



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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## **WHEN DR. BRONNER SPEAKS – FOLKS LISTEN—AND THAT’S A FACT**

Dr. David Bronner is one of the best known and certainly one of the most well-respected public figures in our state. When he makes a statement on a subject, it has been my experience that everybody listens. Over the past several months, Dr. Bronner has been a vocal critic of the selection process for judges in Alabama and that criticism is justified. The following is what Dr. Bronner had to say recently on the subject:

*We made it! The elections are over and I must say, “Thanks be to God.” If voters still cannot understand the need to improve the selection process of our highest justices and judges after this election, I have no choice but to consider them among “the walking dead.” Even though media owners, including the RSA, make millions during intense, nasty elections, Alabamians should demand that its political leaders change the process in the next legislative session. Alabama’s highest judicial officers must be above, and not below, “the political process.” The Alabama Bar Association and all the judicial associations should lead the way in putting judicial integrity above petty party politics with a reform package that can make all Alabama citizens proud of its judicial system.*

*We cannot expect different results just because we do something the same way we always have. The citizens of Alabama must demand that the justices, judges and Alabama Bar Association show the leadership and tenacity to improve this process. Otherwise, voters’ lack of trust will increase and/or force reform. That option will not be a pretty picture.*

Source: The ADVISOR  
December 2006

Hopefully, Governor Riley and members of the Legislature are listening and agree with Dr. Bronner. The people of Alabama deserve a complete reform of a broken system. Those who are determined to destroy the jury system like the way the current selection process works. They have unlimited funds that can be used to influence the election of judges. According to polling data, Alabama citizens support the non-partisan election of judges as well as campaign finance reform. Hopefully, Governor Riley and the legislative leadership will get behind reform. If they do, we will finally see meaningful reform passed this year.

## **ARTUR DAVIS NAMED TO POWERFUL WAYS AND MEANS COMMITTEE**

Artur Davis, who is making quite a name for himself in Congress, has won a coveted seat on the House Ways and Means Committee and that’s good news for Alabama. The appointment is clearly a promotion for the congressman, who is recognized as a rising star in the Democratic Party, and it’s one that’s certainly well deserved. Ways and Means is among the most powerful committees in the House, writing the nation’s tax and trade policies while also overseeing high-profile issues such as Medicare and Social Security. It has been reported that Artur, who is entering his third term, is considering a run for the Senate in 2008. In my opinion, if Artur decides to enter that race he would be a formidable opponent for Jeff Sessions. In any event, getting a seat on Ways and Means is very good for this outstanding Alabamian and his appointment should pay dividends for our state.

## **ALABAMA SHOULD KEEP THE EARLY PRIMARY**

Alabama Democrats shouldn’t go along with a proposal from the Democratic National Committee that would give extra convention delegates to states that move back their presidential primaries. Joe Turnham, the state party chairman, has made his feelings known on the subject. He wants to keep the

early primary date and I believe that is the proper course. As you know, the Alabama Legislature moved Alabama’s presidential primary in 2008 from June 3<sup>rd</sup> to February 5<sup>th</sup>. That decision put our state in play for presidential hopefuls from both political parties.

The Rules Committee of the Democratic National Committee has given preliminary approval to a plan that would award additional convention delegates to states that don’t move up their primary or that move back their primary after moving it up. Thus far, the full DNC hasn’t considered the plan. According to Joe Turnham, getting extra

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convention delegates “pales in comparison to letting the people of Alabama be a player in who the president is going to be.” I totally agree with his assessment.

In years past, when Alabama’s presidential primary finally came, the nominations for both parties were already wrapped up. Alabamians really had little to say about who the nominees for either party would be. Not surprisingly, all of the candidates ignored Alabama. Things are different now and that’s good. After the Legislature moved up Alabama’s primary, several potential candidates from both parties have already visited the state. My friend John Edwards—who many consider the Democratic front-runner—will visit Birmingham this month.

As it currently stands, Alabama’s presidential primary would make us the third state to have a primary. Under the current primary schedule, New Hampshire would start the primaries on January 22<sup>nd</sup>, followed by South Carolina on January 29<sup>th</sup>. Arkansas will hold its primary on the same day as Alabama’s. The DNC apparently came up with the plan for extra delegates in an effort designed to prevent large states from moving up their primaries to February. If that were to happen, it’s obvious that candidates would focus on the larger states. In that event, other states like Alabama wouldn’t get much attention. I believe Alabamians are entitled to have candidates come to our state and ask for their votes. If nothing else, it will be good for the economy.

### **A LOOK AT THE NATIONAL SCENE**

The 2008 race for President has really been heating up since the general election. There are some pretty good candidates who are off and running and a number of others who are putting out their feelers. In my opinion, there are a few potential candidates on the Democratic side who need to drop out now. We can’t afford to have a Democratic nominee who has no business serving as president of our country. We have seen first hand what happens when we elect a person who doesn’t have the ability to handle the job.

The two most recent Democratic nominees for president were poor candidates and their inept performance resulted in 8 years of George Bush. Unfortunately, for the Democratic Party each of these men keeps hanging around. In my opinion, both John Kerry and Al Gore should call it a day and leave the Democratic field to good candidates, who not only have a chance to win, but have the ability to be president if they are successful.

Al Gore had his opportunity in 2000 and wasn’t up to the rigors of a national campaign. He just couldn’t connect with ordinary folks and the more Gore’s advisors tried to change his image and style, the worse things got. Even with his shortcoming as a candidate, Gore’s refusal to let Bill Clinton do any campaigning on his behalf clearly cost the Democratic candidate the election. And then along came John Kerry, who was a total disaster as a candidate in every respect, and who lost a race that should have been won. The Massachusetts Senator—to put it bluntly—was simply a very poor candidate who ran a very poor race. For the good of their party and for the country, each of these men should drop out of contention as a potential candidate for President now and leave the field to others. It would be the best thing that could happen to the Democratic Party.

Having let my opinions about two likely candidates be known, I will take a brief look at the rest of the field. At this juncture, there are lots of folks running—or wanting to run—for President in 2008. There will be changes in the list of potential candidates as the months pass leading up to the year of decision. For example, two Democrats who showed an early interest have already bowed out. First it was former Virginia Governor Mark Warner who elected not to run. Then Senator Evan Bayh dropped out of the race after initially showing a great deal of interest. The following is my list of potential candidates as we enter 2007:

- **Republicans:** John McCain; Mitt Romney; Newt Gingrich; Rudy Giuliani; Sam Brownback; Mike Huckabee, and Bob Riley.

- **Democrats:** John Edwards; Hillary Rodham Clinton; Barack Obama; Tom Vilsack; Bill Richardson; Al Gore; John Kerry and Dennis Kucinich.

There may well be others—not listed—who will see fit to throw their hats in the ring. It will be most interesting to see who all will survive the year and enter 2008 as serious contenders.

### **FEDERAL JUDGE ENDS ALABAMA’S 25-YEAR-OLD COLLEGE DESEGREGATION CASE**

Thankfully, the 25-year-old desegregation case against the State of Alabama has finally ended. In an order dated December 12, 2006, U.S. District Judge Harold Murphy approved agreements that settle the case. Hopefully, all vestiges of segregation in our state’s higher education system have been eliminated. Judge Murphy said the state, its historically white universities and other defendants, have eliminated traces of segregation “to the extent practicable and consistent with sound educational practice...and have demonstrated their commitment to continuing to operate in a constitutional and non-discriminatory fashion.” This is a case that should have been settled years ago. In any event, all Alabamians should be glad that it’s finally over. Hopefully, it will achieve its goal and a sad chapter in Alabama history put behind us.

Source: *Associated Press*

### **ALABAMA INSURANCE COMMISSIONER TO LEAD NATIONAL GROUP**

State Insurance Commissioner Walter Bell has become the first Alabamian to lead the National Association of Insurance Commissioners. Commissioner Bell took over as president last month during the NAIC’s annual meeting in San Antonio, Texas. No Alabama insurance commissioner has ever led the 135-year-old association, which coordinates insurance regulations between states, collects complaints, and advises the public about insurance scams. It’s significant that Commissioner Bell will be the NAIC’s second black president. We wish him the very best in his new job. It’s quite an honor!

## **CHANNEL ONE SHOULD BE "HISTORY" IN ALABAMA**

It appears that Channel One may finally be "biting the dust" and if so, that's great news for Alabama's school children. Its owner, Primedia, says it will be discontinuing the education segment that houses Channel One. I have repeatedly said that Channel One has no place in Alabama classrooms and that its demise would be a most welcomed event. Channel One has been the target of a group out of Birmingham called Obligation Inc., which has urged marketers not to advertise on the schools-based service. They also brought to the attention of the public how bad Channel One was. But for the efforts of my fiend Jim Metrock and others associated with Obligation, Inc., most adults in Alabama would never have heard of Channel One. When I first saw what the children were seeing on a daily basis I was shocked. It has been reported that Channel One also was hurt by the loss of major U.S. government ad funding. In any event, in my opinion, getting rid of Channel One in our schools is a very good and wholesome thing. The programming not only took time from educational pursuits, but it was unfit for young students to view.

## **II. LEGISLATIVE HAPPENINGS**

### **GOVERNOR RILEY'S PLANS DESERVE PRIORITY**

Bob Riley has an opportunity to go down in history as one of the best governors in Alabama's history. In fact, he could actually wind up being the very best to have served. The Governor received a clear mandate from the voters on November 7<sup>th</sup> to lead Alabama into 2007. To be successful, however, the Governor will need bipartisan support in the Legislature this year. Hopefully, his programs will be given top priority in both the House and Senate. To be successful in the legislature, those who are

designated to handle the Administration's programs must be willing to do so in a bipartisan manner, while putting their personal agendas aside.

There are a number of important issues that should be addressed in the regular session of the Alabama Legislature. Based on his campaign promises, Governor Riley has a definite plan of action for our state. Clearly, most of the plan will require legislative approval. I have to believe that the Governor's programs will receive fair treatment by both the House of Representatives and the Senate. In my opinion, any governor deserves that accord by the legislative leadership in both Houses. Alabama, with all of its resources, has an opportunity to finally reach its full potential. My prayer is that 2007 will be the year when that potential is realized.

### **RECOMMENDATIONS FOR 2007 IN ALABAMA**

While the Riley plan has lots of good features, there are also a number of items that might not be on the Governor's agenda. In my opinion, those should also be considered by the Legislature this year. Some of them are:

- Campaign Finance Reform;
- Strong laws to control lobbying activities;
- Reform of the system of selecting appellate judges;
- Strengthening consumer protection laws;
- Protection for consumers against predatory lenders;
- Revision of the Pay Day Lender laws to give consumers needed relief;
- Curbing to the extent possible of mandatory, binding arbitration in consumer contracts;
- An update of the Department of Forensic Science so that they can do their job;
- Making ADEM more environmentally friendly;
- Tax reform for low-income people by

increasing the income tax threshold to \$20,000;

- New revenues for the general fund budget; and
- Constitutional reform in the form of a new state constitution.

I fully realize that passage of the legislation to accomplish all on this list is highly unlikely, but I believe that miracles still happen. Hopefully, Governor Riley and the Legislature will work together to achieve such a miracle. In order for this to happen, however, it will require a breaking away from the special interest lobbyists who have controlled the Alabama Legislature for years.

### **ALABAMA RANKS LOW IN NUMBER OF FEMALE LEGISLATORS**

Alabama did not do well in a report by the Women Legislative network of the National Conference of State Legislatures. According to a survey by the group, Alabama has the 4<sup>th</sup> lowest percentage of female legislators among the 50 states. In November, Alabama elected 14 women to the House of Representatives and 4 to the state Senate. This gives women only 12.9% of the total make-up of the Legislature. I believe that it would be much better for our state if more women were elected to both the House and Senate.

## **III. COURT WATCH**

### **ILLINOIS SUPREME COURT RULES AGAINST CLASS ACTION IN PERSONAL INJURY CASES**

The Illinois Supreme Court ruled recently that most mass tort personal injury cases do not qualify for class action status. In the ruling, the court determined that class actions are inappropriate when the nature and extent of plaintiffs' individual injuries—rather than questions of liability for a catastrophic incident—dominate the action. The case before the Illinois court

involved 11 residents of Tamaroa, Illinois, who had sued the railroad after they were exposed to dangerous chemicals in the aftermath of a February 2003 freight train derailment in the Southern Illinois community.

The plaintiffs sought damages for current and future health problems resulting from their exposure to the chemical spill and other damages. This court's ruling is a rejection of what some consider to be a trend of certifying classes in personal injury cases. Frankly, we haven't seen that trend in our practice. My experience has been that courts treat each case that involves multiple plaintiffs on a case-by-case basis. Each case has to meet the strict requirements of being certified as a class action.

Source: *Business Insurance*

#### **\$30 MILLION PAYMENT TO PEANUT FARMERS APPROVED BY A FEDERAL JUDGE**

A federal judge has approved a \$30 million judgment for peanut farmers in seven states who had sued the government when crop insurance payments were slashed by federal officials. Some 3,870 farmers in Alabama, North Carolina, South Carolina, Virginia, Texas, Georgia and Florida sued after sustained crop losses in 2002, the year the suit was filed. The farmers, whose crop insurance reimbursements were cut in half, lost all or most of their 2002 crops and income from peanuts. The judgment will pay farmers the following amounts, per state:

- Alabama: 625 farmers, \$7.6 million.
- North Carolina: 705 farmers, \$3.5 million.
- Virginia: 332 farmers, \$2.4 million.
- South Carolina: 21 farmers, \$172,683.
- Georgia: 1,641 farmers, \$11.7 million.
- Texas: 367 farmers, \$3.4 million.
- Florida: 188 farmers, \$1 million.

The cuts came after a law eliminated the quota system for peanuts in 2002. Farmers already had planted their crops

and bought insurance that would pay them 31 cents a pound for loss. Under the new system, the payment was set at 17.75 cents a pound. The switch exposed each plaintiff peanut farmer to thousands of dollars in uninsured losses after the peanut crop that year failed as the result of first drought and then at harvest time, heavy rains. The government has indicated that it will appeal the judgment.

Source: *Associated Press*

#### **COURT AGAIN CUTS VALDEZ JUDGMENT AGAINST EXXON**

A federal appeals court has cut in half a \$5 billion jury award for punitive damages against Exxon Mobil Corp. in the 1989 Valdez oil spill case. This litigation has been in the courts since the 1994 decision by an Anchorage jury to award the punitive damages to 34,000 fishermen and other Alaskans. Their property and livelihoods were harmed when the Valdez oil tanker struck a charted reef, spilling 11 million gallons of crude oil. It was the largest oil spill in U.S. history and caused tremendous damage.

This was the third time that the U.S. Court of Appeals for the Ninth Circuit ordered the Anchorage court to reduce the \$5 billion award, saying it was unconstitutionally excessive. This time, in its 2-1 decision, the appeals court ordered a specific amount in damages, while its previous rulings demanded that the lower court come up with its own amount. U.S. District Judge H. Russel Holland, who incidentally was appointed by President Reagan in 1984, had declared Exxon's conduct "reprehensible" and set the figure at \$4.5 billion plus interest, ruling that the Supreme Court's precedent did not directly apply to the case. It will be interesting to see what eventually happens in this case. For years, Exxon Mobil Corp. has acted as if it was above the law and some say that they really are. But hopefully, that isn't the case. In any event, it's time for the powerful oil company to pay off the victims in the Valdez.

Source: *Associated Press*

## IV. THE NATIONAL SCENE

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#### **A POWERFUL U.S. SENATOR HAS LEARNED HOW IT FEELS TO BE A VICTIM**

Sometimes it's real hard for some folks to understand how important the courts are until they become victims of abuse or wrongdoing themselves. It's been said that "an issue doesn't hit home until one's home is hit." That certainly appears to be the case for U.S. Senator Trent Lott, who was recently elected Republican Senate Whip, and whose Mississippi beachfront home was destroyed by Hurricane Katrina last year. Since that time, the powerful Senator has been fighting with his insurance company, over his loss. As you know by now, State Farm refused to pay for damage to Senator Lott's house. This powerful political figure now finds himself in the very same boat with other Katrina victims. He has had to file suit against his insurance company.

The fact that devastated Katrina victims have been forced to go to court against their insurance carriers may be surprising enough for many Americans. But the fact that their ranks have been joined by an ultra-conservative U.S. Senator, who had been an outspoken critic of those who file lawsuits, has to be somewhat mind-boggling. Senator Lott has been a real tort-reformer and an outspoken critic of the jury system. Here is what the Senator once had to say about those who go to court to resolve disputes:

*The Democrats seem to think that the answer is a lawsuit. Sue everybody..., It's sue, sue, sue ... That's not the answer," and "I'm among many Mississippi citizens who believe tort reform is needed.*

It's pretty clear that Senator Lott is singing a different tune now. He appears to have finally seen the light and is experiencing what ordinary citizens have had to put up with from the insurance industry over the past

decade. Hopefully, the powerful Senator will now help consumers get some needed relief in the U.S. Senate. Senator Lott's situation should be a reminder to all of us that insurance companies who abuse their policyholders and refuse to pay valid claims must be held accountable for their actions. I firmly believe that open access to the courts is the best means to accomplish that end. Each time when the tort reformers are able to get closer to shutting the courthouse door to ordinary citizens, Corporate America rises up in unison to cheer. Every lawsuit to them is a frivolous one. Their goal is to eliminate the jury system. I wonder if the leaders of the movement consider Senator Lott's lawsuit to be frivolous. My guess is that they really wish State Farm had seen fit to pay the Lott claim. In any event, it's good to see Senator Lott joining the choir!

#### ***THE POWERFUL LOBBY OF THE OIL INDUSTRY WINS AGAIN***

Hopefully, the new Democratic leadership in Congress will pay attention to a recent report dealing with the oil industry. An eight-month investigation by the Interior Department's chief watchdog has found serious problems in the government's program for ensuring that oil companies pay the royalties they owe on billions of dollars of oil and gas pumped on federal land and in coastal waters. In the report, the Interior Department's Inspector General says:

- the agency's data are often inaccurate;
- that its officials rely too heavily on statements by oil companies rather than actual records; and
- that only about 9% of all oil and gas leases are being reviewed.

Those are serious—but not unexpected—findings by the Interior Department. The companies that make up the U.S. oil industry are very powerful and have great friends in the Bush White House. There is confirmation in the report that the oil companies have been calling the shots for the Bush Administra-

tion on oil policy issues and that has to be stopped. The report undermines claims by top Interior officials that the department is aggressively pursuing underpayments and outright cheating by companies that drill on property owned by the American public. Investigators didn't give an estimate of the amount of money that the government might be losing. But, they cited a host of weaknesses that make the government vulnerable to being short-changed. Having gone up against the oil industry, I know first hand that the companies believe they are above the law. Interior officials defended the program, but announced that they would develop "an action plan" to address the inspector general's recommendations. It is believed that the Interior Department's failures could cost the government as much as \$10 billion over the next five years. The following are among the inspector general's findings:

- Since 2000, the number of audits has declined by 22% and the number of auditors has been reduced by 15%, even though soaring energy prices have doubled the total amount of money at stake, to about \$10 billion a year.
- Though the Interior Department says it has "reviewed" about 72% of all revenues from federal leases, it actually examined only 9% of all properties and 20% of all companies.
- The department's "compliance review" system, a computerized form of fact-checking that has increasingly replaced audits, essentially relies on the word of the oil companies being monitored. Officials conducting such reviews do not ask companies for their actual records.
- Government data are incomplete and often inaccurate, making it almost impossible for enforcement officials to develop strategies for selecting companies for special scrutiny.

The department's Minerals Management Service oversees the royalty collection program. We have written on the weakness of this entity in a previous

issue. It appears that the report verifies how weak the government's attempts to deal with the problems have been. The new report is a broad indictment of the Interior Department's unwillingness to scrutinize oil companies and protect the interests of taxpayers. Without a doubt, the Interior Department's handling of the royalty program has been a series of blunders. They have been turning a blind eye to obvious flaws in the auditing system. There should be a broad and thorough investigation of the oil and gas leasing program as soon as the new Congress comes into session.

This isn't the first time the Interior Department's inspector general has criticized the department. For example, in 2004, the royalty auditing program was described as frequently unprofessional, with auditors who were often unqualified and supervisors who were often ineffective. In September, Earl Devaney, the department's IG, told the House Government Reform Committee that the Interior Department had tolerated "cronyism, ethical breaches and cover-ups of major management blunders."

*Source: Associated Press*

#### ***THERE ARE LOTS OF ENERGY BILLIONAIRES IN THIS WORLD***

All of us know very well that energy is a major and most powerful industry in the United States. However, many of us don't know that some of the richest companies and individuals come from foreign countries that normally don't register as oil-producers. There are 12 oil and gas companies and six utilities in the top 100 of Forbes' list of the world's 2000 largest public companies. I was not at all surprised to see that oil giants **Exxon Mobil, Royal Dutch Shell** and **BP** are in the top ten. What I hadn't realized, however, is that those companies are dwarfed by the state-owned oil companies of Saudi Arabia, Mexico, Venezuela and China. Forbes lists the United States and Russia as having 38 of the 45 energy-related billionaires on Forbes' most recent list of the world's richest people. Canada accounts for three of the remaining seven. Saudi

Arabia, France, Australia and India have one each.

Source: *Forbes.com*

### **VIDEO GAMES CAN BE VERY HARMFUL TO YOUNG PEOPLE**

Most adults don't seem to understand that video games can be most detrimental to the health and welfare of young people. A new study from researchers at the Indiana University School of Medicine has documented how violent video games affect teenagers' brains. Using real-time functional magnetic resonance imaging, the researchers found that teens playing violent games experienced increased activity in the amygdala, which I have learned is the area of the brain responsible for emotional arousal. At the same time, activity in the prefrontal cortex—the part of the brain that controls self-control, inhibition and concentration—was significantly diminished. Despite these findings, the researchers stressed that further study is necessary to determine whether or not the physiological changes they observed would also lead to violent behavior. You can learn more about the results of the study by going to [medicalnewstoday.com](http://medicalnewstoday.com).

### **THE TELEVISION CABLE MARKET MUST BE CONTROLLED**

A recent survey revealed that the average person in this country watches 1,355 hours of television in a year. It breaks down to 678 hours of broadcast and 877 hours of cable and Satellite offerings. That's almost 5 hours a day. Clearly, there needs to be stronger regulation of the cable television industry. Unfortunately, little has been done to bring that about. The following information will give you a look at how programming needs to be cleaned up. In addition to its two broadcast television networks (NBC and Telemundo), NBC/Universal owns all or part of 20 cable networks. This gives NBC the ability to air 528 hours of television programming. Of their 528 hours of daily programming, the broadcast decency

laws apply only to 32 hours—roughly 6% of their total programming. So NBC can legally be as **indecent** and as **offensive** as it wants to be for 496 hours every day—nearly 94% of its program schedule.

NBC and others have fought against regulation of the cable industry. Their claim of a “chilling effect” on program content to avoid proper regulation shouldn't be tolerated. The parents of minor children should learn as much as they can about what the television industry—both broadcast and cable—is doing and then band together in a joint effort to bring some morality and just plain decency to television programming. The current trend of more and more violence, sexual content, and gross behavior must be stopped in its tracks. If you agree, let the politicians know how you feel and that you expect their help to bring about proper regulation.

## **V. THE CORPORATE WORLD**

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### **U.S. JUSTICE DEPARTMENT SHOULD BE TOUGH ON CORPORATE CRIME**

It appears that the U.S. Justice Department will ease up on its tactics for investigating corporate fraud. Deputy Attorney General Paul McNulty announced a policy change on December 12<sup>th</sup> at a New York meeting of corporate and defense lawyers. Details were set forth in a 19-page memorandum sent to U.S. attorneys. The McNulty Memorandum updates what is referred to as the “2003 Thompson Memorandum,” a series of corporate prosecution guidelines issued by then-Deputy Attorney General Larry Thompson.

Under the new guidelines, U.S. prosecutors must seek written permission from McNulty before asking a corporation to turn over confidential communications to its lawyers. Companies that refuse requests to turn over such information under the new rules can't be considered uncooperative by investigators. In addition, prosecutors can't label

a company uncooperative because it advances attorneys' fees to employees who are charged with a crime.

Personally, I believe the Justice Department should be given all of the tools necessary to prosecute corporate criminals. I don't believe—given the history of corporate crime that started to be revealed after Enron was exposed—that anything should be taken away from the Justice Department so long as its actions pass constitutional muster.

Source: *Business Week*

### **DRUG COMPANY FACES A LAWSUIT BY A FORMER CHIEF MEDICAL OFFICER**

Johnson & Johnson, the largest medical device maker, was sued recently by a former chief medical officer. Dr. Joel S. Lippman, who claims he was fired for voicing concerns about the safety of company products and for questioning nine products in development or on the market during his 16 years at the company. Reportedly, Dr. Lippman was fired from J&J's Ethicon, Inc. unit on May 15<sup>th</sup> after he asked his superiors to recall DFK24, a device used in heart surgeries that could lead to patient deaths. The complaint, filed in state court, alleges:

*Ethicon asked Dr. Lippman to resign because of his persistent objections to defendants' failure to recall the DFK24 and prior objections to unsafe medical devices or products. Ethicon terminated his employment.*

Dr. Lippman says the company retaliated because of his complaining about such products as the Ortho Evra birth-control patch, which U.S. regulators say leads to blood clots, and Intergel, a gel once used to reduce scarring after gynecological operations. The company withdrew Intergel in 2003. According to the complaint, it's alleged that Johnson & Johnson violated a New Jersey law designed to protect whistleblower employees as well as an anti-discrimination law.

Dr. Lippman worked in several high-

level posts at J&J's Ortho McNeil Pharmaceutical, Inc. from 1990 to 2000, including being vice-president of clinical trials. He worked at Ethicon as worldwide vice president of medical affairs and chief medical officer from 2000 until he was fired. Interestingly, Dr. Lippman earned total compensation at Ethicon of \$1.15 million last year and received good job reviews. While at Ortho McNeil, Dr. Lippman raised "serious health concerns" about the Ortho Evra patch, which was a big seller for the company. Patches were sold to more than 5 million women since it came on the market in 2002. As reported, U.S. regulators warned last year the patch may cause clots and expose women to 60% more hormones than oral contraceptives.

Dr. Lippman insisted on the recall of Intergel, which J&J marketed with Lifecore Biomedical Inc. It is alleged in the complaint that Intergel had caused "serious injuries and was related to a number of deaths." The companies suspended sales of Intergel in March 2003. Last year, Lifecore and Johnson & Johnson settled 79 of 80 product-liability lawsuits relating to Intergel.

The Lippman lawsuit will be watched very closely. It certainly is a significant case because of who the plaintiff is, where he worked and because of the subject matter involved. Dr. Lippman was certainly in positions with these companies that gave him access to a wealth of information. If it develops that he was fired because of his concerns over health and safety issues, I believe that any jury hearing the case would be incensed. On the other hand, if he was fired because of poor work habits, bad performance, or some other valid reason, no jury would be favorable to his case.

Source: *New York Times*

#### **SUIT COULD BE HEADING TO TRIAL IN FEDERAL COURT AGAINST BIRMINGHAM CONTRACTOR**

Bill Harbert International Construction, a Birmingham company, may be finally facing a federal court trial over

government work. This case, which has been in the court system for years, is expected to go to trial in Washington this month. Judge Royce Lamberth of U.S. District Court for the District of Columbia has twice indicated that the case, originally filed in 1995, will go to trial early this year. A whistle-blower sued the Harbert companies and other firms on behalf of the federal government, accusing them of submitting false bills for construction work in the Middle East that were paid by the U.S. Agency for International Development.

As you may recall, an overseas affiliate of Bill Harbert International Construction faced similar charges in a criminal case in 2002 in U.S. District Court in Birmingham, which was resolved by payment of \$54 million fine. Bill Harbert International Construction and the other defendants are facing many of the same allegations in the civil case in Washington that alleges violations of the False Claims Act while bidding for \$250 million in contracts in Egypt. This is work that came as a result of the historic Camp David Peace accords.

Central to the civil case are the allegations of the whistleblower, a former treasurer of J.A. Jones Construction Co., a Charlotte-based construction firm that is also being sued in the case. The federal whistle-blower alleges that the construction companies conspired to rig bids for the 1988 Egyptian contracts in order to extract as much money as possible from them. It is alleged further that the companies made up fictitious pre-construction costs and complex arrangements that purported to sell and lease building equipment, but which really hid secret payments that were spread among the conspirators. The purpose of the conspiracy was allegedly to obtain a collusive, artificially inflated, and noncompetitive price for the projects. As a result of the alleged conspiracy, the defendants are said to have submitted false and inflated claims for payment to the United States for work. Under the law, the government has the right to collect three times the amount the jury finds attributable to fraud in this case.

Other defendants in the case are

several Harbert affiliates along with German construction giant Philipp Holzmann AG, the former parent of the J.A. Jones firm that employed the whistle-blower. Roy Anderson, the former president of Harbert's affiliate based in Lichtenstein is also a defendant. It's significant that a Birmingham federal jury convicted Anderson of bid rigging and fraud in February 2002. He was sentenced to 72 months imprisonment in that case and was fined \$25,000.

There is another interesting twist to this case. Hoda Elemery, who is an Egyptian woman and a former Harbert employee, sued many of the Harbert companies and their lawyers for improper termination and other alleged wrongs in a U.S. District Court in California. Her suit claims that her job was "using her influence in legal and government circles to delay lawsuits against the companies from moving forward." This woman claims to have recordings she made of people involved in the matter. If that's true, it could make some folks most uncomfortable.

Source: *Birmingham News*

#### **STOCK OPTIONS ERRORS COST \$224 MILLION**

A company with operations in Huntsville, Alabama, has admitted that it backdated stock options. This development will apparently cost Sanmina-SCI Corp. more than \$200 million. The San Jose, California-based electronics parts manufacturer, with operations in Huntsville, listed problems in the way it recorded certain transactions during the past several years, including the backdating of stock options. Stock-option grants awarded to directors, officers and employees from January 1997 to June 2006 were recorded improperly, according to the company's report to the SEC. Sanmina-SCI admits that the backdating practices will cost it about \$224 million.

When backdating the options, the price recorded at times preceded not only the actual grant date, but also the date that the options were approved by directors. Sanmina purchased Hunts-

ville-based SCI Systems in 2001. Presently, the company has about 2,000 workers in Huntsville. A lawsuit has been filed by shareholders against members of Sanmina-SCI.

Source: *Huntsville Times* and *Associated Press*

### **JACKSON MEMORIAL HOSPITAL PAYS \$14.25 MILLION FINE**

Jackson Memorial Hospital has paid a \$14.25 million fine to settle allegations it failed to disclose and return overpayments it knew it had improperly obtained from Medicare and Medicaid. The payment goes to settle a long-standing whistle-blower lawsuit alleging that Miami-Dade County's public taxpayer-funded hospital cheated federal and state insurers in the way it billed them in 1987 and 1988. The settlement and resulting payment was kept secret until a federal judge unsealed the secret agreement. This lawsuit was brought in 1998 by Mark Razin, a former employee of the California-based Healthcare Financial Advisors (HFA), a firm that helped hospitals prepare cost reports for Medicare, the federal program for the elderly and disabled, and Medicaid, the state-federal program for the poor.

I only wish this case was an isolated incident. Unfortunately, there is a great deal of fraud committed by corporations doing business with the federal government in the healthcare field. About a half-dozen hospitals have settled similar claims to that described above. Earlier in 2006, St. Elizabeth Regional Medical Center in Lincoln, Nebraska, paid \$4 million. In 2005, Eisenhower Medical Center in Rancho Mirage, California, paid \$8 million. In 2002, Lovelace Health Systems, a New Mexico hospital and health maintenance organization owned by Cigna, paid \$24.5 million. The lawsuit alleged that HFA helped its hospital clients seek reimbursement for unallowable costs and helped conceal known overpayments from the government.

In the case against Jackson, the hospital was accused of over-calculating the basis for its "disproportionate share payments," which are made by the government to compensate hospitals that have

a large percentage of poor patients. In 2003, Jackson Memorial agreed to pay \$16.9 million to the state and federal governments to deal with accusations that it had double-billed Medicaid claims for four years at its neighborhood health clinics.

Source: *Miami Herald*

### **BRISTOL-MYERS AGREES TO \$499 MILLION SETTLEMENT**

Bristol-Myers Squibb Co. will pay \$499 million to settle federal investigations into whether the company allegedly cheated insurers by inflating the wholesale prices of a number of its drugs. The New York-based drug maker entered an agreement in principle last month with the Justice Department and the U.S. Attorney in Massachusetts to pay the settlement and avoid civil and criminal charges. Bristol-Myers will also enter a corporate integrity agreement with the Office of Inspector General of the Department of Health and Human Services. The agreement must get final approval from the Justice Department.

Attorneys general of several states and a number of counties in New York charged that Bristol-Myers inflated the **average wholesale prices** of its drugs—the same prices that are used by government programs and insurers for reimbursement purposes. All suits were consolidated under the federal district court in Massachusetts. Bristol-Myers products include the blood thinner Plavix—its best-selling drug—along with blood-pressure drug Avapro, cancer treatment Taxol, and the cholesterol-lowering drug Pravachol.

Source: *Associated Press*

### **GOLDMAN SACHS BREAKS BONUS RECORD**

A record was set recently when a \$53.4 million bonus was paid by Goldman Sachs to its chief executive, Lloyd Blankfein. The pay-off for Blankfein included a cash bonus of \$27.3 million, with the rest to be paid in stock and options. Blankfein took the helm of the investment bank in June. The record payday, disclosed by Goldman Sachs

Group Inc. in a filing with the Securities and Exchange Commission, breaks the record set just a week or so before when Morgan Stanley disclosed that it paid CEO John Mack \$40 million in stock and options.

Source: *Montgomery Advertiser*

### **PFIZER'S MCKINNELL TO GET \$180 MILLION PACKAGE**

Pfizer Inc.'s former chief executive, Henry A. McKinnell, who was forced into an early retirement in part because of investor discontent about his rich retirement benefits, will now get more than \$180 million for his retirement. The package includes an estimated \$82.3 million in pension benefits, \$77.9 million in deferred compensation, and cash and stock totaling more than \$20.7 million.

McKinnell earned \$5.97 million in salary and bonus in 2005. His total compensation for the year was valued at \$15.88 million, including salary, bonus, stock options, stock grants and benefits. McKinnell's received \$8,500 in financial counseling, \$65,120 for use of a car and driver and \$43,855 for personal use of company aircraft. That's not too bad for a man who was in effect fired by his company.

Source: *Associated Press*

## **VI. CAMPAIGN FINANCE REFORM**

### **REDUCING CORRUPTION IN CONGRESS MUST BE MADE A TOP PRIORITY**

It was very clear that voters across the country sent a clear message to politicians on November 7<sup>th</sup> and that message was: "Clean up your act!" In fact, 42% of the voters said **corruption** was the most important factor in deciding who to vote for. Even though lots of incumbents were voted out of Congress, it remains a reality that our political system is still broken. It has been said that in the past the officials who were elected to represent the American

people spent their time chasing big campaign checks and using their votes to do political favors for big-money special interests and lobbyists.

The system must be fixed and that must be a top priority for Congress. The ties between politicians and the big-money special interests and lobbyists who currently fund their campaigns must be severed once and for all. Voters should be able to go to the polls knowing that candidates will answer to them—not to big-money, special-interest contributors. Passing strong reforms of how political campaigns are funded at the national and state levels is the answer. This should be made a priority in our nation's capitol and in state capitols around the country.

#### ***POLITICAL GROUPS SHOULD HAVE BEEN FINED***

The Federal Election Commission has finally taken some significant action against some violators of the election laws. Swift Boat Veterans for Truth and MoveOn.org Voter Fund, two outside groups that played key roles in the 2004 presidential election, have agreed to pay nearly \$450,000 for various violations. Those groups, along with the League of Conservation Voters, settled charges that they failed “to register and file disclosure reports as federal political committees and accepted contributions in violation of federal limits and source prohibitions,” according to the FEC. The commission approved the three settlements on a vote of 6-0.

Hopefully, these fines will prompt Congress to make needed changes to stop the 527 committees from continuing to influence elections. The FEC's unanimous decision to approve the agreements goes to the heart of campaign tactics that were major factors in the 2004 presidential campaign. At issue was the emergence of these so-called non-profit political groups, labeled 527s based on the section of the Internal Revenue Service code that governs their activities, operating as independent campaigns. They were actively attacking both Senator John Kerry and President Bush.

The group listed as Swift Boat Veter-

ans and POWs for Truth will pay \$299,500. In the 2004 campaign, that group spent \$20.4 million criticizing Kerry's military record in Vietnam. Much of the group's claims about Kerry's service were either false or never substantiated. Nobody will dispute, however, that the attacks were successful. But, that certainly doesn't justify what they did. MoveOn.org Voter Fund, which will pay \$150,000, challenged President Bush on various issues in the campaign. The group spent \$14.6 million on television ads attacking Bush's record, which admittedly was pretty bad. The League of Conservation Voters will pay \$180,000. The group ran ads against Bush and other federal candidates, criticizing their stands on environmental issues. Again, those attacks were on solid ground, but the issues should have been raised by the Kerry campaign.

The civil penalties levied were the first of this magnitude since the Supreme Court upheld most of the campaign finance law passed by Congress in 2002 that barred political parties from raising unlimited amounts of money from corporations, unions, and wealthy individuals. The FEC concluded that the three 527 organizations violated campaign finance laws because they expressly stated their desire to influence the presidential election in their fundraising, their public statements or their advertisements. Such activity, the FEC said, could only be conducted by political committees registered with the FEC that abide by contribution limits and public disclosure requirements. Hopefully, the penalties will send a “strong message” and will result in Congress taking a look at needed reform and then get something done to eliminate 527s from political activities. The reform should take place before the 2008 presidential race.

Campaign finance watchdog groups label the FEC's action as being “too little, too late.” The Campaign Legal Center and other organizations like it have been calling on the FEC to adopt specific regulations governing 527 groups for some time. The FEC in 2004 refused to enact such rules, claiming

that it would deal with the groups on a case-by-case basis. Several other complaints involving 527 groups are pending before FEC and hopefully will result in future fines. But the real answer has to be the passage of meaningful campaign finance reform that must include putting the 527 committees out-of-business when it comes to politics. Campaign committees that have to play by the rules—including disclosure of where campaign funds are coming from—and how funds are spent—are the proper entities to handle all aspects of a political campaign.

Source: *Associated Press*

## **VII. CONGRESSIONAL UPDATE**

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### ***THE REPUBLICANS LAST STAND IN CONGRESS WAS A PUBLIC DISGRACE***

Once the American people find out what a group of lame-duck lawmakers did in the final hours of the legislative session in Washington, there will likely be even more demand for reform. For example, a major energy policy decision made by a two-vote margin has been labeled by Public Citizen as a last gift to big-money campaign contributors. Hopefully, the new Congress will take immediate action to undo that gift. When the House of Representatives took up H.R. 6111, the massive tax-trade-health care bill, the lame-duck House voted 207-205 against recovering at least \$10 billion in lost royalty payments to the U.S. Treasury due to a loophole involving Gulf of Mexico oil and natural gas leases. What the Republicans in the House did was totally inexcusable.

A number of consumer groups, including Public Citizen, are trying to make the public aware of just how badly they were treated. Lawmakers, who were voted out on November 7<sup>th</sup>, cast the deciding votes that defeated the recovery proposal and that's about as bad as it gets. Seventeen lame-duck lawmakers, in their last stand, voted to con-

tinue allowing oil companies to enjoy their multibillion-dollar royalty break, which will accumulate over the life of the leases. Tyson Slocum, director of Public Citizen's Energy Program, has this to say:

*It is unconscionable that at a time when the largest five oil companies posted profits of \$93 billion in just the first nine months of 2006, Congress, with the help of recently fired lawmakers, voted to protect oil companies at the expense of the American taxpayer. We urge the new Congress to fulfill its pledge to reform the oil royalty program and demand that oil companies pay their fair share.*

There were 47 lame-duck House members in the congressional session that ended last month. Only eight of them didn't vote on the oil royalty measure. Of the remaining lawmakers, 28 voted in favor of protecting the oil company interests (all Republicans) and only 11 of those leaving Congress (6 Republicans and 5 Democrats) voted to hold oil companies accountable. Meanwhile, only \$65 million of the \$3.9 billion in energy tax breaks in H.R. 6111—or less than 2%—are available to individuals interested in promoting energy efficiency to help break America's oil addiction. The rest of the tax breaks are allotted to corporations, including \$350 million in new tax breaks to help oil companies clean up polluted sites and \$176 million for companies producing oil and natural gas from marginal wells.

The \$65 million in campaign contributions from the oil industry since 2001, with 81% going to Republicans, has clearly dominated the energy agenda on Capitol Hill. Instead of rolling back the billions of dollars in oil company tax breaks enacted in the Energy Policy Act of 2005 or fixing the \$10 billion royalty loophole, Congress awarded \$525 million in new giveaways to the oil industry. That is totally unjustified and those who let this happen should be held accountable by the American taxpayers.

The recovery amendment was an

attempt to correct a royalty loophole that has existed since leases were offered to the companies royalty-free with no price ceiling. Politically powerful oil companies are being allowed to extract oil from federal land without paying taxpayers for its use, even as prices have shot up by \$45 to more than \$60 per barrel. The failed attempt to recover billions from the oil companies also would have required the companies receiving the billion-dollar break to renegotiate their sweetheart deals before they could bid on new leases.

Source: Public Citizen

### **HOUSE ETHICS PROCESS IS A SHAMEFUL JOKE**

There is even more bad news to report from the departed 109th Congress. Most folks—outside Washington—believe the Mark Foley episode should have resulted in strong punitive action by Congress against all of those found guilty of violations. The House Ethics Committee spent 100 hours interviewing members of Congress and congressional staff and taking sworn testimony about inappropriate advances to male pages made by Foley while he was in the House. I really believed that the Committee would do the right thing and set an example for the new Congress. But, the Committee's 90-page report, released on December 7<sup>th</sup>, is just another cover-up it appears. Nobody was charged with anything. There were all sorts of wrongful conduct that should have been addressed. House ethics rules are very broad and provide that any member, officer or staff shall conduct themselves "in a manner that shall reflect creditably on the House." Other ethics clauses require any person in the government to "expose corruption wherever discovered."

These provisions surely seem to be solemn obligations to ensure that members of Congress and staff will preserve the integrity and dignity of the institution and expose wrongdoing. If what Mark Foley did wasn't bad enough, and it was awful, the cover-up that took place was even worse. Neither

act can be justified and some heads should roll. Foley was guilty of despicable conduct and the American people expected some strong punitive action taken against him. Strong remedial measures must also be put in place to avoid such activities in the future.

There were others who allowed Foley's conduct to continue and in that regard there appears to have been a deliberate cover-up. Part of the clear obligation owed to the public is to bring potential ethics violations to the attention of the appropriate authorities—in this case, the whole House page board and the House Ethics Committee. While the Committee's investigation makes clear that no one alerted either the board or the ethics committee of concerns about Foley's untoward advances to pages, the report lets all of those investigated off the hook. Clearly, those in power were guilty of an utter abdication of their duty to an ethics process that should handle problems of this nature. The Ethics Committee has the power to issue public reprimands and to assess civil fines, among other sanctions. Instead of taking action, the Committee's recommendations were as weak as last week's dish water. Nobody was punished and that's a crying shame.

The report committee talks about operational details of the congressional page program, calling for, among other trivialities, better education of members about the "role of pages in the House." Public Citizen calls this report an insult to the American public and I agree with their assessment. The ethics process is almost irretrievably broken. Public Citizen believes the only workable fix is "to create an independent ethics monitor to investigate violations on Capitol Hill." If you have a better solution, let the member of the House of Representative from your district know what you think would work. Clearly, the Foley matter can't be allowed to drop off the radar screen. If something isn't done immediately by Congress, that's exactly what will happen.

Source: Public Citizen

## THE ETHICS HALL OF SHAME

We can all agree—regardless of our political persuasions—that over the past several years an unprecedented wave of corruption, cronyism and special-interest sleaze has gripped our nation's capital. To bring greater public attention to individuals involved in these ethics scandals—in the hope of preventing such abuses of the public trust in the future—Public Citizen established the Ethics Hall of Shame. To be included, a member of Congress must have committed illegal acts or engaged in conduct that is highly abusive of the public trust in the service of special interests. According to Public Citizen, those members of Congress in the “dishonorable mention” category have been involved in activity that is ethically questionable or offensive to the public trust, but which does not rise to the same level of wrongdoing as that of the inductees into the Hall of Shame.

The Hall of Shame:

- **Jack Abramoff, Admitted Felon and Former Super-Lobbyist.** Abramoff is the poster child of why systemic reform to the influence-peddling system is so desperately needed in Washington.
- **ex-Rep. Tom DeLay (R-TX).** DeLay, called “The Hammer,” was forced to resign his position as House majority leader. He is under indictment for money laundering in Texas. Likely he will be the focus of a Justice Department investigation for his close ties to Jack Abramoff.
- **ex-Rep. Randy “Duke” Cunningham (R-CA).** He pleaded guilty to taking \$2.4 million in bribes from defense contractors and was sentenced to 8 years in prison.
- **Rep. Bob Ney (R-OH).** Ney resigned as chairman of the House Administration Committee because of allegations that he used his office to help Jack Abramoff and his clients.
- **Rep. Richard Pombo (R-CA).** Pombo went to bat for a Jack Abramoff client. He short-circuited an investigation

into the owner of a failed savings and loan. His aides attempted to scuttle an environmental regulation that could have hurt the Pombo family's business.

- **Senator Conrad Burns (R-MT).** Burns was a major recipient of Jack Abramoff's largess, who went to extraordinary lengths to help an Abramoff client.
- **Rep. William Jefferson (D-LA).** The Louisiana congressman was involved in an investigation of alleged extortion in a business investment scheme; was found to have stashed large amounts of cash in his freezer.
- **Rep. John Doolittle (R-CA).** He passed \$37 million in defense contracts to the same man that bribed Cunningham, held a fundraiser in one of Abramhoff's skyboxes, and is currently under investigation by the Justice Department.

Dishonorable Mention:

- **Senate Majority Leader Bill Frist (R-TN).** Dr. Frist is currently under investigation by the Securities and Exchange Commission for possible insider stock trading. He also went to extraordinary lengths to insert a provision into a new law that will insulate drug companies from some defective products lawsuits.
- **House Majority Whip Roy Blunt (R-MO)** Blunt slipped a favor for a major tobacco company into legislation creating the Department of Homeland Security, but withdrew it after getting caught.

Your Choices:

You can probably think of several others who should be considered for this dubious list. There are a good number who certainly could be candidates. Hopefully, at the end of the year, this list will be much shorter. The American people clearly deserve better than they have gotten thus far in our nation's capitol. Hopefully, we will see a new day during 2007.

Source: Public Citizen

## U.S. SENATE FAILS TO PASS THE COMPREHENSIVE DISASTER BILL

The U.S. Senate failed to pass the comprehensive agricultural disaster bill before the 109<sup>th</sup> Congress was adjourned. That was bad news for Alabama farmers. In a procedural vote, the Senate voted 57-35 against allowing action on this most important legislation. The bill, which would have provided much needed relief for farmers, needed 60 votes to pass. Alabama Agriculture and Industries Commissioner Ron Sparks had this to say on the subject:

*I am extremely concerned that the Senate chose not to take action on such an important bill. Our farmers have been looking to this bill for help and at this time there is no federal assistance coming like we had hoped. Farmers in the state have gone through the worst drought experienced in Alabama in 15-20 years. We have to help them recover so they can possibly have a good year in 2007. This bill should have been moved through a long time ago, but for the Senate to not take action now is disappointing.*

Commissioner Sparks has assured Alabama farmers that he will continue to work with Alabama's Congressional delegation to push for a comprehensive disaster bill until one is passed. There will be an opportunity for a comprehensive disaster bill to be presented again in early 2007. Hopefully, the new leadership in Congress will make the passage of this legislation a top priority.

## VIII. PRODUCT LIABILITY UPDATE

### GOOD NEWS ON THE DUDLEY NOMINATION

As we reported last month, Public Citizen had asked the White House to withdraw the Dudley nomination to head up the Office of Information and

Regulatory Affairs, a most important federal post. Ms. Dudley's record of hostility to protections of public health, safety, privacy and the environment makes her totally unsuitable to fill this position. Hopefully, President Bush won't send the Dudley nomination back to the Senate. The President's attempt to go around Congress by giving Ms. Dudley a recess appointment was clearly wrong. No more industry-backed radicals with an agenda to dismantle the few protections for the public now in place—as scarce as they are—should be appointed to any important regulatory job in government. We don't need to keep allowing the “foxes” to guard the “hen house” in Washington. It's the obligation of Congress to see that this trend is reversed.

#### ***THE PUBLIC CAN BUY VEHICLES THAT CAN PROTECT THEM IN ROLLOVER CRASHES***

The Center for Auto Safety and Public Citizen have unveiled the innovative Jordan Rollover System (JRS), a superior test device for analyzing vehicle roof strength and rollover crash protection under real-world conditions. The system was announced last month at a press conference which was attended by groups interested in automobile safety. The demonstration of the JRS included a video of 10 crash tests conducted at 15 mph in 2006 in California by the JRS developers that showcased one production vehicle that performed well (the Volvo XC90) and others that performed poorly. Over the past five years, validation and research and crash tests have been conducted using the JRS system. The groups released the first detailed dynamic roof crush test results of the Volvo XC90 SUV, which has a stronger roof and performed well compared to other vehicles. The work was conducted under a grant from the Santos Family Foundation and with donations of Volvo XC90s from State Farm Mutual Automobile Insurance Company.

Rollover crashes have been virtually ignored by both the federal government and the automobile industry. These tests prove that safer vehicles are on the market that can withstand the forces of

rollover crashes and protect the occupants. Information about the XC90's performance in rollover crashes was previously unavailable because Volvo kept its own detailed test results secret under pressure from Ford Motor Co., which as you know purchased Volvo in 1999. We have reported that while rollovers account for only 4% of crashes, they represent 35% of all vehicle occupant fatalities. This means that these crashes needlessly kill 10,800 and seriously injure more than 16,000 people each year. It's well known that rollover crashes could be more survivable if vehicles had stronger roofs, but the auto industry has vigorously opposed any improvement to the 1971 roof strength standard. The industry has taken that position even though its engineers have known the importance of roof strength in surviving rollover crashes for a long time.

To address this need, the JRS was designed and built by Acen Jordan, a renowned California-based test device maker, and Donald Friedman, an engineer and founder of California-based Xprts LLC. In the test, the vehicle is mounted on an axis that permits it to roll. A portion of roadway is run underneath the vehicle as it is rotated and dropped so that its roof strikes the road as it would in a rollover. The vehicle is then caught so that it will sustain no further damage. Subsequent rolls can be conducted by resetting and running the JRS test again.

Unlike tests used by the National Highway Traffic Safety Administration to test roof crush resistance, the JRS allows two sequential roof-to-ground contacts. It has been proved that JRS tests are realistic and highly repeatable. Dynamic tests—those that put a vehicle in motion to mirror real-world crashes—provide the best measure of a vehicle's capability of protecting occupants in a rollover. The JRS also can test the effectiveness of seat belts, side curtain air bags, window retention and door latching. The system can also lead to better vehicle design to prevent ejection of occupants.

As you probably know, NHTSA uses dynamic tests for frontal and side crash

standards, but not for its roof strength standard. In a rollover crash, the roof provides the primary occupant protection. If the roof collapses, seat belts may become slack and windows may shatter. Occupants may be crushed by the roof or they may be thrown from the vehicle. These are the two major causes of serious to fatal rollover injuries. As we have mentioned frequently, NHTSA is in the process of issuing a roof strength standard for rollover safety as required by SAFETEA-LU, the 2005 highway bill. However, the agency's proposed rule is little better than the current 35-year-old standard, in which a modest force is applied to only one side of the roof of a stationary vehicle.

The Center for Auto Safety and Public Citizen maintain that all vehicles should be required to pass a dynamic, repeatable test such as the JRS to assess vehicle performance in conditions that closely match real-world rollover crashes and can be used to evaluate the key systems for occupant protection: the roof, safety belts, side window integrity, side curtain air bags and door latches. Donald Friedman, the Engineer who was involved in designing and building JRS, commented at the news conference:

*The JRS compares the injury and ejection probability of vehicles in rollovers and can definitively identify vehicle safety component defects and their causal relationship to death and injury in rollover crashes.*

Clarence Ditlow, Executive Director of the Center for Auto Safety, who is one of the most renowned safety experts in the country, if not in the world, had this to say in making the announcement about Ford's attitude on safety:

*Ford has obtained protective orders in 24 courts prohibiting the public from seeing what we released today—dynamic roof crush tests that show Volvo XC90 occupants escape serious injury in multiple rollover crashes while Ford Explorer occupants suffer serious injury.*

Joan Claybrook, President of Public Citizen, who incidentally served as head of NHTSA during the Carter Administration, and who has fought hard for consumers on automotive safety issues, observed:

*For 35 years, the auto industry has allowed hundreds of thousands of its customers to needlessly die and suffer catastrophic injury in rollover crashes because of weak roofs that crush in on the occupants. The 1927 Ford Model A had a stronger roof than most of today's cars. The federal government has a statutory and moral obligation to ensure that all vehicles have strong, protective roofs that do not crush occupants' heads.*

Since 1999, Volvo has been a subsidiary of the Ford Motor Company. More than 300 occupants in Ford Explorers, which have very weak roofs, were killed in rollovers resulting from defective Firestone tires in the late 1990s. There have been hundreds of successful product liability lawsuits against Ford resulting from rollover injuries and deaths involving the Explorer. Since the introduction of the Volvo XC90, as stated above, Ford has actively suppressed technical information on Volvo's successful rollover occupant protection program and the rollover performance of its XC90.

In 2004, Ford successfully urged a Florida court to seal documents from a rollover case that ruled against the company over fatal injuries caused by the Ford Explorer SUV. The documents showed that throughout the late 1990s, Ford successively weakened the roof of its Ford Explorer and that the vehicle had an extremely low margin of safety in rollover crashes. Testing documents from Volvo also demonstrated that a strong roof can protect occupants in a rollover, and that, in developing the XC90 SUV, Volvo used a much stronger dynamic test to examine roof strength and the interaction of safety systems in a rollover. Although the key documents had already been publicized in news reports throughout the country and

legally obtained by many advocacy organizations, Volvo actually threatened to sue Public Citizen if the consumer advocacy group disseminated the documents. Public Citizen filed a motion in the Florida court in December 2005 to unseal the documents. That case is still pending.

The auto industry has long balked at any federal requirement for stronger vehicle roofs. A 2005 report publicized by Public Citizen revealed that auto industry data showed that automakers have misled government regulators and the public by claiming that roof strength and injuries in rollover crashes are unrelated. The report, written by Martha Bidez, Ph.D., of Bidez Associates, debunked what some auto manufacturers had said for years—that in rollover crashes, people sustain head and neck injuries when they dive into the roofs of their vehicles, not when the roofs crush into the people's heads. Automakers have made this claim to argue against government requirements for stronger roofs on vehicles and to shield themselves from liability in lawsuits brought by families of rollover crash victims. In addition, Friedman has reanalyzed the data from dynamic rollover tests conducted by General Motors in the 1980s to show that there is no basis for the theory in which an occupant's head and neck are expected to restrain an occupant in a rollover rather than the safety belts.

The underlying data and film from these GM tests were hidden from the public until 2005 while GM engineers published papers claiming that they had proved that roof crush was not responsible for occupant injuries. Xprts-LLC and the Center for Injury Research have conducted more than 50 tests of contemporary vehicles using the JRS. The Volvo XC90 is the first vehicle to show good roof crush resistance in these tests. JRS tests have also shown that a vehicle with poor roof crush resistance can be easily modified to provide minimal rollover roof crush with the addition of minor, low cost improvements in roof structure.

Source: Public Citizen

### **GM'S ANNOUNCEMENT IS PROOF THAT FEDERAL DYNAMIC TESTS FOR ROLLOVER CRASHES ARE NEEDED**

In a related and most significant event, General Motors announced last month that it is opening a new safety lab to conduct dynamic, or simulated real-world, rollover crash tests and that it is offering rollover-enabled side curtain airbags. That has to be taken as a positive sign that GM now finally acknowledges the need for new vehicle designs to protect people in rollover crashes. In its announcement, GM admits that it has been conducting dynamic rollover tests for more than 30 years using a dolly rollover test, which is an optional test in airbag standard number 208. GM conducts its dolly rollover test with vehicles pulled sideways on a platform at a 23-degree angle. The new facility has the capacity to conduct additional types of rollover tests that simulate crashes experienced by drivers on the highway.

Over the years, the automobile companies, including General Motors, have consistently objected to the prospect of the National Highway Traffic Safety Administration issuing a dynamic rollover crash test to assure the safety of vehicles when a rollover occurs. It is significant that GM announced installation of rollover-enabled side curtain airbags that must be tested in a dynamic crash test. As you know, NHTSA is currently engaged in rulemaking to upgrade the existing 1971 static roof crush test standard, where pressure is simply applied to one side of the roof. But to date the regulatory agency has yielded to auto industry pressure and has issued only a proposed static standard involving more pressure. The recent announcement by GM makes it clear that the industry is well prepared to do the kind of testing necessary under a government dynamic test standard. As pointed out above, the Volvo XC-90 SUV—manufactured since 2003—is an example of a vehicle, designed using dynamic testing, that protects passengers in rollover crashes.

As we have reported, there is no existing safety standard for seat belts in rollover crashes. It's undisputed that the

strength of the roof and the performance of the belts are the most critical safety protections in rollover crashes. Until all of the deficiencies are addressed, drivers and passengers will continue to be put at risk of death or serious injury on our highways.

Source: Public Citizen

### **DEATH RATES IN MINICARS MORE THAN DOUBLE RATES IN OTHER CARS**

A new study has revealed that driver death rates in minicars are higher than in any other vehicle category and more than double the death rates in midsize and large cars. For the first time, the Insurance Institute for Highway Safety has tested the smallest vehicles sold in the U.S. market. These vehicles gained popularity as fuel prices increased. Now these cars are rated for comparison of occupant protection in front, side, and rear crashes. The Nissan Versa was the only minicar that earned good ratings in all three tests. Two other cars earned good ratings in front and side, but not rear tests. Crash test results indicate which vehicles in each weight category afford the best protection in real-world crashes, and this round of tests reveals big differences among the smallest cars. But results of real crashes show that any car that's very small and light isn't the best choice in terms of safety. The driver death rates in minicars are considerably worse than for other vehicles, according to the safety group. Institute president Adrian Lund stated:

*People traveling in small, light cars are at a disadvantage, especially when they collide with bigger, heavier vehicles. The laws of physics dictate this.*

Death rates in single-vehicle crashes also are higher in smaller vehicles than in bigger ones. Minicars weigh about 2,500 pounds or less. A typical small car weighs about 300 additional pounds, and midsize cars weigh about 800 pounds more than a minicar. A midsize SUV weighs 4,000 pounds or more, exceeding the weight of a minicar by at least 60 percent. In every vehicle cate-

gory including car, SUV, and pickup truck, the risk of crash death is higher in the smaller, lighter models. Consumers should use the ratings to choose the most crashworthy designs among the smallest cars. I suggest that you go to the Institute's Web site ([www.IIHS.org](http://www.IIHS.org)) for a complete rundown on this report.

Source: *Insurance Journal*

### **JUDGE REFUSES NEW TRIAL IN SOUTH CAROLINA FORD CASE**

A South Carolina judge has refused to order a new trial in a Ford rollover case. The jury had awarded the family of one of the passengers in a Ford Bronco over \$31 million as damages in the trial that ended in October. The family sued Ford after the 12-year-old passenger was thrown from the Bronco in 2001, suffering extensive head injuries. Ford is expected to appeal.

### **HASBRO IS SUED OVER INFANT'S CHOKING DEATH**

The father of a 19-month-old West Virginia boy, who apparently suffocated on an oversized plastic nail from a toy that Hasbro Inc. has since recalled, has filed suit against the nation's second-largest toy maker. The child died in January of 2006, after choking on a foreign object. After learning of this death and the suffocation of a 2-year-old Texas child, Hasbro announced a voluntary recall in September of about 255,000 Playskool Team Talkin' Tool Bench toys intended for children ages 3 and older.

### **LAWSUIT FILED AGAINST TIRE MANUFACTURER AND CAR MAKER**

We have written in previous issues about problems caused by aged tires that don't show wear. These tires are typically kept as spares and not used on the vehicles until a need arises. There have been a tremendous number of deaths and serious injuries associated with age-related tire tread separations. In many of these cases the tires were unused spares and showed no signs of

degradation. Sometimes a tire is kept in storage for years before being sold and put in use. Others may be on a vehicle that is seldom used and just sits around parked. In a recent incident, an unknowingly deteriorated tire used as a spare caused a 12-passenger van to roll several times. The crash killed three of the passengers, injured five and affected a total of four different families. One of the passengers, a 10-year-old girl, was left paralyzed from the neck down.

The van was traveling from New Jersey back to Florida when it crashed in North Carolina. Before the group left New Jersey, the driver of the van checked the back right tire as a precaution and then elected to put the unused spare tire in its place.

During the trial it was proved that the tread separated from the steel belt while the vehicle was traveling down an interstate highway. Family members are now suing Uniroyal, the tire manufacturer, and General Motors, the van manufacturer. Warning labels should be put on all tires by the manufacturers showing an expiration date. Carmakers, such as GM, should be made to put adequate warning relating to tires in their manual. Currently, there are no warnings by GM in the U.S.

## **IX. MASS TORTS UPDATE**

### **TEXAS JUDGE CUTS VIOXX AWARD TO \$7.75 MILLION**

A state court judge in Texas has reduced the verdict against Merck & Co. in the Garza case from \$32 million to \$7.75 million. The judge cited Texas' recently enacted caps on punitive damages. In April, the state court jury found Merck liable for the death of Leonel Garza, a 71-year-old man who had a fatal heart attack within a month of taking Vioxx. The company was ordered to pay the Garza family \$7 million in non-economic compensatory damages and \$25 million in punitive damages. The law in Texas caps punitive

damages at twice the amount of economic damages—lost pay—and up to \$750,000 on top of non-economic damages. Because Mr. Garza was retired, the jury awarded no economic damages, so Merck was ordered to pay the most the family could receive under state law.

Source: *Associated Press*

### **DRUG COMPANIES SHOULD CHANGE THEIR WAYS**

Our firm has seen many examples of drug companies ignoring warning signs in their clinical trials. For example, when Merck saw the results of their VIGOR trial, the company decided to “spin” the results instead of warning physicians and their patients about the heart attack risk with Vioxx. Instead, Merck continued to promote and sell the drug for several more years until they were finally forced to pull Vioxx from the market. Now their shareholders find their company stuck in a massive amount of litigation that could go on for years.

Have companies decided to stop charging ahead when they see serious risks arise in clinical trials? Last month Pfizer, the world’s largest drug company, discontinued further studies on Torcetrapib. This drug was intended to treat heart disease. But a large clinical trial showed that it actually increased the risk of death, forcing Pfizer to stop development. The company had estimated the drug could have potential yearly sales of up to \$15 billion. This would have made it the largest selling drug in the world at this time. Although it was a tough decision for Pfizer to make, it was the right thing to do in terms of patient safety. The question is would the same decision have been made in the 1990s before the withdrawals of such drugs as Fen-phen, Rezulin, Propulsid, PPA, Baycol and Vioxx and the subsequent litigation that followed. Just maybe Pfizer was paying attention and realized that that patients injured by drugs have folks to turn to for help. Many now see our judicial system as the lone watchdog for the

public since the FDA has failed the public so many times.

### **STATINS ACTUALLY CAUSE HEART DISEASE IN SOME PATIENTS**

We have seen for years how drug companies hide known risks about their drugs. There have been numerous examples of drug review agencies in other parts of the world being much stricter on drug companies than our very own FDA. It has been reported that doctors are prescribing statins like Lipitor and Crestor at a record pace. There have actually been discussions about putting statins in water systems. Are either the companies or the FDA addressing a scientifically known side effect of statins which is the depletion of COQ10 in the body? This enzyme is sometimes described as a “sparkplug” in the human body that is important in a number of activities related to energy metabolism.

Merck actually has a patent dating back to 1988 for a combination Zocor (statin) and Q10. The FDA appears to frown upon Q10 use as a dietary supplement in conjunction with statin medications. Research published in several medical journals support the theory that Q10 depletion by statins actually leads to congestive heart failure. The question that needs to be answered is whether statins actually contribute to the very disease process they treat—heart disease. Some countries, including Canada, require statin manufacturers to recommend in their labeling that Q10 be taken in conjunction with their statin medication.

You would think that both the drug companies and the FDA are investigating this issue. However, neither is doing so to my knowledge. Drug companies may not want to change their labels since it could reduce the sales of the statin drugs. If doctors told patients that statin drugs could cause heart muscle degeneration, many of their cardiac patients would refuse to take statins. Then there is the economic issue. Patients covered by health insurance often have their prescription drugs sub-

sidized while government programs provide low-income people with free drugs. If these patients were told to take Q10 supplements with their statins, many would be unwilling to do so or unable to bear the extra expense. On the flip side, many statin drugs are not taken because of side effects that Q10, if taken, might alleviate. If so, drug companies may be shortchanging themselves in the long run by not recommending Q10 supplementation.

What do the other countries who recommend Q10 supplement with statins see in the science? Has this been adequately researched? Drug companies and the FDA should look for a definitive answer.

### **STUDY FINDS MEDICATION RAISES SUICIDE RISKS IN YOUNG ADULTS**

In a long-awaited analysis, health officials reported last month that antidepressant medications appeared to increase significantly the risk of suicide attempts and related behaviors in adults under 25 years of age, while reducing such risks in older people. The analysis, the most comprehensive and rigorous to date, found that suicidal behavior of any kind was rare, and that people taking the medications were no more likely to kill themselves than those taking placebo pills.

The report, which included more than a dozen medications, was compiled by the Food and Drug Administration. There has been a long debate over the use of these drugs. The debate has recently focused on children and adolescents. In 2004, after doing a similar analysis, the FDA required drug makers to include on their labels prominent warnings that the drugs were associated with an increased risk of suicidal thinking and behavior in minors. The new study is likely to shift the same attention to young adults. There are numerous patient advocates who believe that antidepressants like Prozac have hidden dangers. On the other hand, psychiatrists insist that the medications are safe. It should be noted that the drug trials studied were not designed to eval-

uate suicide risk.

The risk was the same whether the patients were taking newer drugs, like Prozac from Eli Lilly and Lexapro from Forest Pharmaceuticals, or older products, like imipramine. The drugs appeared to reduce the risk of suicidal behavior significantly in people 65 and over. A panel of experts will advise the FDA on whether to take action on the report's findings.

Source: *New York Times*

### **FIRST PAXIL BIRTH DEFECT LAWSUIT FILED**

The parents of 2-year-old Eric Jackson have filed the first lawsuit contending that use of the antidepressant Paxil during pregnancy caused birth defects in their son. It is alleged that the medication - manufactured by GlaxoSmithKline - caused their son to be born with severe Persistent Pulmonary Hypertension (PPHN), a condition that affects blood flow to the lungs and can cause death. After his birth, Eric was placed on a ventilator for a month. He had two cardiac catheterizations and several other procedures and now remains on oxygen and medications to help him breathe. The family sued the company in state court in Philadelphia for failing to warn consumers of the possible risks of taking the medication during pregnancy. It's almost certain that more lawsuits will be filed against GSK as people learn more about the problems caused by Paxil. Our firm is currently evaluating a number of Paxil cases that involve deaths of persons taking this drug.

A group representing America's obstetricians has recommended that women avoid the antidepressant Paxil if they are pregnant or planning on becoming pregnant. This is due to a potential heightened risk for birth defects. The American College of Obstetricians and Gynecologists (ACOG) also cautioned that treatment with other antidepressants should be considered on a case-by-case basis. ACOG's Committee on Obstetric Practice, in the December issue of *Obstetrics & Gynecology*, recommends that:

*treatment with all SSRIs [selective*

*serotonin reuptake inhibitors] or selective norepinephrine reuptake inhibitors or both during pregnancy be individualized and paroxetine [Paxil] use among pregnant women or women planning to become pregnant be avoided, if possible.*

The guidelines come a full year after the FDA issued a warning about possible birth defects associated with Paxil when the drug is taken during the first trimester of pregnancy. This warning was based on two studies. The first found about a 2% risk of heart defects in babies born to mothers who took Paxil early in their pregnancy, compared with a 1% risk in the general population. The second study found that the risk of heart defects was 1.5% in babies whose mothers took Paxil in the first three months of pregnancy, compared with 1% in babies whose mothers took other antidepressants in the first trimester. The most common defects were cardiovascular.

The initial FDA warning came in September of 2005. In December of the same year, the FDA instructed Paxil's maker, GlaxoSmithKline, to reclassify the drug from a Category C to D (a stronger warning) for pregnant women. Category D means studies in pregnant women have demonstrated a risk to the fetus. Other reports had indicated that SSRIs, the category of antidepressants that includes Paxil, as well as Celexa, Prozac and Zoloft, may cause newborns to have withdrawal symptoms.

Of course, untreated depression has its own risks, including low weight gain, alcohol and substance abuse, and sexually transmitted diseases, all of which have negative maternal and fetal health implications. ACOG acknowledged that the potential problems caused by Paxil must be weighed against yet another study which found that pregnant women who discontinue their antidepressant medication are five times more likely to relapse into depression than women who continue with the medication. Women of reproductive age have the highest prevalence of major depressive disorders, with ACOG experts esti-

imating that about 1 in 10 will experience a bout of major or minor depression sometime during pregnancy or the postpartum period. The statement recommended that fetal echocardiography, which looks for heart trouble, should be considered for women who were exposed to Paxil in early pregnancy.

Sources: *HealthDay* and *Associated Press*

### **LAWSUIT FILED AGAINST JOHNSON & JOHNSON**

A man has sued Johnson & Johnson and a subsidiary for failing to warn him of complications that could be caused by drug-coated stents placed in his arteries. The allegations in the suit come as the Food and Drug Administration cited studies last month showing drug-coated stent recipients face a small but significant blood clot risk. The lattice-shaped tubes prop open clogged arteries. Unlike older, bare-metal stents, newer ones use drugs that dissolve into the bloodstream to prevent tissue regrowth. The 46-year-old man alleges Johnson & Johnson was aware of potential complications from the product before it gained FDA approval in 2003, and that the company failed to warn patients and doctors.

The plaintiff in this lawsuit had five of the newer stents, made by a Johnson & Johnson subsidiary, Miami-based Cordis Corp., implanted in heart arteries in 2003 and 2004 after suffering a heart attack. As recommended in product guidelines, use of blood thinners was discontinued after three months. But then he began to suffer chest pains again and now may be forced to be on the medications for the rest of his life.

Johnson & Johnson, based in New Brunswick, New Jersey, contends there is no significant difference in clotting, heart attack or death rates between its drug-coated stent and bare metal versions. The FDA, citing studies, said the risk emerges a year or more following surgery once patients stop taking blood-thinning medications. The FDA said it was unknown how long patients should remain on the drugs to prevent clots. The agency convened a two-day

meeting to discuss the clotting risks. Boston Scientific Corp. and Cordis are the only two companies with U.S. approval to sell the drug-coated versions of the stents, which have been placed in about 6 million people worldwide. Boston Scientific has acknowledged a slight increase in clotting associated with its version but said it has seen no corresponding increase in heart attacks or deaths.

Source: Associated Press

### **SCIENTISTS MAY HAVE FOUND KEY TO VIOXX HEART RISK**

A recent report has shed more light on the problems caused by people taking Vioxx and other drugs referred to as Cox-2 inhibitors. Scientists may now know why the drugs increase the risk of heart attack and stroke. Researchers at two London medical colleges reported in a study in the December issue of the Federation of American Societies for Experimental Biology journal that the drugs, which block the Cox-2 enzymes that are expressed in inflamed parts of the body, also inhibit the Cox-1 enzyme in cells that line blood vessels. By suppressing Cox-1 in the lining of blood vessels, the drugs slow the production of the blood-thinning substance prostacyclin and thus heighten the heart risks, according to the study.

The research team found that the drugs only had an adverse effect on Cox-1 in endothelial cells, which line blood vessels, and not in other areas such as platelets. They also saw no evidence of Cox-2 in these cells, findings that contrast with conventional scientific thinking about how the drugs work. Tim Warner, a professor at the William Harvey Research Institute at Queen Mary University of London, one of the study's authors, stated:

*It is essential that we have a true understanding of their sites of action so that we can produce new, safe and effective drugs for years to come. This research will help us define such new drugs.*

The risks of Cox-2 inhibitors, which include Vioxx, Celebrex, Bextra, and

Prexige, were thought to arise because the drugs blocked Cox-2 in the blood vessel cells. The findings may help scientists to develop new therapies that still focus on Cox-2, but which do not have an adverse effect on Cox-1 in the cells, the researchers said. Cox-2 inhibitors were developed as an alternative to treatments including ibuprofen and aspirin, which can harm the stomach. The drugs came under intense scrutiny by regulators in the U.S. and Europe because of the Vioxx problems.

Source: Bloomberg News

### **THE IMPACT OF PRE-EMPTION ON THE BEXTRA & CELEBREX LITIGATION**

The recent pre-emption ruling in the Bextra and Celebrex Multi-district Litigation (MDL) regarding the Marketing and Sales portion of the MDL cases has caused concern regarding state law causes of action for these drugs. Specifically, the MDL Court ruled that the cardiovascular risk claims, in the context of the marketing and sales practice portion of the litigation, were pre-empted by the FDA Preamble. The Court did not find, however, that the gastrointestinal risk claims were pre-empted. Importantly, the Court has not addressed whether the Bextra and Celebrex cardiovascular risk claims within the product liability portion of these MDL cases have been pre-empted.

The FDA Preamble became effective earlier this year. It stated that if the FDA approved a drug's warning label, then the manufacturer would be free of liability from state court causes of action that require an additional or stronger warning to a particular drug's label. If given deference, the consequence of the FDA Preamble gives immunity to manufacturers of prescription drugs lawsuits if the FDA has approved the drug's warning label.

The major concern with giving deference to the FDA Preamble is that historically, the FDA's drug approval process has only been a minimum safety standard, which allowed state laws to impose stricter requirements for drug safety. The FDA Preamble would effectively allow dangerous drugs to be

placed on the market without the drug manufacturers being held accountable for injuries and/or death to consumers that would occur as a result of inadequate warning labels.

Several courts have weighed in on the issue of whether the FDA Preamble should be given deference. There have been ten federal courts that have taken the position that the FDA Preamble does not allow pre-emption in most situations. These courts have held, in general, that because the FDA regulations already permit manufacturers to supplement labels with warnings of newly discovered risks without prior FDA approval, state law tort suits do not conflict with FDA regulations. Therefore, state law causes of action, such as failure to warn claims, may only be pre-empted in cases where the FDA has rejected the specific warning proposed by the injured consumer. These courts have also stated, "due to the recent concerns about the effectiveness of the FDA's safety monitoring of recently approved drugs, the availability of state law tort suits provide an important backstop to the federal regulatory scheme."

The issue will receive considerable attention in courts across the country in the coming months. This is a major, wide-spread attack on victims' rights and on states' rights to provide remedies and protection to citizens.

### **TEXAS JURY FINDS IN FAVOR OF PLAINTIFFS IN REMICADE LAWSUIT**

A Texas jury has found that Centocor Inc. negligently failed to warn doctors and consumers about potential side effects of Remicade. The company was ordered to pay \$19.4 million to a woman who contended that she developed lupus as a result of using the drug. The jury found that Centocor committed fraud against the plaintiff and that she and her husband were harmed as a result. The jury awarded the plaintiff \$3,365,908 in actual damages and \$15 million in punitive damages. Her husband was awarded \$50,000 for loss of consortium and \$1 million in punitive damages. The verdict is believed to be the first-ever involving Remicade.

## **FIRST LAWSUITS AGAINST BAUSCH & LOMB MOVE FORWARD**

Pretrial proceedings in the first of the lawsuits against Bausch & Lomb Inc. over its problem contact lens solution have been held. The first court hearing was held in a South Carolina federal court. The exchange of information in the B&L litigation, which now involves 80 cases, will be coordinated by the lawyers. The total number of cases to be filed is expected to be very large. As you know, the contact lens solution was linked earlier this year to an outbreak of a rare eye infection, fusarium keratitis. The first 80 cases, filed in state and federal courts around the nation, were merged in South Carolina. The Bausch and Lomb plant that produced the solution is located in that state. The federal judge in charge of the litigation is working with lawyers to coordinate depositions and other document requests common to all the cases. Eventually the lawsuits will return to their local jurisdictions for trial.

Source: *Associated Press*

## **ELI LILLY PLAYS DOWN RISK OF ZYPREXA**

It appears that the drug maker Eli Lilly has engaged in a decade-long effort to play down the health risks of Zyprexa, its best-selling medication for schizophrenia. This is according to hundreds of internal Lilly documents and e-mail messages between top company managers. The documents, which were given to *The New York Times*, revealed that Lilly executives kept important information from doctors about Zyprexa's links to obesity and its tendency to raise blood sugar—both known risk factors for diabetes.

In Lilly's own published data, which the company told its sales representatives to play down in conversations with doctors, showed that 30% of patients taking Zyprexa gained 22 pounds or more after a year on the drug. Some patients reported gaining 100 pounds or more. But Lilly was concerned that Zyprexa's sales would be hurt if the company was more forthcoming about the fact that the drug might

cause unmanageable weight gain or diabetes, according to the documents, which cover the period 1995 to 2004. Zyprexa has become by far Lilly's best-selling product, with sales of \$4.2 billion last year, when about two million people worldwide took the drug.

Critics, including the American Diabetes Association, have argued that Zyprexa, introduced in 1996, is more likely to cause diabetes than other widely used schizophrenia drugs. Thus far, Lilly has consistently denied such a link. In defending Zyprexa's safety, the company told *The Times* that the documents had been taken out of context. The documents were collected as part of lawsuits on behalf of mentally ill patients against the company. Last year, Lilly agreed to pay \$750 million to settle suits by 8,000 people who claimed they developed diabetes or other medical problems after taking Zyprexa. Thousands more suits against the company are now pending.

In 2003, after reviewing data provided by Lilly and other drug makers, the FDA said that the current class of antipsychotic drugs may cause high blood sugar. It did not specifically single out Zyprexa, nor did it say that the drugs had been proven to cause diabetes. The drugs are known as atypical antipsychotics and include Johnson & Johnson's Risperdal and AstraZeneca's Seroquel. When they were introduced in the mid-1990s, psychiatrists hoped they would relieve mental illness without the tremors and facial twitches associated with older drugs.

Source: *New York Times*

## **X. BUSINESS LITIGATION**

### **JURY RETURNS VERDICT AGAINST FREIGHTLINER**

Last month a jury in Portland, Oregon, returned what's believed to be the largest punitive damages award in that state's history, finding truck maker Freightliner liable for intentionally shift-

ing assets among several of its divisions in an effort to avoid a legal judgment. The jury determined that Freightliner should have to pay at least \$488 million to a rival truck maker under the terms of a 2005 British court decision. The verdict against Freightliner and its parent company, DaimlerChrysler North American Holding Corp., included a combined \$350 million in punitive damages. The jury found that the defendants acted with "malice" and "bad motive" in what it said was a fraudulent attempt to avoid its legal obligations by hiding assets.

The case stems from an alleged accounting fraud in the late 1990s at ERF, a British subsidiary of Canadian truck maker Western Star Holdings Ltd. A German manufacturer, MAN AG, bought ERF from Western Star in March 2000, but claims it didn't discover the accounting problems until the following year. Freightliner bought Western Star in late 2000. In 2002, MAN filed a lawsuit in a British court against Freightliner, attempting to hold it responsible for the fraud.

Last year, a London judge found in MAN's favor, issuing an interim award of at least 250 million British pounds, which at the current exchange rate equals more than \$488 million in U.S. dollars. Freightliner has appealed the ruling. Final damages in the British case are expected to be determined next summer. Not counting the punitive damages award in the Oregon case, Freightliner's payments could rise as high as 350 million pounds, or \$683 million. At about the same time the British lawsuit was filed, Freightliner began shifting assets out of its division that controlled Western Star. By the time the court ruled, the division didn't have enough to pay such a large judgment.

MAN filed the suit in Oregon in late 2004, accusing Freightliner of deliberately stripping the subsidiary to avoid paying any judgment. Freightliner claimed it moved the assets in a restructuring aimed at saving costs during a market downturn, not because of the lawsuits. Freightliner says it didn't own ERF when the alleged financial fraud happened. Freightliner e-mails and other

evidence were put in evidence to prove that executives altered the scope and timing of a restructuring plan days after settlement talks between the two truck makers broke down in 2002. The punitive damages award was as follows: \$280 million from DaimlerChrysler and \$70 million from Freightliner. The foreperson of the jury in the case said the jury issued its punitive award to discourage similar conduct in Oregon.

Source: *The Oregonian*

### **DELOITTE AND BANKS SETTLE ADELPHIA CASE FOR \$455 MILLION**

A settlement by Deloitte & Touche LLP, and Bank of America Corp., including Citigroup Inc., JPMorgan Chase & Co. and Wachovia Corp. has been reached with a group of investors. The companies have agreed to pay a total of \$455 million to settle a lawsuit with the investors in Adelphia Communications Corp., the bankrupt cable television company. Deloitte, which is an accounting firm, will pay \$210 million and the banks will pay \$245 million under a settlement approved by a U.S. District Judge in New York. Actually, the amount each bank will pay is confidential. As you may recall, Adelphia filed for bankruptcy in 2002 after an accounting fraud that led to the criminal convictions of founder John Rigas and his son Timothy. Investors had claimed losses as high as \$5.5 billion, alleging that Deloitte and the banks contributed to the fraud. Adelphia sold its cable properties to Comcast Corp. and Time Warner Inc. for \$16.7 billion in July. A bankruptcy judge is holding hearings on the company's reorganization plan.

The accounting firm audited Adelphia's books and the banks underwrote stock offerings and extended syndicated loans to the company, once the fifth-largest cable-television operator. In April 2005, Deloitte agreed to pay \$50 million to settle U.S. Securities and Exchange Commission claims that it improperly audited Adelphia's 2000 financial statements. Adelphia and Deloitte have sued each other in state court in Philadelphia over who bears responsibility for the

fraud. A trial in that case is scheduled for next year. Adelphia, based in Greenwood Village, Colorado, last year settled a suit brought by the SEC for \$715 million. As part of that accord, the Rigas family turned over 95% of its assets. John Rigas, 82, and his son Timothy, 50, were convicted in 2004 of conspiracy, securities fraud and bank fraud. John Rigas, who was sentenced to 15 years in prison, and Timothy, who was sentenced to 20 years, are free on bail while they appeal their convictions.

Source: *Source: Bloomberg News*

### **CIGNA TO PAY \$93 MILLION TO SETTLE CLASS ACTION**

Cigna Corp., the Philadelphia-based insurance company, will pay \$93 million in the settlement of a class action shareholder lawsuit. In that case, shareholders contended that the company had hidden major problems with a new computer system it installed to handle claims. When the problem came to light, shares fell sharply, according to allegations by the plaintiff. The Pennsylvania State Employees' Retirement System, The Public Employees' Retirement System of Mississippi and the City of Miami General Employees' and Sanitation Employees' Retirement Trust were the lead plaintiffs in the suit, which was filed in 2002 in U.S. District Court in Philadelphia.

The case had been scheduled to go to trial in March. The settlement will have to be approved by a federal district court and a hearing has been set for April. Before any funds can be awarded, the class must be first identified and a division of proceeds decided on. Cigna, among the nation's largest providers of health insurance, has been digging out of a hole ever since the company implemented the computer change. The company lost about one-third of its customers in the process, but apparently the company is now beginning to add customers. The suit covers investors who owned Cigna stock from November 2, 2001, to October 24, 2002.

Source: *Philadelphia Inquirer*

### **FANNIE MAE SUES KPMG FOR \$2 BILLION OVER ACCOUNTING FLAWS**

Fannie Mae, the largest U.S. mortgage finance company, has sued its former auditor KPMG LLP for \$2 billion. It's alleged the accounting firm failed to serve its role as an independent watchdog and prevent \$6.3 billion in accounting errors. Fannie Mae accused KPMG of 17 counts of "negligence and breach of contract," according to the lawsuit filed in the superior court of the District of Columbia. The government-chartered company says as a result of the auditor's wrongdoing it suffered \$2 billion in damages. The losses include \$1 billion in costs to restate earnings.

Fannie Mae's board fired KPMG in December 2004 after the Securities and Exchange Commission found that Fannie Mae executives had been using improper "cookie jar" reserves and deferred expenses to smooth earnings and reach bonus targets for a four-year period dating back to 2001. The Washington-based company now blames KPMG for failing to identify the problems. It's alleged that "at least 30 accounting policies and practices approved by KPMG were not consistent with generally accepted accounting principles."

As a matter of information, Congress created Fannie Mae and McLean, Virginia-based Freddie Mac to expand homeownership by increasing mortgage financing. The companies own or guarantee about 40% of the \$10.5 trillion residential U.S. mortgage market. Interestingly, they are the biggest borrowers in the United States after the federal government. Both Fannie Mae and Freddie Mac have had their share of problems. The companies generate about two-thirds of their profits on the difference between their costs to borrow in the bond market and the returns on mortgages in their combined \$1.4 trillion mortgage portfolios. They also earn money by charging lenders a fee for guaranteeing credit on mortgage-backed bonds.

From 1998 until 2003 KPMG received \$53 million in fees from Fannie Mae, with \$9 million, or 17%, charged for

auditing Fannie Mae. It's alleged in the lawsuit that Fannie Mae was repeatedly "a victim of KPMG's conflicting role as consultant and auditor." This case is a prime example of how a conflict arises internally when an audit firm serves both as consultant and auditor for a corporate client. Replacing KPMG's "consulting engagement" hat with its "auditor" hat, KPMG approved Fannie Mae's bookkeeping each year, according to Fannie Mae. "KPMG often did nothing more than rubber-stamp Fannie Mae's internal accounting decisions."

Source: *Bloomberg News*

#### **STATE REGULATORS TAKE ON BANKING INDUSTRY**

The ability of the states to establish tougher consumer protection laws than the federal government was highlighted in a case (*Watters v. Wachovia Bank*), heard by the U.S. Supreme Court in late November. Although the case featured the age-old power struggle between the state and federal governments, this dispute is found in a relatively new context between state regulators, backed by consumer groups and state attorneys general, and the banking industry. The decision is expected to be issued by July 2007.

Historically, control over the banking industry has been reasonably balanced between the states and the federal government. However, in the past couple of years, the federal government has slowly been encroaching on the states' territory. Specifically, the federal Office of the Comptroller of the Currency (OCC) recently issued regulations which not only bring national banks, but also their subsidiaries, under its control. In response, banks, such as Wachovia Mortgage, changed its status to "subsidiary" and informed state regulators that it was now under control of the OCC. As a result, Wachovia was no longer subject to a multitude of state consumer protection laws. In the *Watters* case, which is the one now before the High Court, after Wachovia changed its status to subsidiary, Michigan regulators moved to bar the bank

from operating in the state. After that development, Wachovia filed suit.

Consumer protection advocates argue that if the banking industry wins in this case, it would result in weakened consumer protections. Additionally, it is contended that the states are much more experienced in the area of mortgage lending as compared to the OCC. On the other hand, Wachovia argues that possessing the ability to transform into a subsidiary and fall under federal control allows the bank to deal with only one concise federal standard as opposed to a large number of costly state regulations. Michigan regulators argue that not only does OCC's encroachment onto state territory exceed the agency's power under federal law, but that the current power structure infringes on state sovereignty in violation of the U.S. Constitution. That argument should appeal to the conservative wing of the Republican Party. The bottom line, however, is that banks don't want to be regulated by states which have strong consumer protection laws that apply to banks.

Source: *USA Today*

#### **FLORIDA MOTORISTS WIN CLASS ACTION OVER STATE SALE OF RECORDS**

Tens of thousands of Florida motorists will get compensation under a \$50 million class action settlement approved last month. The case involved an alleged illegal purchase of the motor vehicle records of the class members by a bank from the state government. U.S. District Judge Daniel T.K. Hurley approved the settlement between motorists and West Palm Beach-based Fidelity Federal Bank and Trust. The settlement funds will be divided between the class members. The bank violated federal anti-stalking legislation, which prohibits companies from buying driver records from state governments, when it purchased the records of 565,000 motorists. Judge Hurley said it was "shocking" that the state sold the data in spite of a federal law that prohibited it.

The affected motorists live in Palm Beach, Martin, St. Lucie and Broward

counties. Between 2000 and 2003 the bank paid the Florida Department of Highway Safety and Motor Vehicles a penny a name for the names and addresses of motorists, who had recently bought cars and used the information to send out brochures advertising auto loans. It was alleged that the bank violated the Driver's Privacy Protection Act in obtaining the names. The law was passed after the 1989 murder of TV actress Rebecca Schaeffer, whose stalker was able to track her down using motor vehicle records. The law allows for penalties of up to \$2,500 per violation. As I have stated before, no state should be allowed to sell personal information it has relating to citizens.

#### **FRANCHISEES FILE CLASS ACTION FRAUD SUIT AGAINST QUIZNO'S SUB**

Twenty-eight Wisconsin Quiznos Sub Franchisees recently filed a class action lawsuit, claiming that the company has "systematically defrauded its franchisees in a scheme designed to build the brand at the expense of its operators in the field." The suit was filed in U.S. District Court for Eastern District of Wisconsin. Specifically, the plaintiffs allege that the company requires franchisees to buy food and supplies from Quiznos at an exorbitant rate while at the same time fixing the retail prices artificially low. As a result, the stores are running at a loss and draining the franchisees of any profits. Furthermore, franchisees claim that Quiznos misrepresents material facts when attempting to sell the franchise to potential franchisees. It is argued that this deceptive scheme is used to induce sales that may not otherwise occur. The plaintiffs are asking the court for monetary damages for loss of investment as well as injunctive relief. The suit is based on both statutory and common law fraud, violations of the Racketeer Influenced and Corrupt Organizations Act, breach of contract, and violations of the Wisconsin Fair Dealership Law.

This most recent lawsuit is not the first filed on behalf of Quiznos franchisees. Earlier this year, a group of New

Jersey franchisees filed a class action suit with similar allegations. In addition, Chris Bray, a Texas Quiznos franchisee, recently formed the Toasted Subs Franchisees Association, Inc. (TSFA). The Association seeks to represent and preserve the rights of those in the Quiznos franchisee community. Mr. Bray argues that, "Quiznos has been taking advantage of its franchisees for years through practices that we contend are illegal and in violation of the franchise agreement." TSFA helped to coordinate the class action suit in Wisconsin. The Association has interesting motto which is, "Get Toasted, Not Burned."

Source: Yahoo! Finance and Toasted Subs Franchise Association, Inc. Web site

### **VISTO WINS \$7.7 MILLION IN DAMAGES IN PATENT CASE**

A federal judge has ordered Seven Networks Inc. to pay \$7.7 million in damages to mobile e-mail provider Visto Corp. for infringing on three Visto patents. This ruling affirms a jury's verdict returned last year. The ruling represents Visto's biggest victory yet in its efforts to protect several patents on technology used by major wireless phone providers to deliver e-mail on their mobile networks. Besides Seven Networks, Visto has sued other rivals including Good Technology Inc., Microsoft Corp. and Research In Motion Ltd., the maker of the ubiquitous BlackBerry device that helps keep workers connected to their jobs even when they are out of the office.

A Texas jury had concluded Seven Networks should pay royalties totaling \$3.6 million to compensate Visto for years of patent violations. Including accumulated interest, the judge doubled the jury's award and ordered Seven Networks to cover attorneys' fees and other legal costs incurred by Visto. The judge also issued a permanent injunction against Seven Networks that has been stayed pending appeal.

Source: Associated Press

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

### **U.S. SUPREME COURT REVIEWS FALSE CLAIMS ACT**

The U.S. Supreme Court recently reviewed a False Claims Act case involving a claim by an 81-year-old engineer at the Rocky Flats Nuclear Weapons Plant. In December, the Justices examined a critical restriction on who can bring a *qui tam* lawsuit in a case involving Rockwell International Corporation. The Court is to decide the issue of whether principal engineer, James S. Stone was "an original source of the information" that served as the basis of the jury's finding that Rockwell violated the law by hiding from the government environmental, safety and health concerns related to its process of nuclear waste.

Rockwell operated the Rocky Flats Nuclear Weapons Facility in Colorado under a contract with the U.S. Department of Energy from 1975 through 1989. Stone worked as the principal engineer there from November of 1980 until March of 1986. Stone claims Rockwell violated the federal Claims Act by falsely reporting to the Department of Energy that it had complied with applicable environmental, safety and health issues in its operation of the facility. A criminal investigation into Rockwell's operations at Rocky Flats led to a guilty plea of ten environmental violations.

The False Claims Act prohibits *qui tam* cases "based upon the public disclosure of allegations or transactions in a criminal, civil or in an administrative, or government report, hearing, audit, or investigation, or from the news media." There is an exception to the "public disclosure" bar. A false claims case that triggers the public disclosure bar may proceed only if the Relator is "an original source of the information." An original source must have "direct and independent knowledge of the information on which the allegations are based," and have "voluntarily provided the information to the government before filing a lawsuit which is based on

the information." The original source exception is the issue in Rockwell's case before the Supreme Court. Rockwell argued before the District Court and the Appeals Court that Stone was not original source under the law because he had no first-hand knowledge of the false claim at issue.

Rockwell has argued that "the best reading is that the Relator must have direct and independent knowledge of information sufficient to permit the trier fact to conclude that a false statement was made to the government in support of a fraudulent claim for payment." The Supreme Court ruling in this case could have a large impact on future false claims cases.

Source: National Law Journal

### **DELL AGREES TO CHANGE SALES PRACTICES AND REFUND OVERCHARGES**

A federal court in Tacoma, Washington has given final approval to a settlement in a class action lawsuit against Dell and its financial affiliates. This brings to an end nearly three years of investigation, negotiation, and litigation. The class action, filed against Dell Inc., Dell Financial Services, L.P., and CIT Bank on behalf of certain Dell customers nationwide, alleged that the defendants' practices caused consumers to incur excessive finance charges and late fees. Defendants have agreed to revamp their sales practices and repay up to \$17 million to computer buyers who incurred excess fees and charges as a result of misleading sales practices.

Class members were enticed into financing their purchases by promotional offers such as "90 Days Same as Cash," but were not informed when they were approved for credit lines that lacked such promotional features. As a result, customers accrued unexpected interest and late charges. Under the terms of the settlement, defendants will have to refrain from luring customers into purchasing its computers with misleading promotional offers, comply with rigorous rules requiring clear and non-deceptive disclosures, and change its sales associates' incentives to ensure

that the employees will not be penalized if a customer declines to purchase a more expensive option.

Source: Trial Lawyers for Public Justice

### **PRUDENTIAL SETTLES CASE WITH NEW YORK ATTORNEY GENERAL**

Prudential Insurance Co. will pay \$19 million in restitution and penalties to settle an investigation of payments made to brokers to steer business its way. The settlement came as part of a multiyear investigation of bid rigging and price fixing in the insurance industry. So far, more than 20 insurance companies have agreed to pay more than \$3 billion in settlements. The case involves “contingent commissions” paid to brokers and agents to steer business to insurance companies and are the equivalent of kickbacks that unfairly increase the prices paid by insurance clients. Under the settlement agreement, Prudential Insurance, a unit of Newark, New Jersey-based Prudential Financial Inc., will end the payments on group insurance products—including life, disability and long-term care.

### **STATE FARM SUES OVER LAPTOP FIRE**

State Farm Fire & Casualty Co., had to pay Anthon and Ann Cannon more than \$147,300 after the Cannon’s laptop computer’s battery purportedly ignited a fire blaze that destroyed their east Salt Lake City home. State Farm is now trying to recover damages from the laptop’s maker, IBM. The insurer is seeking reimbursement for the Cannons’ claim, along with legal costs, interest and other damages. This summer, 10 million Lithium-ion batteries used in Lenovo/IBM, Dell, Apple, Panasonic, Toshiba and other laptops were recalled due to internal contamination that could make them at risk for overheating. In September, Lenovo/IBM added another 350,000 laptop batteries to the recall list.

While that latest recall addressed the ThinkPad line, it limited the scope to models made between February 2005 and this past September. State Farm’s

lawsuit indicates the Cannons’ ThinkPad 650X was at least two years older than those covered by the recall. The bulk of problem batteries thus far were made under contract by Sony, while the Cannons’ model used a battery made by Panasonic. Nonetheless, State Farm blames the laptop’s battery for the fire to the Cannon’s home.

### **JUDGE RULES INSURERS ARE LIABLE FOR WATER**

A federal judge in Louisiana has ruled that even though a homeowner’s insurance policy said floods were not covered, leaving that statement out of the application left the company liable for damages to a house destroyed by Hurricane Rita’s winds and floods. If higher courts uphold the decision by District Judge Edward Rubin, companies could be responsible for billions of dollars in hurricane-related claims. The judge ruled in a case brought by homeowners who had insured their house for about \$55,000. The effect of the ruling is that if there is not a floodwater exception in the application, insurers have to pay the full amount of the policy if there is wind damage.

It was argued by the homeowners’ lawyer that the Louisiana Valued Policy Law, which applies when a home is destroyed, requires insurers to include the water-damage exclusion in the application as well as the policy. Judge Rubin ruled that Louisiana Citizens Property Corp.—Louisiana’s insurer of last resort—must pay for the home. Citizens, the state’s third-largest homeowners insurance company with 135,000 policyholders, will appeal. Judge Rubin’s ruling is the second in Louisiana against the insurance industry. In November, U.S. District Judge Stanwood Duval Jr. found that the wording to exclude water damage in some insurance policies was ambiguous.

Source: *Insurance Journal*

## **XII. PREDATORY LENDING**

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### **PREDATORY PAYDAY LOANS ARE JUST PLAIN BAD**

Last year, extra fees associated with cash advance, payday loans cost Alabama residents \$225 million. This shocking, multi-million dollar pay out is the fifth highest amount in the nation, according to the Center for Responsible Lending, a consumer advocacy group that opposes predatory lending practices. Across the country, payday lenders are routinely charging annual interest rates of up to 450%. Not surprisingly, these lenders, who now represent an industry worth \$28 billion a year, collect 90% of their revenue from borrowers who cannot pay off their loans when due. The payday loan industry contends that they are providing short-term, emergency loans to people in need. Opponents, however, believe policymakers ought to protect citizens from such predatory lending. We once tried a case against a predatory lender and found this stated in an internal memo: “Get them in debt and never let them out—that’s our goal.”

As we have stated in prior issues, there has been a large increase in payday loan institutions over the past 10 years. These businesses generally provide two week cash advances on paychecks. The business model relied upon by the payday loan industry is designed to attract folks who have a need for quick cash and to trap them once they take the bait. In addition to the outrageous interest rates charged by cash advance businesses, the loans are arranged in such a way that borrowers have difficulty paying them off when due. Generally, the predatory loan structure requires full repayment within a short amount of time without an option of paying in installments. Consequently, the lenders induce borrowers to renew the loan again and again with large fees being charged, without paying down the principal. The business model is coined, “loan flipping” by consumer protection advocates and is the main reason for the

payday lending industry's success and the borrower's financial disaster.

In order to escape many state's lending laws, which would cap interest rates and lengthen payback time, the payday loan industry convinced lawmakers that their product was exempt from existing small loan laws. The industry achieved this by characterizing their loan as a short-term, emergency advance instead of a long-term obligation. The payday loan industry not only traps hard-working individuals in a chronic borrowing cycle, but it also circumvents legitimate state law to do so. As concerned citizens, we should call on our lawmakers to apply consumer loan laws to all lenders. Lawmakers interested in preventing predatory lending through the payday loan should simply cap annual interest rates on small consumer loans. Currently, eleven states are free from payday lending altogether. Unfortunately, Alabama is not one of those states. The payday loan sharks were able to get a bill passed by the Alabama legislature that gives them tremendous protection while doing almost nothing for the borrowers. An excellent series on payday lenders appeared in the Montgomery Advertiser in its issues dated December 17<sup>th</sup> and 18, 2006. If you can get a copy, I suggest you read the articles. Then—if you agree that payday lenders are bad news—contact Governor Riley and your Senator and House member. Ask them to ban payday loans in Alabama or at the very least cap the interest rates allowed at 36% per annum.

Source: *The Montgomery Advertiser*, *The Birmingham News* and *The Center for Responsible Lending*

### **TITLE LOANS ARE BAD NEWS**

Title loans are just another example of predatory lenders taking advantage of consumers. The interest rates on title loans are high and this industry uses loans to trap borrowers in a cycle of debt. These loans put at **high risk** an asset that is essential to the well-being of working folks and their families—their vehicle.

## **XIII. PREMISES LIABILITY UPDATE**

### **GROUP HOME FIRE KILLS 10 RESIDENTS**

An early morning fire broke out in a Missouri group home for the elderly and mentally ill a few weeks ago, killing 10 people and injuring two dozen others. The blaze occurred at the privately run Anderson Guest House located in a rural community of about 1,800 people in the Ozark hills of southwest Missouri. Investigators are treating the fire as suspicious. The home had 32 residents and two employees inside when the fire was reported shortly after midnight. The persons killed ranged in age from early 20s to elderly. One of the victims was a worker in the home, and the other nine were residents.

The home, which is operated by Joplin River of Life Ministries, Inc., is a residential care center licensed by the Missouri Department of Health and Senior Services. The facility also has a license from the state Department of Mental Health that allowed mentally ill residents to live at the home and receive treatment elsewhere. Robert Dupont, the executive director of the ministries, was convicted of conspiracy to commit fraud in 2003 and sentenced to 21 months in prison for taking part in a scheme to cheat the federal Medicare program by steering patients from group homes he owned, including the one in Anderson, to hand-picked doctors. Those doctors, in exchange, falsely certified that the patients needed home health services from two companies Dupont owned or co-owned.

There had been a smaller fire at the facility on the Saturday morning in question. No one was injured in that fire, which was still under investigation when the second blaze began. Inspectors from the Missouri Department of Health and Senior Services, which licenses the facility, cited it in March for several health code violations pertaining to food storage and preparation, as well as for allowing a resident to take more than the prescribed dose of an inhaler

and not requesting criminal background checks for new employees as quickly as required by law. But none of those violations were related to fire safety. Two other group homes the company operates were cited for fire-code violations in 2003. Fire equipment in one Joplin-based home was found to have been intentionally disabled, records show. Another facility in nearby Carthage was cited for failing to undergo an annual fire inspection and to ensure staff members could unlock rooms from the outside in case of emergency.

Recently, we wrote about the federal agency that oversees the safety of nursing homes asking for comments about a proposal to require all nursing homes to have comprehensive sprinkler systems. However, if adopted the rule would not address group homes like the one in Anderson because such facilities are not subject to the same federal oversight.

### **JURY RETURNS VERDICT IN UNDERGROUND GAS LEAK CASE**

A jury returned a verdict recently against one of the nation's top manufacturers and marketers of petroleum products in a lawsuit which had been filed in a New York state court. It was a case involving contamination caused by a gasoline leak from abandoned underground tanks at an Inwood filling station. The jury awarded the State of New York more than \$6.3 million, penalizing Sunoco Inc., LVF Realty Co. and LVF's sister company, Sun Super Service Centers, for contaminating a site. Leaks from buried tanks are an issue in the region, because chemicals in gasoline, especially the additive MTBE, are increasingly detected in underground aquifers, the only source of drinking water on Long Island and in Southeast Queens.

Sunoco, based in Philadelphia, operates five domestic refineries and about 4,700 retail outlets nationally. Sunoco owned the gas station involved in this case from 1941 to 1985. Sun Super Service Centers began leasing it in 1980. LVF Realty purchased it about five years later. During construction in

November 1992, contractors found four abandoned, underground steel tanks, which were found to be the source of “widespread” contamination. The State Department of Environmental Conservation was called in to clean it up.

Source: *Newsday*

#### **PROPANE TANK CHECKS NOT REQUIRED BY LAW**

Most American citizens would be surprised to learn that inspections of propane tanks and pipes aren't required by law. An examination of federal, state and city laws by The Associated Press found that guidelines covering propane tanks and pipes nationwide don't require inspections or tests by any government agency once they're installed, no matter how old. Efforts to regulate propane on the federal level failed in the 1990s when Congress passed a law preventing the Environmental Protection Agency from requiring propane facilities to come up with risk management plans.

Without federal oversight, regulation is left to the states, which have adopted variations of guidelines set by the National Fire Protection Association. States also delegate responsibility in some cases to municipalities. Rules cover installation of tanks and pipes but there is no requirement for governmental agencies to re-inspect or retest those used for propane and other liquefied petroleum gases—regardless of how old they are. Companies are required to maintain them, and workers who fill the tanks are required to check them. Problems are usually detected when someone smells propane, checks the propane level or notices dead vegetation killed by leaking gas. However, there is no real government regulation.

In 1999, U.S. Senator James Inhofe, (R-OK), won passage of legislation preventing the Environmental Protection Agency from requiring propane facilities to develop risk management plans. With 63 other flammable and 77 toxic materials, the EPA requires facilities to detail their chemicals on site, maintenance schedules, and safety and health procedures. Apparently, this legislation

was passed to protect small propane dealers and small farmers from the cost of complying with an EPA rule that would have required risk management plans of facilities keeping 10,000 pounds or more of propane in a tank or set of interconnected tanks.

Source: *Associated Press*

#### **FORMOSA SUED OVER TEXAS PLANT BLAST**

Contract workers and residents injured in an October 2005 explosion at a South Texas plastics plant have now sued the company that owns the facility. The explosion at the Formosa Plastics Corp. USA plant in Point Comfort injured 16 employees. The resulting fire from the explosion that sent flames more than 500 feet in the air burned for five days. According to the U.S. Chemical Safety and Hazard Investigation Board, the accident happened after a forklift towing a trailer pulled out a small drain valve at the Olefins 2 unit of the plant, which produces PVC and vinyl for floor and wall coverings. That allowed liquid propylene to escape, forming a large vapor cloud that ignited. The initial explosion burned two men, and 14 other workers sustained injuries while evacuating.

The lawsuit was filed on behalf of 52 individuals, mainly contract workers at the plant. Another 1,000 individuals, mostly homeowners around the plant who suffered respiratory illnesses because of the explosion, are also part of the lawsuit. The lawsuit alleges that Formosa failed to provide appropriate safety equipment and enforce adequate safety programs. Formosa is said to have “a deplorable safety record, one of the worst in the plastics industry” and has committed safety violations.

Formosa is based in Livingston, New Jersey, and is part of Taiwan-based Formosa Plastics Corp. According to the CSB, better protection and fireproofing of equipment and automated valves to shut off chemical releases could have greatly reduced the explosion's impact. The Texas plant, Formosa's largest, employs 1,400 full-time workers and 400 contractors. It is located on the Gulf coast about 120 miles southwest of Houston.

Source: *Associated Press*

## **XIV. WORKPLACE HAZARDS**

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#### **WAL-MART SETTLES CLASS ACTION SUIT**

Wal-Mart has settled a class action lawsuit brought by the estates of 73 former employees in Oklahoma. A federal judge in Tulsa gave final approval last month to the settlement. The plaintiffs had sued to recover life insurance benefits they said Wal-Mart Stores Inc. wrongfully received upon the employees' deaths. The settlement will require Wal-Mart to pay a nearly \$5.1 million to the plaintiffs. Wal-Mart, the world's largest retailer, had taken out life insurance policies on its employees, making itself the beneficiary. The lawsuit alleged that Wal-Mart had no “insurable interest in the lives of its rank-and-file employees.”

It may seem unusual that an employer would name itself the beneficiary of life insurance policies covering thousands of employees, but the situation is not that uncommon. Currently, several million Americans are covered by these policies. However, most of the men and women insured were never told about the insurance on their lives. This means that those families won't know that a claim may exist for policy benefits. A federal judge had refused to dismiss the lawsuit at Wal-Mart's request last year. Wal-Mart had claimed it spends millions of dollars annually to recruit, screen, train and retain its employees because its success depends on a trained, experienced work force. The \$5.1 million represented a 100% of the policy benefits Wal-Mart received from the deaths of the Oklahoma employees. Paperwork will be sent to the class members and the claim forms and supporting documentation will be due back by May 31st. Any unclaimed funds will be turned over to the State of Oklahoma to be held for persons entitled to receive those funds.

## **INTERNAL BP DOCUMENTS RELEASED AS PART OF SETTLEMENT**

We have written on the BP safety problems in previous issues. Now the first set of internal BP documents have been released to the public as part of the settlement in one of the lawsuits. These documents detail prior knowledge within the company of problems at the facility. Part of the settlement included an agreement with BP to release millions of documents. These documents include reports and e-mails that show budget cuts and a lack of leadership contributed to significant safety problems at the facility. The release of these documents to the public was very important to settling the case with BP. Hopefully, BP learned a lesson from this tragedy. It's also hoped that others in the industry will learn from this and correct any safety problems. A new batch of documents will be released every week for the next several months and each batch will have a theme to it.

The first batch focuses on prior knowledge upper management and company leaders had about growing safety problems at the refinery before the explosion. A Web site includes copies of various internal BP reports that at one time were classified as confidential. The site also offers clips of videotaped depositions taken by lawyers for the Rowe family. Prominent on the Web site are clips from the six-hour deposition of Don Parus, the former Texas City plant manager. Parus testified that he had informed upper management at BP about problems detailed in a 2005 study called the Telos Report. The report told of various safety problems at the plant and a lack of resources and management awareness to deal with them.

Another report on the Web site, a 2002 BP commissioned report called the Good Practice Sharing Assessment, stated "there were serious concerns about the potential for a major site incident" at the Texas City plant. Parts of some of the documents released on the Web site have previously been made public by the U.S. Chemical Safety and

Hazard Investigation Board, one of several agencies looking into the blast.

Corporate defendants, in many lawsuit settlements, attempt to include a secrecy agreement which would keep damaging documents from being made public. The BP case is the perfect example of why these secrecy agreements need to be banned. It's very clear BP was guilty of disregarding safety issues and the public deserves to know all about their conduct. Other companies also need to know that they won't be able to hide their own corporate wrongdoing in the future. Public disclosure definitely discourages wrongdoing.

As previously reported, the explosion occurred when part of the plant's isomerization unit, which boosts the level of octane in gasoline, overfilled with highly flammable liquid hydrocarbons. There was a geyser-like release of flammable liquid and vapor, which ignited as the unit was starting up. Alarms and gauges that should have warned of the overfilling equipment failed to work at the BP plant. In its initial report last October, the CSB concluded the unit had a history of problems and was not hooked up to a flare system that burns off vapor and could have prevented or minimized the accident. The report also found that BP fostered bad management at the plant. This case is prime example of why the courts must remain open to victims of corporate wrongdoing.

## **OSHA PROPOSES FINES FOR ALABAMA STEEL COMPANY**

The federal government has proposed \$61,300 in fines for Shipman Inc., an Alabama steel company, after an employee died from a fall at the company's worksite in Hueytown. Roberto Sanchez, the Birmingham-area director for the Occupational Safety and Health Administration, stated:

*It could have been avoided if the employer had assured that adequate fall protection procedures and training programs were in place.*

The worker was with other employ-

ees erecting a prefabricated metal building on June 13<sup>th</sup> when he lost his balance and fell more than 30 feet to a concrete floor. Shipman was cited for two repeat violations totaling \$39,500 in fines for failing to provide fall protection while engaged in steel erection activities and not using work platforms for vehicles properly. Other fines involved claims of insufficient training and a citation about worksite hazards.

## **MILWAUKEE FACTORY BLAST KILLS 3 PEOPLE**

An explosion that may have started in a large propane tank flattened an industrial warehouse near downtown Milwaukee last month, killing at least three people and injuring 37 others. The fiery blast at the Falk Corp. factory flipped cars, hurled debris into the air and forced the evacuation of dozens of workers at the plant, which makes large industrial gears and couplings. Burning rubble was spread over several blocks.

At press time, fire officials had not determined the cause of the blast. The company began to evacuate workers after a leak occurred in one of six large propane tanks. The employees were outside when one of the tanks blew up. Falk employs about 700 people in Milwaukee. As many as 120 firefighters and paramedics responded to the fire, along with hazardous materials crews. The explosion destroyed Falk's warehouse and numerous cars and damaged several other buildings in the complex. The Occupational Safety and Health Administration is investigating the incident.

Source: Associated Press

## **VICTIMS' FAMILIES REJECT STATE REPORT ON SAGO MINE DISASTER**

Family members of miners killed by the January explosion at the Sago Mine in West Virginia, believe that a state report on the tragedy leaves too many questions unanswered. The report, which finds three bolts of lightning ignited the methane explosion that killed 12 miners, was shown to the miners' families last month. The families said the report failed to provide them

with adequate information. According to *The Associated Press*, seals placed on an abandoned portion of the mine where the blast occurred were designed to hold under 20 pounds of pressure per square inch. But the blast blew the seals open with pressure of at least 95 pounds per square inch. How the electricity from the lightning entered the sealed area is still under investigation, and in that regard this report is not complete. The report also says the miners' emergency air packs "did not perform in the manner expected." Hopefully, the report from the federal Mine Safety and Health Administration will provide more answers.

Source: *Associated Press*

### **DEADLY BLAST AT KENTUCKY COAL MINE**

A report has revealed that an underground explosion that killed five Kentucky coal miners last spring was caused by a preventable methane leak, the use of a cutting torch and other mine violations. The state investigative report, which was released last month, was bad news for the mine operators. Methane had leaked from a "poorly constructed" protective seal at Kentucky Darby LLC, No. 1 mine in Harlan County, according to the report. The seal was one of two at the mine that were supposed to keep combustible and poisonous gases underground, but neither met federal guidelines.

The gas was ignited by an open-flame torch used by two of the victims, mine foreman Amon Brock and maintenance worker Jimmy Lee, who were making repairs to metal straps used as underground roof supports. The straps intersected the top of the seal, leaving room for a leak and serving as heat conductors. The report also said Brock and Lee shouldn't have been allowed to use a torch at the site of the repairs because that section of the mine was in the "return air course," which is the ventilation current that passes through active mine areas and is returning to the surface.

According to witness testimony, Mr. Brock had said they had to make repairs to the area before a federal inspector

from the U.S. Mine Safety and Health Administration, who was inspecting the mine the week of the explosion, returned to the site two days later. Both Brock and Lee died at the site of the explosion from blunt force trauma and heat injuries. The other three victims died from carbon monoxide poisoning and smoke inhalation while trying to escape. A sixth miner was rescued with minor injuries. The federal report by MSHA is expected to be released by March. Other major findings listed in the state's report are as follows:

- In March, Darby mine examiner Tom Lunsford notified mine boss Ralph Napier that metal roof straps were present where the seals were to be constructed later in the month. Napier allowed the seals to be built anyway.
- During seal construction, the fiberglass blocks used were "dry stacked" without adhesive and were not secured properly to the mine floor, which violated the ventilation plan. The sealant that was sprayed over the seal also was not approved by MSHA.
- The torch found at the explosion site had its fuel and oxygen valves turned toward the "off" position. However, both valves were still positioned to release fuel to the torch.

It's difficult to understand why safety continues to be ignored in many coal mining operations around the country. I'm not sure what it will take to change things in that regard.

### **COAL INDUSTRY MUST DO A BETTER JOB ON SAFETY**

Coal companies must do a better job on safety in our nation's mines if they really want to eliminate the underground fires and explosions that are killing miners. Hopefully, the safety recommendations for the coal industry, which was released by a panel of experts last month, will help make the situation better. The Mine Safety Technology and Training Commission has studied 25 years of fires and explosions to produce more than 70 recommenda-

tions aimed at eliminating deaths and serious injuries in an industry that has had its worst year in decades. Complying with state and federal regulations is insufficient because not every risk can be addressed in a rapidly changing environment, according to Larry Grayson, commission chairman and a professor of mining engineering at the University of Missouri-Rolla. The companies must do more than just comply with the minimum requirements of the law. The report, which was unveiled at a mining conference in Pittsburgh, also aims to increase the odds of survival when accidents happen.

The report urges a shift in how things are done for the federal Mine Safety and Health Administration when it comes to deploying mine-rescue teams. The commission said companies should be able to relax safety standards when lives are at risk and tighten them when property recovery is the sole objective. So far this year, 46 coal miners have died on the job. The report suggests a continuing urgency for change. The commission was appointed by the National Mining Association, a Washington, D.C.-based industry group, but operated independently, with representatives from coal companies, the United Mine Workers union, mine-rescue teams, and health and safety experts.

The Mine Safety Technology and Training Commission studied 25 years of fires and explosions in underground coal mines to identify persistent problems. The 70 recommendations for building what the report calls "a culture of prevention" appear to be a good step forward. Since Alabama has a good number of coal miners in operation, I believe that Governor Riley and the legislative leadership should get the recommendations and have them studied carefully. Alabama is a state that definitely needs to do a better job on coal mine safety.

Source: *Associated Press*

### **JURY WILL DECIDE ALLSTATE AGE-DISCRIMINATION SUIT**

A federal judge has ruled that a jury will get to decide whether the yearlong

moratorium by Allstate Insurance Co. on rehiring its former sales agents disproportionately affected workers 40 years and older. In ruling for the Equal Employment Opportunity Commission, the judge found there was sufficient evidence that Allstate's policy had a disparate impact on agents 40 years and older. The litigation arose from Allstate's efforts in 2000 to convert its 15,000-member agent workforce to independent contractors from regular employees.

The EEOC charged in a lawsuit that Allstate terminated its sales agents, offered to make them independent contractors, and refused to rehire them in other positions as employees for one year. Because more than 90% of the agents were at least 40 years old, the rehire policy violated the Age Discrimination in Employment Act, according to the EEOC. Allstate argued that the court should dismiss the case because its rehire policy had no disparate impact and was based on a reasonable factor other than age. The court disagreed and ruled for the EEOC.

Source: *Business Insurance*

#### **DILLARD'S SETTLES AGE DISCRIMINATION CASE**

Dillard's Inc. has entered a memorandum of understanding to settle a class action lawsuit alleging age discrimination. Dillard's, based in Little Rock, Arkansas, has agreed to settle the lawsuit for \$35 million. Complaints filed in 2002 and 2004 against Dillard's by former participants in the Mercantile Stores Pension Plan alleged that amendments to the plan violated the Employee Retirement Income Security Act of 1974. It was alleged that payment calculations were age-discriminatory. Dillard's purchased Mercantile Stores Co. Inc. in 1998 for \$2.9 billion. In a separate lawsuit, which is pending, Dillard's is seeking a \$35 million reimbursement from the pension plan's actuarial firm.

Source: *Arkansas News Bureau*

#### **JURY RETURNS VERDICT FOR WIDOW IN ASBESTOS CASE**

A jury awarded \$850,000 to a widow whose husband died of mesothelioma. It was the third lawsuit in 14 months won in McLean County, Minnesota, by plaintiffs who accused Honeywell International Inc. of conspiring to hide asbestos dangers. The jury awards in the three lawsuits have totaled more than \$11 million. In this latest case, Robert Blessing first experienced symptoms of mesothelioma in June 2005 and died in December 2005. He filed the lawsuit, but after his death his wife carried on the litigation. Mr. Blessing worked as a builder and inspector for pipe covering at Union Asbestos and Rubber Co., also known as Unarco, from 1953 to 1960 at its Bloomington plant. As you probably know, asbestos exposure is the only known cause for mesothelioma, a slowly developing cancer. Jurors awarded \$100,000 in damages for losses by Mr. Blessing before he died; \$50,000 for damages suffered by his wife; and \$700,000 for the worker's wrongful death.

A jury also awarded more than \$5 million in October 2005 to the wife of a worker, who died of mesothelioma and worked for Unarco in the 1950s. And another jury awarded \$5.5 million last month to the wife of another worker, who installed insulation on pipes and boilers locally, using materials sold by Bendix Aviation Corp., which eventually became part of Honeywell. Honeywell is one of several companies accused of involvement in a conspiracy to hide the dangers of asbestos exposure from workers. Unarco, which also was alleged to be part of the conspiracy, filed for bankruptcy in 1982.

Other defendants in the lawsuit that resulted in the latest verdict — Pneumo Abex Corp., Owens-Illinois Inc., and the Metropolitan Life Insurance Co. — had settled out of court. The jury verdict was only against Honeywell. That company claimed at trial that it didn't know about the harmful effects of exposure to asbestos until 1972, and that workers were told about the risks after that. The only reason Honeywell told people after

1972, however, was because OSHA was created and the company then had to tell people.

During the trial a communication between employees of Bendix and another asbestos company, Johns-Manville Corp., that was very damaging was introduced into evidence. The Bendix employee had told the Manville employee that he was sending him an article about the harmful effects of exposure to asbestos. This is how the employee replied:

*My answer to the problem is this: If you have enjoyed a good life working with asbestos, why not die from it?*

That statement obviously was bad news for the defense. It pretty well tells us that if this employee's mindset was like that of the company, the safety, health and welfare of employee's don't have any priority in the corporate boardroom.

Source: *The Pantagraph*

#### **INSURANCE COMPANY SETTLES WITH ASTROS OVER BAGWELL CLAIM**

Connecticut General Life Insurance Co. has settled a lawsuit the Houston Astros filed after the baseball team's claim to recoup \$15.6 million of injured first baseman Jeff Bagwell's contract was denied. On the same day that the settlement was made public, Bagwell announced his retirement after 15 years with the Astros. Houston filed the suit in April, three months after the team deemed Bagwell too injured to play because of chronic shoulder problems. The Astros filed the insurance claim in January to try to get back most of the \$17 million Bagwell was to be paid in the final year of his contract. In March, Connecticut General notified the Astros they had denied the claim. The Astros appealed after Bagwell said the pain in his shoulder had become too much for him and he was placed on the 15-day disabled list with bone chips in the shoulder. Bagwell tried unsuccessfully to come back in spring training after pinch hitting in the first two rounds of

the playoffs and starting at designated hitter in the first two games of the World Series in 2005. The terms of the settlement are confidential.

Source: *Insurance Journal*

### **FORMER NFL PLAYER'S ESTATE WINS DISABILITY BENEFITS**

There was another sports-related lawsuit that should be of interest to football fans and to people who are interested in fairness generally. Mike Webster, who played for the Pittsburgh Steelers in the NFL, became disabled and unable to work after his playing days were over. The estate of the NFL Hall of Fame center will now be entitled to collect more than \$1.5 million in disability benefits because brain damage left Webster unable to work following his football career. The unanimous decision by a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit upheld a Baltimore judge's order that the NFL pay Webster's estate benefits retroactive to the date of his retirement, plus interest and legal fees. The total amount will be between \$1.5 and \$2 million.

The court said the board that administers NFL players' retirement and disability plans ignored overwhelming evidence that the pounding Webster absorbed during his 16-year career left him totally and permanently disabled when he retired in March 1991. Webster died of a heart attack in 2002 at age 50. This ruling should give hope to other NFL players who are fighting for benefits. It's believed by many experts that many former players have gotten a raw deal from the NFL pension plan.

From 1974 to 1988, Webster anchored the offensive line for a Pittsburgh Steelers team that won four Super Bowls. He played 245 games—the most ever by a center—and played every offensive down for six consecutive seasons, earning the nickname “Iron Mike.” Webster finished his career with the Kansas City Chiefs. His remaining 11 years of life were plagued by a series of failed business ventures. Webster was homeless at times, sleeping in his car or the equipment room of the Chiefs, who

briefly employed him “as a favor” to help the strength and conditioning coach. In 1999, Webster applied for disability benefits under the NFL plan. At issue was whether Webster was already disabled when he was retired or whether his condition was “degenerative,” which would reduce his benefits by about half.

The board, consisting of three members from NFL management and three from the players' union, classified the injury as degenerative. The judges overruled the board's unanimous decision. The appeals court noted that even a doctor hired by the board wrote that Webster “was completely and totally disabled as of the date of his retirement ... and will not be expected to improve.” The court said the board could have required further evaluations, but that it could not simply ignore the opinion of its own expert and others who found Webster was totally disabled upon retirement. This appears to be a good decision and hopefully it will have a positive effect for other athletes who find themselves in a similar situation.

Source: *Insurance Journal*

## **XV. TRANSPORTATION**

### **SETTLEMENT REACHED IN CIRCUIT CITY PLANE CRASH**

The wife of a Virginia man who was killed in the crash of a Circuit City Stores jet in February of 2005 will receive \$3.5 million under a settlement. Kyle Jeffrey Harmon, a 26-year-old assistant buyer for the Richmond electronics company, was one of eight killed when the corporate jet crashed while battling icy conditions on approach to an airport in Colorado to refuel. The plane was en route from Richmond, Virginia to Santa Ana, California. Circuit City and Richmond-based Martinair Inc., which managed the plane, agreed to pay \$3.5 million to the widow. The agreement reached last month releases both of the companies from any further claims for the death. The settlement was reached

without the necessity of the widow having to file a lawsuit.

The National Transportation Safety Board has not yet identified a cause for the February 16<sup>th</sup> crash. A transcript of the in-flight data recorder showed the pilots talking about ice buildup on one of the plane's wings, affecting its weight and handling, according to an NTSB report. Other lawsuits filed by two employees are pending in Colorado and Ohio alleging that the Cessna's wing de-icing and ice detecting mechanisms were defective.

Source: *Associated Press*

### **FAMILY SUES LIQUOR COMMISSION AND HOMEOWNER OVER DRUNK DRIVING DEATH**

The family of a New Hampshire man killed in a drunken driving crash two years ago has filed a lawsuit against the state Liquor Commission and the woman who owns the home where his friends were drinking that night. Randy Holmes, 24, was a passenger in a friend's car when it crashed in September 2004. The 20-year-old driver was charged with negligent homicide. Holmes' family accuses the state Liquor Commission of illegally selling alcohol to the driver. The suit also names the home owner, whose grandson invited the other young men to her home.

It is alleged that a person at the state liquor store in Hooksett sold vodka, rum, and brandy to the driver, which the men drank at the home. Late that night, another relative living in the house woke up the homeowner to tell her her grandson was having a loud party, leading to a confrontation in which the men were told to leave. The crash occurred when the car hit a telephone pole going 53 mph in a 30 mph zone, according to court records.

Source: *Insurance Journal*

### **USING A BLACKBERRY WHILE DRIVING A CAR RESULTS IN AN ACCIDENT**

We have written on occasion about the hazards caused by the use of cell phones while driving a motor vehicle. I never thought that any person would

use a BlackBerry while driving, but I was wrong. Dorothy Barnes, a 71-year-old woman, was badly injured in a motor vehicle accident when the driver of the van ran a red light and crashed into her. The van driver was looking down at his BlackBerry at the time he ran the light. Don Svec, an employee of Berry Electric Contracting Co., was lost and using his BlackBerry's navigation device to try to find his destination. Ms. Barnes, then 70, a retired employee of a Mount Prospect bank, was driving her Saturn when Mr. Svec ran the red light and crashed into her. Because he was distracted while using his BlackBerry, Mr. Svec could not even say if the light was green or red when he went through it. Witnesses, however, said he ran the red light.

Drivers using BlackBerrys or text-messaging on cell phones create safety problems on our highways. This is a most serious and growing problem in our country. Ms. Barnes underwent five surgeries, including two on her neck, where she has lost a range of motion. She has metal that holds her pelvis together. She also has permanent vision problems. The lawsuit, which was scheduled to go to trial on December 1st, was settled by the parties.

Source: *Chicago Sun Times*

### **TRUCKING SAFETY RULES WERE BADLY NEEDED**

The Bush Administration's decision to reject tighter industry regulation of the trucking industry and to actually reduce existing safety rules is causing people to lose their lives in accidents caused by trucks on our nation's highways. As a result of yielding to pressure for the trucking industry, poorly trained truckers are allowed to drive and even qualified drivers are driving longer hours without proper rest. After intense lobbying by the politically powerful trucking industry in 2003, federal regulators rejected proposals to tighten drivers' hours. Instead, they did the very opposite, relaxing the rules on how long truckers could be on the road. That was impossible to justify at the time and since then many fatal accidents have occurred

involving untrained drivers and drivers who were too tired to be on the road. Government officials had also turned down repeated requests from insurers and safety groups for more rigorous training for new drivers.

Clearly, the Bush Administration's record of loosening standards endangers motorists on our nation's highways. The fatality rate for truck-related accidents remains nearly double that involving only cars, according to safety and insurance groups. Weakening the rules has reversed a course set by the Clinton Administration and has resulted in the federal government repeatedly missing its own targets for reducing the death rate on our nation's highways.

In decisions that had the support of the White House, the motor carrier agency has eased the rules on truckers' work hours, rejected proposals for electronic monitoring to combat widespread cheating on drivers' logs and resisted calls for more rigorous driver training. Those decisions ignore government safety studies and put the industry's economic interests ahead of public safety. Typically, to advance its agenda, the Bush Administration has placed industry officials in influential posts.

The Transportation Department in a budget submission to Congress last February noted its repeated failure to cut the death rate and conceded that the agency "has difficulty demonstrating how its regulatory activities contribute to reaching its safety goal." Safety experts believe the numbers reflect the agency's failures in dealing with safety concerns. It's time for the Bush White House to start taking steps to make our highways safer for the motoring public. In order to do this, they must first quit allowing the trucking industry to run the show.

Source: *New York Times*

### **UNION PACIFIC AND INSURANCE COMPANY FIGHT OVER INSURANCE SETTLEMENT FUNDS**

A court has ruled that an insurance company does not have a valid claim to more than \$3 million it tentatively paid in a settlement over an Arkansas Union Pacific train crash with a van that killed

a Louisiana woman and her daughter. A three-judge panel of the U.S. Court of Appeals for the Eight Circuit overturned a ruling by a lower court that had agreed with Ohio Casualty Insurance Company that it did not have to pay part of a settlement reached in a case arising out of an August 7, 2000, wreck.

A mother and her 14-year-old daughter were killed in the motor vehicle crash. A suit was filed against Union Pacific for failing to provide adequate signs in a construction zone at a railroad crossing. Union Pacific settled the wrongful death suit for \$12.5 million. At the time, Ohio Casualty, which insured Tri-State Traffic Control Inc., the company that provided traffic control and warning signs for Union Pacific, agreed to pay \$3 million of the settlement, but reserved the right to deny coverage if a court later determined that the insurance policy didn't cover Union Pacific. The appeals panel said the policy did cover Union Pacific and overturned the lower court's order.

A van and train collided at a crossing on an Arkansas state highway located a half mile north of the Louisiana border. In addition to the two deaths, the driver and another passenger were injured. The appeals panel noted trial testimony in the state lawsuit that the traffic control plan, signs and flagging at the crossing were substandard. The appeals court said the testimony showed the number of signs to be inadequate, the signs were not installed correctly and one of the signs was lying on the ground. Flaggers also were at lunch at the time of the accident.

On appeal, Union Pacific argued that the railroad company was an additional insured party under the contract it had with Tri-State and that even though the written contract had expired, Tri-State continued to work for Union Pacific and the accident "arose out of Tri-State's work." Ohio Casualty said Union Pacific wasn't covered because it wasn't specifically named in a written contract with Tri-State at the time of the accident. The appeals court said Union Pacific's status as an additional insured party didn't automatically end when Tri-State's written contract with the railroad

company expired. Also, referring to Merriam-Webster's Collegiate Dictionary for the definitions of "to be" and "currently," the appeals court said the Ohio Casualty policy took effect when the insurance company issued the policy January 22, 2000, and was in effect when the accident occurred.

Source: *Insurance Journal*

#### **SETTLEMENT REACHED IN INTERSTATE CRASH**

A settlement has been reached in a lawsuit that had been filed involving the death of a young woman who was killed in a fiery crash. The crash was blamed in part on incorrectly installed cable barriers on an interstate highway in Washington State. Survivors of Marijke Holschen, who was 18 years old, will receive \$2 million from the State Department of Transportation. The insurance carrier for the driver, who was blamed for causing the crash, will be responsible to pay the other \$7 million of the settlement. The lawsuit arose out of a crash on Interstate 5 that occurred in December of 2004 near Marysville, Washington.

A Ford Explorer driven by a 24-year-old went onto the shoulder of the highway, veered across three lanes of traffic, broke through a cable barrier in the median and slammed into the Holschen family's Chevrolet Suburban and a Toyota Tundra pickup truck in the northbound lanes of the interstate. Ms. Holschen died in the fiery crash. Her mother, younger sister and two younger brothers were injured. It was reported that only the heroic efforts of other motorists, who risked serious injury, to pull others from the flaming wreckage prevented additional deaths. The driver of the Explorer was issued a traffic citation and paid a \$538 fine for second-degree negligent driving.

The cable barrier failed to stop the Explorer when the vehicle hit the cable. The State of Washington had failed to fix a known problem with the cable barriers along this stretch of highway. In accidents like the one that killed Ms. Holschen, an out-of-control vehicle hits the cable barrier, and instead of being stopped, the

vehicle goes under or over the barrier and into oncoming traffic. I understand that the Washington State DOT is finishing a project to install a second line of cable barriers along the 10-mile stretch of I-5 between Marysville and Arlington. A recent study by the DOT found that 18 vehicles had gone through the cable barriers from 1999 to 2005. Three of those cross-median collisions were fatalities, including a collision in 2005, where three members of another family were killed.

Source: Associated Press

#### **SETTLEMENT REACHED IN TRAUMATIC BRAIN INJURY CASE**

A lawsuit resulting from a serious van accident that took place in August of 2005, in Boca Raton, Florida, was settled recently. The \$6.1 million settlement was reached with Catholic Charities and the Diocese of Palm Beach. The settlement will enable the family of Lori Hoyt, 47, who suffered a traumatic brain injury, loss of sight in her right eye, as well as multiple orthopedic injuries, to provide for her long-term care and well-being. Ms. Hoyt, who was born with Down syndrome, was the front seat passenger in a van carrying 13 developmentally disabled passengers who were being transported to work by Catholic Charities from the organization's Nazareth Homes group homes, where she and the others resided.

The driver of the van veered off the highway in suburban Boca Raton and hit a tree, critically injuring Ms. Hoyt and five other passengers, one of whom subsequently died from his injuries. The driver of the van had been convicted of several offenses in the past and was required to take a substance-abuse course before this incident. Clearly, he should never have been allowed to drive a van of this sort transporting people.

Source: Associated Press

#### **DRUNK DRIVING DEATH RATES DECLINED IN 23 STATES LAST YEAR**

Drunken-driving deaths declined slightly across the nation in 2005, and the rate of drunken-driving deaths fell in

23 states, according to the National Highway Traffic Safety Administration. It was reported that 23 states and Puerto Rico had a decrease in the fatality rate for crashes involving a driver with an illegal blood alcohol level of at least 0.08. The death rate involving those circumstances increased in 21 states and the District of Columbia and remained flat in six other states. The government said in the report that 12,945 motorists died in crashes involving a legally drunk driver in 2005, compared with 13,099 in 2004. Alcohol-related fatalities also fell during that span from 16,919 in 2004 to 16,885 in 2005.

All 50 states now have a 0.08 standard since Minnesota adopted of the law last year. States with lower fatality rates involving at least one driver with an illegal blood-alcohol level were: Alabama, Arkansas, Colorado, Connecticut, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah and Virginia. States with higher rates were: Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Minnesota, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, South Dakota, Vermont, Washington state, Wisconsin and Wyoming. The six states with the same rates were: Alaska, Kansas, Nebraska, Ohio, Pennsylvania and West Virginia. Transportation officials in the U.S. spent \$7 million for advertising during the December holiday season as part of a "Drunk Driving—Over the Limit—Under Arrest" campaign.

Source: *Insurance Journal*

## **XVI. NURSING HOME UPDATE**

#### **JURY RETURNS VERDICT IN NURSING HOME SUIT**

A quadriplegic who was severely neglected and abused at a Denver nursing home was awarded more than \$3.2

million recently by a jury. John Gordy, 41, the disabled man, will receive about \$4 million including the interest that has accrued. Mr. Gordy, a former employee of a market research firm in Casper, Wyoming, was riding his bicycle near a reservoir in 2002 when his dog cut in front of him. When Gordy abruptly stopped to avoid the dog, he flew over the handlebars and landed on his neck, suffering severe injury. Mr. Gordy was attracted to the Red Rocks Health Care Center in Denver by marketing materials that promised good quality care provided there. The materials promised “a culture of extraordinary talent.”

During his three-year stay at Red Rocks, according to trial testimony Mr. Gordy was subjected to repeated acts of degradation, including being left in waste for hours, and was deprived of needed help with activities of daily living. It was said that he was subjected to retaliation for complaining about his care and that staff ignored his emergency call light for long periods. In July 2001, state inspectors visited Red Rocks and found so many problems - the facility got 21 citations for deficiencies - that state officials temporarily withheld Medicaid and Medicare reimbursements for new patients. During his stay at the nursing home, testimony indicated that Mr. Gordy developed severe bed sores, was dropped on his neck and was burned on his chest. Red Rocks claimed that their staff took good care of Mr. Gordy, but that he frequently refused to allow the staff to provide therapies and treatments that had been prescribed. Obviously, the jury didn't buy the contentions by the defense in this case.

Source: *Denver Post*

## XVII. HEALTHCARE ISSUES

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### **FDA APPROVES NEW WARNING FOR BAYER DRUG**

Government health officials have approved a new label for Bayer's Trasyolol that highlights the possible risk of

kidney damage associated with taking the drug. More than 600,000 people worldwide were treated with the drug in 2005, according to Bayer. It was reported that Trasyolol accounted for \$291 million in sales in 2005 for Bayer with annual revenue for the company being \$34.7 billion for that year. Trasyolol is the only drug approved by the FDA to reduce blood loss during coronary artery bypass surgery. The new label states that the drug should only be used on patients who are at an increased risk for blood loss and blood transfusion during the surgical procedure.

FDA began reassessing the safety of Trasyolol earlier this year, when two separate studies suggested the drug was linked to heart attack, stroke and kidney problems. In September, Bayer submitted new data to the FDA about risks of Trasyolol. That came just days after a public hearing was held to review the drug's labeling. The company admitted that it should have disclosed the results earlier and suspended two senior staff members as a result of the incident.

Source: *Forbes*

### **NEW GUIDELINES URGE CAUTION IN ANESTHETIZING CHILDREN**

New guidelines, which were published in December by the American Academy of Pediatrics and the American Academy of Pediatric Dentistry, urge caution in anesthetizing children. Doctors and dentists who sedate children should be specially trained and use age-appropriate equipment, such as emergency “crash carts” stocked with drugs and devices designed for young patients, according to these rules. They highlight the importance of proper medical practices that minimize the risks of sedation for children. The voluntary recommendations have been in development for almost three years. The message of the guidelines is that medical providers should closely monitor pediatric patients and be prepared to respond quickly if their breathing becomes suppressed or other unexpected problems develop. Dr. Stephen Wilson, co-author of the guidelines, observed:

*Should a patient become unstable, practitioners should have the training and background to recognize the signs and help that patient recover or stabilize them.*

Dr. Wilson pointed out that in the vast majority of cases, sedation is safe for children and no complications occur. The new guidelines reflect one of the most profound long-term trends in health care: the movement of surgical and diagnostic procedures into doctors' and dentists' offices, imaging centers, and surgery centers. As a result, more children are receiving sedation outside of hospitals. It's recognized in the medical community that children present more of a challenge when receiving sedative medication. The guidelines provide that:

*practitioners of sedation must have the skills to rescue the patient from a deeper level than that intended for the procedure.... Sedation and anesthesia in a nonhospital environment (private physician or dental office or free-standing imaging facility) may be associated with an increased incidence of 'failure to rescue' the patient.... Rescue therapies require specific training and skills.*

The recommendations propose that all medical centers administering sedation to children have age-appropriate crash carts—an easily transportable collection of drugs and devices needed to save patients in an emergency—as well as up-to-date monitoring devices and other equipment, such as child-sized face masks, IV lines and breathing tubes. It's suggested that well-established protocols for calling in backup emergency services are also needed. Dr. Randall Clark, chairman of the American Society of Anesthesiologists' committee on pediatric anesthesia, made this comment:

*What's encouraging is, when practitioners follow guidelines such as these, sedation is safe and problems very uncommon.*

Hopefully, doctors and dentists will take the recommendations to heart and

follow them as if they were mandatory.

Source: *Chicago Tribune*

### **PEDIATRICIANS WANT TO PROTECT CHILDREN FROM TELEVISION ADS**

The American Academy of Pediatrics has taken a strong stand on behalf of children relating to television marketing ads. The group wants government bans and restrictions on advertising to teens and children. Suggested guidelines published in the journal "Pediatrics," note that children are bombarded with 40,000 television commercials a year and three-thousand each day. Dr. Victor Strasburger, from The University of New Mexico, who was lead author of the guidelines, says the ads have an affect on obesity, sex, drugs, smoking, and drinking.

The Academy recommends limiting television ads to 12 minutes per hour and banning commercials promoting junk food and fast food in programs for young children. The Academy also suggests greater control of product "tie-ins" between movies and fast food restaurants. As expected, the fast-food industry and the beer distributors want the burden put solely on parents. You can see the recommendations made by the doctors by going to [www.aap.org](http://www.aap.org). Let your personal doctor know—even if he or she is not a pediatrician—that you appreciate this stand taken by the Academy.

Source: *Associated Press*

### **GOVERNMENT SCIENTIST PLEADS GUILTY**

The powerful drug industry uses every trick in the book to influence government regulators and other decision-makers who can have an effect on the approval and marketing of drugs. The following is an example of how some of those in the industry operate. A senior government scientist has pleaded guilty to accepting hundreds of thousands of dollars in undisclosed fees from the same drug manufacturer whose public-private research collaboration he oversaw. As part of his agreement with federal prosecutors, Dr. Pearson Sunder-

land III, chief of the geriatric psychiatry branch of the National Institute of Mental Health, which is part of the National Institutes of Health, will have to forfeit \$300,000 in illegal proceeds and reimbursements. He will likely receive two years of supervised probation as a sentence. His ethical misdeeds came to light after a series of newspaper stories led to a congressional investigation into the federal government's premier collection of research centers based in Bethesda.

NIH scientists should be paid enough so that they won't have to accept outside income. The discovery of dozens of private financial arrangements between drug companies and publicly employed scientists has embarrassed the agency in recent years. The federal prosecutors who handled the case said Dr. Sunderland "violated the fundamental rule" of being a government scientist who both oversaw a research partnership with an outside company and cut an outside deal to enrich himself on the same project. Dr. Sunderland, who was charged with conflict of interest, admitted accepting payments from Pfizer Inc. without authorization from his superiors and ethics watchdogs. According to the plea agreement, he must also complete 400 hours of community service.

NIH officials have said that more than 40 scientists at the agency are thought to have engaged in outside, fee-based relationships with private companies. Almost none of them were charged with crimes. Instead, it appears that the scientists were disciplined internally or allowed to retire from the agency. It's not clear whether other scientists will be prosecuted on similar charges. Congressional leaders have said this case raises fundamental questions about the management of the National Institutes of Health, founded in 1887 and considered one of the world's foremost medical research centers. The organization currently employs more than 18,000 people.

Dr. Sunderland was required under agency rules to disclose all income earned from outside activities and travel expenses exceeding \$260 that were

reimbursed by outside sources. In addition, before engaging in outside employment, he was required to file a form disclosing the name of the outside organization, the nature of the employment and any anticipated compensation. In late 1997, representatives of Pfizer approached Dr. Sunderland about his agency joining a scientific collaboration. It was to involve researchers at Pfizer and NIH who were searching for Alzheimer's biomarkers, physical traits in the blood or cerebral spinal fluid indicating the presence and progress of the disease.

Prosecutors said that Dr. Sunderland joined the collaboration, but did not tell his bosses that he cut a side deal for personal payments from Pfizer on the same project. During his five years as a consultant, Pfizer paid Dr. Sunderland \$125,000 in retainer fees, \$35,000 to attend company meetings and additional money for related travel expenses. Dr. Sunderland did not disclose to his supervisors at the National Institute of Mental Health the nature of his work and compensation from Pfizer. The drug companies shouldn't be allowed to "hire as consultants" any doctor or scientists who has authority to determine what drugs can be marketed or to make public health policy decisions.

Source: *Sun Reporter*

## **XVIII. ENVIRONMENTAL CONCERNS**

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### **WHITE HOUSE ATTEMPTS TO CUT PAYOUT TO NUCLEAR WEAPONS WORKERS**

The White House has been accused of curtailing the number of payouts to nuclear weapons workers injured by toxic materials. It is argued that of the 97,778 claims asserted under a federal program created to pay damages to workers with illnesses caused by their employment at government nuclear weapon manufacturing plants, only 24,000 have been approved. However, out of those claims approved, not all

were actually paid out. This comes from a recent memo written by congressional investigators.

In October 2000, Congress passed the Energy Employees Occupational Illness Compensation Act. This Act was intended to provide both health care and monetary damages to those nuclear workers sickened by exposure to radiation, beryllium, or silica on the job. The program was considered to be a monumental step forward for numerous workers whose occupational injuries were ignored by the government for years. Unfortunately, due to its current implementation, the program doesn't appear to be creating the intended results.

Critics of the present execution of the Act, which was signed into law by President Clinton, state that the Bush Administration has been actively seeking ways to deny legitimate claims made by injured workers. It is stated in the staff memo written for a House Judiciary subcommittee:

*There is a continuous stream of (administration) communications... strategizing on minimizing payouts.*

In rebuttal, the Administration claims that they are instead attempting to make certain that the program is executed in accordance with the law. However, the panel's chairman states that the documents summarized in the memo do not corroborate the Administration's position of innocence. In summary, of the 97,778 compensation case filed, 36,780 have been denied, 24,056 have been approved, and 36,942 are pending. If the allegations that the Bush Administration unlawfully limited payouts to rightful recipients are true, the cost to the American public is twofold:

- First, injured workers who dedicated their lives to serving the government are being ignored by the very institution which allowed them to be harmed.
- Secondly, and just as importantly, the mismanaged implementation of an enacted law is proof that our elected

officials are not carrying out the wishes of the American people.

Source: USA Today

### **HONEYWELL SETTLES POLLUTION SUITS IN GEORGIA**

Honeywell International, the world's largest maker of airplane controls, will pay \$50 million to settle two lawsuits that contended a predecessor company polluted land and water outside a Brunswick, Georgia, chemical plant. The first case was filed by Glynn County and the second was brought on behalf of four hundred and fifty landowners surrounding the plant. Honeywell will pay \$25 million to a group of more than 200 property owners along the Turtle River in Brunswick and \$25 million to the Board of Commissioners of Glynn County, Georgia. Honeywell also agreed to accelerate its cleanup of the plant site. Property owners and the county claimed that AlliedSignal discharged hundreds of thousands of pounds of mercury and PCBs, a cancer-causing chemical, into Glynn County marshes and the river. AlliedSignal bought Honeywell in 1999 and took its name. Over 1,500 pounds of mercury a year was going into one canal fed into the Turtle River. It was alleged that this plant was the largest source of mercury contamination in the state of Georgia.

Honeywell and other former owners have been cleaning up the site under the jurisdiction of the Environmental Protection Agency. Honeywell agreed in November to spend \$451 million to remove hazardous chemicals from Onondaga Lake in New York. Honeywell estimates it will have to pay \$888 million in environmental costs in the future, according to a July regulatory filing. The first suits were filed by property owners near the plant against AlliedSignal in 1995. They sought damages for diminished value of their homes and loss of use of the river and marshes. Areas close to the plant were barred for commercial fishing. Advisories went out warning pregnant women not to eat the fish. It was alleged by the plaintiffs in their suits that

AlliedSignal knew that the plant was polluting the area surrounding the plant. The company's documents showed they were discharging mercury directly into the water.

The property owners settled as a class covering owners of 245 parcels of land along the Turtle River and adjacent creeks as of 1995. All persons who purchased this land since that time are also included. A special master appointed by the court will determine the exact amounts of damages to each owner. The Glynn County commissioners approved the county's settlement on November 16<sup>th</sup>. U.S. District Judge Anthony Alaimo gave preliminary approval to the property owner class action settlement on November 21<sup>st</sup>. Final approval by the court will result in the settlement being final.

In the late 1990s, bio-remediation was employed to eradicate a significant amount of polluted soil. However, the remediation efforts were inadequate to restore the land to its original uncontaminated condition. Since that time, landowners have had to endure no-fish advisories and other such limiting policies to ensure that they are not injured by lurking pollutants. As a result, it was argued that hundreds of property-owners have not been able to enjoy their property as they should.

The cases brought by the County and surrounding landowners are not the first that Honeywell International has had to defend with regard to this plant. In 2001, approximately 75 employees sued the Brunswick plant for illegally discharging pollutants and endangering the health of their workers. The suit resulted in a twenty million dollar settlement for the employees. Additionally, the former executives were given prison sentences of between four and nine years. As for the fifty million awarded to Glynn County and the property-owners, half will go to the County and the other half to the individual landowners. A special master will be appointed to allocate the class funds.

Source: Daily Report and Bloomberg News

## XIX. THE CONSUMER CORNER

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### **HIGHLIGHTS OF ALABAMA'S NEW LANDLORD-TENANT LAW**

As you may recall, the Alabama Legislature passed our state's first landlord-tenant law last year. The new law spells out the rights of landlords and tenants of the 500,000 rental houses and apartments in Alabama. While this legislation won't end substandard housing in our state, it is certainly a step in the right direction. At the very least, it levels the playing field for the first time. The following are the highlights of Alabama's new law, which took effect on January 1<sup>st</sup>:

- The law requires landlords to make sure rental property is habitable, with working heat, electricity and water.
- It allows a tenant to break a lease after 14 days' notice when a landlord doesn't correct a major health and safety problem, such as a heating system not working.
- It allows a landlord to break a lease with seven days' notice for not paying the rent and with 14 days' notice for other lease violations.
- The law standardizes eviction procedures throughout the state.
- The eviction process is speeded up for landlords by giving cases priority in district court.
- It provides that security deposits can't be more than one month's rent, with the exception of additional risk-related charges, such as pet deposits.
- Landlords are required to return security deposits within 35 days after a lease ends or provide an accounting of why money was taken out of the deposit for repairs.
- Landlords must give two days' written notice before entering rental property, except in an emergency.
- Landlords are under no obligation to pay interest on security deposits.

- The law requires tenants to notify their landlords when they are going to be away for two weeks or longer.
- Landlords are required to provide a garbage receptacle and requires tenants to dispose of their garbage properly.

Alabama Arise, a lobbying group for the poor, was largely responsible for getting this important new law passed. They are to be commended. You can get more information on the Act on the web at [www.arisecitizens.org](http://www.arisecitizens.org). A publication that explains the law entitled "The Alabama Tenants' Handbook" can be obtained from Alabama Arise, Alabama Appleseed, or Legal Services of Alabama.

Source: *Associated Press*

### **GROUPS CHARGE BIG OIL WITH CONSUMER FRAUD**

Truck drivers and motorists in seven states have filed a complaint against seventeen oil companies and gasoline and diesel retailers for overcharging at the pump for fuel heated above the industry standard. It's said that this so-called "hot fuel" provides less energy than a standard gallon and cheats consumers of more than two billion dollars nationwide. For decades, fuel retailers have been overcharging drivers by selling gasoline or diesel that is warmer than the industry standard of 60 degrees. Like all liquids, the volume of fuel expands and contracts when the temperature changes. Hotter fuel has less energy in each gallon than cooler fuel. Regardless of whether fuel temperature rises due to radiant heat from the sun or the refinery process, the results are the same: consumers pay **more** for **less** energy.

Those who buy fuel in bulk, such as our armed forces, have temperature-adjusted purchase agreements with the oil industry. In fact, fuel is adjusted for temperature all along the distribution line except at the end point, when it is delivered to individual consumers. At the retail pumps in this country, motorists never know how much energy they will receive from a gallon of motor fuel. By some estimates, retail-

ers are shortchanging drivers 760 million gallons per year.

The class action lawsuit charges the petroleum retailers with breach of sales contract and consumer fraud and seeks relief for motor fuel consumers in the states of California, Texas, Florida, Arizona, New Jersey, North Carolina and Virginia. It calls for remedies in the form of restitution and the installation of temperature correction equipment for pumps that dispense gasoline and diesel fuel. The seventeen companies charged in the suit are Alon USA, Inc., Ambest, Inc., Chevron USA, Inc., Circle K Corporation, Citgo Petroleum Corporation, ConocoPhillips LLC, Costco Wholesale Corporation, Flying J, Inc., Petro Stopping Centers, L.P., Pilot Travel Centers LLC, Inc., 7-Eleven, Inc., Shell Oil Products Company, LLC, Tesoro Refining and Marketing Company, The Kroger Company, TravelCenters of America, Inc., Valero Marketing and Supply Company and Wal-Mart Stores, Inc.

It seems very clear that hot fuel overcharges add up to huge, ill-gotten windfalls for Big Oil. To add insult to injury, the oil industry also benefits from state and federal tax loopholes related to overheated fuel. Gasoline and diesel fuel is measured and taxed at the time it is bought at wholesale. Instead of going to federal and state governments, any additional amount of taxes paid by motorists at the pump buying hot fuel goes straight into the pockets of the oil companies and retailers. Interestingly, the oil industry's position on temperature-adjusted motor fuel pumps at the point of retail sale depends on where it is standing on this issue. While it opposes temperature compensation in the United States, it embraces it in Canada, where it stands to lose money from selling "cold fuel" that has more energy than the standard gallon. The industry has voluntarily implemented the use of temperature control equipment at retail pumps in Canada and supported legislation there to make the technology mandatory at the point of sale. Public Citizen President Joan Claybrook had this to say about the lawsuit:

*This lawsuit comes at a particularly appropriate time to expose a*

*system that has been quietly picking money from the pockets of citizens throughout the country.*

Ultimately, Congress needs to protect U.S. consumers against the industry-wide practice of hot fuel overcharges—but in the absence of government protections, the only solution is for consumers to band together and force a remedy through the legal system.

Source: Public Citizen

### **INCREASES IN ENFORCEMENT ACTIONS REPORTED**

The Alabama Securities Commission has reported significant increases in the number of enforcement actions, money ordered returned to investors, and years of incarceration for securities law violations during the most recent reporting period. These statistics reflect the ongoing vigilance of state securities regulators to protect Main Street investors from fraud. Joe Borg, Director of the Alabama Securities Commission, who is also President of the North American Securities Administrators Association (NASAA), has been instrumental in this effort. The NASAA is the oldest international organization devoted to investor protection.

NASAA reported a 23% increase in enforcement actions, which includes administrative, civil and criminal actions, to 3,635 during the 2004-2005 reporting period, up from 2,964 during the 2002-2003 reporting period. One-quarter of all enforcement actions involved the financial exploitation of seniors. Thirty-four percent of all successfully concluded enforcement actions involved either variable or equity-index annuities. Investment fraud targeting seniors is an ongoing concern. It's good to see that federal regulators and others have joined with state regulators in efforts to fight senior investment fraud through targeted and aggressive enforcement.

Money ordered returned to investors (including restitution, rescission, and disgorgement) increased 38% to \$911 million from \$660 million during the same period. Years of incarceration as a

result of securities law convictions rose 30% to a cumulative 935 years, compared to 718 years in the previous reporting period. NASAA also reported monetary fines and penalties ordered during the 2004/2005 reporting period totaled \$61 million. During the 2002/2003 reporting period, penalties and fines totaled \$822 million, which included amounts ordered stemming from settlements related to several large Wall Street investigations. Director Borg had this to say concerning the efforts:

*While our emphasis has always been on enforcing the securities laws and getting money back to investors, the industry-created scandals of recent years led to larger than usual totals for fines and penalties during the previous reporting period. We hope that the lower amount of penalties and fines in the current reporting period reflects that Wall Street now understands that business must be done for the benefit of investors, not to their detriment and that the lessons of the past will not be forgotten in the new economic climate.*

The enforcement statistics represent responses from 42 of the 53 U.S. jurisdictions within NASAA's membership. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, the U.S. Virgin Islands, Puerto Rico, Canada, and Mexico. The 2004-2005 reporting period includes either calendar year 2005 or the most recent fiscal year, July 1, 2004 through June 30, 2005.

### **FEDERAL GOVERNMENT WANTS TO STOP HIGH LEAD LEVELS IN JEWELRY**

The federal government appears to be cracking down on potentially dangerous lead in children's jewelry. Federal regulators are following the lead of public health advocates who say current federal standards are too lax. As any parent knows, very young children don't just wear jewelry, they also usually put the jewelry items in their mouths.

That's how lead can get into the bloodstream. At low levels, it can cause learning and behavioral problems. At high levels, retardation and even death can occur. It has been reported by the federal government that cheap children's jewelry can be loaded with lead. There have been a number of serious incidents resulting from the lead exposure.

Earlier this year, 4-year-old Jarnell Brown of Minneapolis, Minnesota, died of lead poisoning after swallowing a charm. The trinkets were later recalled. That was one of 14 federal recalls of children's jewelry — totaling more than 160 million pieces — since 2004. The problem is so serious, the Consumer Product Safety Commission wants to streamline federal regulations. The commission's new proposal would ban all jewelry with a lead content above .06%. Presently, if jewelry exceeds the federal limit, the consumer commission requires another test to see how quickly the metal gets into the bloodstream. There's no safe level of lead in a child's blood, according to health safety experts. A spokesman for the CPSC said:

*The goal is to make the marketplace safer when it comes to children's jewelry by having a simpler policy for companies in their manufacturing and CPSC in assessing safe from dangerous.*

As you know, the CPSC is an independent federal regulator responsible for making sure products are safe for consumers. The Agency works with companies to issue recalls when it finds consumer goods that can be harmful. In 2004, the CPSC recalled 150 million pieces of children's jewelry with unsafe lead levels — the biggest recall in the agency's history. While lead in old paint in older homes is still the number one lead danger for children, but this toy jewelry product line has really come to the forefront since 2004.

Stores shouldn't be able to sell toys that are likely to be a danger to children when used as intended by the seller. The CPSC is doing a good thing in calling for this ban. No matter how vigilant parents are, they are simply never going to be

able to do on their own what the federal government can do with a ban. Under current regulations, children's products found to have more than .06% lead are usually subject to a recall, in which the company must reimburse consumers for the value of the product, provide a replacement or offer a repair. By banning toy jewelry with that much lead, the agency can fine companies that knowingly manufacture, sell or import it.

Source: *Associated Press*

### **STUDY SHOWS THAT MAGNETS IN TOYS CAN BE DEADLY TO CHILDREN**

Magnetix, the maker of a popular building toy, has reached a \$13.5 million settlement in a lawsuit over the death of a Washington state toddler who swallowed several magnets that had fallen off a toy. The settlement included 14 other families in eight states who filed suit against the company for failing to warn consumers about the popular toy, which is very popular and a big seller. Kenny Sweet was 18 months old when he died last November. The magnets he swallowed were so powerful that they squeezed and twisted parts of his intestines together, causing perforations and infection. The infant died two days after he began complaining of stomach aches and was vomiting. An autopsy found nine small magnets stacked together. They had caused a twisting of the bowel and a blood infection.

In March, the Consumer Product Safety Commission recalled 3.8 million Magnetix toy kits after the Sweets and several other families filed suit against former Magnetix maker Rose Arts, which later was purchased by Mega Brands. The toys are sets of plastic building pieces and rods, which can be linked together using magnets that in the past have loosened and fallen off. Soon after Kenny Sweet's death, three other children in the Pacific Northwest, between the ages of 3 and 8, swallowed Magnetix magnets and required emergency surgery. A 5-year-old boy inhaled two of the magnets, and they had to be surgically removed from his lungs. The

toys are recommended for children age 6 and older, and carry a choking warning for children under 3. Previously, there was no warning about what can happen if more than one magnet is swallowed.

At least one U.S. child has died and 19 others have needed surgery since 2003 after swallowing magnets used in toys, according to a government report released last month. Most of those cases were believed to involve tiny but strong "rare earth" magnets that can link together in children's digestive tracts, squeezing and even perforating the intestines, the researchers said. The magnets, made from neodymium iron boron or other compounds, have become common in the U.S. toy market in the past five years because they have become cheaper to produce. Jonathan Midgett, an engineering psychologist with the CPSC, was the study's lead author. The magnets are used in building sets, action figures and dolls. Mega Brands Inc. recalled 3.8 million Magnetix building sets, added warning labels and agreed to pay \$13.5 million to settle lawsuits.

Source: *Associated Press and Lawyers USA*

### **NATIONAL STUDY REVEALS 8 OUT OF 10 CHICKENS FOUND IN GROCERY STORES HAVE BACTERIA**

A new study released by Consumer Reports Magazine found chicken folks buy might not be as clean as they think. Researchers tested more than 500 chickens in 23 states and found eight out of ten chickens contained dangerous bacteria in packaged and fresh poultry. Most were laced with salmonella. The biggest problems uncovered were unclean surfaces, workers not wearing gloves and chicken not being set at the proper temperature of 34 degrees. The study also found consumers aren't very cautious when it comes to buying and preparing chicken at home.

Source: *Consumer Reports Magazine*

### **MAJOR BREACH OF UCLA'S COMPUTER FILES**

There have been a number of incidents recently where hackers gain access to databases from universities around the country. It was reported last month that one or more hackers gained access to a UCLA database containing personal information on about 800,000 of the university's current and former students, faculty and staff members, among others. UCLA officials confirmed that the attack on a central campus database exposed records containing the names, Social Security numbers and birth dates—the key elements of identity theft—for at least some of those affected. The attempts to break into the database began in October 2005 and ended on November 21<sup>st</sup>, when the suspicious activity was detected and blocked. This appears to be one of the largest computer security breaches ever at an American university.

Those whose records might have been accessed were requested to monitor their consumer credit files and consider fraud alerts and other precautions. The UCLA incident is the latest in a series of computer security breaches affecting private organizations, financial institutions, government agencies and other large employers. Partly because of their tradition of openness, universities are proving to be a favorite—and often vulnerable—target, according to security experts.

Comprehensive statistics on computer break-ins at colleges do not exist. But in the first six months of this year alone, there were at least 29 security failures at colleges nationwide, jeopardizing the records of 845,000 people. Both private and public institutions have been hit. In 2005, a database at the University of South California was hacked, exposing the records of 270,000 individuals. In a survey released by Educause in October, about a quarter of 400 colleges said that over the previous 12 months, they had experienced a security incident in which confidential information was compromised.

The attack at UCLA was described as sophisticated. It used a program

designed to exploit a flaw in a single software application among the many hundreds used throughout the Westwood campus. An attacker found one small vulnerability and was able to exploit it, and then cover their tracks. The problem was spotted when computer security technicians noticed an unusually high number of suspicious queries to the database. It took several days for investigators to be sure that it was an attack and to learn that Social Security numbers were the target.

#### **OTHER SECURITY BREACHES REPORTED**

Computer records containing personal information of about 130,000 members of Connecticut-based health insurer Aetna Inc. were stolen from the office of a vendor. A lockbox stolen during a break-in at Concentra Preferred Systems in October contained computer backup tapes of medical claim data. Accessing information from the backup tapes, which cannot be used on a standard personal computer, would require commercial equipment and special software packages, according to Concentra Preferred Systems. The Naperville, Illinois-based company provides claims cost management services to health insurance carriers and health maintenance organizations. The stolen data included information on 19,000 Aetna members in Ohio and several other Concentra clients. Hartford, Connecticut-based Aetna, one of the nation's largest health insurers, plans to notify members and providers who could be affected and offer them free credit monitoring services for a year.

In another incident, a Boeing Co. laptop containing the names and Social Security numbers of 382,000 workers and retirees has been stolen, putting the employees at risk for identity theft and credit-card fraud. The theft was the third such incident at Boeing in just over a year. Files on the computer also contained home addresses, phone numbers and birth dates. Some of the files listed salary information. The laptop was stolen in early December when an employee left it unattended. The company claims that no proprietary,

customer or supplier data were on the computer. The computer was turned off when it was stolen and apparently a password is needed to log onto the desktop. Boeing began contacting current and former employees on December 12<sup>th</sup>. It will provide credit-monitoring services for three years for those persons affected. A Boeing laptop containing information on roughly 160,000 current and former employees has been stolen in November 2005. Then, in April, a laptop containing information on 3,600 employees and retirees was stolen.

#### **BRIEFS AGAINST CREDIT SCORING FILED BY STATES IN U.S. SUPREME COURT CASE**

Thirteen states have filed briefs against insurance industry use of credit scoring in two cases pending in the U.S. Supreme Court. The cases, which have been consolidated, involve Safeco and GEICO. Consumers in the cases claim that insurance companies Safeco and GEICO violated the federal Fair Credit Reporting Act. The consumers contended that when a consumer's credit information resulted in the consumer receiving a higher rate, insurers should have sent out "adverse action notices" required under FCRA and acted in "willful" disregard of the FCRA in not doing so. FCRA adverse action notices are sent to consumers by banks, landlords and others when a consumer's credit report has caused them to be denied for a loan or a lease, for example, or even if a consumer is required to have a higher than usual down payment or deposit due to their credit score, the brief notes. The 13 state insurance commissioners told the Supreme Court that they were filing their brief to:

*Further their collective mission of protecting consumers by supporting interpretations of the FCRA that (a) put valuable information in the hands of consumers, (b) provide appropriate incentives for insurance companies that use consumer credit information to adopt procedures that assure compliance with the law, and (c) hold insur-*

*ance companies accountable when they adopt policies that recklessly disregard consumer rights in contravention of the FCRA.*

The brief urges the Supreme Court to uphold the decisions of the 9th Circuit Court of Appeals in the Safeco and GEICO cases that the companies willfully disregarded the FCRA by not sending adverse action notices to some consumers. The states insurance commissioners filing on the brief include those from Delaware, Arkansas, California, Georgia, Iowa, Kansas, Michigan, Montana, New Mexico, North Dakota, Oklahoma, Utah and Washington. I had hoped that Alabama would have joined in this effort, but for some reason the state Insurance Commissioner elected not to do so.

Source: Associated Press

## **XX. RECALLS UPDATE**

### **CHECK ALL CHRISTMAS GIFTS FOR CHILDREN FOR HAZARDS**

Now that Christmas is over, it's a good idea for adults to check all toys that children in their homes have received as gifts. Some of these toys could be dangerous and present a hazard to a child. Thus far, there have been a number of toy recalls. The following are a few of the recalled toys:

#### **GAMO USA Corp. Recalls Air Rifles**

GAMO USA Corp. has recalled about 14,000 GAMO Air Rifles. The scope mount on these rifles can be installed incorrectly, causing the rifle to unexpectedly fire. This poses a serious injury hazard to consumers. GAMO has received one report of an air rifle firing unexpectedly. Thus far, no injuries have been reported. The recalled air rifles are the following GAMO models: Hunter Pro, Hunter Sport, Shadow Sport, and F1200. These models bear the serial numbers 04-IC-415577-06 through 04-IC-

579918-06. The model and serial numbers can be found on the left side of the barrel just above the front left side of the stock. Models Shadow Sport and F1200 look identical. The air rifles were sold in sporting goods stores and gun shops nationwide from June 2006 to September 2006 for between \$150 and \$280. Model F1200 was exclusively sold at Wal-Mart stores. Consumers should stop using the recalled air rifles immediately. Consumers that have not been contacted by GAMO should call the company toll-free at (877) 246-3831 anytime or visit the company's Web site at [www.gamoussa.com](http://www.gamoussa.com)

### **Children's Parka Jackets Are Recalled**

Silla America Inc. of Los Angeles has recalled 180 children's parka jackets that have potentially dangerous drawstrings. The garments have a drawstring through the hood, posing a strangulation hazard to children. Thus far, no injuries or incidents have been reported. The jackets come in seven color combinations: black with a grey stripe along the sleeves, light blue with a black stripe along the sleeves, grey with a black stripe along the sleeves, navy blue with a gray stripe along the sleeves, yellow with a grey stripe along the sleeves and navy blue with a white stripe across the chest, and black with a white stripe across the chest. The jacket's zipper goes all the way up to create a mock turtleneck. The removable hood attaches with a zipper and has a drawstring. There is elastic at the sleeves, side pockets, and a drawstring at the waist. Consumers should immediately remove the drawstrings from the jackets to eliminate the hazard. Consumers should contact Dollar Days Customer Service for a refund or store credit. To get more information on the recall, you can call 877-837-9569.

### **Children's Necklaces Recalled Due To Lead Poisoning Hazard**

The U.S. Consumer Product Safety Commission, in cooperation with Really Useful Products Inc., of Darien, Ill has recalled Children's Mood Necklaces and Diva Necklaces. The recall involves about 51,600 necklaces. The recalled jewelry contains high levels of lead. The recalled Mood Necklaces are multi-colored pendants shaped as hearts, moons, shamrocks, spiders, butterflies and lizards that hang from a black chord. The packaging is a black cardboard wrapped in plastic with "Mood Necklace" printed on the front and "Item # JW41001" and "UPC number 898846410011" printed on a sticker on the back. The recalled Diva Necklaces consist of pendants shaped as the words "ANGEL" or "Diva" that hang from a black chord. The packaging is pink cardboard with "Hand Painted" and "Diva Necklace" printed on the front, and "Item # 21800020" and "UPC number 898846200186" printed on the back. Consumers should immediately take this jewelry away from children. Consumers should return the recalled jewelry to the store where purchased for a full refund or contact Really Useful Products toll-free at (888) 484-3444 between 9 a.m. and 5 p.m. CST, Monday through Friday, or visit the firm's Web site at [www.ruproducts.com](http://www.ruproducts.com) for information on how to receive a full refund.

### **Children's "Powerpuff Girls" Necklaces Recalled Due To Lead Poisoning Hazard**

Rhode Island Novelty, of Cumberland, Rhode Island, is recalling children's Powerpuff Girls necklaces due to high levels of lead contained in the necklaces. Lead is toxic if ingested by young children and can cause adverse health effects. No injuries have been reported. The recalled necklaces are multi-colored metal pendants that hang from a black cord. The pendants are in the

shape of the head of one of three "Powerpuff Girls" cartoon characters. The packaging consists of purple cardboard with the three Powerpuff Girls cartoon characters and the words "CARTOON NETWORK" and "THE POWERPUFF GIRLS" printed on both sides. The necklaces were sold at carnivals, amusement parks, family entertainment centers, small discount stores nationwide and at [www.rinovelty.com](http://www.rinovelty.com) from March 2003 through November 2006 for about \$1. Consumers should immediately take this jewelry away from children. Consumers should return the recalled jewelry to the store where purchased for a replacement or contact Rhode Island Novelty for information on how to receive a replacement. For additional information, contact Rhode Island Novelty at 1-800-528-5599 between 8:30 a.m. and 6 p.m. EST, Monday through Friday, or visit the firm's Web site at [www.rinovelty.com](http://www.rinovelty.com)

### **Wal-Mart Recalls Stuffed Christmas Beagles Due To Choking Hazard**

Wal-Mart is recalling 56,000 Holiday Time™ Stuffed Christmas Beagles due to a choking hazard. No injuries have been reported, however, the red pompoms on the wreath attached to the beagle's mouth could detach, posing a choking hazard to young children. The stuffed animal is a brown and white beagle with a red scarf and Santa hat trimmed in red and white stripes. A green wreath with red pompoms is attached near the beagle's mouth. The stuffed beagle measures 7-inches tall and 5-inches long. "Marketed by WAL-MART STORES, INC" and UPC number "8 85271 90780 3" are printed on the dog's sewn-in labels. "Holiday Time™" is printed on the animal's hang tag. For more information, contact Wal-Mart at (800) 925-6278 between 7 a.m. and 9 p.m. CT Monday through Friday, or visit [www.walmartstores.com](http://www.walmartstores.com)

## Other Product Recalls:

There have also been a number of other recalls involving products and equipment used in the home. I suggest that you go to the Web site of the CPSC which is [www.cpsc.gov](http://www.cpsc.gov), to get a complete listing. Those set out below are a few of the recalls:

### Pressure Washers And Air Compressors Recalled By DeVilbiss Due To Fracture And Laceration Hazards

DeVilbiss Air Power Company, of Jackson, Tennessee, has recalled about 620,000 pressure washers and 72,000 air compressors. The pressure washers and air compressors have pneumatic tires with plastic hubs that can burst, posing a laceration or fracture hazard to consumers. DeVilbiss has received 26 reports of injuries including fractures, lacerations and bruises. The recalled pressure washers and air compressors were sold under the following brands and model numbers:

- Delta Pressure Washer: DTH2450, DTH2450-1, D2750H, D2400H-2, D2400H-3, D2700K-1, DTT2450; manufactured from 1/27/04 through 8/3/05. Excell - XR2750-1, XR2600, XR2600-1, XR2600-2, XR2500-1; manufactured from 1/26/04 through 11/2/05.
- Porter-Cable Pressure Washer: PCV2250-2, PC2525SP-1, PCE1700-3, PCH2401-1, PCK3030SP-1, PCV2500, PCH2800C, PCE1700-2, PCH2425-2; manufactured from 6/4/04 through 10/24/05.
- Pressure-Wave Pressure Washer: PWH2500, PWH2500K; manufactured from 1/6/05 through 10/31/05.
- Water Driver Pressure Washer: WHAB2627-1; manufactured from 6/11/04-7/19/05.
- Porter-Cable Air Compressors: CFFR350B-1, C3151-1, C3551-1, PTA51 Service Kit; manufactured

from December 16, 2004 to May 5, 2006.

On the pressure washers, the brand, model number and manufacturing date are located on the name plate on the rear of the engine base and on the air compressors they are located on the front of the motor housing. Only pressure washers and compressors with pneumatic tires with plastic tire hubs are affected; pressure washers and compressors with solid tires or metal tire hubs are not affected. The recalled pressure washers were sold at home center and hardware stores nationwide from January 2004 through Month 2006 for between \$300 and \$1,400. The recalled air compressors were sold at home center and hardware stores nationwide between December 2004 and October 2006 for between \$300 and \$500. Consumers should contact DeVilbiss toll-free at (866) 323-9867 between 8 a.m. and 5p.m. ET Monday through Friday or visit the firm's Web site at [www.devap.com](http://www.devap.com) to obtain the location of the nearest service center to receive a free replacement of the tires.

### Recall Of Door Locks

Stanley Security Solutions Inc. has recalled about 25,000 Keyed 5K Series Door Handle Locks. The locks can fail and the door cannot be unlocked from the inside, posing an entrapment hazard. This failure could lead to the inability to vacate a location in an emergency. Stanley Security Solutions has received three reports of the locks failing. Thus far, no entrapments have been reported. The recalled units include the 5K Light/Medium Duty Lever Series door handle locks. These sets have a brass or stainless steel finish with the word "BEST" embossed below the key whole on the elongated handle. The door handle locks were sold by locksmiths, hardware, and building supply stores nationwide from November 2005 through September 2006 for between \$65

and \$115. Consumers should contact Stanley Security Solutions to schedule an appointment to have the locks replaced free of charge. For additional information, contact Stanley Security Solutions product support department at (800) 479-9087 between 8 a.m. and 6 p.m. CT Monday through Friday or visit the firm's Web site at [www.stanleysecurity.com](http://www.stanleysecurity.com)

### Safety Switches Recalled

Square D Co., of Palatine, Illinois, has recalled about 27,600 General Duty Safety Switches. The safety switch can continue to supply electricity even after being placed in the "OFF" position. This poses the risk of an electric shock or electrocution hazard to consumers. No incidents or injuries have been reported. The recall includes General Duty 30 and 60 ampere, 240 volt, 1 phase and 3 phase NEMA 3R safety switches. The switches are typically used to control the flow of electricity to outdoor motorized units that are hardwired to a household or business' electrical system such as outdoor air conditioning and heating equipment. The switches contain "ON" and "OFF" positions. The "OFF" position is designed to cut the flow of electricity to an outdoor motorized unit to protect the person who is servicing the unit. The recalled switches have the date codes and catalog number printed on bottom of the wiring label inside the front cover or on bottom of the package label.

### CHRYSLER RECALLS VEHICLES TO REPROGRAM BRAKE SYSTEM COMPUTERS

DaimlerChrysler AG's Chrysler Group is recalling more than 60,000 vehicles to reprogram a brake system computer to avoid the loss of antilock brakes and traction control. The recall involves 62,369 model year 2007 Chrysler Sebring, Chrysler 300, Jeep Commander, Jeep Compass, Jeep Grand Cherokee,

Jeep Liberty, Jeep Wrangler, Dodge Nitro, Dodge Magnum, Dodge Charger and Dodge Caliber vehicles. The automaker said that in a small number of vehicles, the instrument panel warning lamps might illuminate and be followed by the loss of its Electronic Brake Distribution, antilock brake system, traction control and speedometer functions. That could lead to a loss of vehicle control. DaimlerChrysler says thus far no accidents or injuries have been reported.

## XXI. SPECIAL RECOGNITIONS

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### *MIRIAM SHEHANE IS A SPECIAL PERSON*

Miriam Shehane has been my friend for years. I first met her when she worked at a bank in her hometown of Clio, Alabama. Miriam has served with distinction as Executive Director of VOCAL for the past several years. Recently, an article appeared in the Eufaula Tribune that tells how Miriam got involved with VOCAL. It tells her story extremely well and outlines in detail her work on behalf of victims of crime. Miriam Shehane is a very special person and I have been blessed to have her as a friend. The people of Alabama are most fortunate to have this very special person on the side of victims of crime, fighting on a daily basis for them.

### *LITIGATORS OF THE YEAR*

In December, two of the firm's lawyers were selected by their peers as Litigators of the Year for 2006. Graham Esdale from the Products Liability Division and Leigh O'Dell from the Mass Torts Division received the honor. Each of these lawyers worked extremely hard for their clients over the course of the year and contributed greatly to the firm's success. Graham has successfully handled a number of Product Liability lawsuits and has done an outstanding job. Leigh has been very busy with

Vioxx litigation. She has done outstanding work, which will pay dividends for the clients we represent. We are extremely fortunate to have these two lawyers in our firm and it's appropriate that they be honored for their performances. Not only are they good lawyers, but they are also real good people in every respect.

## XXII. FIRM ACTIVITIES

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### *SPOTLIGHTED EMPLOYEES*

#### **J.P. Sawyer**

Before coming to our firm, J.P. Sawyer, a native of Coffee County, was involved in a broad range of civil litigation consisting of representation of wronged and injured individuals. Currently, J.P.'s litigation focus is in the area of product liability lawsuits. He has become primarily involved in cases involving defective vehicle roof structures. J.P. is actively involved in both the Alabama Trial Lawyers Association and the Mississippi Trial Lawyers Association. He serves on the Executive and Legislative Committees of the Alabama Trial Lawyers Association. J.P. is also a "lifetime member" of the Mississippi Trial Lawyers Association.

J.P. is married to the former Keely Warren of Enterprise, Alabama, and they have one daughter, Ella. J.P. and Keely are active members of St. James United Methodist Church. J.P. serves as Chair of the Missions Committee at St. James and he enjoys foreign mission work. We are fortunate to have J.P., who is an outstanding lawyer, in the firm. J.P. really cares about his clients and their well-being and works very hard on their cases.

#### **Rick Morrison**

Rick Morrison joined the firm in 1996 after practicing for several years with a defense firm. Initially, Rick handled consumer and insurance fraud cases. He currently handles product liability lawsuits for the firm, including crashworthy litigation involving the automobile industry. Rick has been involved in cases

against automobile manufacturers dealing with defective seat belts, seats and seat backs, fuel systems, structural integrity, safety glass, and cargo restraints. He has also handled rollover and roof crush cases dealing with SUVs and heavy trucks. In addition to the numerous cases Rick has handled against automobile manufacturers, he also has represented clients in their cases dealing with motorcycles, helmets, saws, tractors, presses, and ATVs. Several of these cases have resulted in substantial settlements or verdicts for his clients. Rick is married to the former Estee Knudsen and they have one daughter, Meredith Grace. Rick is a very hard worker who has developed into an outstanding lawyer. He is a definite asset to the firm.

#### **Bruce Huggins**

Bruce Huggins, Chief Investigator, heads up the firm's Investigative Section. We learned very early in our firm's existence that having in-house investigators is a definite advantage for the firm and the clients we represent. The section employs six full-time investigators who are all professionally-trained law enforcement officers. Bruce, who sets the example, has provided excellent leadership for all of the investigators in his charge.

Bruce has been with Beasley-Allen for eighteen years, having come on board in April of 1988 from the Montgomery County Sheriff's Office. During his eleven years with the Sheriff's office Bruce won numerous awards, including Officer of the Year in 1983. He was the first member of the Sheriff's Office to attend and graduate from the prestigious FBI National Academy in Quantico, Virginia. Bruce and his wife, Cindy, celebrated thirty years of marriage in August. They are looking forward to the graduations of their daughter, Amanda, from Southern Union School of Nursing and their son, Daniel, from Birmingham-Southern in the spring. Cindy is a Registered Nurse who currently works at Montgomery Surgical Center.

Bruce is a totally dedicated employee, who does outstanding work for the firm. We are most fortunate to have Bruce heading up a most important

function in the firm. To say that Bruce is an avid Alabama Crimson Tide fan is an understatement. He and I have had many “interesting discussions” on the Alabama-Auburn series over the years. I can say without reservation that I have never won any of those debates and Bruce always manages to have the last word.

### **Bridget Strength**

Bridget Strength, who has been with the firm for over three years, currently handles new client calls for all sections in the firm. Her job involves answering calls, getting the initial contact information and then putting it on a case-open sheet. The case is then sent to the proper lawyer for handling. In addition to new client calls, Bridget also handles case-opens for the Consumer Fraud Division, making sure all mail makes it to the correct staff person. She also helps out in the mailroom whenever needed. As you can see, all of this work is important. It’s essential that clients who call in are connected to a lawyer in the firm as soon as possible. Because of the volume of new client calls, it’s extremely important that the contacts are handled properly.

Bridget attended Holtville High School and has future plans of getting certified as a Paramedic / EMT. She lives in Prattville with her three miniature daschunds: Fred, Rocco, and Roxy; and her two bulldogs; Trixie and Tucker. In her spare time, Bridget likes to read, paint and take long road trips. She also enjoys volunteering at the Humane Society. Bridget is a very good employee who has a most difficult job. She handles her responsibilities in an outstanding manner.

### **Penny Cigelske**

Penny Cigelske started out with the firm as a temp but became a permanent employee in our Mass Torts Division this past summer. Penny currently serves as Staff Assistant to Roger Smith and is part of the Vioxx Litigation Team. Since March of this year, Penny has been working on Claimant Profile Forms, which require a great deal of time and effort. Contacts with our clients and their families are very important and are

a recurring event on a daily basis. There are constant deadlines that have to be met in the Mass Torts Section.

Penny has a son, Benjamin, who is in the first grade at Holtville Elementary School. Benjamin is very involved in Taekwondo and just received his green belt. Penny’s fiancée Niall is currently in Dunedin, New Zealand, where he just completed his degree in Business Management at Otago University. They also have one cute but feisty puppy named Rocket. Penny is a very good and dedicated employee.

## **XXIII. SOME CLOSING OBSERVATIONS**

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The drug and oil industries, big insurance companies and other powerful forces in Corporate America have spent billions of dollars over the past several decades to wage an unrepresented attack on justice in this country. As has been pointed out repeatedly, their goal is very simple. All they want to do is to destroy the civil justice system, which is the only thing left holding wrongdoers accountable. The tort reformers want corporations to be free to do as they please with no fear of the consequences. The court system, which is the last resort for many Americans who have been wronged, must be defended.

It’s essential that consumer groups and dedicated citizens work to make sure that any person who is injured or damaged by the wrongful conduct of any powerful corporate interest can get justice in the courtroom. Lawyers must play a vital role in the ongoing battle. Even when taking on the most powerful interests, in our society, an ordinary citizen who has a valid claim should have full access to the court system. Hopefully, this New Year, we will see a new day for ordinary citizens in the defense of the jury system. That should now be possible because of tremendous gains made in Congress on Election Day last year.

## **XXIV. SOME PARTING WORDS**

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Many American citizens are facing the New Year with a great deal of apprehension and even despair. Presently, the entire world seems to be in turmoil. Even in the United States serious problems persist. On the global scene things appear to be more unsettled than ever before. Political leaders seem weak and even misguided on occasion. Nations which are classified as “rouge countries” refuse to even negotiate with the so-called “responsible countries” on important issues that threaten international security. Their rulers blatantly ignore warnings from the United Nations and from the “super powers.” Some world leaders seem to speak in a tone of fear over what the future holds for their countries. Outlaw rulers boast, beat their chests and openly threaten countries that challenge them. To say there is a great deal of unrest as we go into 2007 is not an understatement.

The obvious question for all of us who are concerned over the current state of affairs is what can we do and where can we turn? It’s my firm belief that there is but one answer and that is, we must turn to Jesus Christ and rely on His promises for all believers. The words of Jesus give us assurance that He is in control and that we may rest in His peace:

*These things I have spoken to you, that in Me you may have peace. In the world you will have tribulation; but be of good cheer, I have overcome the world*

*John 16:33.*

God has not abandoned the earth or its people regardless of how “wicked” and “faithless” humankind has become. As followers of Jesus, we shouldn’t be concerned. That’s not to say we should ignore current events and the activities in the world. Certainly, we aren’t expected to live in a vacuum and be isolated from reality. But we can turn to Jesus’ words as recorded for us in the Holy Scriptures. We can rest assured that nothing happening

in this world can upset God's plan. Jesus rules and reigns over our world today. What we are presently experiencing is just a blip on God's eternal screen. We must trust in God, obey Him and rely on His Son Jesus Christ today more than ever. That is all we need to experience true peace as we deal with many problems. I can think of nothing more assuring!

Over the years, I have found it most helpful to start each day in prayer. The following prayer was sent to me a few years ago. I have borrowed it. Now I will pass it on. It helps me get the day started—even on "bad days." Hopefully, it will help you on a daily basis.

*I begin this day with you, God  
You are my loving Father,  
& I place all my love and confidence in You.*

*Nothing can disturb me when I trust You.*

*I know that You love me and sustain me in all things, under all circumstances.*

*I lean on Your mighty power to help me.*

*I rest in Your love that bids me not be troubled about anything.*

*With You all things are possible.*

*With You I can do all things.*

*I trust Your wisdom to guide me this day.*

*I trust Your life to renew me and strengthen me.*

*You are my help in every need.  
You are my shepherd and I shall not want for any good thing.  
You are my supply and I trust You to fulfill my needs.  
You are my comfort—You work through me to accomplish Your good purposes.  
And I trust Your perfect will for me.*

*Whatever I need to do today I shall do it calmly,  
trusting Your spirit within me to guide me to success.  
Your light makes my way plain.  
You love opens doors for me.  
My heart is at peace, for I trust You—God.*

My personal prayer for the New Year for my family is that we will trust and obey God completely and not let anything stand in the way of our relationship with Him. Hopefully and prayerfully—that will be the prayer for your family for 2007.

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