDI, along with other products.

I didn't realize it, but Bayer, Dow, BASF, Huntsman and actually Lyondell control the entire MDI and TDI markets and seventy-five (75%) percent of production of polyether polyol, a

polyurethane material that is mixed with other substances to make foams used in furniture, automobile seats and other products. Two years ago, federal authorities consolidated 16 cases filed across the country against polymer manufacturers by customers who alleged the companies had gotten together to fix the price of urethane and urethane chemicals.

Source: *Associated Press*

#### **CLASS ACTION FILED AGAINST LENDINGTREE**

A nationwide class action suit was filed recently in California against LendingTree LLC and its subsidiary, Home Loan Center, Inc. It is alleged that both businesses, which operate under “LendingTree Loans,” have engaged in unfair business practices and false advertising. The lawsuit claims that LendingTree’s slogan—“When banks compete, you win”—is false advertising because there is no competition at all. The class alleges that the company merely uses their slogan and Web site to generate leads for its direct-lending division, Home Loan Center. The lawsuit further alleges that LendingTree takes the leads to sell unsuspecting borrowers loans at an increased price.

LendingTree.com, a loan origination service which is not even a lender, attracts over 70,000 potential borrowers a month by claiming that their origination service allows lenders to compete for borrowers’ business. The lawsuit claims that LendingTree does not “shop around” for a better loan rate for the customer. Instead, LendingTree uses their catchy slogan to attract customers in order to sell them loans through the company’s direct-lending division at a greater price minus the competition. The class action seeks declaratory and injunctive relief along with compensatory and punitive damages, and restitution. In September, former mid-level LendingTree executive, Fadel Lawandy, was fired for alleged “insubordination” after making complaints about the company’s business practices.

Source: *PR Newswire*

#### **SNAP-ON TOOLS REACHES SETTLEMENT WITH FRANCHISE HOLDERS**

Franchise owners of Snap-on Tools have settled a class action lawsuit that alleged that Snap-on participated in deceptive business practices and caused their franchises to fail. Snap-on Tools makes tools and equipment for mechanics, and distributes the tools to mechanics through dealers that sell the tools out of a panel truck. Snap-on required its franchisees to make minimum weekly purchases of its products, but it appears that Snap-on also limited the sale of those products to a certain number of customers.

The \$125 million settlement, which was approved by a federal judge in New Jersey, includes \$38 million that will be split among former and current dealers. The two named plaintiffs in the class action lawsuit will receive \$50,000 each. The remaining \$61.6 million includes the forgiveness of debt of former franchisees. As part of the settlement, Snap-on also agreed to change its business practices, including its franchise distribution model. Snap-on will reduce the required investment for initial inventory and improve training for new franchisees.

Source: *Asbury Park Press*

#### **JUDGE RULES FOR MICROSOFT ON ISSUE RELATING TO DAMAGES**

A state court judge in Iowa has limited the potential damages in a class action lawsuit that claims Microsoft overcharged Iowa customers millions of dollars for its software. Microsoft had objected to an adjustment of the estimated \$329 million consumers claimed they were overcharged for Microsoft products between May 1994 and June 2006. Experts for the plaintiffs had raised that amount to \$452 million to adjust for present value. But the judge ruled in favor of Microsoft, saying that, under Iowa law, there can be no adjustment for the damages.

The lawsuit, filed in 2000, is one of several filed across the country against Microsoft alleging that the company overcharged for its products. The Iowa

trial is expected to last for about six months. There is also a class action case pending in Mississippi. All of the other cases in 30 states, which total about 200, have either been dismissed or settled. Under the court’s ruling, the plaintiffs in the Iowa case will be able to introduce evidence of allegedly unethical business practices.

Source: *Des Moines Register*

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

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#### **STATE OF OHIO REACHES SETTLEMENT WITH ZURICH**

The State of Ohio has reached a settlement with Zurich American Insurance Co., resolving allegations that the company conspired with other insurers and insurance broker Marsh & McLennan to eliminate competition, mislead customers and inflate premiums paid for commercial casualty insurance policies in Ohio, all violations of Ohio’s antitrust and insurance laws. As a part of the settlement, Zurich has agreed to pay a total of \$7 million in civil penalties and to repay fees and expenses incurred by the State. The company also agreed to adopt comprehensive business reforms and cooperate with the state’s continuing investigation of the conspiracy.

In connection with the resolution of other investigations and a class action lawsuit now awaiting approval, Zurich would pay nearly 79,000 of its business and government policyholders in Ohio their proportionate share from nationwide settlement funds exceeding \$209 million. An investigation had been started in October 2004 of allegations that Zurich and other insurers participated in a market allocation scheme with Marsh & McLennan, dividing commercial customers among themselves by agreeing not to compete with each other for those customers.

Insurers participating in the scheme submitted fictitious and artificially high premium quotes designed to deceive the customer into believing that the

winning quote was the best available premium as determined by a competitive process. Such agreements among competitors to divide markets or customers violate an antitrust law in Ohio called the Valentine Act. The use of misleading, unfair or deceptive practices by brokers or insurers to manipulate insurance markets also violates state insurance laws enforced by the Department of Insurance.

The settlement agreement prohibits Zurich from providing false quotes and from entering into so-called "pay-to-play" arrangements under which insurers compensate brokers for being included on a list of companies from which the brokers solicit bids or quotes. In addition, Zurich must institute business reforms that result in disclosure of information to consumers about the compensation it pays to insurance producers, including brokers. Zurich must also designate a compliance officer and create a compliance program to make sure it adheres to the terms of the agreement.

The lines of insurance affected by the alleged conspiracy are purchased primarily by business and government entities and include umbrella, excess casualty, directors & officers, errors, & omissions and commercial auto. Personal lines of insurance, such as homeowner, personal auto, life, or health were not involved in the settlement.

Source: *Insurance Journal*

### **EARNINGS FOR INSURANCE COMPANIES ARE REACHING RECORD LEVELS**

Even with all the "crying wolf" by the insurance industry, and with more demands for restrictions against lawsuits, by company executives, it now appears that insurance companies in the U.S. will have record profits in 2006. Industry experts are estimating that profits may reach as much as \$60 billion. It's reported that insurers had high profits on lines of coverage such as automobile insurance, workers compensation, and general liability. Even with Katrina and other storms, the insurers ended up with a profit of \$43 billion for 2005 because of exceptionally good

results on investments, declining claims on policies on homes away from the coasts and profits on other lines of coverage. It now appears that 2006 will be much better.

For example, Northbrook, Illinois-based Allstate Corp., the second-largest U.S. personal-lines insurer behind State Farm, has reported a \$1.16 billion third-quarter profit. Allstate's revenue for the quarter was \$8.74 billion. The full year earnings will be very good. As we all know, homeowners and businesses along the Gulf and Atlantic Coasts have been hit with much higher insurance costs after the barrage of hurricanes. Interestingly, these folks won't get any relief on premiums as a result of the much quieter hurricane season.

Source: *New York Times*

### **AMCO TO PAY \$19.3 MILLION IN SETTLEMENT**

A Des Moines insurer and its parent company have agreed to pay about \$19.3 million to policyholders who claimed the companies failed to inform them adequately when changes to their credit scores led to higher rates on their auto insurance coverage. Suit had been filed in 2001 in a U.S. District Court in Portland, Oregon, against Nationwide Mutual Insurance Co. and AMCO Insurance Co., a unit of Nationwide. As many as 67,000 policyholders will receive checks from the settlement.

AMCO did not properly disclose to policyholders that their rates would be rising because of changes in the credit scores even though federal law requires such a notice. Similar lawsuits against other national auto insurers are pending around the country. Tens of millions of policyholders are involved in those cases. Most insurers in the U.S. have developed scores, based upon readily available credit information, that they say help them predict whether a policyholder will file a claim. While most states allow the practice, some of the insurance companies abuse the scoring practice. Insurers claim that scores are actuarially sound, but many consumer advocate groups contend that they discriminate against lower-income insur-

ance seekers. It's my belief that in many cases the companies use the scores to discriminate and therefore abuse the system.

Source: *Des Moines Register*

### **STATE FARM SETTLES CREDIT-SCORE LAWSUIT**

State Farm Insurance has agreed to pay \$1.2 million to settle a lawsuit over credit scores that were improperly used to set rates for Hawaii customers. The lawsuit resulted in premium refunds being paid to 1,396 people who are part of the class action lawsuit. Another 285 people with claims totaling \$174,494 were not located, but may still claim their settlement checks from State Farm. This lawsuit will result in a full refund to State Farm policy members whose credit reports were misused. According to the lawsuit, filed in 2001, State Farm improperly used credit scores to set insurance rates, which violates Hawaii law. Under Hawaii law an insurance company can't set rates for auto insurance using credit scores.

Source: *Pacific Business News*

### **LAWSUIT AGAINST INSURANCE COMPANIES SETTLED**

A class action settlement has been reached in a case against Nationwide Mutual Insurance Co., and its subsidiary, AMCO Insurance Co. brought by approximately 65,000 of their policyholders. It was alleged by the policyholders that Nationwide and AMCO charged them more for insurance based on information in their credit reports, but failed to provide adequate "adverse action" notices as required by and defined in the Fair Credit Reporting Act. The total amount of the settlement is \$19.5 million. Under the settlement, which has received court approval, the class members will receive checks of approximately \$200.

At the time the case was settled, it was on appeal to the Ninth Circuit Court of Appeals. Related cases against Farmers, Safeco, State Farm, GEICO and Hartford were also pending in the Ninth

Circuit at the time. The U.S. Supreme Court has accepted the Safeco and GEICO cases for consideration by the court during this term. Arguments in those cases will take place in January.

### **DISABILITY INSURER SETTLES STATE SUIT**

UnumProvident Corp., the nation's largest disability insurer, has settled a lawsuit filed by state regulators and has agreed to give prospective policyholders more information about commissions paid to brokers. The settlement ends an effort that began in 2004 to curtail the alleged steering of business by brokers to insurers who paid higher commissions. It's pretty basic that brokers, agents, and insurers owe their clients truth and honesty in their dealings.

California Insurance Commissioner John Garamendi filed the UnumProvident lawsuit a year ago as part of an action against four insurers, alleging that they steered kickbacks to San Diego-based broker Universal Life Resources Inc., which placed group life and disability insurance business with a number of large employers. The action, which paralleled a class action lawsuit by private lawyers, was part of a coordinated enforcement campaign with the New York Attorney General's office. A separate settlement was reached by New York with Chattanooga, Tennessee-based UnumProvident. That settlement includes \$15.5 million in restitution to policyholders and a \$1.9 million civil penalty. The last settlement in California contains no restitution or penalties. Instead, it requires the company to start proving customers with details of broker compensation and estimates of how the commissions affect premium prices.

Source: *Los Angeles Times*

### **PHILADELPHIA "LIFE SETTLEMENT" FIRM ACCUSED OF FRAUD**

One of the nation's leading "life settlement" companies - a business that helps people cash in life insurance policies before they die for a fraction of their

value—allegedly made "secret payments" to suppress competitive bids and charged high commissions that hurt the policy sellers. A lawsuit was filed against Coventry First LLC of Philadelphia, a leader in the growing \$6 billion industry, by New York Attorney General Eliot Spitzer in a New York state court. It is alleged in the suit that Coventry violated fraud and antitrust laws by making secret payments to competitors that stifled bidding and weren't disclosed to policy sellers.

It should be noted that the practice of paying policyholders for their life insurance is legal. In fact, this industry has tripled in size in the last three years. The companies pay for the policies, keep up premium payments, and then collect upon the sellers' deaths. It is alleged that Coventry brokers in more than 200 cases nationwide were paid undisclosed commissions that amounted to fifty (50%) percent or more of what the policy seller received.

Source: *Associated Press*

### **SOME AMERIQUEST VICTIMS STILL NEED HELP**

Earlier this year Ameriquest Mortgage settled with the States' Attorneys General for \$325 million. While this is a significant settlement, it is unlikely to provide meaningful compensation to many of Ameriquest's victims. It appears that an average refund will be between \$300 and \$600, which would compensate for minor wrongdoing, but would do little for those folks who have been through a foreclosure. This is causing many to elect to opt out of the States' settlement so they can pursue litigation individually or through a class action. The investigation by the states found a laundry list of wrongdoing by Ameriquest:

- Consumers were misled into adjustable rate mortgages;
- Good faith estimates were dramatically lower than actual mortgage payments;
- Prepayment penalties were not disclosed; and

- Even home appraisals were inflated leaving consumers unable to refinance later.

A person's decision as to whether to participate in the settlement should be one that is carefully considered and well thought out. Conventional wisdom would indicate that pursuing individual litigation would obtain greater relief for consumers who have suffered the most harm. But consumers who haven't suffered very much harm would be forgoing a sure settlement for a definite amount. Each person's situation should be considered before deciding whether to stay in or opt out of the settlement.

### **PROPOSED INSURANCE POOL FOR RESIDENTS OF BAYOU LA BATRE**

One year after Hurricane Katrina hit the waterfront town of Bayou La Batre, which is located in Mobile County, many houses are still empty and many downtown businesses remain vacant. Approximately 700 homes were damaged by Katrina with about 80 homes completely demolished. It's quite obvious that lots of folks need a home to come back to. I understand that the City of Bayou La Batre and Volunteers of America, a national nonprofit, are working to provide affordably priced homes on 41 acres north of downtown. However, I also understand that in order to qualify for this housing, applicants must first demonstrate their ability to obtain insurance. According to preliminary research, because very few applicants in the area can afford insurance, many aren't able to qualify for federal aid.

Some sort of relief for the people in Bayou La Batre is definitely needed. One possibility that has been discussed is for the City to create an insurance pool of Bayou La Batre residents, that will possibly be managed by the City's Community Development Board. The proposed program would be solely for residents who need to repair their homes but can't receive federal funds without insurance. This would allow residents to obtain insurance at much cheaper rates than if they were attempting to obtain insurance on an individual basis. The City's

housing authority would manage the pool by holding the members' deductibles and seeking reinsurance policies, which would allow the pool to protect itself against risk by allocating some of the risk to insurance companies.

Another possibility being discussed is to obtain coverage from the Alabama Insurance Underwriting Association, a local insurer of last resort, commonly called the "Beach Pool." Regardless of the route chosen, some sort of an insurance pool of residents is badly needed to reduce insurance premiums so that federal aid can be obtained by area residents to repair and rebuild their homes. The folks in the Bayou La Batre badly need help and hopefully that help is on the way. It's been a long time since Katrina hit! Chris Sanspree from our firm, who has been working with policyholders on their Katrina claims in Mobile County, has been most impressed with the attitude of the Katrina victims in the Bayou La Batre area.

#### **FEDERAL COURT SCHEDULES KATRINA LAWSUITS**

Trial dates in federal court have been set in 2007 for 145 Hurricane Katrina-related insurance cases. A similar number could be scheduled for sometime later in 2007 and in 2008. However, the trials, which had been scheduled for January, have been postponed. Overall, the U.S. District Court has 1,100 Katrina lawsuits filed and pending against insurance companies. This obviously puts a terrific strain on the court. U.S. District Judge L.T. Senter Jr. will be joined in hearing the cases by other visiting judges from the U.S. Court of Appeals for the Fifth Circuit, which includes Louisiana, Texas and Mississippi.

#### **AN IMPORTANT RULING IN KATRINA CASE**

A federal judge has entered a most important order in a number of Katrina insurance cases. U.S. District Judge Stanwood Duval Junior refused to throw out a lawsuit for damages from Hurricane Katrina's floods, saying the language excluding water damage from some

policies is ambiguous. The ruling covered several cases that had been consolidated. The decision was sent to the U.S. Court of Appeals for the Fifth Circuit for review.

Judge Duval ruled that, under Louisiana law and case law precedent, insurance companies must prove that a clause excluding coverage applies. The judge found that language used by most insurance companies doesn't differentiate between a flood caused by an act of God, such as excessive rainfall, and a flood caused by an act of man, which would include the levee breaches.

Although the court's ruling covers several cases it hasn't been certified as a class-action suit. A decision on that issue probably won't come until after the appellate court rules. Obviously, this is a most important ruling which could affect all persons whose homes sustained storm-related water damage. Hopefully, the Fifth Circuit will uphold the lower court's order and do so quickly.

Source: *Associated Press*

## **XII. PREMISES LIABILITY UPDATE**

#### **TWO KILLED IN EXPLOSION AT ARKANSAS ALUMINUM RECYCLING PLANT**

There has been a number of incidents over the past several weeks involving explosions at industrial plants. One such incident occurred at Arkansas Aluminum Alloys, which is located in Texas, in an October 31st. An explosion at the aluminum recycling plant killed two people and injured a third. The explosion occurred in the early morning hours in a production area at the plant where scrap aluminum is melted down for recycling. At the time of the explosion, the employees were working with containers of aluminum on conveyor belts when the accident occurred. Arkansas Aluminum Alloys uses furnaces and casting equipment to recycle scrap aluminum. At press time we didn't know the cause of the explosion.

Source: *Houston Chronicle*

#### **LEAD POISONING LAWSUIT CONTINUES**

A class action lawsuit over lead paint poisoning is still pending in California against the country's largest paint companies and has taken on new life. The suit alleges that several manufacturers and the Lead Industries Association promoted the sale of lead-based paint for decades while disregarding the health risks to children. The suit, which includes a number of California cities and counties as plaintiffs, alleges a public nuisance, liability, fraud and negligence. It demands that the companies remove paint from buildings and pay restitution.

The lawsuit had been filed several years ago and was dismissed in 2003 by the trial judge. But a March ruling in the California Sixth District Court of Appeal reinstated it. Defendants in the suit are Atlantic Richfield Co. (Arco), NL Industries, American Cyanamid, ConAgra Grocery Products, E.I. du Pont de Nemours & Co. (DuPont), Millennium Inorganic Chemicals, Sherwin-Williams and O'Brien.

About 310,000 children nationwide between the ages of 1 and 5 have lead levels greater than 10 micrograms, according to the Centers for Disease Control and Prevention. As we all know now, lead poisoning in children can cause learning disabilities and behavioral problems. At very high levels, it can cause kidney damage, seizures, coma or death. The greatest risk is to children younger than 2 years of age. The central nervous system and the ability for the brain to develop are impacted. Clearly, the health and safety problems caused by lead used in paint are most serious.

Source: *San Jose Mercury News*

#### **THE FEDERAL GOVERNMENT SHOULD MANDATE SPRINKLER SYSTEMS**

The federal government should require all nursing homes in the U.S. to install sprinkler systems. It's very clear that this would greatly enhance fire safety in the homes. However, a rule proposed by the Centers for Medicare and Medicaid Services would end an exemption in existing law that mandates sprinklers for new nursing homes,

but not older facilities. The exemption has left about one in five facilities nationwide without full sprinkler coverage, according to federal data. This would exclude about 3,500 facilities from the rule.

In my opinion, a universal sprinkler requirement should have already been in place. Since 2003, patient advocacy groups and fire officials, including the National Association of State Fire Marshals, have been calling for sprinklers in nursing homes. In 2003, 31 patients died in two fires at nursing homes without sprinklers in Hartford, Connecticut, and Nashville, Tennessee. Since that time, at least a dozen other patients have died in nursing home fires around the country, according to a USA TODAY analysis of federal statistics.

In an investigation last year, the USA Today reported that about 2,300 fires are reported in nursing homes annually. Of the 18 worst nursing home fires since 1970, every one happened in a facility that lacked sprinklers in patient rooms and corridors, the national newspaper found. Those fires killed more than 200 patients. Leslie Norwalk, acting administrator for the Centers for Medicare and Medicaid Services, observed:

*Sprinkler systems are integral to increasing fire safety in nursing homes.*

Medicare and Medicaid pay \$70 billion annually for nursing home care. The proposed rule would cover all nursing homes that accept Medicare and Medicaid, or nearly ninety (90%) percent of facilities. The centers will take public comment before implementing the rule, which as proposed, could take effect as early as 2008. It would be phased in so older nursing homes would have 3 to 10 years to comply. While the rule is good, it's something that should have been done 30 years ago. Janet Wells, policy director for the National Citizens' Coalition for Nursing Home Reform, told USA Today that congressional studies first recognized the risks of not having sprinklers in nursing homes in the mid-1970s. She stated further:

*The USA Today stories really exposed the problem to a wider audience and put a lot of pressure on regulators.*

Previous efforts to require sprinklers have been consistently blocked by the nursing home industry. Congress has considered bills to help facilities pay the costs of installing in sprinklers, but so far none passed. The 2003 fires brought to the attention of the public the risks at nursing homes without sprinklers. Collaboration between the industry, fire safety groups and patient advocates—while long overdue—to put a regulation in place is good news. Fire prevention should be a top priority for all nursing home owners. USA Today is to be commended for making safety in nursing homes a top priority in this country.

Source: USA Today

### XIII. WORKPLACE HAZARDS

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#### **COST-CUTTING LED TO BLAST AT BP PLANT**

It has now been established that BP PLC's cost-cutting efforts contributed to a Texas refinery explosion that killed 15 workers and injured 180 others last year found that The Chemical Safety Board. BP senior management knew of "significant safety problems" at the Texas plant and 34 other BP facilities months or years before the explosion, but that "unsafe and antiquated equipment designs were left in place, and unacceptable deficiencies in preventative maintenance were tolerated." The incident has created major legal problems for the London oil company and justifiably so.

BP has now settled with the families of all of the workers killed in the Texas City, Texas, incident and with hundreds more who were injured. There are still some injury cases that haven't been settled and are still pending, but it's expected that those will settle soon. The Justice Department had been asking for documents for its own investigation and

it verifies what had been alleged by the victims. Now, BP must do everything necessary to change its priorities and put safety at the top for a change.

A look at how BP had been operating will let you know how truly bad its conduct was. BP implemented a twenty-five (25%) percent cut on fixed costs from 1998 to 2000 that adversely impacted maintenance expenditures and infrastructure at the refinery. Maintenance spending had declined throughout the 1990s, when the refinery belonged to Amoco Corp. Once Amoco merged with BP, further cuts were imposed. The report stated that at an aging facility like Texas City, "it is not responsible to cut budgets related to safety and maintenance without thoroughly examining the impact on the risk of a catastrophic accident." In the 30 years before the explosion, a worker had died in an accident at the Texas City refinery on average of once every 16 months. Don Holmstrom, the CSB's supervisory investigator, said:

*BP's safety initiatives had focused largely on improving personnel safety—such as slips, trips and falls—rather than management systems, equipment design, and preventative maintenance programs to help prevent the growing risk of major process accidents.*

The CSB also said that the training staff at the refinery was cut to eight in 2004 from 30 in 1997 and that the training budget was cut in half, that a 2003 BP audit called the Texas City infrastructure "poor" and cited a "checkbook mentality," that pre-explosion internal reports cited workers who said safety complaints were not heeded, and that a 2002 plan to eliminate a unit (known as a blowdown drum) was never implemented and that the unit exploded in 2005.

BP says it will now eliminate blowdown drum units such as the one in Texas City from all its refineries by 2008. The company has also moved more than 200 trailers that are used to house workers away from refinery processing equipment. It will spend more than \$1 billion to refurbish the Texas

City refinery over the next five years. The Texas City refinery explosion was the worst industrial accident in the United States in more than a decade. Unfortunately, BP's safety problems aren't confined to its Texas facility.

Source: *Washington Post*

### **A MOST INTERESTING TWIST TO THE LAST OF THE BP SETTLEMENTS**

The last settlement to be reached by BP was with the daughter of two plant workers who were killed in the explosion. That lawsuit was settled for an undisclosed amount of cash to the plaintiff and an additional \$32 million in donations to health care, training, and safety education. Eva Rowe's parents, Linda and James Rowe, were among the workers who were killed in the explosion and fire. As part of the Rowe settlement, \$1 million will be donated to the cancer center at the St. Jude's Children's Research Hospital in Tennessee in memory of Ms. Rowe's parents. Texas A&M University and the University of Texas will receive \$12.5 million each in the names of the 15 workers who died during the oil plant fire, while the College of the Mainland's safety and training program will receive \$5 million in the names of the deceased.

Source: *Houston Chronicle*

### **BP SETTLES WITH FIRED REFINERY WORKERS**

There was another unusual development in the BP settlements. Six former BP workers, who were fired shortly after the fatal blast at the refinery, have settled their libel suits against the company. BP settled the cases with the workers for confidential amounts. The workers, who were operators and supervisors, alleged that they were defamed when BP placed most of the blame for the blast on them during a news conference after the incident occurred.

All but one of the employees were part of the team that was restarting a unit after a month-long outage when it exploded. The other employee had worked on the unit the night before and had initiated some of the start-up steps.

BP had placed the blame on these six employees at a news conference shortly after the blast. Later BP retracted that statement. It finally acknowledged that BP management had become complacent about safety. That was a major understatement based on all that has been exposed concerning how BP operated the facility.

### **BP FACES MORE PROBLEMS IN INDIANA**

It appears that BP's safety-related problems are not over. Indiana workplace-safety regulators have proposed fining BP about \$384,000 for a series of violations at the company's Whiting, Indiana, refinery. This is the latest safety setback for the British oil giant at its U.S. facilities. In addition to the Texas safety issues, mentioned in this issue, there have also been safety problems at BP's facility in Toledo, Ohio. Inspectors for the Indiana Occupational Safety and Health Administration cited the company for 8 "serious" violations, ranging from inadequate safety documentation for workers to failing to test equipment such as fire hydrants. There were also 5 citations against BP for what the agency called "knowing" safety violations, which it deems more serious. These included failing to test critical equipment for mechanical integrity and not correcting problems with piping and relief-valve systems at the plant. When you consider that BP had profits of \$22.3 billion last year, having safety problems is inexcusable. Since the safety problems are evident in a number of separate facilities, it's obvious that this is a company-wide issue.

### **ASBESTOS/MESOTHELIOMA LAWSUITS SETTLED**

A Mississippi woman settled her asbestos case that had been filed against several Georgia-based companies. She blamed the companies for her deadly cancer that she alleged was caused by secondhand asbestos. For years, Patsy Jean Bodkin, who is 60 years old, washed her father's and brother's work clothes. The clothes, which were covered in asbestos dust, ultimately made her sick. Ms. Bodkin is now bedridden, relying on

oxygen and morphine and is confined to a nursing home in northern Mississippi. The case was settled by the parties just before the trial was set to begin and is confidential.

As we all know, it's common to see asbestos claims from the person who actually handles it at work. This case was different because the victim never worked directly in a job that put her in touch with asbestos. Ms. Bodkin, a retired cook, who was raised in a small home in rural Mississippi, became sick in 2003 and was having trouble breathing. Her doctors found a fluid buildup around her lungs and diagnosed her with malignant pleural mesothelioma, an aggressive type of cancer most often linked to asbestos exposure. There is no cure for this cancer and patients often die within 6 to 15 months.

Ms. Bodkin filed suit in Fulton County State Court in 2005 against several companies that made roofing, siding, joint compounds and insulation products used by her father and brother, who had a small home-building business in Corinth, Mississippi. Since she was a child, Ms. Bodkin had shaken the dust off their work clothes and laundered them. None of the companies warned consumers about the dangers of exposure to asbestos despite the industry's awareness of the potential harm as early as the 1960s. The settlement was with four companies, including Georgia-Pacific Corp. and two other companies that made joint compounds, Kelly-Moore Paint Co. Inc. and Bondex International Inc. A fourth company, Certainteed Corp., also agreed to settle out of court. The plaintiff was represented by Pat Keahey of Birmingham, Alabama. He did an outstanding job in this case.

Source: *Atlanta Journal Constitution*

### **JURY AWARDS \$3 MILLION IN FIRST U.S. TALC/ASBESTOS MESOTHELIOMA**

A New Jersey jury has returned a verdict of more than \$3 million in compensatory damages in a case involving the death of a potter. This is believed to be the first court award in the United States dealing with asbestos in industrial

talc. After a four-week trial, the jury rejected arguments by R.T. Vanderbilt that talc from its New York State mines contained fibers that may have looked similar to, but were not a lethal form of asbestos. Peter Stanley Hirsh, a potter, died from mesothelioma, an aggressive lung cancer associated with asbestos fibers. When asbestos fibers are inhaled, some reach the lung linings, which can damage the cells lining the lungs.

Mr. Hirsch's exposure to industrial talc occurred during the seven years the artist operated pottery studios in New Jersey. Industrial talc from Vanderbilt's New York State Mines was proved to contain lethal asbestos fibers. Not only must workers be protected from lung disease, end users and others who come into contact with the product must be warned properly of the carcinogenic fibers lurking in this dusty powder used in so many manufacturing applications. The industrial talc is used in plastics, rubber and ceramics. There are other cases pending against Vanderbilt by miners and others who have died.

R.T. Vanderbilt's Gouverneur Talc Company has two milling and several mining operations in New York State. Two different types of minerals are mined, including tremolitic talc, sold under the trade names NYTAL and CERAMITALC. The magnesium-silicate based NYTAL, which is used to make products such as wall tiles, dinnerware, sanitary ware and hobby ceramics was used by Mr. Hirsch in his pottery manufacturing.

The jury awarded \$1.4 million for pain and suffering, \$1.45 million for the decedent's loss of earnings, and \$500,000 for his widow's loss of companionship. The jury returned November 28th to consider punitive damages against industrial miner Vanderbilt and industrial talc distributor Hammill & Gillespie at press time that phase of the trial had not started.

Source: *Mineweb*

#### **JURY RETURNS VERDICT AGAINST RAP MAGAZINE**

A verdict was returned recently in a lawsuit filed against music magazine

The Source and two former co-owners. A federal jury in New York found that former Source editor and plaintiff Kimberly Osorio was fired in retaliation for complaining about the lewd work environment at the so-called bible of hip-hop. The jury returned a \$15.5 million verdict and found that Osorio had been defamed. However, the jury ruled in favor of the defendants on sexual harassment and discriminatory discharge claims. The jury believed the plaintiff's claims that she had been fired for making a good faith complaint.

The Source, Scott and Mays are each liable for \$4 million of the \$15.5 million the jury awarded in compensatory damages. Scott must also pay an additional \$3.5 million for defamation. Source Enterprises Inc., Source Entertainment Inc., Mays and Scott were accused of violating Title VII of the Voting Rights Act of 1964. The magazine's female employees were allegedly subjected to a "continuing pattern of sexual harassment" that included vulgar sexual comments and propositions, inappropriate touching, verbal abuse and threats of violence.

Sexual harassment was said to have been so pervasive at the Source that women were "forced to hide in their offices" and avoid walking through hallways to steer clear of harassment from Scott and other male employees. The defendants argued that a certain amount of "bawdiness" was to be expected at a magazine devoted to rap music and hip-hop culture. They claimed that Ms. Osorio's willing entry into that atmosphere undermined her harassment claim. Regardless of where folks work, all employees should be treated with respect and certainly not sexually harassed. It's good that the courts are open so that conduct of this sort can be dealt with.

Source: *Portfolio Media*

#### **OSHA PROPOSES \$112,000 IN FINES FOR TUSCALOOSA CONTRACTOR**

The federal government has proposed \$112,000 in fines for GILCO Contracting, which is located in Tuscaloosa, Alabama, after an employee was seri-

ously injured at the City's Cottondale Sewer Project. Roberto Sanchez, the Birmingham-area director for the Occupational Safety and Health Administration, reported:

*A worker was seriously injured because this employer ignored safe trenching practices and failing to use safety equipment available at the site.*

The incident referred to took place in April of this year. The worker, who was standing in a filled rock-box bucket, was being lowered into an excavation site when the soil under the equipment collapsed. The stones spilled and pinned the worker under the bucket in an 18-foot-deep trench. Fortunately, rescuers were able to rescue the employee, but unfortunately, he sustained a fractured leg and crushed arm that had to amputated. GILCO was cited for two willful violations totaling \$100,000 in fines for not providing a safe means for workers to enter excavations and not protecting employees from cave-ins. Other fines involved claims of insufficient training and a repeat citation about worksite hazards.

Source: *Associated Press*

#### **SETTLEMENT REACHED IN SEWAGE DEATHS**

The families of two men, who died after inhaling toxic fumes during a sewer repair project, have settled a lawsuit against a Missouri company and the City of Des Moines, Iowa. The two men worked for Insituform Technologies. They were overcome by hydrogen sulfide gas in July 2002 when working in a Des Moines sewer. The Iowa Supreme Court had ruled in September of this year that the City violated safety regulations by not informing the workers of proper safety precautions to take in the sewer.

Insituform, based in of Chesterfield, Mo., sent the two workers to Des Moines after the City contracted with the company to install a lining in underground sewer pipes to prevent further leaks into a nearby reservoir. The workers collapsed face down and drowned in sewage after inhaling the

gases. Five other workers also were overcome by the fumes as they entered the sewer in a failed rescue attempt. State officials filed a complaint against the City for violating occupational safety and health standards for confined space work. The Employment Appeal Board found that the City committed two serious violations. The Iowa Supreme Court upheld the ruling, saying:

*The City should have known that the employees of Insituform entered the sewer and when in the sewer, the workers were exposed to a substantial probability of death or serious physical harm.*

Since the full amount of this settlement will be paid by Insituform's insurance company, the city will not have to pay anything. I am reasonably sure there was some type indemnification agreement in place that protected the city.

Source: Associated Press

#### **WIDOW SUES KENTUCKY MINE OPERATORS**

The widow of a miner killed in the underground roof collapse that occurred at a southeastern Kentucky mine has filed a wrongful death lawsuit against the five Virginia companies that oversee the operation. The lawsuit, filed in federal court, alleges that the defendants were guilty of negligence in connection with the miner's August 2005 death at the Stillhouse Mine No. 1 near Cumberland, Kentucky. It's alleged further that Black Mountain Resources, Harlan Resources, Stillhouse Mining, Cumberland Land Corp., and Cumberland Resources Corp., failed to ensure the mine complied with federal and state safety laws and to train employees on placement of roof supports. The miner, who was a foreman, was allowed to work with his crew in a mine area where there was a crack in the roof.

Another miner was also killed in the collapse. The two deaths prompted \$360,000 in federal fines against Stillhouse Mining. They also focused attention on so-called retreat mining, a practice that has been blamed for the deaths of at least 17 coal miners in the

past seven years. The process requires the removal of coal pillars, which hold up the roof. In underground coal mining, crews first do what's called advance mining, digging into the mountain to remove coal. Coal pillars—25 to 100 feet across—are left in place, resulting in a network of tunnels. When companies have advanced as far as possible, they begin retreat mining, so named because the miners are working toward the outside of the mine. The process usually allows the companies to remove twenty (20%) percent or more of the remaining coal.

Source: Insurance Journal

#### **WORKER INJURED AT JINDAL STEEL IN BAYTOWN**

An employee at Jindal United Steel Corp., which is located outside Baytown, Texas, was struck in the back by a pipe moving down a conveyor. The employee, a maintenance technician, was injured while working on an out-of-service system at one of Jindal's specialty divisions, SAWPipes USA, Inc., just after midnight on a workday. While this incident may not sound too important, it does point out a larger problem at the facility. The company has had a number of safety problems over the years.

In part of the violations cited in 2002, OSHA reported SAWPipes USA Inc., had 67 willful violations for failing to properly document recordable injuries and illnesses—the largest case of record-keeping violations in a decade. OSHA had inspected the Baytown facility after receiving a complaint. The inspection was later expanded due to safety violations discovered during that initial inspection.

OSHA then cited the steel manufacturer for a total of 182 alleged violations, 126 of which were categorized as willful, at SAWPipes and two other Jindal operations at the Baytown complex. The complex, which boasts one of the widest mills in North America, produces hot-rolled plates and large diameter pipes. These products are sold to shipyards, oilfield fabricators, heavy equipment producers, and petrochemical companies. Hopefully,

this company will correct its safety problems and make the workplace safe for its employees.

Source: Houston Chronicle

#### **IBM SETTLES OVERTIME LAWSUIT FOR \$65 MILLION**

International Business Machines Corp. has settled a federal class-action lawsuit, agreeing to pay a total of \$65 million to 32,000 technology workers who claimed the company illegally withheld overtime pay. The suit was filed in U.S. District Court in San Francisco on behalf of three employees who said they were forced to work more than 40 hours per week and on weekends without additional compensation. The case involved workers classified as "Technical Services Professional and Information Technology Specialists." IBM considered them highly skilled professionals exempt from overtime laws detailed in the Fair Labor Standards Act and California labor laws.

According to the settlement, which will have to have court approval, the IBM workers may apply for additional pay based on a mutually agreed-upon formula. Individuals will be paid depending on their rank and number of hours worked. The lawsuit against IBM is one of several in the workaholic technology sector, where employees are often classified as overtime-exempt software designers with specialized degrees and skills. There have been other settlements involving Siebel Systems Inc. and Computer Sciences Corp.

Source: Associated Press

## **XIV. TRANSPORTATION**

#### **A NEW PUSH TO COMBAT DRUNK DRIVING IS NEEDED**

Now that the holiday season is well under way, Mothers Against Drunk Driving, the group that has led to the fight to combat drunk driving over the years, it has launched a new campaign. MADD wants to literally wipe out drunk

driving in this country. Each year, 13,000 people are killed in the U.S. by drunk drivers. That is a shocking statistic and is clear evidence of a continuing national problem. MADD is calling this new program "The Campaign to Eliminate Drunk Driving." It will have four components:

- tougher enforcement;
- better use of new technology;
- support for emerging technology; and
- grassroots mobilization.

There have been some new technological advances that hopefully will prove to be effective. MADD officials are excited about the new technology that keeps people from driving if they've had too much to drink. For example, there are 100,000 alcohol ignition locks currently in use. But, there were nearly 1.5 million drunk driving arrests last year. Hopefully, because of the campaign being pushed by MADD, the number of the devices in use in the next five years will increase to over 500,000. We all have a duty to get involved in the effort to get drunk drivers off the nation's highways. I recommend that you support the efforts of MADD and law enforcement agencies during the holidays and let that support carry over into the New Year.

Source: Associated Press

### **DRUNK DRIVER KILLS 5 INNOCENT PEOPLE**

Drinking and driving just don't mix. Eventually, that combination will result in a disaster that causes innocent lives to be lost. Recently, a pickup truck going the wrong way on a highway struck a minivan, killing five members of a family heading home from a soccer tournament. The pickup's driver, whose blood alcohol content was four times the State's legal limit, was also killed. The drunk driver, a 44-year-old man, was driving the wrong way on Interstate 25 near Santa Fe, New Mexico, on a Saturday night in November when his truck hit the minivan. Blood samples showed he had a blood-alcohol content of point thirty-two (0.32%) percent—four times

the limit for driving—and an open container of alcohol was found in his truck.

The five family members killed were a husband and wife along with their three daughters. A fourth daughter survived and was hospitalized with injuries. The drunk driver, who had a valid New Mexico license, had been convicted at least three times—in 1989, 1990 and 1991—of drunken driving in Colorado. This tragic occurrence is a prime example of why drunk drivers must be kept off our highways.

Source: Associated Press

### **TRAGIC CRASH REKINDLES DEBATE OVER SEAT BELTS ON BUSES**

The deadly bus crash in Huntsville, Alabama, last month resulting that resulted in four deaths, has raised once again the question whether seat belts should be required on Alabama school buses. The national debate over seat belts on buses has been held in states across the country for years. Several federal studies have found that seat belts are not needed in buses. The National Transportation Safety Board declared in 2002 that "compartmentalized" buses are safe in front and rear crashes because the high, cushioned seats are spaced closely together and designed to absorb energy during a crash.

The National Highway Traffic Safety Administration, according to a May 2006 summary "Seat Belts on School Buses," maintains that school buses of 10,000 pounds or more are heavier and distribute crash forces differently than passenger cars and light trucks. The NHTSA also maintains that school buses are about seven times safer than passenger cars or light trucks. The school bus occupant fatality rate is 0.2 fatalities per 100 million vehicle miles traveled while the fatality rate for cars and trucks is 1.44 fatalities per 100 million vehicle miles traveled.

School buses in Alabama convey about 357,700 students every day. In 2005, school buses in our state were involved in 401 wrecks, resulting in 162 injuries. There have been 14 deaths in school-bus related crashes over the past

five years, according to the Alabama Department of Public Safety.

Three states—New York, New Jersey and Florida—require buses to have seat belts, but only New Jersey and Florida require students to use them. Two Alabama legislators, who have been unsuccessful with previous attempts to require belts on school buses, say they plan to introduce similar bills in the next legislative session, in March. Senator Steve French, R-Mountain Brook, and state Rep. Howard Sanderford, R-Huntsville, want seat belts on Alabama school buses. The Legislative Fiscal Office in 2000 estimated that it would cost between \$16 million and \$20 million to retrofit buses for seat belts.

There are a number of safety experts who believe that seat belts are needed on school buses. The National Coalition for School Bus Safety has the installation of seat belts on buses as one of its missions. Coalition President Alan Ross observed:

*My organization has been advocating for improvements in school bus safety for the last 40 years. We're very unhappy with the current state of our children's safety when they're riding the yellow school bus.*

I believe seat belts could be effective in certain types of accidents involving school buses. The Huntsville incident might just have been one where belts would have prevented the deaths if in use. This was a tragic occurrence and it has again brought the seat belt issue to the attention of parents and others who are interested in safety.

A preliminary investigation into the crash indicates that a "faulty steering mechanism" on a passing car actually contributed to the accident. The problem is believed to have caused the driver of the 1990 Toyota Celica to lose control of his car and veer into the bus. The bus dragged along the concrete barrier on the Interstate ramp before plunging 30 feet off the overpass. It was reported that the bus driver was not belted and was ejected before the bus left the overpass. It could take up to a year for the NTSB to complete its inves-

tigation into what actually caused the accident.

Source: *Associated Press* and *The Huntsville Times*

### **A LOOK AT SCHOOL BUS INJURIES**

Since the Huntsville tragedy has received so much media attention, it might be good to take a look at the history of school bus injuries in this country. National data show school bus-related accidents send 17,000 U.S. children to emergency rooms each year, more than double the number in previous estimates that only included crashes. Nearly one-fourth of the accidents occur when children are boarding or leaving school buses, while crashes account for forty-two (42%) percent, according to this research. Slips and falls on buses, getting jostled when buses stop or turn suddenly, and injuries from children playing rough are among other ways children get hurt on school buses, the data found.

Injuries range from cuts and sprains to broken bones, but most are not life-threatening and don't require hospitalization. And while the numbers are higher than previously reported, they represent a small fraction of the 23.5 million children who travel on school buses nationwide each year. The results, according to the researchers, provide a strong argument for requiring safety belts on school buses. As expected, industry groups and the NHTSA say it is unnecessary. The NHTSA, as pointed out above, has taken the same stance. Safety belts, particularly lap-shoulder belts "could not only prevent injuries related to crashes," they could also keep children seated "so they're not falling out of their seats when buses make normal turns or brake," according to lead author Jennifer McGeehan, a researcher at Columbus Children's Hospital's Center for Injury Research and Policy in Columbus, Ohio. Dr. McGeehan says: "Our study shows that there needs to be continued vigilance on school bus safety." The study appeared in November's *Pediatrics* and it's worth reading.

The research, involving nonfatal injuries treated in emergency rooms, is based on 2001-2003 data from a surveil-

lance system operated by the U.S. Consumer Product Safety Commission. Some 51,100 children up to age 19 were injured during the study period, or about 17,000 annually, the researchers said. Data from NHTSA through 2005, show that about 8,000 children are injured each year in school bus crashes. But on average fewer than nine are killed — numbers that have remained stable for the last decade or so, according to the agency. The tally is based on police reports, and not all injuries resulted in emergency room treatment.

In a 2002 report to Congress, NHTSA recommended against lap-only belts in school buses because, according to the agency, they can be risky, especially in small children, by restraining them high on the abdomen, potentially causing internal injury in a crash. Five states — California, Florida, Louisiana, New Jersey and New York — and some districts have implemented varying safety belt requirements for school buses, according to the National Coalition for School Bus Safety, a nonprofit advocacy group. Robin Leeds of the National School Transportation Association, an industry group that represents school bus companies, made this comment:

*It's an expensive proposition to outfit school buses with lap-shoulder belts, not just because of the cost of the equipment but because it also reduces seating capacity.*

The American Academy of Pediatrics advocates having lap-shoulder belts on all new school buses. The Academy also supports having adult monitors on buses, according to Dr. Barbara Frankowski, a Vermont pediatrician and chair of academy's council on school health. When you get down to it, I suspect the school bus seat belt issue boils down to weighing the safety advantages against the costs involved.

Source: *Associated Press*

### **NTSB URGES CELL PHONE BAN FOR BUS DRIVERS**

The National Transportation Safety Board is recommending that the federal and state governments forbid motor

coach and school bus drivers from using cell phones while driving, except in emergencies. The recommendation came in a report by the NTSB relating to a non-fatal bus accident that occurred in Alexandria, Virginia, in November 2004. A tour bus of Catholic school students from Massachusetts crashed into a low, stone overpass along the highway, crushing the roof and injuring 11 teenagers on a class trip.

It was reported by the NTSB that the bus driver was talking on a hands-free cell phone at the time of the accident. The driver told investigators that he did not see the signs on the roadway that alert motorists to the height of the overpass. NTSB Chairman Mark V. Rosenker made this statement relating to incidents of this sort:

*Professional drivers who have dozens of passengers' lives entrusted to them should devote their full attention to their task. What we saw in this accident is appalling and could have resulted in great tragedy.*

The NTSB concluded that "the driver's cognitive distraction resulting from his use of a hands-free cell phone caused the accident." But the low clearance of the overpass, which does not meet current standards, also contributed to the accident, according to the NTSB. As you may already know, the NTSB investigates transportation accidents and makes recommendations on how to prevent them. This recommendation relating to cell phone use is a good one.

Source: *Washington Post*

### **\$10 MILLION SETTLEMENT FOR WOMAN HIT BY BUS**

You normally wouldn't expect a large bus to crash into a bus terminal. But that's exactly what happened in New York. Unfortunately, that incident had tragic consequences. A woman whose legs were severed three years ago when a bus crashed into the bench she was sitting on has settled her lawsuit. Under the settlement, Youlanda Scott, who was 48-years-old at the time of the February 2003 accident, will receive \$5 million

from Cummins Engine Co., which manufactured parts of the bus that hit her; \$4.5 million from the Metropolitan Transportation Authority; and \$500,000 from Nassau County. Scott was one of six people injured when a Long Island Bus crashed into the MTA bus terminal.

The driver lost control of the bus apparently because of a mechanical problem with the brakes. Despite pressing the brakes several times, the driver was unable to stop the bus and it plowed into Ms. Scott, who was sitting on a bench just outside the terminal's waiting area, pushing her through the glass wall. The bus was moving at about 5 mph at the time of impact. Large pieces of glass and metal flew through the air when the bus crashed into the terminal. Ms. Scott, who was left lying beneath metal debris with both legs severed, must now face life as a double-amputee. The fact that she even survived is a miracle.

Source: *Newsday*

#### **FAA FINDS MORE ERRORS ON RUNWAYS**

It has been revealed that using the wrong runway, the error that led to the August crash at a Kentucky airport that killed 49 people, is fairly common. A top official of the Federal Aviation Administration made that disturbing observation recently. A search of 10 years of records by the FAA found 117 other cases in which the crew was confused. There have been at least two other incidents that occurred recently and are not included in the report.

In one of the incidents, a Continental Airlines Boeing 757 in Newark mistook a taxiway for the parallel runway and landed on it. The taxiway was empty, which is not always the case, and fortunately no damage resulted. A few days later, at the Seattle-Tacoma International Airport, an Alaska Airlines 737 took off on the wrong runway. Safety officials are now investigating whether the problem was confusion between the tower and the cockpit about which runway had been assigned.

In the Kentucky crash, which occurred on August 29th, a single taxiway led to both runways at the Lex-

ington airport, but one runway was long enough for propeller traffic only and not for regional jets like the plane that crashed. According to aviation experts, to end up on the wrong runway, the crew would have had to ignore the heading indicator in the cockpit. That indicator shows, in compass degrees, which way the plane is pointed. As you may know, runways are named for their compass orientation.

For your information, it's not easy to find prior incidents of runway confusion. To find the 117 cases, the FAA had to go through more than five million records, and it knew what it was looking for. The Lexington crash fits loosely into the category of runway safety, already a subject of grave concern in the industry. The National Transportation Safety Board lists protection against "runway incursion" as one of the "most wanted" safety improvements. The NTSB has declared unacceptable the FAA's responses to its previous recommendations on that subject.

Runway incursion occurs when a plane, a vehicle, or a pedestrian strays onto a runway that has been assigned for use by another plane. The Lexington accident involved a single plane, so it did not strictly meet that definition. The Lexington accident and the incidents in Newark and Seattle, both now under investigation by the board, were "runway incursion-type things," according to John Clark, the chief of aviation safety for the Board. Mr. Clark, who gives a less formal definition of runway incursion, says it's when a pilot "was doing something he was not supposed to be doing" on the runway. That makes sense to me. Obviously, the problem becomes more serious as the number of takeoffs and landings increases such as would be the case at airports in large U.S. cities.

Hardware already on airliners could be used to make it harder for crews to pick the wrong runway, but this has been used only on wide-body jets. Airliners presently carry a system that uses global positioning to warn pilots if they are too close to the ground or heading into a mountain. The leading manufacturer of those units, Honeywell, is trying to sell a software upgrade that makes

the system announce, in a mechanical voice, which runway the plane is on. The system knows the type of plane on which it is installed, and its approximate required length for takeoff. If the runway is too short, as it was in Lexington, the system makes announcements such as "3,000 feet remaining," as a warning. But the system costs about \$18,000 per plane, and the FAA does not require it.

Source: *New York Times*

#### **HALF OF U.S. AIRPORTS LACK RUNWAY SAFETY ZONE**

The Federal Aviation Administration says that airports need an overrun area at the end of runways. More than half of U.S. commercial airports, however, don't have a 1,000-foot margin at the end of a runway—an overrun area that is needed as a safety zone. Some of the busiest airports at in the United States—including Los Angeles International Airport, Chicago's O'Hare International Airport, and Hartsfield-Jackson Atlanta International Airport—have more than one runway that does not meet safety standards, according to statistics supplied by the FAA. That should cause all persons who fly commercially a great deal of concern.

The FAA says it is diligently upgrading the runways and that all of them are expected to meet the standard by 2015, when they are legally required to do so. An FAA spokesperson says that seventy (70%) percent of commercial service runways have a runway safety area within ninety (90%) percent of the standard. It was reported that 236 runways were improved as of September 22nd. At 325 airports — more than half of the 573 commercial airports in the United States — at least one runway lacks the 1,000-foot safety zone, according to the FAA's own figures. Presently, 507 commercial runways — almost half — don't meet the safety standard. Deadly airplane crashes can happen on runways because they are too short, improperly lit, poorly designed, or lack safety equipment. There is very little margin for error at a busy airport. A minor procedural error by a pilot or an air traffic controller can

turn tragic if a vehicle or another airplane happens to be in the way.

Within the past year, two fatal commercial airline crashes involved runways. We mentioned the Kentucky crash where 49 people were killed when a Comair regional jet took off on the wrong runway. In December of last year, a 6-year-old boy in a car was killed when a Southwest Airlines 737 overran a runway at Chicago's Midway Airport and plowed into the street. There have been 45 fatal crashes reported due to aircraft overrunning runways since 1983. Part of the problem is that some airports were built in congested urban areas and have no room to lengthen their runways. One solution is to install soft concrete beds at the end of a runway. These barriers—called Engineered Material Arresting Systems, or EMAS—slow an airplane that rolls off the end of a runway.

Source: *Insurance Journal*

#### **LAWSUIT FILED AGAINST AIRBUS FOR JULY AIR CRASH**

A lawsuit has been filed in the United States against Airbus Leasing II Inc. on behalf of victims of the S7 Airlines crash on July 9th in which 159 passengers were injured or killed. The Siberian-operated Airbus A310-324, operated by S7 Airlines and traveling from Moscow to Irkutsk, crashed into a building after landing and burst into flames killing 129 of the aircraft's passengers and crew. The suit was filed in the United States District Court of the Southern District of New York. Additional plaintiffs are expected to join the action. I'm sure some of our readers wonder how this case could be filed in a U.S. Court.

Airbus Leasing—an affiliate of aircraft manufacturer Airbus, a unit of European Aeronautic Defense & Space Co.—has operations in Virginia, which allows the plaintiffs to file suit in the United States. Airbus Leasing owns the aircraft and as a result is legally responsible for the negligence of its operation. The lawsuit contends that S7 Airlines, which formerly was known as Sibir Airlines, in addition to other safety problems, failed to carry out several safety procedures

and knowingly allowed the plane to fly with an inoperative thrust reverser.

The airline has about \$300 million of insurance coverage. After the crash, S7 revealed that all passengers were insured, under a Russian law that makes insurance mandatory, by UralSib Insurance Group, a unit of Russian financial group UralSib Financial Corp. In addition, according to S7, provided by Ingosstrakh Insurance Co., the airline with third-party passenger, freight, baggage, and civil liability insurance. Insurance coverage for the plane was provided by Lloyd's of London and was spread in the Lloyd's and London company market.

Source: *Insurance Journal*

#### **NORFOLK SOUTHERN AGREES ON SETTLEMENT OF CLASS ACTION LAWSUIT**

Freight railroad system operator Norfolk Southern Corp. has agreed in principle on a class action suit settlement related to a train derailment in 2005. Under the settlement, compensation will be offered for personal injury claims associated with the railroad's 2005 derailment at Graniteville, South Carolina. The settlement will provide varying levels of compensation for people who were injured and who received medical treatment or were hospitalized as a result of the derailment and subsequent release of chlorine.

The agreement covers claims that were not part of a previous class action settlement approved last year for property damage, evacuation expenses and losses, and minor personal injuries. The settlement was presented for preliminary court approval in early November. Two freight trains collided in Graniteville, South Carolina, in the early morning hours of January 6, 2005, releasing a cloud of chlorine gas. Several people were killed, about 250 hurt, and some 5,400 people were evacuated.

Source: *Associated Press*

#### **A FIERY TANKER CRASH IN FLORIDA KILLS SEVERAL**

A tractor-trailer carrying a nearly full

load of 9,000 gallons of gasoline crashed into another vehicle on a Florida Interstate highway in February of 2005, resulting in the tragic loss of several lives. The tanker had cut in front of a car on a ramp that had an extremely sharp turn and a 35 mph posted speed limit. The tanker was traveling at least 60 mph, according to eye witnesses. The tanker, owned by Floval Oil Corp. of Miami, skidded out of control, flipped onto a 2001 Mercury Sable station wagon carrying four people and exploded into flames. Three people burned to death in the station wagon. The fourth passenger in the case jumped out, engulfed in flames. The man stumbled into a nearby pond, where he drowned.

Lawsuits have been filed recently by family members of the persons killed. It is contended that speed and reckless driving weren't the only factors in this accident. It is contended by the families that Floval forced the driver to drive an illegally high number of hours and make far too many stops during his nightly runs. It is said that the driver—who had been cited for driving violations at least 10 times previously—operated the truck “with reckless disregard for human life.” The driver had worked 128 hours without a day off from January 31, 2005, until the crash happened on February 11<sup>th</sup>, 2005. On average, that's more than 10 hours a day. Federal safety rules allow truckers who haul hazardous cargo to drive a maximum of 60 hours over a seven-day period - a limit exceeded by this driver after only four days that week. The driver had only met the legal driving limit for nine of the 42 weeks he had worked for Floval, working more than 80 hours during nine other weeks and more than 90 hours one week. He also had to often squeeze eight or nine stops during his nightly runs, stretching over 200 miles or more.

After the crash, the state Department of Transportation cited Floval with 483 safety rules violations, most of them for failure to require its drivers to keep records of their on-duty hours. The National Transportation Safety Board investigated the accident, but has not

yet released its report. As we have reported previously, driver fatigue is frequently cited as a key cause of crashes involving large trucks. The U.S. Department of Transportation, in a study released in March, found that fatigue was an “associated factor” in crashes involving 5,000 large trucks from April 2001 to December 2003.

Source: Associated Press

## XV. ARBITRATION UPDATE

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### **AN OPPORTUNITY FOR RELIEF IN CONGRESS**

Mandatory, binding arbitration is like a cancer growing at an uncontrolled rate, affecting all consumers in some manner. There is a definite need to change the Federal Arbitration Act to exclude mandatory, binding arbitration from all consumer contracts. This can be done by a simple act of Congress. Hopefully, under the new Democrat leadership, there will be legislation enacted next year dealing with the issue of consumer arbitration. All it will take is for Congress to pass a bill to amend the FAA. If you agree, contact your U.S. Senators and members of the House of Representatives. Let them know a change in the law is needed and that you support it. Ask for their support.

### **NOTHING GOOD TO REPORT IN ALABAMA**

In Alabama there is nothing of significance to report relating to arbitration. Nothing has changed in the Alabama Supreme Court on the issue. It's obvious that people don't like arbitration, but it's also apparently that the politicians don't seem to care. That's the sad state of affairs in our state and as a result, it appears we must look to Washington for relief.

## XVI. HEALTHCARE ISSUES

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### **AMERICAN RED CROSS IS FINED OVER BLOOD SAFETY**

I was shocked to learn that the American Red Cross is facing another heavy fine over blood-safety violations. This brings penalties levied against the organization to more than \$15 million over the past few years. The Food and Drug Administration fined the organization \$5.7 million in November for continuing to violate blood-safety rules and failure to comply with a 2003 agreement aimed at correcting the unsafe practices. The Red Cross was given a mid-December deadline to produce a report on how it intended to comply with FDA requirements.

Obviously, violation of blood-safety laws is a most serious matter. It's troubling that the terms of the 2003 consent decree are apparently being ignored by the Red Cross. That settlement resolved charges that the Red Cross had committed “persistent and serious violations” of federal blood safety rules dating back 17 years. The Red Cross provides more than forty (40%) percent of the nation's blood supply, selling blood products to health facilities. This organization needs to clean up its act and do it promptly.

Source: Associated Press

### **MERCK COMES WITH A NEW PAINKILLER TO REPLACE VIOXX**

Merck & Co. is coming with a new painkiller to replace the loss of Vioxx. However, the first published studies of Arcoxia are getting mixed reviews from the medical community. Some say the results don't make a case for the medication's approval. The critics cite, not just Arcoxia's side effects, but also that Merck tested it against diclofenac, an older painkiller known to raise heart risks. A fairer comparison would have been to a medicine that does not do that, such as naproxen. Dr. Steven Nissen, a Cleveland Clinic cardiologist who formerly headed the Food and

Drug Administration's cardiac drug advisory panel, observed:

*The development program for Arcoxia is fatally flawed. My advice to the FDA is that they should not approve this drug.*

Dr. David Graham, an FDA drug safety expert who has criticized his agency's handling of Vioxx, agrees with Dr. Nissen. Relating to the new drug, Dr. Graham stated:

*It's my own suspicion that this study was intentionally designed to minimize the possibility of their having a repeat of what happened with VIGOR, the study that revealed Vioxx's heart risks.*

The new research “raises red flags,” according to Dr. Graham. It's his opinion that the drug should not be approved, since it suffers from the same problems as Vioxx. Hopefully, the FDA will do a much better job on this new drug. It should since it learned a bitter lesson from its handling of Vioxx.

### **SILICONE GEL BREAST IMPLANTS ARE BACK ON MARKET**

Silicone Gel Breast Implants have been approved by the FDA and will be made available again in the U.S. Many health and safety experts are questioning this controversial action by the FDA. The following is a statement on the subject by Dr. Sidney Wolfe, Director of Public Citizen's Health Research Group, which is highly critical of the FDA:

*Public Citizen has opposed the use of silicone gel breast implants since the fall of 1988, when we petitioned the Food and Drug Administration (FDA) to ban them after receiving numerous documents from FDA scientists concerned about their safety. In terms of adverse safety and health information known at the time of approval—such as high rates of rupture, the need for repeat surgery and clear evidence of lymph node infiltration and damage by leaked silicone—sili-*

*cone gel breast implants are the most defective medical device ever approved by the FDA. The approval makes a mockery of the legal standard that requires "reasonable assurance of safety."*

*It is a terrible reminder of the double standard for women versus men that the FDA has not approved silicone gel testicular implants because of the inadequacy of clinical trials on these devices. (Saline breast implants and testicular implants have been approved by the FDA.) This approval of such a defective medical device raises again the larger issue of the poor leadership and dangerously poor performance of the FDA's Center for Devices and Radiological Health (CDRH). Recent examples of this include the large number of defibrillator and pacemaker recalls, primarily the fault of manufacturers such as Guidant but abetted by the lack of FDA promptness, and the approval of the vagus nerve stimulator for depression despite the opposition of dozens of FDA staffers because it lacked evidence of effectiveness. We will certainly be urging thorough congressional investigations and hearings on this lack of assertion of regulatory authority by the FDA's CDRH.*

This response by Dr. Wolfe is typical of how many safety experts and consumer groups feel about the implants. Frankly, I was greatly surprised that the FDA took this action. Hopefully, it won't prove to be a tragic mistake.

Source: Public Citizen

#### **BREAST IMPLANT MANUFACTURER WITHHOLDS SAFETY DATA FROM FDA**

It should be noted that Public Citizen had called for a criminal investigation several weeks back into Mentor Corporation's apparent failure to send the Food and Drug Administration data showing safety problems with their silicone gel implants. The consumer advocacy organization had asked the FDA to

wait until it reviewed all available safety data before deciding whether to approve the implants. Obviously, their request fell on deaf ears at the FDA.

On June 22<sup>nd</sup>, a former scientist from Mentor—one of the two companies seeking FDA approval of silicone gel breast implants—sent a letter to the FDA accusing the company of withholding from the FDA a variety of important new safety information. Before sending the letter, the scientist had raised all of the serious concerns documented in the letter within the company, urging Mentor to submit the data. The company refused and fired the scientist. It doesn't appear that the FDA has any intention of correcting the problem. Dr. Sidney Wolfe, who sent the letter to the FDA calling for an investigation, observed:

*Unless the FDA opens a criminal investigation into Mentor's failure to submit the studies, it will only encourage Mentor and other device manufacturers to selectively send the agency only those studies that put their products in the most favorable light.*

The former Mentor scientist told the FDA that data about the diffusion of chemicals from the implant into the body were invalid and had been fraudulently represented. Other data he referred to understated the magnitude of weakening of the implant shell after implantation, which is relevant to its rupture. Still other data showed that as the distance from the front of the implant to the back increased, the estimated lifetime of the device decreased. How the FDA could have put the implants back on the market—with this sort of information available—is beyond me.

Source: Public Citizen

#### **FLU DRUG TAMIFLU MAY CAUSE ODD BEHAVIOR IN CHILDREN**

Responding to reports from overseas, U.S. health officials have urged doctors and parents to watch for signs of bizarre behavior in children taking the flu drug Tamiflu. Officials at the U.S. Food and

Drug Administration don't know if the more than 100 new cases of strange behavior, including three deaths from falls, are tied to the drug, to the flu itself, or a combination of both. The FDA is considering changes to the Tamiflu label that may recommend that all patients, especially children, be closely monitored while on the drug.

The agency acknowledged that stopping Tamiflu treatment might harm flu patients if the virus is the underlying cause of delirium, hallucinations and other abnormal behavior that make up the symptoms observed in children abroad. Many of the pediatric problems have been reported in Japan, where the number of Tamiflu prescriptions is about 10 times greater than in the United States. Although severe cases of flu have been known to produce such side effects, the number and type of cases, plus comments from doctors who believe the abnormal behavior is associated with the drug, are keeping the FDA from ruling out Tamiflu as the cause.

Source: HealthDay

#### **THE YOUTH OF AMERICA MAY BE FACING THE RISK OF HEARING LOSS**

I have been greatly concerned that many of our young people, and even some older folks, will suffer serious hearing problems caused by the blaring music they listen to. The threat is one that has been pretty much ignored. Even some churches have gone in for the loud music in worship services. Last year, about 33 million people bought a Bluetooth wireless, a headset device that allows a person to do other things while listening to a phone call. Lawsuits filed in Tampa federal court accuse manufacturers Motorola, Plantronics and Jabra of failing to warn consumers that their headsets can cause permanent hearing loss. A test of one Motorola model produced a maximum volume of 106 decibels, enough to damage the hair cells of the inner ear even if used only five minutes a day, the suits claim. If the request for class action status is approved, anyone who bought a Bluetooth headset in Florida since October 2002 would be allowed to join the suit. Similar lawsuits have been filed in

Arkansas, Illinois, Oklahoma and Tennessee, and more suits are expected.

It should be noted that concern over hearing loss isn't confined to Bluetooth headsets. A similar class action suit against the makers of iPod, the enormously popular portable-stereo system, has also been filed. A recent study by audiologists at Harvard and the Children's Hospital of Boston, found that MP3 players used at high-volume can in fact cause damage even when used for only minutes a day. As a result, it appears avid iPod users are putting their hearing at risk by listening to loud music for any period of time. According to the researchers, the key to avoiding hearing damage, appears to be limiting, not so much how long one listens to music, but how loud it's played. The study was presented at a recent conference on noise-induced hearing loss in children.

Sources: *Associated Press* and *St. Petersburg Times*

## XVII. ENVIRONMENTAL CONCERNS

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### **NUCLEAR LAB EMISSIONS MAY BE A CAUSE OF CANCER**

Radioactive emissions and chemical contamination from a rocket engine nuclear accident may have caused cancer in local communities. The accident that occurred in 1959 still shows evidence in the soil and groundwater around Rocketdyne's Santa Susana Field Laboratory near Simi Valley, California. The public wasn't aware of the nuclear accident until 1979. A local research lab study claims that the accident could be the cause of 260 to 1,800 cases of cancer since 1959. The research team includes independent scientists and health experts. Paid by federal funding, the scientists claim that contaminants present in groundwater and soil may have come from the most worrisome compounds associated with nuclear testing—iodine and cesium. The study also found that radioactive and chemically contaminated components were disposed of at an open-air sodium burn

pit at the field lab that caused soil and groundwater pollution.

Boeing, Rocketdyne's owner, released a study last year that claimed that cancer deaths among employees between 1994 and 1999 were lower than that of the general population. Boeing performed their study to combat findings of a UCLA study that found elevated cancer deaths among workers exposed to increased levels of radiation. Critics have consistently asked Boeing to provide information for a new study of health impacts of past accidents.

The Simi Valley research lab opened on a 2,850-acre plat in Ventura County, California, in 1948. Lab workers performed nuclear research for the federal government until the late 1980s. The site has also served as the home to over 30,000 rocket engine tests. Information about an explosion was released to the public in 1979 from UCLA graduates. The details called for an investigation into the radioactive contamination at the lab. The disclosure also forced a study of the health impacts of nuclear lab workers.

Source: *Los Angeles Times*

### **JURY AWARDS FAMILY \$2 MILLION IN TOXIC MOLD VERDICT**

A family whose home in Mississippi was destroyed by toxic mold has been awarded more than \$2 million by a Hinds County jury to cover medical expenses and the cost of rebuilding. The home, near the Ross Barnett Reservoir, was attacked by several different kinds of mold, including stachybotrus, aspergillium, and penicillium. The family—primarily the mother, who was a registered nurse, and one of the couple's three sons—suffered from bloody noses, chronic fatigue, chronic diarrhea and migraines. The family sued their builder (who built five homes on five lots in the subdivision). Classic Design Homes Inc., Supreme Design Homes Inc. and Service Air Heating and Air Conditioning Inc. The defects causing the mold, mostly in the design and construction of the foundation, led to moisture penetration in the home. That allowed mold to grow and resulted in the family's problems.

### **BUNGE SETTLES CLEAN AIR ACT CASE**

Bunge North America Inc., an oilseed processing company, has agreed to a \$13.9 million clean air settlement with the Federal Government. The Bunge facilities involved in the settlement are soybean processing plants located in Decatur, Alabama; Cairo and Danville, Illinois; Decatur and Morristown, Indiana; Council Bluffs, Iowa; Emporia, Kansas; Marks, Mississippi; and Delphos and Marion, Ohio. The U.S. Department of Justice and the federal Environmental Protection Agency brought the lawsuit alleging that Bunge violated the Clean Air Act by not obtaining preconstruction permits before increasing emissions and for not complying with applicable standards for new air pollution sources.

The settlement requires Bunge to fund engineering projects to reduce emissions at the facilities by 2,200 tons a year. The settlement also requires that Bunge pay \$625,000 in cash and spend \$1.25 million to fund community environmental projects selected by the affected states. Community projects include environmental education in Kansas; retrofitting diesel fuels in Alabama, Indiana, Iowa, Kansas, and Ohio; providing hazardous materials response equipment and training in Illinois and Mississippi; abatement of residential lead contamination in Illinois; and removal of mercury, lead, and asbestos from schools in Louisiana.

The Department of Justice acknowledged in its consent decree that Bunge had completed more than 20 projects between 2002-2004 that reduced 1,180 tons per year of volatile organic compound (VOC) emissions and 76 tons per year of particulate matter (PM) emissions. Bunge is a food and feed ingredient company that operates grain elevators and oilseed processing plants in the United States, Canada, and Mexico. I am glad to see that the EPA and the Department Of Justice are requiring companies like Bunge to clean up the pollutants they are emitting into the air.

Source: *St. Louis Business Journal*

## XVIII. THE CONSUMER CORNER

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### **VEHICLES PASS INSURANCE INSTITUTE CRASH-TESTS**

The Insurance Institute for Highway Safety announced 13 vehicles last month that earned its Top Safety Pick awards for 2007. Winners include four cars, seven SUVs, and two minivans. Three of the 13 winning vehicles for 2007 are from Honda, including an Acura SUV. Three winners are Subarus. Interestingly, no small vehicles were winners this year. IIHS says its award recognizes vehicles that do the best job of protecting people in front, side, and rear crashes based on ratings in Institute tests. Winners also have to be equipped with electronic stability control (ESC). The Top Safety Pick winners for 2007 are:

- Large car: Audi A6 manufactured in Dec. 2006 and later;
- Midsize cars: Audi A4, Saab 9-3, Subaru Legacy equipped with optional electronic stability control;
- Minivans: Hyundai Entourage, Kia Sedona;
- Luxury SUVs: Mercedes M class, Volvo XC90;
- Midsize SUVs: Acura RDX, Honda Pilot, Subaru B9 Tribeca; and
- Small SUVs: Honda CR-V, Subaru Forester equipped with optional electronic stability control.

The Institute rates vehicles good, acceptable, marginal, or poor based on performance in high-speed front and side crash tests plus evaluations of seat/head restraints for protection against neck injuries in rear impacts. The first requirement for a vehicle to become a top pick is to earn good ratings in all three Institute tests. A new requirement for 2007 is that the winning vehicles must offer ESC. This addition is based on Institute research indicating that ESC significantly reduces

crash risk, especially the risk of fatal single-vehicle crashes, by helping drivers maintain control of their vehicles during emergency maneuvers.

Pickups aren't included in this round of awards because the Institute hasn't begun to evaluate their side crashworthiness. SUVs weren't eligible to win in 2006 because the Institute hadn't evaluated the side crashworthiness of many of them. Now more SUVs have been rated, and 2007 winners reflect the safety improvements manufacturers have been making to these vehicles. Newer SUVs perform better in crash tests and, when equipped with ESC, are much less likely to roll over. All but one of the seven SUVs that were selected have ESC as standard equipment. Recent Institute research found that ESC reduces the risk of serious crashes involving both SUVs and cars. The largest effect is in single-vehicle crashes, which were reduced forty (40%) percent with the addition of ESC. Fatal single-vehicle crashes went down fifty-six (56%) percent, and fatal rollovers of cars and SUVs were reduced by about eighty (80%) percent.

### **JURY AWARD IN ODOMETER FRAUD CASE**

A jury in Missouri recently awarded \$1.04 million in a lawsuit brought by the customer of a Finance Plaza Inc. car dealership in a case involving odometer fraud. Of the total amount awarded only \$39,000, were for compensatory damages, with the remainder of the award being for punitive damages awarded against the car dealership and Regency Financial Corp., the finance company. Half of the punitive damages award will be contributed to a victims' fund. Both common law fraud and a violation of federal odometer laws by Finance Plaza were proved at trial. Consumers are known to rely on the odometer as an indication of the car's reliability and safety, which is addressed in the federal law.

All sorts of unlawful acts were testified to during the trial. It appears that the defendants manipulated titles and other paperwork to conceal the true mileage on this vehicle and others. Evidence showed the vehicle in this case

had a dangerous fuel system problem, which wasn't corrected when the car was sold to Speakman. Finance Plaza had previously been sued and required to pay treble damages for odometer fraud. Some of the car dealer's former employees testified that they had been ordered by the owner to withhold titles to vehicles from consumers and to have consumers sign blank documents on occasion. The case was successfully handled for the plaintiff by Dale Irwin of the Kansas City, Missouri firm of Slough, Connealy, Irwin & Madden.

Source: *Missouri Lawyers Weekly*

### **HACKERS ZERO IN ON ONLINE STOCK ACCOUNTS**

Hackers have been breaking into customer accounts at large online brokerages in the United States and making unauthorized trades worth millions of dollars as part of a fast-growing new form of online fraud under investigation by federal authorities. E-Trade Financial Corp., the nation's fourth-largest online broker, has reported that "concerted rings" in Eastern Europe and Thailand caused their customers \$18 million in losses in the third quarter alone. Another company, TD Ameritrade, the third-largest online broker, also has suffered losses from customer account fraud. Unfortunately, this appears to be an industry problem. Federal regulators cited recent cases in which hackers gained access to customer accounts at several large online brokers and used the customers' funds to buy certain stocks. The hackers appeared to be trying to drive up share prices so they could sell those stocks at a profit. This is a very serious matter and one that the federal government has to get a handle on. John Reed Stark, chief of the Office of Internet Enforcement at the SEC, said:

*Although these schemes cleverly combine aspects of securities fraud, identity theft and backing, what they really boil down to is outright thievery. In the last couple of months we have seen a marked increase in online brokerage account intrusions.*

Most folks don't have a clue how all of this works. It has been reported that during the last few months more than 10 million people have bought or sold investments online in the U.S. The scams typically begin with a hacker obtaining customer passwords and user names. Unlike banks, brokerage accounts are not protected by Federal Deposit Insurance Corp. and other federal banking rules that ensure consumers get their money back. Consumers must rely on the company to cover any losses.

In Canada, the Investment Dealers Association, the self-regulatory arm of Canada's securities industry, is looking into similar scams. Online financial fraud has grown so serious that the Federal Financial Institutions Examination Council, a government entity that establishes standards for banks, has given U.S. financial institutions until the end of this month to tighten security measures for accessing online accounts. The problem is so widespread with such a significant impact on the industry at large that structural changes in the industry will have to be put in place.

Source: *Washington Post*

### **NHTSA INVESTIGATION**

NHTSA has an ongoing investigation into more than 800,000 Daimler-Chrysler vehicles for potentially defective airbag sensors. These sensors can delay or prevent the deployment of airbags in the event of an accident. The vehicles affected by the investigation include 805,000 Dodge Caravan, Dodge Grand Caravan and Chrysler Town and Country minivans for model years 2005 and 2006.

## **XIX. RECALLS UPDATE**

### **VOLVO RECALLS 360,000 CARS FOR SPEED CONTROL BUG**

The National Highway Traffic Safety Administration has ordered Volvo to recall about 360,000 cars because of a problem with vehicle speed controls

that can cause engines to lose power without warning. Volvo, which as you know is now a unit of Ford Motor Co., says a defect in the electronic throttle module in cars built between 1999 and 2002 could cause the vehicle to shift into a "limp home" mode in which the maximum speed is about 15 miles per hour. The "limp home" setting is a safety feature in Volvo cars intended to prevent unintended acceleration in case of a throttle malfunction.

The recall applies to Volvo C70 and V70 models built between 1999 and 2002, S60 models built between 2001 and 2002, and S70 and V70X models built between 1999 and 2000. The automaker says it has fixed the speed control problem on about 165,000 vehicles of the recall total after sending out notices to owners in March. California's Air Resource Board had first flagged the throttle control problem. NHTSA informed Volvo that it was making the recall mandatory. Volvo owners who bring their cars to dealerships will have new software reinstalled for the throttle control unit.

### **CHRYSLER RECALL OF SUVs**

DaimlerChrysler's Chrysler Group is recalling about 128,000 Pacifica sport utility vehicles because of a problem with the software governing the fuel pump and power train control. According to NHTSA, the defect could cause the engine to stall in some cases. The recall applies to Pacifica models built between 2005 and 2006. Chrysler dealers will reprogram the power train controls and replace the fuel pump on certain cars as part of the recall.

### **TOYOTA RECALLS SCION OVER AIR BAG ISSUES**

Since airbags came to the forefront in 1990, they have helped save thousands of lives. Unfortunately, defectively designed airbags have been found to cause a number of serious injuries. Those include: brain injuries, spinal injuries, blindness, facial fractures, upper body injuries and disfigurement. The National Highway Traffic Safety Adminis-

tration has recalled 29,542 Scion TC Toyotas for the 2005 and 2006 model years. The side and curtain airbags on these vehicles may deploy if the car door is closed too hard, according to NHTSA. In fact, the airbags are so sensitive that NHTSA has advised owners to use "minimal force to close the driver and passenger doors."

### **PERRIGO RECALLS ACETAMINOPHEN**

A major manufacturer of store-brand acetaminophen has recalled 11 million bottles of the pain-relieving pills. The recall came after discovering some were contaminated with metal fragments. There have been no reports of injuries or illness at press time. Perrigo Co., believed to be the world's largest manufacturer of store-brand nonprescription drugs, said it discovered the metal bits during quality-control checks. The recall affects bottles containing various amounts of 500-milligram caplets. In the recall, the Allegan, Michigan, company did not disclose the chains for which it manufactures the store-brand acetaminophen. However, Wal-Mart Stores Inc., CVS Corp., Walgreen Co. and Costco Wholesale Corp. are among the companies it supplies with health care products, according to company Securities and Exchange Commission filings. It's reasonable to assume that these companies would be affected by the recall.

### **CONNECTICUT BEEF RECALLED FOR POSSIBLE E. COLI CONTAMINATION**

A Connecticut company recalled about 1,680 pounds of ground beef products recently because the products could be contaminated with a dangerous strain of E. coli. No illnesses have been reported from consumption of the beef subject to the recall. Omaha Beef Co. Inc., located in Danbury, Connecticut, produced the hamburger patties and bags of hamburger in October and sent the products to restaurants in Connecticut and southern New York State. The effected beef was packaged in 10-pound boxes of "HAMBURGER PATTIES, OMAHA BEEF CO., INC." Customers who bought the products

affected by the voluntary recall should return them to the place of purchase, the service said.

The most dangerous strain of *E. coli* has been found in cattle and other animals, such as deer, goats, and sheep. It can be spread to humans in a variety of ways, including through consuming undercooked meat and eating vegetables and fruits that were exposed to manure. *E. coli* is believed responsible for about 60 deaths and 73,000 infections a year in the United States. The potentially deadly strain can cause bloody diarrhea and dehydration. The very young, the old and people with compromised immune systems are the most at risk. Hopefully, this was an isolated incident which fortunately didn't result in any serious health problems. From all reports, it appears the distribution of the meat was limited. This occurrence does, however, point out a most serious problem with the potential to do great harm.

#### **MATTEL RECALLS 4.4 MILLION MAGNETIC PLAY SETS**

With the holiday gift-buying season in full swing, Mattel Inc. has recalled 4.4 million Polly Pocket magnetic play sets. The recall came after three children were hospitalized with serious injuries from swallowing tiny magnets that fell off the toys. The Consumer Product Safety Commission is urging shoppers to avoid buying toy sets with small magnets for children under six years of age. Gift buyers also should check the toy labels, select age-appropriate toys and avoid gifts with sharp edges and small parts. The Commission has received 170 reports of the small magnets falling out from the dolls and accessories in the Polly Pocket sets. Each of the three injured children swallowed more than one magnet and suffered intestinal perforation that required surgery.

The Polly Pocket play sets contain plastic dolls and accessories featuring small magnets measuring 1/8 inch in diameter. The magnets are embedded in the hands and feet of the dolls, plastic clothing, hair pieces and other acces-

sories that attach to the dolls. The tiny magnets can fall out and be swallowed or inhaled by children. If more than one magnet is swallowed, they can attach to each other and cause intestinal perforation, infection or blockage, which can be fatal. The recall applies to about 2.4 million sets that were manufactured before April 1, 2005, and sold at department stores and toy stores in the United States from May 2003 through September 2006. It also affects another 2 million Polly Pocket play sets were sold worldwide.

Last March, another toy company, Mega Brands Inc., recalled 3.8 million Magnetix magnetic building sets after one child died and four others were seriously injured after swallowing tiny magnets in them. In 2005, there were 20 toy-related deaths and 152,400 toy-related injuries involving children under age 15. The majority of injuries were sustained from riding toys.

Apparently, this recall does not include sets currently on store shelves. The recalled Polly Pocket brand sets include: Polly Place Hangin' Out House, Polly Place Treetop Clubhouse, Spa Day, Quik-Clik Boutique, Quik-Clik City Pretty Playset, Quik-Clik Sporty Style Playset and Totally Zen Playset. Polly Totally brand Polly Place Totally Tiki Diner sets are also being recalled. Consumers should take the toys away from children and contact Mattel to arrange for the return of the toy and to receive a voucher for a replacement toy. For more information about the recall, you can contact Mattel at 888-597-6597 or visit <http://www.service.mattel.com/> or <http://www.cpsc.gov/>.

#### **TWO WAL-MART RECALLS**

Wal-Mart seems to stay in the news these days for a number of reasons—some good and some bad. The following recalls, made in cooperation with the U.S. Consumer Product Safety Commission, involved Wal-Mart products.

Wal-Mart is recalling the "Home Trends" wood footstools sold in its stores. Due to improper construction, the stool can break and collapse, posing a fall hazard to

consumers. Wal-Mart has received nine reports of the footstools breaking. There have been seven reports of injuries, including a broken toe, neck and shoulder soreness, cuts, bruises, swelling, a slight concussion, and soft tissue injury. The footstool is a natural-colored wood footstool. The standing surface is 11 1/2-inches by 11 1/2-inches with a 4-inch-long oval opening in the center. The stool is 11 1/2-inches tall. The recalled footstool can be identified by a white sticker underneath the step that contains the UPC number 87065900001.

The stools were sold at Wal-Mart stores exclusively nationwide from December 2005 through September 2006 for about \$10. Consumers should immediately stop using the product and return it to Wal-Mart for a full refund.

Wal-Mart is also recalling Minnie Mouse Cardigan Sets sold in its stores. If the cardigan is buttoned, the ribbon woven around the neckline poses a strangulation hazard for children. The pink cardigan is sold as part of a three-piece set which also includes a light pink turtleneck and denim pants. The cardigan has a pink ribbon woven around the neckline. Minnie Mouse is embroidered on the lower left front of the cardigan. The cardigan was sold in sizes 12M, 18M, 24M, 3T, 4T, and 5T.

The sets were sold at Wal-Mart stores nationwide from July 2006 through August 2006 for about \$15. Consumers should take the recalled cardigan away from children immediately and return the entire three-piece set to Wal-Mart for a full refund.

Consumers can contact Wal-Mart at (800) 925-6278 between 7 a.m. and 9 p.m. CST Monday through Friday, or visit the store's Web site at [www.walmartstores.com](http://www.walmartstores.com).

## **COMPANY RECALLS 23,200 POUNDS OF BEEF JERKY**

Mirab USA Inc., which is a Michigan company, has recalled about 23,200 pounds of beef jerky sold across the country because it may contain the animal drug Doramectin. The products were sold in several southeastern states. For more information, you can call the company at 313-292-4100 or visit <http://www.fsis.usda.gov>.

## **XX. FIRM ACTIVITIES**

### **EMPLOYEE SPOTLIGHTS**

#### **Frank Woodson**

Frank Woodson joined the firm in 2001 and his practice focuses on litigation related to pharmaceuticals. Frank, who brought 17 years of litigation experience to the Mass Torts Section, has been involved in the firm's COX-2 drug litigation, including our Vioxx cases. He is the Vice Chair of the sales and marketing committee for the Vioxx MDL in New Orleans.

In the Spring of 2002, Frank was responsible for preparing the firm's first "Rezulin" case for trial that helped generate the first group settlement of Rezulin cases in the country. He was also involved in the other group settlements of the firm's "Rezulin" cases in the Fall of 2002 and the Spring of 2003, culminating in all of our firm's Rezulin cases being resolved in 2004. The amounts of the Rezulin settlements are all confidential.

Frank, who was part of the Sections' "Baycol" team, has been a frequent speaker on that litigation around the country. He was responsible for taking several key depositions in this national litigation and has been involved in the resolution of a number of the firm's Baycol cases. Frank, who enrolled all the firm's Propulsid claims in the MDL settlement program, has also investigated claims involving Neurontin, Zyprexa, Accutane, Crestor and drugs that cause Stevens Johnson Syndrome.

Frank is a member of the Alabama Trial Lawyers Association and serves the organization in any way that he can. He is the author of "Pharmaceutical Drug Litigation — An Overview" and "The Bayer Criminal Convictions." Frank is married to the former Marti Glaze of Tuscaloosa, Alabama, and they have four children ranging in age from 6 to 11. The family is active at Frazer United Methodist Church and are involved with the Harbor Light Sunday School class. Frank, who is one of the biggest University of Alabama fans alive, presently serves on the Board of Stewards at Frazer UMC.

#### **Carol Thompson**

Carol Thompson, one of our most experienced legal assistants, works for Greg Allen in our Product Liability Section. Carol, who has been with the firm since 1990, has been involved in some of our most important product liability cases. The work in product liability cases is hard, demanding, and intense for a number of reasons. These cases always involve either a death or serious injury that permanently disables the victim, and require a great deal of medical knowledge and expertise. Discovery is always difficult and requires a good deal of plain old hard work. There is no other way to obtain documents and information from corporate defendants than to work hard, be persistent and never give up.

Carol is married to Mark Thompson, who is a veteran with the Montgomery County Sheriff's Department, and they have three sons and one grandson. Most of Carol's free time is spent entertaining her three year old grandson, Gavin. Carol's life has been dedicated to her family and her job. She says between the two, there is not much time for anything else. Carol is an excellent employee who does outstanding work. She cares about Greg's clients and has played a most important part in the successful results that he has in product liability cases.

#### **Charles Duffee**

Charles Duffee has been with the firm for over five years as an investigator. He currently works in our Personal Injury/Products Liability Section. Many

of the cases Charles works on are what we refer to as "crashworthiness" cases involving product defects. The work of the investigators includes photographing the scene and vehicles involved; locating and interviewing witnesses, emergency personnel and law enforcement personnel; attending vehicle inspections conducted by our experts; and obtaining specific information requested by attorneys handling various cases. Charles, who worked for the Montgomery Police Department from 1981 until he retired with 20 years of service in 2001, retired as a Major.

Charles has been married to his wife, Linda, for 23 years. Linda has been a pediatric nurse for over 20 years. They have 2 children. Brian, who is 20 years old, just completed training for the U.S. Army Reserve and will be assigned to a transportation reserve unit in Anniston, Alabama. He plans to return to school at AUM. Morgan, who is 14, is a ninth grader at Wetumpka High School, where she is a junior varsity cheerleader. Morgan's goal is to own a Build-A-Bear workshop. Charles and his family are active members at Heritage Baptist Church in Montgomery. Charles enjoys hunting, fishing and other outdoor activities. We are most fortunate to have a man with Charles' experience and training working as an investigator with the firm. This veteran investigator does an outstanding job for the firm and our clients.

#### **Candice Wyatt**

Candice Wyatt, who has been with the firm for over four years, serves as Legal Secretary for Rick Morrison in the Products Liability/Personal Injury Section. She previously worked in the Graphics Section. As a Legal Secretary, Candice has many responsibilities including handling Rick's scheduling and court filings. Candice is married to Travis and they have two daughters, 7-year-old Kaileigh and 2-year-old Kennedy. She does excellent work and is a valuable employee.

#### **Paula Shaner**

Paula Shaner has been with the firm for almost four years now. She first worked as a "temp" in the Toxic Torts Section before being moved to our Con-

sumer Fraud Section. Paula currently serves as the Legal Secretary for Bill Robertson. In this position, Paula basically performs all of the duties required of a legal secretary in a litigation firm. Paula has been married to Chuck Shaner for over 25 years and they have one daughter, Charli, who will be 15 years old in December. Paula graduated from a Christian school in Prattville. She will complete her work to get a paralegal degree in the near future. Paula is a very good employee who works very hard for clients represented by Bill. We are fortunate to have her with the firm.

#### **EMPLOYEES CHRISTMAS CHARITIES**

Every Christmas season our employees voluntarily support a minimum of about five separate charities. This year they did seven, which is very good. This doesn't include personal giving or involvement with other good causes. Our employees believe that it's important to share their blessings with others and that's a very good thing. The Christmas Season is an excellent time in which to adopt a charity. This effort tells us a great deal about the kind of folks who work with the firm. The following are this year's charities:

##### **Operation Christmas Child**

A favorite has always been Operation Christmas Child, which has touched the lives of millions of children. It is a unique project of Christian relief and evangelism by the organization Samaritan's Purse. Shoeboxes are filled with items for children and then delivered all over the world.

##### **A Soldier Ministry**

The past two years, our employees have also have involved with a "soldier ministry." This year, they collected names of relatives, close friends and loved ones of our employees who are serving overseas in the military. A care package was mailed to each of them.

##### **Friendship Mission**

New this year was the Friendship Mission project, which is a PCA

Presbyterian church and shelter, located on the western side of town. The church and shelter provides: 2 worship services a day except Saturday; hot meals for all homeless and poor who attend; and counseling and Bible study on weeknights for about 50 men living in the shelter. Our employees donated items like blankets, adult—men and women—clothes, non-prescription drugs and personal hygiene items to be passed out at this shelter. Our lawyers also took up a monetary donation in which we were pleased to present to the facility.

##### **Capitol Hill Nursing Home Angel Tree**

Our employees also took part in the Capitol Hill Nursing Home Angel Tree and Chisholm Ministry Toy Store. Capitol Hill is a nursing home in the Capitol Heights area of Montgomery. Each Christmas the facility puts up an Angel Tree for the residents. Each Angel contains a residents Christmas wish list. There are usually a number of small personal items on the list like lotion and slippers.

##### **Chisholm Ministry Center**

Chisholm Ministry Center Toy Store helps low income families provide Christmas gifts for their children. Our employees took up a collection of new toys to donate to the Store.

##### **Arthritis Foundation Jingle Bell Run**

We also had quite a number of employees who participated in the Arthritis Foundation's Jingle Bell Run this year. The 5k run and 1 mile walk was held this year at Huntingdon College. According to the Arthritis Foundation, 46 million American adults plus 300,000 children have some form of doctor-diagnosed arthritis. It was good to help out on a project that does such worthwhile work.

##### **Family Sunshine Center**

Our lawyers also take on a

project of their own. Each year, the firm gets a list of needs from 6 families from the Family Sunshine Center, consisting of mothers and their children only. The lawyers can then voluntarily "adopt" a mother, child or the whole family. The gifts are purchased and wrapped by each participating lawyer and all of the gifts are taken to the Center in preparation for the Christmas party held for the families before Christmas. This has been a most rewarding experience.

## **XXI. SPECIAL RECOGNITION**

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#### **CHARACTER AT HEART BOARD**

Character at Heart, a non-profit organization committed to developing character in the youth of America, is doing some very good work. Character at Heart is hard at work helping to build character in the youth of Alabama through their programs:

- ***Manners of the Heart*** is a 36-week Kindergarten through 3<sup>rd</sup> grade curriculum that promotes building character based on **self-respect** and **respect for others**.
- ***Building Strong Character for a Lifetime*** is a 38-week, 4<sup>th</sup>-6<sup>th</sup> grade curriculum. Designed as a "stand alone" program, it builds upon character traits and skills developed in *Manners of the Heart*.
- ***Teen Mentors*** is our program for high schools where we train and equip high school counselors and students to teach *Manners of the Heart* and *Building Strong Character for a Lifetime* to elementary school students.

Since being established in April 2000, Character at Heart has raised over \$860,000 needed to provide *Manners of the Heart* curriculum, training, and support to over 130 schools, serving more than 35,000 students annually in 18 Alabama counties. They have helped

provide Building Strong Character for a Lifetime training, curriculum, and support to over 50 schools in 6 Alabama counties. In 2005 and 2006, Character at Heart conducted Business of Manners Workshops in Montgomery and Andalusia. Cole Portis, who heads up our Personal Injury/Products Liability Section, serves on the board of this organization.

#### **ALABAMA ARISE DOES GOOD WORK**

Alabama Arise promotes state policies that improve the lives of low-income Alabamians. Kimble Forrister is the Executive Director of Alabama Citizens Policy Project, which is a 501(c)(3) tax exempt status organization. Alabama Arise, which has had 140 faith-based and community groups involved with them, was responsible for obtaining passage of a landlord tenant law and a bill to help low-income citizens on the income tax in Alabama. In my opinion, this organization does outstanding work and is one of the few groups that really works hard for low-income citizens in our state. In 2006, there were 675 registered organizations and agencies lobbying the legislature. You can rest assured that only a handful of those lobbyists work for the interest of ordinary Alabamians. Most all of the lobbyists fight legislation that attempts to help consumers and low-income citizens. Of course, there are exceptions. We should all be thankful for the work done by Alabama Arise.

#### **PAUL BLAND HONORED**

Trial Lawyers for Public Justice Staff Attorney F. Paul Bland, Jr. was presented recently with the Vern Countryman Law Award by the National Consumer Law Center at its Consumer Rights Litigation Conference in Miami. The NCLC presents the award annually to an exceptional consumer attorney "whose special contributions to the practice of consumer law have strengthened and affirmed the rights of low-income Americans." Paul is an exceptional leader and strategist in the fight to preserve access to justice, a skilled litigator with a

number of extraordinary victories on behalf of consumers, and a mentor and teacher to many other lawyers. He has directed TLPJ's Mandatory Arbitration Abuse Prevention Project and advanced the group's Class Action Preservation Project with great success, and argued cases before the U.S. Supreme Court and courts of appeals nationwide. Paul has won victories for consumers in cases involving, among others, banks, payday lenders, credit card companies, realtors, and HMOs. In my opinion, Paul is a true consumer advocate who is certainly worthy of this recognition.

## **XXII. SOME CLOSING OBSERVATIONS**

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On numerous occasions I have said that I am proud to be a trial lawyer and to have the opportunity to represent victims of corporate wrongdoing and abuse. Nothing has happened to make me change my feelings in that regard. I firmly believe that victims are entitled to be represented by lawyers and to have their day in court when the need arises. However, I am fully aware that a few powerful people, and even some appellate court judges, don't share that point of view. In fact, those people want to shut the courthouse door to victims and take away their Constitutional right to a trial by jury. Tort reform groups have spent literally billions of dollars nationwide over the past 15 years trying to convince folks that their movement is a "righteous one." Nothing could be further from the truth. When you look at how some of the giants in Corporate America have operated over the years, it's pretty easy to figure out why they want to eliminate lawsuits.

It was real good to see that voters in the recent elections let their collective voices be heard and the message they sent was very clear. That message could be summed up as follows: "Ordinary folks demand a voice in governmental affairs and they also want a court system that is open, fair and independent of the powerful special interests." They were

telling the politicians in both parties that reform is needed in many areas of concern. It will be interesting to see if the politicians were really listening.

I want to mention some of the campaign tactics that took place in a few judicial races this year in Alabama. In at least one race in our state, the negative campaign by a well-financed judicial candidate was run in large measure directed against **trial lawyers**. It's a fundamental principle that no judge or judicial candidate should be allowed to single out a segment of the bar for attack. It's just plain wrong for any candidate to target any group of lawyers for attack in campaign ads and materials used in a judicial race.

While **trial lawyers** were the subject of this attack, it would be just as wrong if that candidate had elected to attack **defense lawyers** as a group. Those lawyers represent litigants who are entitled to be defended when they come into the courts as defendants. They are entitled to fairness in the form of a level playing field and with an impartial judge to hear their cases.

Needless to say, the same type treatment should be afforded to victims of wrongdoing or abuse who come into the courts as Plaintiffs. They also deserve the same type court system and the same type treatment by judges. Hopefully, we will see reform in the Legislature next year that will address and remedy this sort of wrongful conduct in judicial elections. I believe that every lawyer in Alabama would support that type reform. More importantly, however, the people of Alabama expect and deserve it.

## **XXIII. SOME PARTING WORDS**

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We are now enjoying one of my favorite times of year. Thanksgiving and Christmas holidays are special times for my family and have been over the years. The Thanksgiving season allows families with members living in different locations to spend valuable time together

and that's always good. It's a time for all of us to be thankful for the many blessings we enjoy on a daily basis, but all too often take for granted. One of our employees, Willa Carpenter, who is the firm's "spiritual counselor," sent this Thanksgiving message out to all of our employees, just before we broke for the holiday, entitled "The Priestly Blessing:"

*The Lord bless you and keep you;  
the Lord make His face shine upon  
you, And be gracious to you; the  
Lord lift up His countenance upon  
you, and give you peace. Amen*

*Numbers 6:23-26*

That is truly a blessing that comes directly from God and it's a powerful one. That very special message carries us through Thanksgiving into the Christmas season and really forever. Obviously, the Christmas season is special to all of us for a number of reasons. It's a time for families to get together—a time for holiday parties—a time for good food—a time for the giving and receiving of gifts—a time for us to count our blessings—and a time to help others. The most important reason for the season, however, is that it includes the celebration of the birth of Jesus. As you know, the historic record of the birth of Christ is found in Matthew 1:18-25 and Luke 2:1-20.

Over the years, I have read and enjoyed the comic strip "Peanuts" because it featured **regular folks** who dealt with life on a daily basis just like **real people** do. While the characters were children and animals, there were some very **good lessons** in life contained in Peanuts for me. Everybody

loves the characters because they demonstrate the failings and strengths of all human beings. I guess my favorite character was Snoopy, but I also identified with Charlie Brown who sometimes had a hard time "getting things right."

It was quite evident that Charles Schulz, the person who drew Peanuts for over 50 years, had a good relationship with his Lord and Savior. Millions have watched "A Charlie Brown Christmas" since it first appeared on CBS in 1965. It has earned a permanent place in the hearts of families and that's a good thing. We need to watch this "treasure" at some point during the holidays. The Christmas story being told by Linus to Charlie Brown is one that will never lose its meaning:

*And there were in the same country shepherds abiding in the field, keeping watch over their flock by night. And, lo, the angel of the Lord came upon them, and the glory of the Lord shone round about them: and they were sore afraid. And the angel said unto them, Fear not: for, behold, I bring you good tidings of great joy, which shall be to all people. For unto you is born this day in the city of David a Saviour, which is Christ the Lord. And this shall be a sign unto you; Ye shall find the babe wrapped in swaddling clothes, lying in a manger. And suddenly there was with the angel a multitude of the heavenly host praising God, and saying, Glory to God in the highest, and on earth peace, good will toward men.*

*Luke 2:8-14.*

Unlike any other baby, the one born that night in Bethlehem was unique in all of history. The baby—to be named Jesus—was not created by a human father and mother. He had a heavenly pre-existence (John 1:1-3, 14). He is God, the Son—Creator of the universe (Philippians 2:5-11). This is why Christmas is called the incarnation, a word which means "in the flesh." In the birth of Jesus, the eternal, all-powerful and all-knowing Creator came to earth *in the flesh*. Over the years many have asked: why would God do such a thing? Why would He come as a baby, instead of appearing as a King in power and majesty?

The Jewish people of that day expected a Messiah to come and solve all of their problems. They believed a military leader with awesome power and one with the ability to crush their enemies would soon come. Obviously, that wasn't God's plan. It was difficult for the people to understand Jesus' ministry. Unfortunately, even today many of us still "don't get it." Why would God make Himself a true man and live among us, when He knew full well how terribly He would be treated? There is but one answer and that is the totality of God's love. When you consider the fact that God loves us so much that He gave His only Son as a total and complete sacrifice for the sins of mankind, it explains the real meaning of Christmas.

Christmas is indeed a very special time for all of us. I wish for each of you and your family a blessed Christmas and a most happy and healthy New Year.

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