



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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## *A GOOD RESULT FOR GEORGIA CLIENTS*

We represented Sam and Colette Martinez in a civil lawsuit recently that was filed in Warner Robins, Georgia. Sam, a 49 year old man with a very good job as an air traffic controller in Macon, was involved in a motor vehicle accident on October 20, 2004. While on his way to work at about 4:30 a.m., Sam was hit by a delivery van being driven by an inexperienced driver working for a large corporation. The van driver, who had been talking on her cell phone that morning, drove through a stop sign at an intersection at a speed of between 42 and 49 mph. She never applied her brakes and hit Sam's car in the right front side. Sam suffered a severe traumatic brain injury in the collision. He has been treated by a number of doctors over the past two years and has undergone intensive rehabilitation. Sam, whose life has been dramatically changed as a result of his injury and impairments, will need assistance to perform the activities of daily living for the rest of his life. Colette, who has been a real jewel and a most supportive wife, had to give up a very good job as a result of this incident.

A life care plan for Sam was put together by Kathy Willard, a licensed vocational specialist, with a present day value of more than \$7 million. Dr. Donald Leslie, medical director at the Shepherd Center, which is located in Atlanta, approved the life care plan and testified in a deposition taken for trial that all of the provisions for Sam in the plan were necessary and needed. Sam's doctors testified that he will never be able to hold down a regular job and will require lifetime care and assistance. It is hoped that this courageous man will eventually be able to work at some type sheltered employment even though his impairments resulting from the TBI are

permanent. His lost earnings, past and future, were almost \$2 million reduced to present value.

We were able to settle the case for Sam and Collette after jury selection in Houston County, Georgia. The settlement received court approval on Wednesday, March 7<sup>th</sup>. The amount of the settlement is confidential at the request of the defendants. The medical treatment and rehabilitation efforts by the medical professionals who have been involved on Sam's behalf have been tremendous. I don't believe I have ever seen a more dedicated group, and that has been great for Sam, Colette, and their two sons. The support the entire family has had from friends has also been unbelievable. It makes me realize once again that there are still lots of good folks in this world.

My hope and prayer is that Sam will have a miraculous recovery and be able to lead a life that will allow him to do and enjoy many of the things that he was able to do before his injury. Cole Portis, LaBarron Boone, and I, along with Ben Finley of the firm of Finley and Buckley from Atlanta, handled the case for the Martinez family. Being able to help this family makes me realize that what we do is worthwhile and that the jury system is still badly needed in our society. I am going to write more about brain injuries in the Healthcare Section of this issue so that our readers will be able to understand more fully how these injuries affect patients and their families.

## ***FEDERAL APPEALS COURT AFFIRMS \$20 MILLION POLLUTION VERDICT***

A federal appeals Court has affirmed the \$20.7 Million verdict in a pollution case involving the emission of carbon black from a plant in Phenix City, Alabama. The suit had been brought by the City of Columbus, Georgia, and three other Georgia Plaintiffs, a business and two individuals, against Continental Carbon Incorporated and its parent company, China Synthetic Rubber Cor-

poration. After 10 days of trial, a jury had awarded the Plaintiffs a total of \$20,709,000, including \$17,500,000 in punitive damages. Significant injunctive relief against the defendants was also ordered by District Court Judge Mark Fuller who presided over the trial. Carbon black, a pollutant, had been released from Continental's plant over a long period of time, which damaged the property of the Plaintiffs. The emissions of carbon black continued even after plant officials had been repeatedly asked to stop it. The appellate court found the conduct of Continental to be

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extremely reprehensible and refused to reduce the award of punitive damages.

The affirmance by the 11<sup>th</sup> Circuit Court of Appeals should put an end to this phase of the litigation which has been fought very hard by this corporate wrongdoer. There are other claims, both for personal injury and property damages to persons and business in the Columbus-Phenix City area, that are either pending in court or in the process of being filed. We were pleased to have been selected to handle this most important case for our clients. Hopefully, Continental has learned its lesson and will become a good corporate citizen. The case was tried in federal court under Georgia law. David Byrne and Rhon Jones from our firm, along with Jeff Friedman of Birmingham, Alabama, and Eddie Jackson of Jasper, Alabama, tried the case and handled the appeal. The opinion of the court was very strong and extremely well written.

#### ***THE ALABAMA LEGISLATURE GETS HIGH MARKS ON SPECIAL SESSION***

The Alabama Legislature completed the special session called by Governor Riley in a most successful manner and that was certainly good news for all Alabamians. In fact, I would grade the legislators' performance as excellent. The \$400 million industrial incentive package, designed to lure a German steel mill and other major industries to the state, was approved in the minimum time required to pass a bill in the Legislature. The incentive package received a unanimous vote at each step of the way as it went through the legislative process. This session was an example of what can happen when all factions in the Legislature work together in harmony. I had hoped that this was a preview of coming attractions.

It should be noted that the incentive package is a constitutional amendment. It won't take effect unless approved by Alabama voters in a statewide referendum to be held on June 5<sup>th</sup>. State offi-

cialists have predicted that public support will match the legislative support, and I concur with their assessment. I believe that the voters will react to the urgent need for the package and vote overwhelmingly for it. Governor Riley hit the nail on the head when he observed:

*The economic growth plan is absolutely essential if Alabama is going to continue competing for new jobs.*

Governor Riley had called the Legislature into special session to help Alabama compete with Louisiana for a \$2.9 billion steel mill planned by German steelmaker ThyssenKrupp AG and to provide money to attract other industries. The need to act promptly was urgent because the Louisiana Legislature had approved a \$300 million incentive package in December. The German steelmaker is eyeing sites 25 miles north of Mobile and between New Orleans and Baton Rouge, Louisiana. In addition to the German steel company, Alabama is also competing for a number of other industries. There is more activity on the industrial front in our state at present than I can ever recall. Under the incentive legislation, the governor can issue up to \$400 million in bonds that will be paid off with royalties from natural gas wells drilled in state-owned waters along the Alabama coast. The repayments will not come out of regular state tax collections. Alabama is on the move from an economic perspective, and folks need to go to the polls and pass the incentive amendment by an overwhelming vote.

#### ***GOVERNOR RILEY WANTS TO HELP SMALL BUSINESSES***

Governor Bob Riley is pushing his plan that would provide a tax incentive for small businesses to offer health insurance for their employees. In my opinion, this is something that will not only benefit small business owners but will be a boost for the state's economy.

When discussing his plan recently, the governor said:

*This is a smart way to address three problems. We can make health care more affordable, lower the number of Alabamians who lack health insurance, and at the same time, we can strengthen our economy by helping our small businesses. Additional economic growth results in additional funding for education.*

The Riley proposal would help small employers with 25 or fewer employees to access affordable health insurance. The proposal would allow small employers to deduct twice the amount they pay for health insurance premiums from their state income taxes. Small business employees with incomes of up to \$50,000 would be also able to deduct twice the amount they pay for health insurance from their individual income taxes. Employers with 25 or fewer employees represent 90% of all businesses in Alabama. The proposal also prevents revenue loss to the Education Trust Fund. Because it is phased in over a five-year period, each year's tax incentive does not go into effect until 3% estimated growth in the trust fund has been certified by the Department of Finance. If approved by the Legislature, the tax incentive would take effect January 1, 2008. Hopefully, there will be bipartisan support for this measure in both the House and Senate.

#### ***SOME EARLY POLL RESULTS IN ALABAMA***

As predicted, even with the election over 17 months away, national politics are already heating up in Alabama. Predictions that the presidential candidates from both parties wouldn't ignore Alabama this time around were apparently correct. As mentioned last month, a number of the candidates have already been to Alabama, and more will be showing up in weeks to come. Arizona Senator John McCain, who has already been in the state on two occa-

sions, was back on March 20th to meet with key Republican leaders and to address the Legislature.

A poll released last month relating to Alabama voters revealed some rather interesting results. It showed that Senator Hillary Clinton and former New York Mayor Rudy Giuliani had gained tremendous support in Alabama. For example, among likely Democratic voters the poll results showed: Senator Clinton was favored by 35%; Senator Barack Obama was second at 19%; Former North Carolina Senator John Edwards had 9%; Former Vice-President Al Gore showed up with 8%; 8% favored other candidates; and 21% were undecided.

The poll also was quite revealing as to the Republican candidates. I am convinced that the current GOP field is one of the weakest in recent memory. Clearly, there is no real strong candidate among the current group. It will be interesting to see how things develop. For now, among likely Republican voters in Alabama, this is the way things shake out: Mayor Giuliani polled 28%; Senator McCain was supported by 23%; Former House Speaker Newt Gingrich was favored by 18%; Former Massachusetts Governor Mitt Romney had the support of 3%; Former Arkansas Governor Mike Huckabee also had 3%; 2% favored other candidates; and 23% were undecided.

The poll was run by Capital Survey Research Center, the polling arm of the Alabama Education Association, which is directed by Dr. Gerald Johnson. The veteran pollster had done a similar survey in mid-January that found McCain at 24% and Giuliani with 20%. But that was when Senator McCain was enjoying favorable publicity from attending Governor Bob Riley's inauguration. Since then, Giuliani has kicked off his presidential campaign and has risen in all of the national polls. A similar rise appears to be occurring in Alabama. It was pointed out by Dr. Johnson that in our state Giuliani is still considered as the nation's mayor. In spite of his per-

sonal problems and his controversial history on a number of social issues, Giuliani still shows "vigor and vitality," according to the polls. Senator McCain, who has appeared to be sort of tired and flat lately, is now coming across as just another "politician" who has changed his positions on a number of important issues. Also, it's quite evident that Romney isn't going to do very well in Alabama. He got no boost from his campaign visit to the state on February 9th. In my opinion, the GOP field is wide open for a candidate who doesn't have the baggage that the current group collectively has. In any event, it's a pretty scary thought when you consider that Giuliani might actually wind up being president. But, it's even scarier that a man like Newt Gingrich is even on the radar screen as a possible leader of our great nation!

As for the Democrats, Dr. Johnson's mid-January survey found Senator Clinton with 27% support and Senator Obama with 19%. Speculating about Clinton's improvement in the new poll, it was pointed out that President Clinton's popularity among Democratic voters in Alabama appears to be rubbing off on his wife. As was widely publicized, both of the Clintons and Senator Obama attended Selma's voting rights celebration last month. The most recent poll, which was completed after their appearance in Selma, indicated Senator Clinton benefited more from coming than did Senator Obama. Interestingly, in the new poll, Senator Clinton led among black voters. The only group where Senator Obama finished first was among those ages 18-24.

Dr. Johnson, who is a longtime and well-respected Alabama pollster, said the only surprise in the two surveys is what he described as the continuing inability of my good friend John Edwards, a Southerner and former vice-presidential nominee, to catch on with Democrats in Alabama. Frankly, I don't believe that is too significant at this stage. Rather, I believe that the vast amount of free media attention being given to Senators

Clinton and Obama is probably the reason they are polling well in all states at this juncture. They are sort of playing off of each other. Although that's good for now, it eventually could wind up hurting both candidates. I like John Edwards personally and trust him to do the right thing. I have to believe that John will be a more formidable candidate by the time 2008 rolls around. His approach is simply to tell it like it is and not worry about the consequences. That is pretty refreshing in today's political climate!

Just as this issue was being sent to the printer, the news about Elizabeth Edwards' cancer problem was made public. This could have an effect on the Edwards campaign, but it's too early to know how much or how things will change. Without a doubt, his wife's health and well-being are first and foremost in John's mind and heart. Nevertheless, it will have to be considered by John at this time. I will mention that situation in more detail below.

As reported last month, Alabama will be among the earliest states conducting presidential primaries in 2008, with the date now set for February 5<sup>th</sup>. I believe that there will be a number of significant developments in the coming months that will directly affect who wins the primary votes in our state. It also appears that other states will be moving their primary dates up, which could result in a super primary early on in the process. Although I believe that so many states being involved will actually hurt the process, I suspect a multi-state affair will happen. If it does, there is no way any of the candidates can effectively campaign in all of the states leading up to the voting day on February 5<sup>th</sup>. In any event, I am glad the roadshow is coming to Alabama!

*Source: Associated Press*

#### **ELIZABETH EDWARDS HEALTH PROBLEMS**

When I learned on March 22nd that Elizabeth Edwards had experienced a recurrence of cancer, the news came as

quite a shock. Many of our lawyers have gotten to know John and Elizabeth well over the past several years. John says he will continue his campaign for the Democratic presidential nomination. The recurrence of her cancer—this time on the bone—presents a setback for the couple from a personal standpoint. Knowing each of them, However, I am sure this problem will be handled in the right way. Both say they will stick with their plans to campaign vigorously for the nomination and that's good news.

I know that John will only pursue his second bid for the presidency, if Elizabeth is doing well. Her health and well-being are his top priority as they should be. The two of them have gone through tough times before, having lost a teenage son in a motor vehicle accident several years ago. They will simply put their personal crisis in God's hands and go on with their lives. It's my belief that we need more men and women like this couple in public life. There aren't many candidates around who have the character and ability to handle a job like being President of the greatest county in the world. Finding such a person, who is willing to become a candidate is a rare occurrence in today's political climate. I firmly believe John fits the bill. Of course, our prayers go out to John and Elizabeth as they go forward with their lives and with the campaign. May God bless them and provide their every need.

### **LNG BLAST COULD CAUSE MAJOR PROBLEMS UP TO A MILE AWAY**

Several months ago we wrote a series of reports on the possibility of a liquefied natural gas facility being located in the Mobile area. Thus far, nothing has developed in that regard. Recently a significant congressional study was released that contained some safety factors that are most alarming. A terrorist attack against a tanker ship carrying LP gas could ignite a fire so fierce that it would burn people within a one-mile radius, according to the study. The

federal Government Accountability Office (GAO) examined terrorism risks on the nation's waterways and concluded in its report that further research is needed to fully understand the consequences of such a remarkable inferno.

In 2003, the *Mobile Press-Register* first reported that experts believed LNG fires could burn people who were up to a mile away. The newspaper also noted that government studies conducted in the 1970s and 1980s suggested the potential for such a fire hazard. At the time of those newspaper reports, ExxonMobil was attempting to build an LNG docking facility at the mouth of the Theodore Ship Canal in south Mobile County. An elementary school and hundreds of residences would have been within the one-mile-wide zone.

It should be noted that Energy Department officials disputed the newspaper's reporting in 2003, arguing that a study it commissioned in the wake of the September 11th terror attacks in 2001 was more accurate. That 2001 study concluded that such a fire would burn people only within about 600 feet of an LNG fire. Energy Department officials backed away from those conclusions after the Press-Register reported that the company that conducted the study acknowledged that it contained flaws and the Energy Department had "misused" the results.

According to lawmakers in Washington, the latest GAO study coincides with projected increases of 400% in liquefied natural gas imports over the next 10 years, as energy companies await federal approval on 32 applications to build new terminals in 10 states and five offshore areas. It should be noted that new tanker ships being launched are nearly twice as large as many tankers currently in use. Hopefully, before a facility is located in Alabama or at any Gulf Coast location all safety precautions will be put in place. It's important for the decision-makers to have all of the facts and study results before allowing a facility to be located anywhere.

Source: *Associated Press*

## II. LEGISLATIVE HAPPENINGS

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### **ANOTHER IMPORTANT BILL PASSED IN THE SPECIAL SESSION**

In addition to the industrial development incentive amendment passed by the Legislature, mentioned in the Capitol Comments Section, the House and Senate also voted unanimously to give final approval to legislation creating two state trust funds to save money for the future health care costs of retired state employees and educators. Creating the two trust funds will protect Alabama's bond rating and help get lower interest rates on the bonds the state will issue for the industrial incentive package. The bill creating the trust funds were signed into law by Governor Riley. Besides passing legislation to set up the trust funds, the Legislature approved a constitutional amendment that would make sure the trust funds can't be raided by future state leaders. Alabama voters will decide the fate of that constitutional amendment in a special election June 5<sup>th</sup>. Passage of the legislation setting up the trust funds was most significant, and the Legislature came through with flying colors.

Interestingly, there has already been activity resulting from passage of this legislation. The state Public Education Employees Health Insurance Board, which handles health insurance for active and retired education employees, has already set up its trust fund and is transferring \$200 million from its reserves into the fund. The State Employees Insurance Board, which provides health insurance for active and retired state workers, will have its trust fund running by May and will put some of its reserves into the fund.

The trust funds are the result of the Government Accounting Standards Board requiring all city, county, and state governments to start recognizing their long-term liability for their retired employees' health insurance and

making plans to address it. Alabama's liability is estimated at \$20 billion. The good work by the governor and the legislators will help the state maintain a good bond rating and get good interest rates on future bond issues.

#### ***AN EARLY LOOK AT THE REGULAR SESSION***

The opening of the Legislature for this quadrennium got off to what I would consider to be a normal start. For example, in the first two days, 449 bills were introduced in the Senate and House. I had hoped that all of the goodwill that was created in both the House and Senate during the special session will carry over into the regular session. We should all be praying for the legislators and encourage them to put partisan politics on the back burner at least for a while. An early filibuster in the Senate was not a good sign insofar as "unity" and "cooperation" among Democrats and Republicans in the upper chamber are concerned. Hopefully, that will change once folks back home hear about the effects of a slow-down in the Senate.

#### ***REPUBLICANS SHUT DOWN SENATE WITH FILIBUSTER***

GOP senators have started a filibuster in an attempt to force the Democratic majority to change the Senate operating rules. In my opinion, that strategy could wind up being a big mistake. There are too many important issues to be dealt with in this regular session to waste any legislative days. In some cases in years past, an early filibuster in a session meant that those doing the talking had a hidden agenda that benefited by long delays early in a session. It's easy to filibuster on a subject that doesn't identify such happens to be agenda or the real object of the "extended debate." That's because the filibusters don't have to directly deal with the real issue and can be directed at anything that is available. Hopefully, that's not the case this time. I

am told by my sources in the State House that this slow down is really about the Senate rules. Even so, the delay could prove to be costly. Unfortunately, the loser in this battle could be Governor Riley's legislative package and that's not good news.

A Senate shutdown at this stage would stop the Governor's proposals and other important bills from coming to the floor for full debate. It would also create a log jam of bills that would slow things down once the filibuster is ended. As we all know, the Senate has many important issues to address, including the budgets for education and the general fund, as well as the election and lobby reform legislation, and any loss of valuable legislative days is counterproductive. The Senators should put partisan politics on the shelf for this session and get down to business. Lt. Governor Folsom should serve as a mediator and help to get things back on track in the Senate. Governor Riley may eventually have to step in and persuade the Republican Senators to change their strategy and tactics so that the work of the Senate can go forward. Hopefully, things will get better very soon so that a productive session can still be possible.

#### ***THE PAYDAY LENDER DUEL IS ON IN THE ALABAMA SENATE***

There are at least two bills being considered in the state Senate relating to the payday loan industry. Each of the bills, sponsored by Senator Lowell Barron and Senator Bradley Byrne respectively, is aimed at curing ills that plague folks who borrow money from payday lenders. It will be interesting to see which of these bills finds favor with the rest of the Senators. Senator Byrne believes that the Barron bill doesn't do enough to solve the problems. Senator Byrne's bill, which I believe is the better of the two, would put the payday loan business under the Small Loan Act, effectively capping the annual percentage rate at 36%.

Payday loan companies can currently charge 17.5%, or \$17.50, on each \$100 borrowed. That can end up being as much as 400% in annual interest paid by the borrower. My mind was actually made up as to which bill was the best, but when Steven Schlein, a spokesman for an industry group, the Washington, D.C.-based Community Financial Services Association, came out against the Byrne bill, I knew that I had made the right choice. That opposition speaks volumes. Hopefully, the Senate will pass the Byrne bill and send it on to the House before the logjam in the Senate takes over and slows things down. Consumers aren't protected under the current law, which was pushed through the House and Senate by the payday lenders, and badly need help. If you agree, contact your senator and ask him or her to back the Byrne bill.

#### ***A LEGISLATIVE PAY RAISE WAS NEEDED AND CAN BE JUSTIFIED***

There has never been a good time for a legislator to vote for a legislative pay raise and the present time is certainly no exception. Regardless, the House and Senate passed such a raise early in the current session. It's my belief that the legislators badly needed a long overdue raise in their pay. Unfortunately, it took overriding a veto by Governor Riley for the legislation to become law. It has been scarcely mentioned that the members of the House and Senate haven't received a pay raise in years. I believe the last one was in 1991. In debating the issue, it's generally overlooked that for any person to serve in the Legislature is very expensive. Persons who live outside the Montgomery area have to spend at least three nights per week in motels and buy meals while the Legislature is in session. There are other expenses such as transportation costs that have to be paid.

It's never popular to vote for a personal pay increase, but in this case I believe such a vote was justified. If polls

are accurate on the issue, most folks were against the raise—that puts me in the minority. There is a long range solution, however, and that is to establish an independent Compensation Commission that would set pay and expense allowances for legislators. Hopefully, that will now be set up during the session so that future problems of the sort this raise proposal encountered can be avoided.

My final thoughts on the current increase in compensation are that I would much prefer for the state to pay legislators a reasonable annual salary and to pass legislation designed to lessen the influence of lobbyists on the system. If the members of the House and Senate will now get down to business and tackle the many problems facing our state, the pay raise will be more acceptable to the voters in 2010.

#### ***AN OVERALL LOOK AT HOW THE PUBLIC VIEWS THE ALABAMA LEGISLATURE***

Although a statewide poll found widespread dislike for the legislators' pay raise, there are other legislative actions that the public apparently likes. The poll by the Press-Register and the University of South Alabama found that about half of those surveyed—over 51%—believe the Legislature will act in the state's best interest in the current session. A majority—56%—also like the Legislature moving up Alabama's presidential preference primary by four months to February 5, 2008.

There was also support for legislation, proposed by Senator Vivian Figures (D-Mobile) that would ban smoking in all public places statewide, including restaurants and bars. The legislation was favored by 63% of those polled and opposed by 35%, with 2% undecided. Without a doubt, the Legislature's top priority should be education. The second highest priority according to the poll, was economic growth and jobs which was no surprise. Education and economic growth go hand-in-glove in

my opinion. It was interesting to note that of those surveyed, 41% said they identified with the Republican Party, with 30% saying they like the Democratic Party. It was most significant that 21% said they were undecided as to which party they liked the best. I have always believed that a very large percentage of the voters in Alabama vote for candidates rather than parties. The current governor is a very good example of that type thinking. In my opinion, Bob Riley would actually run extremely well in a democratic primary.

*Source: Associated Press*

### **III. COURT WATCH**

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#### ***DOCUMENTS SHOULD NEVER BE KEPT SECRET WHEN THE PUBLIC'S HEALTH AND SAFETY ARE AT RISK***

In late 2006, confidential documents related to the anti-psychotic medication Zyprexa were leaked from an ongoing products liability lawsuit against Eli Lilly. The documents were made the basis for a front page story in the New York Times in December of last year concerning Zyprexa. Now electronic copies are available from a variety of Internet sources. At the request of Eli Lilly, a U.S. district judge initially entered an injunction against a number of websites which were publishing leaked documents related to the litigation. The judge, for practical reasons, soon realized that he couldn't enforce such an injunction. A subsequent order dissolved the injunction. The Electronic Frontier Foundation (EFF) represented an anonymous individual who was previously barred by the court's earlier order from posting links to the Zyprexa documents on the Internet. Concerning the injunction, a lawyer for EFF observed: "This ruling makes it clear that Eli Lilly cannot evoke any court orders in its futile efforts to censor these documents off the Internet."

The district judge had rejected EFF's arguments that it had a First Amendment right to publish the documents. But the judge hearing the matter concluded that it was unlikely that the court could effectively "enforce an injunction against the Internet in its various manifestations, and it would constitute a devious manifestation of public policy" if the court attempted to do so. Although this appears to be a victory for the Internet, it is yet to be determined how it could affect large litigation like this in the future with millions of pages of documentation that are claimed to be confidential. It's long been my belief that, unless important trade secrets are involved, no corporate defendant should be able to keep damaging documents from public scrutiny if the public interest would be benefited by their disclosure. Usually, the documents relate to public health or safety issues that demand that they be made public so that folks can be warned or at least informed as to the existence of a risk of injury or damage.

*Source: Electronic Frontier Foundation*

#### ***JUDGE ORDERS CLEANUP BY FORMER LEAD PAINT MANUFACTURERS***

A state court judge in Rhode Island has ordered three former lead paint manufacturers to clean up contamination in Rhode Island. A special master will be appointed to advise the court on exactly what the companies should be required to do. The cleanup is projected to cost more than \$1 billion. The decision by the court marks a major step forward in the state's lawsuit to force the companies — Cleveland, Ohio-based Sherwin-Williams Co., Dallas, Texas-based NL Industries Inc., and Millennium Holdings LLC of Cockeysville, Maryland — to clean up properties that contain toxic lead paint. Last February a jury found the three manufacturers liable for creating a public nuisance, and Silverstein's 197-page decision affirms that verdict. Because the state presented

enough evidence to support the jury's verdict, the companies' motion for a new trial was denied by the court. The state's request for a special master to assist in recommending a cleanup plan and to monitor the plan's implementation was approved by the court. The special master will serve in an advisory role, considering questions including how much a cleanup plan would cost, whether any of its elements duplicate programs already provided by the state and whether the defendants have the practical ability to carry it out. The state has said the plan should include inspections of older homes, education and the covering up and removal of flaking or chipping lead paint.

Rhode Island was the first state to sue former lead paint and pigment manufacturers when it filed suit in 1999. The first trial ended in 2002 with a hung jury, and the second trial began three years later. A fourth company named in the suit, Atlantic Richfield Co., was found not responsible by the jury. Although no other states have filed suits, lawsuits brought by cities and counties elsewhere in the country have been filed and are now moving through the courts.

Source: *Insurance Journal*

#### ***BUSINESSES GET THEIR OWN COURT IN FLORIDA***

A newly created court in Tampa, Florida, labeled the Complex Business Litigation Division, will be dedicated solely to business-related cases. These include such cases as contract disputes, trade secrets and noncompete agreements, and claims arising out of corporate sales. It's the third court in Florida of this sort to be established. It's said that the creation of these courts follows a national movement that is allowing these lawsuits to avoid general dockets. In effect, it gives business owners their own court system. Fourteen states now have some form of business court with some being statewide in scope. Some of

these courts are implemented in only a few jurisdictions in a state. Apparently, more such courts are on the way. If this concept is so good, why not have special courts for victims of corporate abuse or wrongdoing?

The new court in Tampa, which started up on January 22<sup>nd</sup>, closely resembles Florida's first business court, which began in Orlando in 2003. The other court, in Miami-Dade, began on January 8<sup>th</sup> of this year. I understand that the cases to be assigned to this new court have to meet certain criteria. Personal injury, class action consumer claims, and eminent domain cases are not eligible. It will be interesting to see how this concept works in Florida.

Source: St. Petersburg Times

#### ***CLASS STATUS DENIED TO ENRON SHAREHOLDERS***

The lawsuit filed by Enron shareholders seeking class action status has been dealt a major setback. On March 19<sup>th</sup>, an appeals panel reversed an order granting class certification in the case, which had been set for trial this month. The ruling by the U.S. Court of Appeals for the Fifth Circuit panel took away the plaintiffs' ability to allege and prove that Merrill Lynch & Co., Credit Suisse First Boston, and Barclay's were primary participants in the fraud that helped fuel Enron's failure and therefore would be liable for their own actions as well as those of others. That was the most important aspect of the panel's ruling. The lead plaintiff in the case, the Regents of the University of California, will appeal to the U.S. Supreme Court. If the High Court refuses to review the case, that means shareholders will have no remedy against the banks.

Source: *Houston Chronicle*

## IV. THE NATIONAL SCENE

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### ***THE BUSH LEGACY WON'T BE A VERY GOOD ONE***

I have never been a fan of our current President and have often wondered how ever he could have been elected to the most powerful public office in the world. George W. Bush was elected to the presidency in 2000 by less than a majority of the votes cast, and many believed that Al Gore actually should have been declared the winner. Even though I could never support a Bush candidacy, I really didn't believe that Gore was up to being president for a number of reasons. We simply had poor choices to select from in 2000 in my opinion. But that's another story. President Bush was elected to a second term in 2004 against perhaps the worse candidate in John Kerry that the Democrats could have possibly selected to carry their banner. In any event, as we all know, very little went well for our president in his first term and things have gotten much worse for him and the country in the second term.

Historians will have a most difficult time finding anything from the Bush years that will distinguish this Administration in a positive manner. But there will certainly be plenty of negatives. It's my belief that the legacy left by the Bush Administration will fare poorly in comparison to that of others who have held this most powerful office. The following are specific areas that historians will have to deal with in writing about the Bush years:

- **Iraq War**—George Bush has made it clear he will leave office with no change in strategy—and our troops remain bogged down bloody in a civil war with no end in sight. The planning for this war and its existence have been equally bad.

- **The Political Influence Over the Justice Department**—The recent debacle in the justice department is more than just a little alarming. Lying to Congress and the American people relating to firings of U.S. attorney by the nation's Attorney General is about as bad as it gets. When we learn that Karl Rove was up to his neck in the matter at an early stage, which makes matters even worse. Nothing happens in the Bush White House that Rove doesn't have a strong hand in. He is without question the most powerful influence in the Bush White House and that's not good.
- **The Scooter Libby Conviction**—The conviction in a criminal court of the top advisor to the Vice-President is more than alarming—it's an indictment of the entire Administration.
- **Surging National Debt**—Our national debt has increased by nearly 50% under President Bush with no end in sight to the rising deficits. He will go down in history as the biggest spender of all American presidents. We have gone from a record surplus under President Clinton to a record deficit under President Bush.
- **Global Warming**—President Bush has ignored this most serious problem from the start. The oil companies, because of their influence in the Administration, are largely to blame for this. Now we have to play catch-up!
- **Energy Crisis**—It's a crying shame that our government still has no real energy policy when it comes to finding a solution to our "addiction" to foreign oil. Six years have been lost in the struggle to find alternatives to oil and end our dependence on the Middle East. The oil companies are making record profits, and American businesses and consumers alike are hurting.
- **Government of the Rich, By the Rich, and For the Rich**—It's said that GOP

rule under President Bush has created a new "robber baron" era of economic inequality. The division between the super rich and the very poor has grown during the Bush years at an alarming rate. The middle class is being virtually destroyed by the policies and politics of this Administration.

- **Crisis in Health and Education**—Almost 50 million Americans have no health insurance. Our public schools are still struggling. Millions of young people simply can't afford college. These issues are too important to largely ignore any longer.
  - **The Attempts To Destroy The Court System**—The Karl Rove-led efforts to shut down the civil justice system have hurt countless numbers of victims of corporate wrongdoing and abuse. Unless checked, this movement will result in ordinary citizens having no recourse when they become victims of abuse or wrongdoing. Protecting the wrongdoers and penalizing their victims has been the order of the day—under the guise of tort reform—over the past six years.
  - **The FEMA failures**—The performance by FEMA after Hurricane Katrina devastated New Orleans and the Gulf Coast was as bad as it gets. This agency is one of the worst examples ever of a governmental bureaucracy that functions poorly at great expense to taxpayers. The president took a real licking on the sorry manner in which FEMA has operated. The waste and incompetence that we have seen would be hard to match by any standard.
  - **The Walter Reed Hospital Scandal**—An Administration that talks tough on all military issues should hang its head in shame on how our wounded veterans from Iraq have been treated. It's a shame and a disgrace and won't be tolerated by the American people!
- I'm reasonably sure that things won't

get any better during the last of the Bush years in Washington. Unfortunately, it will take a long time to undo much of the damage that has been done under this administration.

### *A CONSTITUTIONAL CRISIS IS ON THE HORIZON*

After weeks of outright lies from the Administration about the firing of eight U.S. Attorneys, the Senate Judiciary Committee has had enough and has authorized subpoenas for a number of persons, including Harriet Miers and Karl Rove and others. President Bush went on television on March 21<sup>st</sup>, drawing a line in the sand, saying he would oppose any attempts to subpoena White House officials. It's my personal belief that Karl Rove was the engineer behind the efforts to fire those U.S. Attorneys who were not politically acceptable to the Bush White House. It certainly has the Rove smell. It will be interesting to see what develops as this fight progresses.

Regardless of who was behind the firings, it appears that the Bush Administration has another self-inflicted crisis on its hands. The political firing of these federal prosecutors will be in the news for a long time. The Attorney General, who is known as "Bush's lawyer," may be forced to resign because of the ordeal. He is a good example of how putting a political crony in the office of Attorney General will wind up embarrassing the President. The likelihood of some being names being involved in this scandal is very good.

Even though U.S. Attorneys are generally considered political appointments, once a lawyer is appointed to the position, politics must be put on the shelf. We definitely don't need folks like Karl Rove playing any part in deciding what U.S. attorneys do or don't do after taking office. Interestingly, Rove has been one of the Administration figures who has attacked the group of U.S. attorneys who were fired. Rove has

blamed Democrats in the Senate for all of the problems relating to the firings. He even came to Troy University in Alabama spouting that message. I have to wonder how much longer the man dubbed as the “architect” and “Bush’s Brain” will last in this Administration. On second thought, however, Rove may know too much to be fired and that’s real scary. I can make one observation without reservation—a man like Karl Rove can’t be allowed to run the prosecutorial arm of the U.S. government.

### ***FALL OUT FROM THE LIBBY VERDICT***

The guilty verdict against Scooter Libby was clearly a major blow for the Bush White House. It tells the American people that we have people in powerful positions in Washington who have no regard for any person who believes in the Constitution and the rule of law. The principle that no man, no matter how powerful, is above the law is certainly applicable in the Libby saga. But this was about much more than just Scooter Libby. In the course of this trial, the obscene lengths that Vice-President Cheney and his allies would go to manipulate intelligence about Iraq and ruthlessly attack those who questioned them were put on display. I have to believe that the Bush Administration understands the full gravity and true meaning of this verdict. Libby’s conviction is a realization that we have some pretty bad folks who are very close to the President and wield tremendous influence over him making decisions that affect our country’s welfare.

It was interesting to see the editorial pages of the *Wall Street Journal*, *New York Post*, and the *National Review* leading a growing chorus calling for President Bush to pardon Libby. Hopefully, that won’t happen. President Bush must let the justice system run its course. Mr. Libby has every right to appeal the verdict and let appellate courts decide his fate. If the president were to short-circuit this process, however, it would strike a crushing

blow to the very heart and soul of our democracy. It has become very obvious that Scooter Libby was a fall guy for the Vice-President and Karl Rove. These two men left Libby hanging out to dry and allowed him to face a court and jury, keeping their distance, which doesn’t say much for either their character or their loyalty.

You will recall that in 2003, President Bush pledged to fire anyone who was involved with the Valerie Plame Wilson leak. We now know that Karl Rove was unquestionably a party to the leak, and yet he remains free and at the right hand of the president. Karl Rove’s track record in politics is one that is downright scary. He literally destroys his enemies in order to accomplish his political goals. It’s said in Texas that Rove has always followed a “scorched earth policy” and that he “takes no prisoners.” It is most troubling that this president would protect his loyalists even in the face of their unethical behavior. In my opinion, the American people will not allow justice to be subverted in this case. The President should keep his word and get rid of any person in the Administration who was involved in the Cheney-Rove affair, for which Libby obviously was the fall guy. The current Justice Department scandal involving the political firing of U.S. Attorneys is even more evidence that men like Rove have no place in our in our governmental system at any level.

### ***THE CIVIL WAR IN IRAQ IS FAR FROM OVER***

It’s difficult to believe that the war in Iraq has now gone into its fifth year. The tremendous costs in human lives and taxpayer dollars are even more difficult to justify. We went into this war, which actually has evolved into a bloody civil war, based on lots of false premises. In fact, nearly all of the reasons for our invading Iraq turned out to be totally false. In fact, getting rid of an evil dictator in Iraq could have been accomplished without a full-scale war effect. Nevertheless, our troops are now com-

mitted to a war that is totally out-of-control and one that appears to be going downhill on a daily basis. It’s quite obvious that there is no easy solution to the current dilemma. For that reason it appears our troops will be in Iraq for a very long time unless Congress cuts future funding. That will be a real difficult thing to do and I am not sure that it’s the right thing to do.

Regardless of how one feels about this war, we must fully support our troops so long as they are in Iraq. Without a doubt, the America people are sick of the war and want a prompt resolution, but I am afraid that is impossible. When you consider that about 3,600 American lives have already been lost, tens of thousands seriously wounded, and with a cost of almost \$500 billion to American taxpayers in carrying out the war, one has to wonder how in the world we even wound up fighting this war. Some are comparing the war in Iraq to Vietnam, and I must confess there are striking similarities when you consider the poor planning involved in each of the wars. It’s becoming very clear that military strategy and planning were largely ignored by the Bush Administration. We are now paying the price for that mistake.

We now find our troops bogged down in a sectarian civil war in a country where none of the multiple sides wants us there. The manner in which the Iraq war has been conducted has also hurt us worldwide, even with our allies, and that’s not good. We have lost all of the good will that we had after September 11<sup>th</sup> terrorist attack on our country. That’s directly a result of how poorly our government has handled the Iraq war. In any event, we must continue to hope for a workable solution in Iraq that will not make our influence in the Middle East and in other parts of the world any weaker than it is at present. In the meanwhile, we must all pray constantly for our troops and for their families back home.

## ***BIG FIRMS BROKE RULES AFTER KATRINA CLEANUP***

All of the waste and possible corruption relating to the expenditure of tax dollars after Hurricane Rita devastated New Orleans and the Gulf Coast are difficult to comprehend. Now we learn that large companies that were awarded million-dollar government contracts for Hurricane Katrina clean-up, are bending or exploiting rules aimed at helping small companies share the work, according to a report by the Government Accountability Office (GAO). It was revealed that large contractors routinely did not file reports explaining their efforts to find subcontractors, as required under federal rules. At other times, contractors provided figures that were misleading as to how much work the companies were sharing after Katrina hit in 2005. Investigators could not offer any assurance the large companies were making "good-faith efforts to meet their small business subcontracting goals," the report said. GAO investigators found that only 28% of the \$11 billion in contract money from the departments of Homeland Security and Defense, the Army Corps of Engineers and the General Services Administration ultimately went directly to small businesses.

Source: *Associated Press*

## ***PRESIDENT BUSH SELECTS BUSINESS EXECUTIVE TO HEAD IMPORTANT SAFETY BOARD***

It really didn't come as a big surprise to learn that a manufacturing trade association executive was President Bush's choice to be chairman of the Consumer Product Safety Commission (CPSC). Michael Baroody, executive vice-president of the National Association of Manufacturers, was selected to head the Commission, which is charged with protecting the public from unreasonable risks of serious injury or death from more than 15,000 types of consumer products. Many safety and consumer

advocates voiced concern that the nominee will be too beholden to business interests to be an effective head of the Commission.

Before his present job, Mr. Baroody was senior vice-president for policy, communications, and public affairs for the manufacturing association. Earlier in his career, he was assistant secretary for policy at the Labor Department and deputy assistant to the president for public affairs. Janell Mayo Duncan, senior counsel for Consumers Union, the nonprofit publisher of Consumer Reports, said Baroody's ties to NAM prompted red flags at her organization. That group will ask Congress to carefully scrutinize his views. The President had a golden opportunity to select a true champion of consumers to head up this very important commission. Instead, he selected a person who represents the special interests and not consumers. I would have preferred to have seen someone like my friend Joan Claybrook picked to serve as chairman of the CPSC. But, as long as Dick Cheney and Karl Rove are in charge in this Administration, no such person will ever be selected for an important role in government.

Source: *Associated Press*

## ***EU LEADERS AGREE TO CUT GREENHOUSE GASES***

EU leaders have agreed on a bold set of measures to fight global warming, pledging that a fifth of the bloc's energy will come from green power sources such as wind turbines and solar panels by 2020 and 10% of European cars will run on biofuels. The agreement — which does not yet include an enforcement mechanism — noted the role atomic energy could play in replacing coal or oil-fired power plants blamed for pumping out greenhouse gases. The inclusion of the emergency of atomic energy caused unease for non-nuclear states such as Austria and Ireland. These developments also triggered complaints

from a number of environmental groups. This agreement is the first to go beyond the 35-nation Kyoto Protocol in its targets for greenhouse gas emissions cuts. It marks a turning point in the fight against global warming in the opinion of many observers.

German Chancellor Angela Merkel challenged other nations to follow suit, saying the world still had time to "avoid what could well be a human calamity" caused by climate change. The EU agreement was a compromise between nations that had demanded mandatory targets on clean energy, and eastern European nations led by Poland and Slovakia who claim not to have the money to meet such high targets for developing costly alternatives. The agreement makes three main promises to be obtained by over the next 13 years:

- Greenhouse gas emissions will be cut by at least 20% from 1990 levels;
- The EU will produce 20% of its power through renewable energy, an increase from the current figure of around 6%; and
- One-tenth of all cars and trucks in the 27 EU nations should be running on biofuels made from plants.

Hopefully, this commitment by European leaders will encourage other leading polluters, such as the United States, Russia, China and India, to agree on deep emissions cuts. Chancellor Merkel will present the plans to President Bush and other leaders at a summit of the Group of Eight industrialized nations that she will host in June.

Source: *Associated Press*

## ***DRUG PAYOFFS FACE GROWING OPPOSITION IN U.S. CONGRESS***

When you read the above title, you probably assumed that this part of the Report was going to deal with drug companies paying off politicians. But let me assure you that is not the case. The pay-offs referred to are actually being

made to other drug companies. Support is building in Congress for legislation to stop brand-name drug makers from paying rivals to keep cheaper, generic alternatives off the market. Backed by the Federal Trade Commission, lawmakers want to override two federal appeals court rulings in 2005 that permitted the payoffs by Schering-Plough Corp. and AstraZeneca Plc. These rulings triggered a wave of similar payments that settle patent litigation between brand-name and generic drug makers.

“Billions of dollars are at stake for consumers,” according to the FTC. Senator Orrin Hatch of Utah, a key Republican member of the Senate Judiciary antitrust subcommittee panel, says he is open to a bipartisan solution to the problem. Similar legislation to bar the payments stalled last year when the Republicans were in control of Congress. Opponents of the payments argue that brand-name companies benefit from exclusive rights to sell patented medications while the generic manufacturers get a handsome settlement to keep cheaper drugs off the market. In any event, the American public winds up being the only loser.

Source: *Bloomberg News*

## V. THE CORPORATE WORLD

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### ***GREED CAN LEAD SMART FOLKS INTO MAKING DUMB CHOICES***

It's somewhat amazing to see some smart executives in Corporate America getting into serious trouble because of the real dumb choices they made. I continue to hear this question being asked: “Why did so many intelligent, and sometimes brilliant, corporate executives commit white-collar crimes in the boardroom and executive suite?” I am convinced that a combination of greed and power is largely responsible. Some say the number of corporate bosses

who did bad things was actually small compared with the number of executives who didn't break the law or engage in unethical behavior. That seems to be reasonable. At least, I certainly hope that's the case.

Tom Walker, writing in the *Atlanta-Journal Constitution* recently, gave another explanation for what appears to have been lots of top level corporate wrongdoing. Mr. Walker believes corporate executives are like celebrities who believe rules don't apply to them, or that when caught they have the wealth to get themselves out of trouble. He says that they may also believe themselves simply to be invincible. This gentleman may be on to the answer for all of the corruption we have seen at the top levels of a number of large corporations. In any event, it appears that some of the corporate criminals actually started to really believe that corporate assets were their own personal property to do with as they pleased.

The following are a few of the corporate executives who were caught and found out that crime really doesn't pay in the long run:

- Bernard Ebbers, who was convicted of fraud and conspiracy as a result of WorldCom's false financial reporting. He was sentenced to 25 years in federal prison.
- ImClone Systems founder Sam Waksal was sentenced to seven years in prison and a stiff fine for insider trading.
- Tyco International Chief Executive Dennis Kozlowski, who threw a \$2 million toga party in the Mediterranean for his wife's birthday, paid for in part with company money, was found guilty. Kozlowski was convicted of misappropriating more than \$400 million of his company's funds and was sentenced to eight years in prison at a minimum.
- The entire Enron gang, whose mindset was to steal, steal, steal and

then steal some more, paid a price for their greed and unabashed breaking of the law. Fortunately, at least some of them were convicted of crimes and sentenced to prison terms.

High-profile executives—with their lavish perks, luxurious homes and hefty paychecks—have actually been elevated mostly due to media involvement to celebrity status in the eyes of the public. The impact of the serious wrongdoings by corporate bosses endangers jobs, pensions, and investment for others. Hopefully, Congress won't allow the Bush Administration to make it easier for corporate executives to do wrong and not have to worry about the consequences. We should get tougher rather than more lenient with wrongdoers in Corporate America.

Source: *Atlanta-Journal Constitution*

### ***A REPORT ON CORPORATE BACKDATING OF STOCK OPTIONS***

Dozens of companies granted stock options to top executives or other employees after the September 11, 2001, terrorist attacks. It has been reported that some of those companies made the grants weeks later and backdated them. The disclosures reported in the *Wall Street Journal* are the latest wrinkle in a backdating scandal that involves more than 140 companies and has resulted in more than 70 firings or resignations of corporate officials. The new information suggests some executives profited from the stock market's plunge following September 11<sup>th</sup> by manipulating options grant dates. This is clearly wrong and allowed corporate insiders to profit greatly on stock options.

Stock options give the recipient the right to buy shares at a set price, typically the stock's closing price on the day the options were granted. If the stock later rises, the recipient can cash in the option for a profit. Obviously, the lower the exercise price, the greater the potential gain will be. Backdating options involves looking for past low

points for a stock, then pretending the options were granted on those favorable dates. A *Wall Street Journal* analysis published in July found that among a set of 1,800 leading companies, the frequency of option grants more than doubled in late September 2001, compared with other years. While this sort of thing may seem relatively harmless, let me assure you that it's not. It's a most serious matter and is just plain wrong. No longer can this sort of wrong doing at the top levels of Corporate America be tolerated.

Source: *Wall Street Journal*

### ***THE ACCOUNTING INDUSTRY SHOULD AVOID CONFLICTS OF INTEREST***

The future of large accounting firms in this country may depend on how they deal with a number of legal issues facing the industry. Currently, there are only four major firms left in the business. Five years after the indictment and collapse of Arthur Andersen, one of the then Big 5 accounting firms, the government is still struggling with how to deal with audit firms that commit wrongs that hurt their clients. Predictably, the industry is lobbying hard to obtain virtual immunity from lawsuits. They don't want accounting firms to be held accountable by juries when those firms commit wrongful acts. The top firms recently launched a public policy center and are looking to the Bush Administration and the federal Securities and Exchange Commission (SEC) for relief.

SEC officials are reportedly considering ways to create **safe harbors** that would shield auditors from legal liability. Regulators may also compel companies to bring disputes with auditors to an **arbitration** panel rather than a jury. Frankly, it's difficult to comprehend how the federal government could grant **immunity** to audit firms just a few years after the series of corporate collapses devastated investor confidence. Clearly, the reputation of the accounting profession, which failed to detect wide-

spread fraud, and on occasion were even actively involved in the fraudulent conduct, was greatly tarnished at that time. In fact, on more than one occasion, the audit side of an accounting firm closed its eyes to obvious wrongdoing by a client. That same firm was advising the client in return for large fees at the same time.

Of the four major companies left, three of them—PricewaterhouseCoopers, KPMG and Ernst & Young—are currently involved in litigation over alleged wrongdoing in their dealings with clients. The campaign for relief by the industry comes even though the number of lawsuits against auditors has declined since 2002. In 2005, only nine cases named accounting firms as defendants. Most of the time, under the current state of the law, it's difficult for investors to successfully sue audit firms. That's largely because the companies that hire the firms have primary responsibility for their own financial reports. Over the years, courts and Congress generally have forced investors to prove that auditors took part in fraudulent conduct in order to prevail in court. Rather than the law limiting or immunizing accounting firms from liability, the firms should simply avoid conflicts of interest internally. It's virtually impossible for one firm to both advise a corporate client on financial or legal-accounting matters and even investments, and then audit that same client. I hope the new Congress won't allow any significant changes in existing laws that would give the accounting industry immunity when its companies commit wrongful acts that cause hurt and damage others.

Source: *Washington Post*

### ***THE BOSS AT THE U.S. CHAMBER OF COMMERCE SEEMS TO HAVE SERIOUS CONFLICTS-OF-INTEREST***

As president of the U.S. Chamber of Commerce, Thomas J. Donohue has consistently railed against federal regulation, especially when it comes to the

Securities and Exchange Commission (SEC). Public Citizen pointed out recently that perhaps Donohue's tough talk was prompted by issues of a personal nature. For 12 years, Donohue has been a board member, including serving on the audit committee, of Sunrise Senior Living, a publicly traded company, which interestingly is being investigated by the SEC. Recently, the SEC opened an inquiry into allegations that company insiders, including Donohue, may have improperly cashed \$32 million in stock options before Sunrise announced an accounting problem in May that caused its stock to drop. Predictably, Donohue calls the allegations meritless and claims they were drummed up by labor unions that want to organize the company.

The controversy over Sunrise adds fuel to complaints that investor activists have leveled at Donohue ever since he took over the Chamber, the nation's largest business lobby, in 1997. His critics have questioned how Donohue could serve on any boards, given his position with the Chamber. An independent director—at least in theory—is supposed to represent stockholders, not management, which is Donohue's constituency. There has also been concern that Donohue might see fit to tilt the Chamber's potent lobbying influence to favor the companies he serves. As an example, Donohue is a director of Union Pacific, the country's biggest railroad. He is also a director of XM Satellite Radio.

Now that Sunrise is being scrutinized by the SEC, his critics are adding a new complaint, and it seems to be a valid one. They say Donohue has diminished the value of his own arguments against certain regulations because he has a personal stake in curtailing them. Barbara Roper, director of investor protection for the Consumer Federation of America, observed: "It undercuts his credibility as a critic of SEC enforcement and regulation. He undermines any claim he might have to objectivity."

Interestingly, the Chamber will soon

launch its third anti-consumer newspaper. It already owns two legal periodicals, the *Madison County Record* in Illinois and the *West Virginia Record* in Charleston, which publishes stories that highlight what it considers abuse of lawsuits by consumers against businesses. I understand the Chamber will soon open a newspaper in Texas. I was sort of surprised to learn that the Chamber owned newspapers, which seems to be outside what I believe a chamber of commerce should be doing.

In addition, the Chamber, under Donohue's leadership, plans a huge new effort to "manage" government's reaction to global warming. The Institute for Energy Security, Competitiveness and American Jobs will raise about \$20 million from oil companies, electric utilities, and automakers to try to temper Washington's regulation of greenhouse gas emissions. Donohue has proved to be a master at forming groups to do the bidding of the giants of Corporate America and hiding the sources of the groups' funding. A prime example was a group labeled the American Taxpayers Alliance, which was heavily involved in judicial elections in Alabama last year.

Source: Public Citizen

## VI. CAMPAIGN FINANCE REFORM

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### *LITTLE IS BEING DONE ON CAMPAIGN FINANCE REFORM ON THE NATIONAL SCENE*

Even with Democrats in control of both the House of Representatives and the Senate, very little of substance has been done to bring about meaningful campaign finance reform. The people who elected the new Congress expected prompt action and certainly deserve better than what we have seen so far. The honeymoon is over for the Democrats on this issue, and it's time for both chambers to get down to work. If there isn't a major overhaul of the entire

system of elections, with the major emphasis being on campaign finance reform, there won't be a Democratic majority after next year's elections in my opinion. More of the same in Congress is simply not acceptable.

### *THERE IS A NEED FOR MORE THAN JUST A BAN ON PAC TO PAC TRANSFERS*

On the state level in Alabama, the House of Representatives has again voted to ban the practice of transferring campaign donations from one political action committee to another. It's the sixth year in a row the House has passed by near-unanimous votes bills to ban the practice known as "PAC-to-PAC transfers." The sponsor of the bill, Rep. Jeff McLaughlin, D-Guntersville, has fought long and hard to obtain passage of this legislation. Each year the bill passes the House and then dies in the Senate without coming up for a vote. House Speaker Seth Hammett has apparently been assured by Senate leaders the bill would be considered in the upper chamber this session.

I agree with Governor Bob Riley, who says the House bill, as passed, is not as strong as it should be. The Governor proposed a bill that would have banned both PAC-to-PAC transfers and the practice of candidates transferring money from their campaign committees to another candidate. Personally, I believe that passing a ban on PAC-to-PAC transfers only gets rid of the "tip of a massive iceberg" so to speak. There is a great need to limit **amounts** that can be **contributed** to candidates as well as the **amounts** that can be **spent** by a candidate. In addition, outlawing the massive third-party spending by groups such as the American Taxpayers Alliance in state elections is badly needed. Nonprofit organizations should have to **disclose** the source of money used to **influence** the outcome of an election. Rep. McLaughlin, who admits his bill is the first step in cleaning up election campaigns, must get a "gold star" for his

efforts. I hope the Senate will amend the House bill and make it into real campaign finance reform. If that is done, Alabama will go down in history as the "bell-cow" of reform!

Source: *Associated Press*

## VII. CONGRESSIONAL UPDATE

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### *MR. ROVE MAY HAVE FINALLY MET HIS MATCH*

It will be most interesting to see whether Karl Rove will have to testify under oath before a congressional committee relating to the U.S. Attorney firing scandal. If I were a betting man, my wager would be that this slick gentleman from Texas will again find a way to wiggle out of his problem, as he has successfully done when challenged in the past. If he can't do so, it will be that Rove has finally met his match in Senator Patrick Leahy (D-VT), who heads up the Senate Judiciary Committee. In my opinion, this Senator won't back down and for that reason, things should get pretty interesting and soon.

### *CONGRESSIONAL DEMOCRATS CALL FOR IMPROVED BUS SAFETY*

Democratic leaders on the House Transportation Committee have called for better inspections and tougher standards for bus carriers. A hearing on the subject brought out partisan differences over government regulation versus free-market forces. Citing the recent deadly bus accidents in Georgia and Texas, Rep. Peter DeFazio (D-OR) questioned why the government hasn't implemented long-standing recommendations for restraints such as seat belts or stronger windows that could prevent passengers from being ejected from their seats during a crash. Many victims in the Atlanta interstate crash that happened last month had no seat belts to use.

Weaknesses in federal inspection procedures that, for example, allow new companies to operate for up to a year and a half without any meaningful federal safety review, were pointed out. Rep. DeFazio, who chairs the Transportation subcommittee on highways, stated: "Clearly the regulatory structure is not sufficient to the challenge. I don't think the American public would have a high level of confidence in this."

In the Atlanta accident, many of the passengers killed were ejected from the bus. The National Transportation Safety Board, which is investigating the accident, has for years recommended improved restraint systems such as seat belts or stronger windows that many experts say could prevent those kinds of deaths. It's time for the federal government to act.

Source: *Associated Press*

## VII. PRODUCT LIABILITY UPDATE

### *ANOTHER U-HAUL VERDICT IN KENTUCKY*

We wrote last month about a jury verdict that was returned against U-Haul in Ohio. Now, there has been another such verdict in Kentucky. A trial in Louisville, ended with a verdict being returned against U-Haul in the amount of \$11.9 million. Another defendant in the case, Ford Motor Co., had reached a pro tanto settlement, for a confidential amount before the trial. This case involved a 1993 Ford Explorer towing a Ford Contour on a rented U-Haul tow dolly. The towing combination swayed and jackknifed, forcing the Explorer to strike and roll over a guardrail. A rear seat passenger sustained a crushing injury to her spine, rendering her a paraplegic.

U-Haul initially placed its tow dollies on the market in 1982. At that time, it required that the towing vehicle weigh at least twice as much as the vehicle in tow plus the tow dolly. In addition, SUVs

were not allowed to be rented and were thereby prohibited as a tow vehicle. Over the years, however, U-Haul has made some changes in its official policy. Each of the changes made by the company was intended to increase its rental market by cutting back on the weight ratio and the SUV prohibition. Finally, in 1998, the current model was placed on the market, and both a "one to one" weight ratio and SUVs were permitted. This obviously made towing by SUVs with that weight ratio extremely dangerous, thereby creating a hazard that had to be known and accepted both by U-Haul and Ford. In other words, both companies were willing to run the risk.

The Kentucky case is especially noteworthy. What started out as a family on its way to a new life in Florida, ended up in disaster on a Kentucky highway. Christopher Burkes, an airline pilot, his wife Corry and their infant son, Ryan, were heading to Florida when their lives were changed forever and not in the intended way. The Burkes had rented the tow dolly from U-Haul in Indianapolis in 2002. The 650-pound dolly should never have been used as U-Haul and Ford allowed it to be used in combination. The dolly was unsafe when used by an SUV like an Explorer because of the high center of gravity of an SUV combined with its narrow wheel base.

Corry Burkes, who was in the rear seat of the Explorer, is now paralyzed. Her baby who was in a car seat, suffered a fractured skull and was awarded \$510,739.27 by the jury for medical expenses and pain and suffering. Peter Perlman, an outstanding lawyer from Lexington, Kentucky, represented the Burke family, and as usual did an outstanding job of handling the case. The exceptional discovery efforts in this case by the lawyers for the plaintiff's allowed the jury to understand how this incident occurred and why it would never have happened had both U-Haul and Ford done the right thing.

### *NHTSA SHOULD ENHANCE ITS NEW CAR ASSESSMENT PROGRAM*

The New Car Assessment Program, known as NCAP, originally launched by the National Highway Traffic Safety Administration (NHTSA) in 1978, is long overdue for an update. Public Citizen President Joan Claybrook gave testimony on the subject recently before NHTSA and the Department of Transportation. The program, which was introduced while Ms. Claybrook was head of NHTSA during the Carter Administration, provides consumers with information about vehicle performance under conditions that are more stringent than those used for safety standards. Interestingly, the program had been a model for similar programs initiated in other countries. But programs in the European Union, Japan, and Australia are now more comprehensive than NCAP, highlighting the need for NHTSA to modernize the program and bring it up to date.

Although NHTSA's January 2007 report, *The New Car Assessment Program: Suggested Approaches for Future Program Enhancements*, notes that NCAP must be updated in order to continue to motivate vehicle safety improvements, Ms. Claybrook and Public Citizen don't believe that the agency's planned updates go far enough. When consumers purchase a vehicle, they want to know how it performs in various types of tests, not just the three now included in the NCAP program, which are front, side and rollover causation. The existing program does not include a dynamic (real-world) rollover crash test to determine a vehicle's safety during a rollover crash. A rollover crash protection NCAP test is of great importance to consumers because rollover crashes represent more than 20% of highway fatalities. As has been reported, the number of rollover crashes has increased dramatically over the past several years. Unfortunately, however, NHTSA's response to the rollover problem has been ineffective. That is inexcusable.

NHTSA should include an aggressively standard in the updated NCAP that would provide consumers with information about the risks their vehicles pose to others on the roads and show the consequences of crashes between lighter and heavier vehicles. In this regard, Ms. Claybrook observed:

*When a consumer chooses a vehicle, she is primarily concerned with the safety of an occupant in that vehicle but often does not consider the safety to occupants of other vehicles. Occupants of vehicles are twice as likely to be injured or killed in side-impact crashes with SUVs as with other cars.*

NCAP can be improved by rating child safety restraints, creating a pedestrian rating, rating vehicle performance in rear-impact crashes and adding an offset frontal crash test rating. NHTSA should use its authority to restructure NCAP so that manufacturers are required to test their vehicles before making them available for sale. This would assure that all new models have crash test ratings available on the window sticker and in the owner's manual on the first day they are sold. This information would be incredibly valuable to consumers who are in the process of buying a new vehicle. NHTSA would then randomly test vehicles to make sure that the manufacturer's rating is accurate, and if they aren't, the agency would require a consumer notification to take place.

All of this is particularly important in view of the implementation of the 2005 Stars on Cars Act, which requires vehicles available for purchase to have NHTSA's five-star NCAP rating visible on the vehicle at the point of sale. It should be noted that the agency's NCAP program is now seriously under funded. NHTSA should exchange NCAP's current five-star rating system for a letter grade system using the letters A, B, C, D, and F, according to Ms. Claybrook. This would avoid the confusion that

goes along with the star rating system. A letter grade system would provide a greater incentive for manufacturers to strive for top safety ratings. Hopefully, NHTSA listened to Ms. Claybrook's sound recommendations and will promptly implement them. You can review all of her testimony by going to Public Citizen's Web site, [www.citizen.org](http://www.citizen.org).

Source: Public Citizen

#### **FATAL FIRE LAWSUIT AGAINST FORD MOTOR CO. IS SETTLED IN IOWA**

An Iowa man, whose wife died in a fire alleged to have been caused by a Ford pickup truck, has settled his wrongful death lawsuit with the auto manufacturer. Darletta Mohlis, died on May 2, 2005, after a fire spread from the garage attached to her house into the home itself. Earl Mohlis and his three grown children filed the lawsuit, alleging that a cruise control deactivation switch in the 1996 Ford F-150 pickup started the fire. You may recall that we had written on the problem concerning this defect a few months back.

Four months before the fire, in January 2005, Ford recalled nearly 800,000 vehicles because of a cruise control switch problem. It wasn't until four months after the Mohlis fire, in September 2005, that the company expanded the recall to include 3.8 million pickups and sport utility vehicles from the 1994-2002 model years. The Mohlis lawsuit contended that Ford initially limited the recall of vehicles with similar speed control switches to save money.

Mrs. Mohlis was unable to escape the fire that engulfed her home. As a result she was burned alive. Tragically, Mr. Mohlis, who witnessed the death of his wife of 34 years, suffered emotional pain and anguish as a result. The Mohlis case was one of three in the United States in which faulty cruise control deactivation switches were blamed for causing fatal fires. The remaining cases are pending in Georgia and Arkansas.

Source: *Insurance Journal*

#### **FAMILY OF INJURED CHILD SETTLE THEIR LAWSUIT**

International Biomedical Inc., a medical equipment company, along with other defendants named in a lawsuit, have agreed to pay \$5.3 million to the family of a baby who suffered severe head injuries when a vehicle crashed into an ambulance carrying the child in 2003. A faulty aluminum restraint bar made by the company led to injuries that left the child, now 4 years old, deaf and unable to walk or speak. The family alleged that the bar, which held the baby's incubator in place, snapped, causing the baby to be thrown onto the ambulance floor. The other defendants in the case were Children's Hospital of Pittsburgh, Guardian Angel Ambulance Services of Allegheny County, and the estate of the driver of the vehicle that collided with the ambulance. Because a minor is involved, the settlement will have to be approved by the court where the case was to be tried.

Source: *Associated Press*

#### **VERDICT IN WRONGFUL DEATH LAWSUIT INVOLVING A DODGE DAKOTA**

A jury in Los Angeles County returned a verdict last month against Daimler-Chrysler AG. The \$55 million verdict was in a trial arising from the April 2004 death of a 38-year-old longshoreman who was killed in an accident involving his 1992 Dodge Dakota. Richard Mraz suffered fatal head injuries after he got out of the 1992 Dodge Dakota he was driving at a maritime terminal. He had walked away from his vehicle believing that it was in park. The truck began moving in reverse, and Mr. Mraz was injured while attempting to get into the truck to stop the vehicle. Mr. Mraz fell into a coma and died 17 days after the accident. The vehicle, which was owned by his employer, had been recalled by the automaker.

The verdict includes \$5.2 million in compensatory damages and \$50 million in punitive damages. It was alleged that

Chrysler intentionally failed to fix the “park-to-reverse” automatic transmission defect in millions of vehicles. Beginning in 2000, DaimlerChrysler conducted three separate recalls in the “park to release issue” involving about 2 million vehicles. It should be noted that several million vehicles with similar problems are said to remain on the roads. According to information supplied at trial, more than 1,000 complaints relating to the defect have been made. The vehicles allow drivers to place the gear shift in what appears to be the park position, when actually it’s between gears. It doesn’t move when the brake is released. From this position, the vehicle can have a dangerous delayed engagement of powered reverse. It was alleged that senior managers at DaimlerChrysler failed to investigate the full extent of the problem.

At trial, lawyers for the plaintiff introduced a 1999 memo written by Antonius Brenders, a senior manager in DaimlerChrysler’s Vehicle Safety Office, that detailed the pros and cons of doing a survey that the National Highway Transportation Safety Agency sought to determine the cause of the park-to-reverse incidents. One “significant risk” to doing the survey was it could provide “product liability credence to a hypothesis” ... the company had ‘long ignored.’ The memo revealed that DaimlerChrysler “refused to properly investigate the cause of all the accidents for liability reasons.” In its verdict the jury found Mr. Mraz 10% responsible, his employer APL 15%, and DaimlerChrysler 75% responsible in the compensatory phase. DaimlerChrysler was ordered to pay all \$50 million of the punitive damages.

Source: *Detroit News*

## IX. MASS TORTS UPDATE

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### *OUR FIRM’S MESOTHELIOMA TRIAL IS SET IN TEXAS*

Mike Andrews, along with James Ferrell and Andrew McEnaney of the law firm of R.G. Taylor and Associates, will try an asbestos/mesothelioma death case in July against several corporate defendants in Beaumont, Texas. After working for over 40 years as a joiner, or marine carpenter, in the Ingalls Shipyard in Pascagoula, Mississippi, our client’s husband contracted mesothelioma. It is now being recognized that mesothelioma is a “signature disease” caused by exposure to asbestos. In fact, no other cause of mesothelioma is recognized by the American medical community. Occasionally defendants debate just how dangerous certain types of asbestos fibers are and offer experts who downplay the dangers, but the science is clear and irrefutable: mesothelioma is caused by inhalation of asbestos fibers.

In his job as a joiner, our client’s husband was responsible for installing the interior surfaces of ships. Many of the interior surfaces were covered with a laminate material similar to formica material found on countertops. Although similar in appearance to formica, the material installed on ships was comprised of sandwiched inner layers of asbestos sheets covered by hard decorative coating. In some ships, joiners would install around a million square feet of asbestos laminate. Because the installation required the joiners to cut the material to custom fit the ship, the joiners and those nearby were continually exposed to hazardous airborne asbestos fibers. Unfortunately, premises owners and employers waited until the 1970s before instituting dust or airborne fiber protection procedures for employees and other persons exposed to the fibers. In addition to working at

the Ingalls Shipyard, our client’s husband also worked at the Bethlehem Steel Shipyard in Beaumont, Texas in the 1970s. As we look forward to presenting this case to a Jefferson County, Texas jury, we continue to evaluate mesothelioma cases around the country. We have dedicated an adequate number of lawyers and support personnel to this project. Mike Andrews is the lead lawyer for the firm on these cases.

### *JURY IN VIOXX CASE AWARDS \$47.5 MILLION TO IDAHO COUPLE*

In what is being described as a major defeat for Merck & Co., a state court jury in New Jersey found that Merck & Co.’s painkiller Vioxx contributed to the heart attack of an Idaho postal worker and awarded a total of \$47.5 million in damages. The verdict came at the end of an eight-week trial in Atlantic City. The jury initially awarded Mike Humeston and his wife \$20 million in compensatory damages. Mr. Humeston, 61, of Boise, Idaho, suffered a heart attack in September 2001, several months before Merck put a stronger warning about the cardiovascular risks of Vioxx on the drug’s detailed package insert. The decorated veteran had taken Vioxx intermittently for about two months for knee pain from a Vietnam War shrapnel wound.

The jury ruled on March 2<sup>nd</sup> that Merck was negligent and did not provide adequate warning about those risks prior to Mr. Humeston’s heart attack. The case then went into the second phase to consider whether Vioxx contributed to Mr. Humeston’s heart attack, entitling him to damages. After hearing evidence on that issue, the answer by the jury was unanimously “yes.” The trial then went into the third and final phase to consider the issue of whether to award punitive damages. The jury then found Merck guilty of “willful and reckless” behavior and awarded \$27.5 million in punitive damages.

This was another huge win for all Vioxx victims. It’s now quite obvious

that Merck has lied to the FDA, the medical community, and the public concerning the dangers and risks associated with taking Vioxx. We had learned early on that Merck has no regard for the truth and would go to great lengths to mislead judges and juries concerning heart attack risks of Vioxx. Merck has dealt misery to hundreds of thousands of people in this country and should have to pay for what it has done.

#### ***THE VIOXX TRIAL CONTINUES IN ILLINOIS***

The Vioxx case that Andy Birchfield and Leigh O'Dell are trying, along with Mikal Watts and Larry Wright of The Watts Law firm from Corpus Christi, Texas, and Larry Driscoll of Brown and Crouppen of St. Louis, is very close to a conclusion. The plaintiff rested her case on March 13<sup>th</sup> and at press time the defense case was completed. Oral arguments were taking place on the very day this issue was being sent to the printer. A verdict will have been reached by the time this issue is received.

#### ***TEXAS JUDGE LETS \$7.75 MILLION VIOXX VERDICT STAND***

In another Vioxx case, the \$7.75 million jury award against Merck & Co. will stand. The Texas state court trial judge let the company's request for a new trial expire without issuing a ruling. Because the judge did not act on Merck's bid for a new trial within the 75-day time limit, the motion is effectively denied. The time limit expired on March 12<sup>th</sup> and Merck says it will appeal. As you may recall, a Texas jury awarded \$32 million last year to the family of Leonel Garza. The verdict was reduced under Texas law because of a cap on noneconomic damages. The verdict in the Garza case was the first in the country in which a jury found short-term usage of Vioxx to be causative in heart attacks. Merck had created the myth by way of an effective public relations campaign that Vioxx was danger-

ous only after 18 months of use. Of course, that was false and Merck knew it to be false.

Source: *Associated Press*

#### ***THE CLASS-ACTION RELATING TO VIOXX IS ON APPEAL***

The class-action lawsuit filed by health insurers and union health plans is on appeal in the New Jersey Supreme Court. As you will recall, the trial court had certified a class and Merck & Co. appealed that ruling. An intermediate appellate court affirmed the trial judge and this appeal followed. It should be noted that this is a nationwide class and it's estimated that the verdict in this case could exceed \$15 billion. The Supreme Court heard arguments on March 19<sup>th</sup> and a ruling is expected in about 6 weeks.

Source: *Associated Press*

#### ***RECENT STUDIES CONFIRM THE INCREASED RISK OF COX-2 DRUGS***

The Cox-2 class of drugs, which as you know all too well, includes Vioxx, Celebrex, and Bextra, continues to receive heavy scrutiny in the medical community. Although Vioxx and Bextra are now off the market, with Celebrex having a black box warning in its label indicating the increased risk of heart attacks and strokes, there is even more bad news for the drug companies that put these drugs on the market. Frankly, I have been shocked that the manufacturers of the Cox-2 drugs have continued to deny liability for the thousands of lawsuits that have resulted in serious injuries or death associated with the ingestion of these drugs. To date, there have been several Vioxx trials that have led to jury awards for victims ranging from \$6 million to \$253 million. The latest decision was in the New Jersey case referred to above. Interestingly, there have been no Celebrex or Bextra lawsuits to reach trial yet.

Along with the jury verdicts, there has been an increasing body of clinical trials

and scientific and medical literature confirming the safety risk associated with Cox-2 drugs. The use of Celebrex is now very much in question. A recent article in one of the nation's most authoritative medical journals, "Circulation - Journal of the American Heart Association", confirms the concern of an increased risk of heart attacks and strokes with users of the Cox-2 drugs. Clinicians have found strong evidence that safety risks are likely to occur in patients at a high risk for cardiovascular disease. The majority of patients in this high risk group are the older population. As we have learned, the Cox-2 drugs were specifically marketed to this group for arthritis pain. Therefore, there is a direct connection between the injuries associated with these drugs and the high risk patients that use them, and that really can't be disputed.

For doctors who continue to prescribe Celebrex, the safety risk must be relayed to all patients before doctors can prescribe this medication. Additionally, the medical literature suggests that Celebrex use should be limited to patients for whom there are no appropriate alternatives and used only as an absolute last resort. If those criteria are met, then only the lowest dose for the shortest duration necessary will help manage the increased risk of heart attack and stroke associated with Celebrex. But the question remains: why prescribe a Cox-2 drug with increased safety risk, but with no gastrointestinal advantages over other pain relievers? The more the medical community learns about the dangers associated with the Cox-2 drugs, the more widespread the litigation exposure of the drug companies will become. The public is already coming to realize that these companies were putting their own profits over the health and safety of their customers. But, based on recent history in this industry, that shouldn't be a big surprise.

## **MONTANA SUES OVER ZYPREXA MARKETING**

Montana has joined the list of states suing Eli Lilly and Co. over claims that the company fraudulently marketed its antipsychotic drug Zyprexa for unapproved uses. It's alleged that the drug company owes the state for prescription costs and harm to patients. Montana Attorney General Mike McGrath says that Lilly gave kickbacks to doctors and improperly promoted the drug to nursing homes as a sedative. The drug maker "instructed its representatives to minimize and misrepresent the dangers of Zyprexa, affirmatively and consciously placing company profits above the public safety," according to the complaint filed by the state. It's alleged that "this failure to warn was designed and intended to maximize company profits."

The lawsuit is the seventh state claim against Indianapolis, Indiana-based Lilly over Zyprexa marketing, and the second to be filed this year. Pennsylvania sued Lilly and two other makers of similar drugs February 26<sup>th</sup> on behalf of its Medicaid programs. Both states seek unspecified reimbursement for money paid on prescriptions and any harm caused by Zyprexa. It should be noted, that Lilly also faces federal probes into the drug's marketing. Lilly through a spokeswoman says that the company will fight the Montana lawsuit. In a statement, the company says that it promotes its medications "only for approved uses."

Lilly's off-label marketing has enabled Zyprexa, approved only for use for schizophrenia and bipolar disorder, to become the company's top-selling drug. Lilly promoted Zyprexa for use by patients suffering from dementia, depression, and autism, among other nonapproved uses. Under federal law, doctors may prescribe medications for uses that aren't approved by the Food and Drug Administration, although pharmaceutical companies are barred from marketing their drugs for such "off-label" uses.

Lilly created a 280-person sales force

"to promote Zyprexa exclusively for off-label uses, specifically for long-term-care facilities to maximize off-label use of Zyprexa sales" for the elderly. Zyprexa, AstraZeneca's Seroquel and Johnson & Johnson's Risperdal, all members of a class of medications called atypical antipsychotics, have been linked to weight gain and diabetes. In September 2003, the FDA required the three companies to place warnings on the drugs' labels. The three drugs, approved for schizophrenia and bipolar disorder, are among the top-selling medications in the world. Lilly's global sales of Zyprexa were \$4.36 billion in 2006.

Lilly has settled about 28,500 claims brought by users of Zyprexa for a total of as much as \$1.2 billion. About 1,300 individual claims are still pending. In addition to the suits against it by Montana and Pennsylvania, the drug maker also has been sued by Louisiana, West Virginia, Alaska, New Mexico, and Mississippi. The Alaska suit against Lilly is set for trial in March 2008. Our firm is handling cases for individuals who have taken Zyprexa with Frank Woodson being the lead lawyer on those cases.

Sources: *Bloomberg News* and *Indiana Star News*

## **LAWMAKER SEEKS DATA FROM MAKERS OF STENTS AND DRUGS**

Rep. Henry A. Waxman (D-CA), Chairman of the House Oversight and Government Reform Committee, which is involved in an investigation into product safety and marketing practices, has asked two medical device companies and three drug makers to turn over documents. Rep. Waxman has asked Boston Scientific and Johnson & Johnson for information on their drug-coated stents to treat clogged heart arteries. In making this request, Rep. Waxman cited concerns about the safety and off-label use of the devices.

As we have reported previously, off-label use of medical devices and drugs occurs when doctors use the products to treat ailments other than those for

which they have been approved by regulators. Rep. Waxman also sought information about allegations of inappropriate marketing by the drug makers Eli Lilly & Company, AstraZeneca, and Cephalon. His letter to Eli Lilly requested information about the schizophrenia drug, Zyprexa, citing allegations that the company "misled physicians and inappropriately promoted off-label uses" of the drug. As you may recall, the company's efforts to encourage Zyprexa for off-label uses like treating dementia was the subject of an article appearing last year in *The New York Times*.

The AstraZeneca letter sought details about its schizophrenia drug, Seroquel. Rep. Waxman's letter to Cephalon asked for information about the narcotic painkillers Actiq and Fentora. All three drug makers and the two stent makers were asked, among other information, for lists of studies conducted on each product as well as documents related to marketing plans. As you know, drug-coated stents are small, medicated wire-mesh tubes inserted into diseased arteries after they have been unclogged. They have come under increased scrutiny after research showed the devices can cause blood clots months after implantation. Sales of the devices have been affected because many doctors and patients have reassessed the risks and are proceeding with more caution than had previously been the case. Our firm's handling of civil cases involving Zyprexa was mentioned in another section of this issue.

Source: *Reuters*

## **DECLINING INCIDENCE OF BREAST CANCER MAY STEM FROM SUDDEN FALL IN HORMONE REPLACEMENT THERAPY**

A recent study conducted by doctors at the University of Texas M.D. Anderson Cancer Center in Houston suggests that the dramatic decline in incidence of breast cancer may be the result of decreased use of hormone replacement therapy. According to an article pub-

lished in the February 21, 2007, volume of the Journal of the National Cancer Institute (JNCI), “the decline [in incidence of breast cancer] began in mid-2002, apparently mirroring the drop in hormone use that occurred after release of the Women’s Health Initiative (WHI) findings in June of [2002].” Although the researchers stress that the analysis does not prove “cause and effect,” the lead author of the study, Donald Berry, Ph.D., acknowledged that the magnitude of the decline was persuasive. According to Dr. Berry, the month-by-month declines in breast cancer were significant, falling an average of 1% per month beginning in July 2002 through December 2003. The results of the study were presented by Peter Ravdin, M.D., of the University of Texas M.D. Anderson Cancer Institute in Houston at the San Antonio Breast Cancer Symposium in December 2006. The study results will likely lead to significant additional research in the long-term follow-up of the incidence of breast cancer and hormone replacement therapy.

In last month’s issue, we reported on two hormone replacement therapy lawsuits in Pennsylvania in which individuals injured by Wyeth’s Prempro therapy were awarded \$1.5 million and \$3 million in compensatory damages by two different juries. Since our last report, we have learned that Wyeth has settled two more hormone replacement therapy cases for undisclosed amounts, according to administrative orders dismissing the lawsuits signed by Middlesex County, New Jersey, Superior Court Judge Alexander Waugh, Jr. Our firm continues to investigate claims of injuries caused by hormone replacement therapy. Our HRT team is currently preparing for its first trial, scheduled for November 2007 in Minnesota. Ted Meadows is the primary lawyer handling these cases for the firm.

Source: *Journal of the National Cancer Institute*

#### ***AN UPDATE ON THE FOSOMAX LITIGATION***

Our firm has filed several lawsuits against Merck & Co., the makers of Fosamax, which is classified as a bisphosphonate drug, used to treat osteoporosis. Fosamax has been linked to serious bone disease called osteonecrosis of the Jaw (ONJ), also known as “dead jaw.” ONJ is a breakdown or death of the jaw bone, which can lead to serious infection requiring long-term care or lead to death. We have reviewed and filed cases that involve individuals diagnosed with osteomyelitis and ONJ after taking Fosamax for several years. The FDA released a warning to dentists and physicians in 2004 about the risk of serious adverse effects from bisphosphonate therapy. We continue to evaluate cases involving these devastating injuries and will keep you update on any litigation developments. Jerry Taylor and Chad Cook from our Mass Torts Section are the primary lawyers in our firm who are working on the Fosamax cases.

#### ***AN UPDATE ON ORTHO EVRA LITIGATION***

Our firm has recently filed a number of lawsuits against Ortho McNeil, a subsidiary of Johnson & Johnson, the makers of the popular birth control patch Ortho Evra. Two of these lawsuits involve young women in their twenties who suffered strokes after using the Ortho Evra Patch for several months. A third lawsuit involves a woman who suffered deep vein thrombosis (DVT) in her lower left leg and multiple pulmonary emboli in both lungs after using Ortho Evra. There continues to be strong evidence that the risk of these blood clots, heart attacks, and strokes associated with Ortho Evra is significantly higher than with birth control pills. Before U.S. approval in 2001, the FDA expressed concern about Ortho Evra, saying:

Post-marketing surveillance for DVT (Deep Venous Thrombosis) and PE (Pulmonary Embolism) events will be impor-

tant, as there are potential serious adverse risks (with two cases of pulmonary emboli in the clinical trials) with this new delivery system for contraception.

The “delivery system” that the FDA mentions involves Ortho Evra being released directly into the blood stream, as opposed to the “delivery system” for a birth control pill, which is ingested and metabolized by the body. These differences can create very serious risks for Ortho Evra users. We will continue to update you on new developments in this litigation in future issues. Chad Cook and Frank Woodson are the primary lawyers in our firm working on Ortho Evra cases.

#### ***APPROVAL OF KETEK APPEARS TO BE ANOTHER FDA FAILURE***

Ketek, an antibiotic manufactured by Sanofi-Aventis, was approved by the FDA in April 2004. This drug has been prescribed over 5 million times for the treatment of sinusitis, pneumonia and chronic bronchitis. Ketek has come under fire in recent months upon allegations of adverse side effects, including liver damage and liver failure. The drug immediately began causing these side effects when three cases of liver failure were reported in January 2005. At that time, reports surfaced indicating that doctors performing a major Ketek study **falsified** information and **failed** to keep adequate records. One of these doctors was arrested and put in jail for fraud. Our firm is investigating cases involving Ketek that involve serious liver damage and liver failure. We believe that this litigation will uncover more of the “cozy” relationship between the FDA and the drug companies. Is there any wonder the FDA supports preemption—without the treat of litigation, many wrongs created by this relationship would go uncovered. Frank Woodson and Ben Locklar are the primary lawyers reviewing Ketek cases for our firm.

Source: *Associated Press*

## ***ANOTHER BAD BAYER DRUG IS ON THE MARKET***

As we all know, Bayer had to withdraw its cholesterol lowering medication, Baycol, from the market in August 2001 because of serious injuries it was causing. In the last year, there has been lots of controversy over Trasyolol, another Bayer drug. The release of a new study last month raised new concerns about this widely used heart surgery medicine. The study reported that the drug increased patients' long term risk of dying by nearly 50%. An estimated 10,000 deaths worldwide could be avoided over the next five years if Trasyolol were not used, according to the report in the Journal of the American Medical Association.

According to the authors of the study, Trasyolol was unnecessary for most patients because safer and cheaper alternatives were available. The drug, also known by its generic name, Aprostinin, is used to control bleeding during open heart surgery. One of the authors recommended that this drug should be restricted to patients only with the highest risk of bleeding complications and only used as a drug of last resort. Last year other researchers linked Trasyolol to a high risk of kidney failure, heart attack, heart failure and stroke. That report was published in the New England Journal of Medicine. The FDA has now required an additional warning about kidney failure to be added to the product label. Our firm is currently investigating Trasyolol claims involving kidney failure and heart attacks. Frank Woodson and Ben Locklar are the primary lawyers handling these cases for the firm.

Source: *New York Times*

## ***A BLOW TO PFIZER***

Pfizer has been forced to drop a project aimed at getting a new heart pill approved and on the market. The drug company had spent more than \$900 million testing this experimental heart

pill, torcetrapib, before bringing the project to a sudden halt. In December, a 15,000-patient study revealed that this chemical increased death rates. At press time, I really didn't fully understand what had happened since torcetrapib was being touted by Pfizer as a most promising drug.

In any event, the bad results from the test have thrown the whole concept of raising HDL by way of drugs into turmoil. At the annual meeting of the American College of Cardiology, this development was the hot topic for discussion. The plight of other similar drugs was discussed at the meeting attended by cardiologists. We will likely write more on this next month as things become more clear.

Source: *Forbes News*

## **X. BUSINESS LITIGATION**

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### ***JURY FINDS THAT VONAGE VIOLATED VERIZON PATENTS***

A jury has ruled that Internet phone provider Vonage must pay Verizon \$58 million in damages for infringing on three of the phone giant's technology patents. A hearing was held in a federal court in Virginia on March 23<sup>rd</sup> to determine whether Vonage can continue to use the patented technology—which goes to the heart of how it provides low-cost Internet telephone service to more than 2 million customers. If the court lets Vonage use the technology, then it must pay Verizon 5.5% of total revenue on an ongoing basis, according to the jury's verdict. That could tack an additional \$47 million to \$50 million onto Vonage's tab this year. At press time, the court had not ruled.

One patent controls how Vonage passes calls to the "public switched network" operated by Verizon and other big phone companies. The second involves custom calling features, such as

voice mail and call waiting. The third deals with calls on Wi-Fi networks, becoming increasingly popular. It's a modest business for Vonage but has growth potential. The jury ruled for Vonage on two patent claims that deal with billing and fraud. In the weeks leading up to the trial, Vonage characterized Verizon's patent claims as specious and unfounded. It also accused the New York-based communications giant of trying to drive it out of business. About half of Vonage's customers used to belong to Verizon, and apparently Verizon didn't like Vonage cutting into its customer base. The court's ruling will determine much of Verizon's future.

Source: *USA Today*

### ***SETTLEMENT APPROVED IN SECURITIES FRAUD SUIT***

A federal judge has approved a \$10.5 million settlement of a securities-fraud lawsuit that accused Willbros Group, Inc., of bribery. The company is a contractor for the oil and natural gas industry. Investors sued the construction and engineering firm in Houston federal court in 2005, accusing it of bribing government officials in Nigeria, Ecuador, and Bolivia in an attempt to win work. According to the plaintiffs, the company's wrongful actions led to delays and restatements of financial results. The settlement stems from the results of an internal company probe that was originally announced on May 16, 2005.

Willbros Group has confirmed that the recent court order ended the class action litigation, which was pending in Houston Federal Court. The settlement will be funded by the company's insurance carrier. As a matter of interest, Willbros Group recently received an order to build much of a natural gas pipeline from Louisiana to Alabama. The contract, a joint venture of CenterPoint Energy and Spectra Energy Corporation, is for 190 miles of a pipeline that will stretch from northeast Louisiana to

Alabama. Willbros Group is headquartered in Panama City, Panama, while its administrative offices are located in Houston, Texas.

Sources: *Houston Chronicle* and *Bloomberg News*

### **RAYTHEON FILES PATENT SUIT OVER INFRARED DETECTORS**

Giant defense contractor Raytheon has filed suit against Indigo Systems and Flir Systems over patents for infrared detectors. The complaint, filed in U.S. District Court in the Eastern District of Texas, claims Indigo and its parent company, Flir, infringed on five patents issued between 1991 and 1997. All of the technology is used in both military and consumer applications ranging from infrared cameras and nightscopes to automobile safety systems. One of the patents involves uncooled bolometers. The patent says there are several ways to detect infrared waves, including scanning or staring arrays and detectors that are cooled with liquid nitrogen, which are extremely accurate and used for military applications such as missile guidance systems. Uncooled detectors are not as sensitive as cooled ones, but they use less power and work better in portable devices.

Even within the uncooled models there are several options. Bolometers, which are the ones used by Raytheon, rely on temperature changes in thin metal films, which are suspended on an insulating layer on a silicon substrate. What Raytheon claims is its real breakthrough is the ability to manufacture these chips using standard semiconductor processes. Other patents involved in the suit pertain to focal plane arrays and readout integrated circuits, both of which are essential components in infrared cameras used by the military, firefighters, automobiles, and law enforcement. The suit claims this technology was taken by three ex-employees who teamed up to start Indigo. It's alleged that all three had access to Raytheon's trade secrets and could not have developed the technology so quickly on their own. Raytheon

describes the process of developing technology as a painstaking process of trial and error. Raytheon is seeking damages, including punitive damages, and a permanent injunction against Flir and Indigo.

Source: *Electronic News Network*

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

### **TIME WARNER SETTLES SUIT FILED BY THE STATE OF OHIO**

Time Warner Inc., the world's largest media company, will pay \$144 million to the State of Ohio and five state pension funds to settle a securities-fraud lawsuit. This will resolve one of the last claims over its 2001 merger with America Online Inc. Ohio Attorney General Marc Dann says the payment is \$135 million more than the pension funds would have received had they participated in a \$2.4 billion settlement with shareholders in 2005. The company also agreed to cover \$31 million in legal fees and expenses. The Attorney General, in making the announcement, said: "We are sending a loud and clear message to corporate America and to Wall Street: We will not tolerate fraud, stock manipulation or deceit in this state."

The Ohio Bureau of Workers' Compensation and the state pension funds lost almost \$400 million after it was revealed America Online inflated its stock price by misrepresenting earnings to help close the merger with New York-based Time Warner, Dann said. The settlement is Ohio's largest-ever reimbursement to pension funds in a securities case. In fact, the 2005 settlement is the fourth-biggest ever for a securities class action lawsuit, according to *Bloomberg News*.

Interestingly, last month Time Warner agreed to pay \$260 million to end a similar suit led by the University of California. The company and its bankers and accountants also agreed to pay \$105

million to the California State Teachers' Retirement System. The Ohio settlement is subject to approval by the company's board and the pension funds. Attorney General Dann is "confident" all parties will sign off on the settlement. The funds involved are the State Teachers Retirement System, the Public Employees Retirement System, the Police and Fire Retirement System, the Highway Patrol Retirement System, and the School Employee Retirement System.

You may have seen the recent tirade against lawsuits by AOL on its website. I'm sure this was just another coincidence. The article, labeled "most outrageous lawsuits," was nothing more than tort reform propaganda put out by groups like the American Tort Reform Association and Citizens Against Lawsuit Abuse. But, Time Warner may have more personal reasons for the attack. The fact that AOL has committed a good number of wrongful acts that hurt lots of folks could be the motivating factor that prompted its attack on the jury system. As you know AOL and Time Warner are now one of the same company due to a merger. The following are just a few of the examples of the legal trouble Time Warner and AOL have been involved in:

- As mentioned above, Time Warner has agreed to pay \$246 million to compensate the University of California for losses to their pension and endowment funds because of alleged wrongdoing by AOL.
- On February 26, 2007, Time Warner reached a settlement which required the payment of \$405 million to settle lawsuits related to past accounting problems at AOL.
- On February 7, 2007, AOL reached a \$105 million settlement with the California State Teachers' Retirement System that claimed that AOL executives and bankers had artificially boosted the value of its stocks prior to buying Time Warner.

- In December, 2006, AOL settled a securities fraud case for \$50 million with the state of Alaska.
- In September, 2006, AOL members joined together in a class action suing AOL for violating their privacy by posting their search queries online. AOL made public the search queries of over 600,000 members.
- In January, 2006, AOL settled a class action for \$25 million after the company was accused of wrongfully billing its customers.
- In 2005, Time Warner settled a \$2.4 billion securities fraud lawsuit stemming from their misstatement of advertising revenue on the eve of its merger with AOL.
- In 2004, AOL settled two class actions that claimed it had continued to bill plaintiffs after their subscriptions were cancelled.

After you have read about all of these legal problems and resulting settlements because of alleged wrongdoing by Time Warner and AOL, I will leave it to you, our readers, to decide whether the referenced blasting of the judicial system by AOL was just another coincidence!

Source: *Bloomberg*

#### ***PUNITIVE DAMAGES AWARDED IN INSURANCE CASE***

A jury in El Cajon, California, has awarded \$15.5 million to Darla Johnson in her lawsuit against Prudential Insurance Co. Ms. Johnson, 49, suffers from chronic fatigue, lupus, fibromyalgia, and an immune system disorder. But, her insurance company took the position that she really wasn't sick. Obviously, a jury disagreed with Prudential on that claim and ordered Prudential to pay \$14 million in punitive damages, in addition to \$1.5 million awarded in compensatory damages to cover benefits the company had wrongfully refused to pay. Prudential says it will ask the trial judge to set aside the verdict, and if the judge

doesn't, it will appeal.

I hope this verdict will cause Prudential and other insurance companies to reconsider the way they evaluate disability claims. Insurance companies sometimes believe it is cheaper to deny valid claims than to pay them. Their thinking is that most people won't fight back. In this case, Ms. Johnson did and rightly so. She was the project manager in the construction department at the University of California San Francisco, when she was diagnosed with lupus, fibromyalgia, chronic fatigue, and antiphospholipid antibody syndrome, a disorder of the immune system. Ms. Johnson would come home from work to her husband and 4-year-old daughter and literally collapse from exhaustion. In 1995, Ms. Johnson had to leave her job and went on disability.

For five years, Prudential paid Ms. Johnson \$3,130 per month, which was half her previous income. The Johnson family moved to San Bernardino County in 2000, where they bought a house. Prudential assured the lender of her future disability income. Six months later, however, the benefits were terminated. The doctor Prudential had sent her to for a so-called independent medical examination had filed a report after doing a perfunctory exam saying Ms. Johnson wasn't disabled. Out of frustration and despair, Ms. Johnson filed two appeals with the insurance company, then was forced to file suit in August 2003. It appears quite clear that when Prudential realized it would be paying disability benefits until Ms. Johnson was 65, it terminated her benefits and was willing to run the risk that she wouldn't file suit. They were flat wrong in their assessment. The jury correctly found Prudential guilty and awarded damages. Ms. Johnson was awarded \$1.5 million in compensatory damages to cover past and future benefits as well as for the grief and inconvenience she suffered when Prudential refused to pay her claims. Under applicable law, the company also must pay attorneys' fees, which will likely be more than \$500,000. The punitive damages were

properly awarded to punish the company for its wrongful conduct.

Source: *Union Tribune*

#### ***FLORIDA BUSINESS AWARDED \$18.8 MILLION IN LAWSUIT***

A jury in Florida has awarded The Broadcast Team Inc., an Ormond Beach business, \$18.8 million against Hartford Insurance Co. of the Southeast. The issue involved in the case was whether the **company** should have been protected by the insurer from the actions of someone who worked for it. In 2001, the company started an automobile dealership in Louisville, Kentucky, and hired an independent contractor, Phillippe Portocorrero of Louisville, as its first salesman. The owners didn't know that Mr. Portocorrero, who had long worked in auto sales, brought with him marketing materials from previous jobs. In each of the places where the man had worked before, all of the employees were encouraged to get marketing materials from all over the industry. Mr. Portocorrero's previous employers sued him and the Broadcast Team, claiming that he had taken protected information. The company's officers believed they would be covered against such a lawsuit by their insurance policy and that Hartford would defend the company and its officers.

In February 2002, company officers received news that Hartford would not cover them, so they settled the case for \$237,500, and as a part of the settlement, agreed not to compete with Mr. Portocorrero's former employers for a period of four years. The Broadcast Team then filed suit against Hartford in an attempt to recoup some of their losses. Hartford tried to show the lawsuit fell under an exclusion in the policy, but the judge entered an order saying that Hartford should have defended the lawsuit. The jury award included \$18,550,000 for lost profits, and \$237,500 to replace the money

that The Broadcast Team had been forced to pay in settlement of the claim.

Source: *Daytona Beach News Journal*

#### **INSURER TO PAY \$17.5 MILLION IN CONNECTICUT I-84 FAULTY CONSTRUCTION CLAIM**

The insurer behind the performance bond for part of the troubled Interstate-84 construction in Connecticut will pay \$17.5 million to settle claims involving installation of defective drains, according to a settlement agreement worked out with state officials. The payment from United States Fidelity & Guaranty on behalf of L. G. DeFelice, Inc., the contractor, allows the state to begin repairing the defective drains along a three-mile stretch of I-84 in Cheshire and Waterbury. Under the agreement, the state retains the right to sue the contractor for additional funds. In early 2006, after the DOT uncovered defects in the project's drainage system, L.G. DeFelice of North Haven, the primary contractor for the project, actually walked off the job. The contract with the Maguire Group, Inc., of New Britain, Connecticut, hired by DOT to inspect the project and ensure contract compliance, was subsequently terminated.

While the state says it may bring more lawsuits in the future, USF&G has itself already sued DeFelice. In a lawsuit filed in U.S. District Court, the insurer has accused officials from the North Haven contractor of transferring money to other family-controlled interests and even buying luxury cars with company resources. The contractor has denied the accusations and claims that all of its financial transactions complied with the law. USF&G says it bonded DeFelice projects, including a \$54 million widening of I-84 in Cheshire and Waterbury, with the understanding that it would be reimbursed by the contractor for any claims. Many of the defective drains lead nowhere, some are clogged with debris and others were apparently connected with substandard, cracked and leaking

pipes. Original estimates by the state said it would cost \$27 million to repair them. It's sort of interesting that road builders in Alabama are trying to get our legislature to give them immunity from lawsuits. The type conduct described above would be protected rather than punished in the courts.

Source: *Associated Press*

#### **STATE FARM WILL REOPEN MISSISSIPPI KATRINA CASES**

It's pretty difficult to stay current with all of the developments relating to State Farm Mutual and its Katrina claims in Mississippi. State Farm had reached an agreement with the Mississippi Insurance Commissioner to reopen disputed cases involving homes destroyed by Katrina. Interestingly, Commissioner Dale's agreement with State Farm was challenged by Richard Scruggs, who is the lead attorney in a multimillion dollar class action lawsuit brought by Gulf Coast residents against State Farm. The Mississippi lawyer said his lawsuit involves more Mississippi homeowners than the Commissioner's agreement covers, including those who suffered storm damage, but did not lose their homes. The Scruggs team also says this agreement by State Farm doesn't go far enough to protect claimants.

That suit filed by Scruggs' clients has been on hold since January, when U.S. District Court Judge L.T. Senter rejected the terms of a proposed settlement agreed to by State Farm, saying he wanted more information. Since then State Farm has announced that it would no longer write new homeowner policies in the state. On March 13th, in a surprise move, the team of lawyers led by Scruggs, withdrew their request for Judge Senter to approve the State Farm settlement. Had it been approved, State Farm would have paid out \$50 million to settle with the policyholders. It appears those cases are now headed to trials. It also appears that Commissioner Dale and State Farm are going forward

with their agreement. Also, State Farm settled four separate claims with policyholders on an individual basis last month. That was unrelated to the agreement referred to above. Just before this issue was sent to the printer another significant development occurred.

U.S. District Judge L.T. Senter Jr. has refused to allow the class action against State Farm Insurance Cos. To go forward. Judge Senter, who heard testimony on the proposal in February, ruled on March 22<sup>nd</sup> that a class-action for "slab cases" is "inconsistent with the requirements of due process." The claims will now have to proceed as individual claims. Judge Senter has consistently expressed strong support for using court-ordered mediation to clear a backlog of federal lawsuits over Katrina damage.

In a related development, Mississippi state and federal lawmakers, led by Senate Republican Whip Trent Lott, have asked Congress to revoke the insurance industry's immunity from federal antitrust investigation and prosecution. Hearings on that issue were held last month in the U.S. Senate. It will be interesting to see how much support the powerful and generally well-liked Senator can garner for his legislation. The industry is extremely powerful and won't back down from a fight, even with Senator Lott and his Senate colleagues on the other side.

Sources: *Reuters* and *Associated Press*

#### **LOUISIANA STATE INSURER SETTLES CLAIMS**

Louisiana's state-run insurer has agreed to a mass settlement with more than 150 policyholders whose homes were damaged by Hurricane Rita. The settlement involves claims on homes that were damaged by Hurricane Rita. This is the state's first mass settlement of lawsuits. Citizen Property Insurance, which is Louisiana's insurer of last resort, agreed to pay approximately \$6.6 million to 167 policyholders in Cameron Parish. Citizen Property Insur-

ance had been sued for its refusal to cover damages from Rita. Private insurance companies already have reached individual settlements with hundreds of homeowners in Louisiana who sued in the wake of Katrina and Rita. All of the homeowners have signed off on the settlement. All but a handful of the 167 policyholders included in the settlement had their homes reduced to rubble by Rita. The cases took priority for Citizens because they are among the most contentious of all the disputed claims

Citizens and other insurers say the homeowner policies cover damage from wind but not from rising water, including wind-driven storm surges. Rita's storm surge destroyed or damaged thousands of homes. On Friday, Louisiana Attorney General Charles Foti visited Cameron Parish for the first of several meetings with homeowners to talk about how insurers handled claims after Katrina and Rita. Citizens writes policies for home and business owners who are unable to purchase coverage from private companies. About 2,000 policyholders have sued Citizens over damage from Katrina and Rita. Citizens has become the state's third largest property insurer in the wake of the 2005 hurricanes.

#### **STATE FARM BOSS GETS A HEFTY PAY RAISE**

It appears that in spite of all of the company's legal issues, the big boss at State Farm Insurance Co. is doing right well financially. Ed Rust Jr., who is Chairman and Chief Executive Officer, received a \$5.26 million (82%) raise after the company posted a record profit last year. He earned a total of \$11.66 million in 2006, with a base salary of \$1.77 million and results-based bonus of \$9.89 million. Mr. Rust also did well in previous years, having made \$6.4 million in 2005 and \$5.5 million in 2004. The giant insurer generated a record \$5.32 billion profit last year. It's too bad State Farm doesn't treat its Mississippi, Louisiana, and Alabama policyholders very well when it comes to paying claims. But the

company's board takes good care of the company's boss man.

#### **TRAVELERS' CEO PAID \$15.7 MILLION LAST YEAR**

State Farm is not the only insurance company with a big boss who is doing extremely well financially. The Travelers Cos. Inc., paid Chairman and CEO Jay S. Fishman \$15.7 million last year. Mr. Fishman's pay included a \$1 million base salary and a \$6.5 million bonus. Travelers also granted him \$7.7 million in restricted shares and options. In awarding executive bonuses, the Travelers compensation committee decided that he and other executives had "substantial success" in meeting the company's goals for the year. The Associated Press calculates total compensation including salary, bonus, incentives, perks, and the estimated value of stock options and awards granted during the year. It also includes above-market returns on deferred compensation, although Travelers said Fishman received no such compensation.

Fishman's pay included \$267,639 for personal use of the company plane, which Travelers said it requires for security reasons. At the beginning of this year Mr. Fishman reportedly started reimbursing the company for personal travel on the company plane. St. Paul, Minnesota-based Travelers also paid \$164,055 for use of a company car and driver for Mr. Fishman. Mr. Fishman presently owns or has the right to buy about 3 million shares of the company's stock. At press time, those would be worth about \$166 million.

Source: *Insurance Journal*

## **XII. PREMISES LIABILITY UPDATE**

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#### **COMCAST SUED IN WRONGFUL DEATH LAWSUIT**

A wrongful death lawsuit has been filed by the family of a 23-year-old woman who was beaten to death in her Chicago, Illinois, home in December. A cable company allowed a repairman to continue making service calls even though he was suspected in an earlier slaying. The wrongful death complaint alleges that Comcast Corp. took no action when informed that the repairman was suspected in the death of a customer in October. The man, who was employed by a Comcast subcontractor, is accused of raping and killing the woman during a service call to her home on December 8<sup>th</sup>. He is also charged in the death of another woman who was found in her home October 23<sup>rd</sup>, two days after the Comcast repairman allegedly made a call there.

The lawsuit, filed in Cook County Circuit Court, names Philadelphia-based Comcast, the subcontractor, and the repairman as defendants. Currently the repairman, who has pleaded not guilty to charges of murder, sexual assault, robbery and burglary, is being held without bond. It certainly appears that Comcast should have been more careful about its workers. It appears that law enforcement officers investigating the earlier death had questioned this very man and took fingerprints and a DNA sample from him on October 27<sup>th</sup>. They notified Comcast and told the company that their employee was a suspect. It's very clear that companies engaged in a business that requires having their employees go into the homes of their customers must do background checks on those employees. When a company is on actual notice of a potential risk involving an employee the burden becomes even greater.

Source: *Associated Press*

## **MANY URBAN BUILDINGS ARE FIRE HAZARDS**

It has been reported that fire fatalities have steadily declined in the U.S. since the late 1970s. This results partly from improved building codes, which require safety measures such as sprinkler systems, multiple fire exits, and fire-resistant construction materials. Unfortunately, there are still far too many buildings, especially in urban settings, that are unsafe because of fire hazards. A deadly blaze in the New York City recently served as a reminder that many of the country's big cities have a tremendous number of homes that have none of the safety features mentioned above. The March 7<sup>th</sup> fire in the Bronx claimed 10 lives when flames ignited by a space heater spread rapidly through a century-old town house inhabited by two immigrant families from West Africa.

Investigators found a number of fire hazards in the ashes of the burned building. The three-story house lacked a fire escape and had only one stairwell, giving residents no way out once those steps were blocked by flames. There were no sprinklers and the house had only two smoke detectors, neither of which had working batteries or was hard-wired to the electrical system. In addition, the relatively small home was badly overcrowded with 22 residents, most of them children. And yet, I was shocked to learn that none of those obvious deficiencies appeared to violate the city's building code.

As is the case in most cities, one-family and two-family homes in New York are more lightly regulated than larger dwellings. According to reports, neither a sprinkler system nor a fire escape was required for this house in the Bronx that burned. Apparently, there are thousands of homes just like it in New York City. Unfortunately, that may well be the case in most large cities, where buildings don't meet the current standards. In many cases it's said that the owners don't want to spend the money to bring these buildings up to code standards. I suspect that's true in many cases.

Based on all that I have read, the use of single-family homes for large numbers of occupants appears to be a major problem for fire safety. The National Fire Protection Association, a public safety advocate, says that 2,570 of the 3,675 civilian deaths in fires in 2005 occurred in one- or two-family homes. Those deaths are down considerably from 1978, when 7,710 civilians died in fires, including 4,945 in one- and two-family homes. Nevertheless, this is a safety problem that should be addressed primarily at the local level of government.

Source: *Insurance Journal*

## **CALIFORNIA JURY RETURNS ASBESTOS VERDICT**

A San Francisco jury found in favor of the family of a drywall taper recently in a products liability case against a former manufacturer and supplier of asbestos-containing joint compound, spray texture, and acoustical ceiling spray. The jury determined that defendant Rich-Tex Inc.'s asbestos-containing products were defectively designed and assessed \$368,787.64 in economic damages and \$500,000 in non-economic damages. Douglas Ivance, who had been a career drywall taper for 47 years, died in 2003 from respiratory failure caused in part by asbestoses and severe asbestos-related pleural disease. Mr. Ivance had worked with asbestos-containing drywall products, including joint compound, spray texture and acoustical ceiling spray.

Based in Richmond, California, Rich-Tex, Inc. was a manufacturer and supplier of asbestos-containing drywall products, including joint compound, spray texture and acoustical ceiling spray, from 1963 to 1977. The company supplied asbestos-containing drywall products to the majority of Ivance's employers during that time period, when Ivance used the products. At trial, plaintiffs presented evidence showing that when used as intended, Rich-Tex, Inc.'s asbestos-containing products had

to be mixed, applied, sanded, and cleaned up—all of which released hazardous asbestos dust.

Source: *Insurance Journal*

## **XIII. WORKPLACE HAZARDS**

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### **TRIAL IN BIRMINGHAM IS SET OVER SLAYINGS OF 3 COLOMBIAN UNION LEADERS**

U.S. District Judge Karon Bowdre will allow a most interesting civil lawsuit to go to trial in Birmingham, Alabama. The Colombian arm of Drummond Ltd., the giant Alabama coal company, is accused of complicity in the killings of three union leaders in the South American country in 2001. The company and its president, Augusto Jimenez, are defendants in the lawsuit, filed by the Colombian union Sintramienergetica. Judge Bowdre said the union had shown enough evidence "to assert claims for extrajudicial killing of its leaders" under the Alien Tort Claims Act. This Act allows lawsuits involving actions that occur outside the country to be heard in U.S. courts. The case is set to be tried starting on May 14<sup>th</sup>.

Judge Bowdre, who is known to be fair and impartial in her judicial rulings, dismissed all other claims, including all accusations of wrongdoing against Drummond Co. Inc., a privately held company based in Birmingham. That company is the parent company of Drummond Ltd. The company's mine in Colombia is actually operated by Drummond Ltd. In the Sintramienergetica suit, it is claimed that Drummond was responsible for the killings of union leaders at the company's mine in northern Colombia. It was alleged that two union members were taken off a Drummond bus and shot to death by assassins hired by the company. Another union member became president of the union local after the slayings and was subsequently killed by paramilitaries, the suit

alleges. Besides the wrongful death claims, other union leaders joined the case contending they were threatened by people connected with Drummond after the killings. Judge Bowdre threw out claims about the alleged threats, citing a lack of evidence, but she said the wrongful death claims against Drummond Ltd. and Jimenez could go forward.

The union had originally sued Drummond Co. chairman and CEO Garry Neal Drummond, but the plaintiffs later agreed to drop him from the case. Judge Bowdre has ruled that the testimony of Rafael Garcia, a former Colombian security official who is imprisoned in Colombia, will be permitted at trial. Garcia claims to have been at a meeting where the President of Drummond Ltd., Mr. Jimenez, paid money to a paramilitary leader in exchange for the murders of union leaders from Drummond.

Drummond Co., headquartered in Birmingham, operates an extremely lucrative coal mine in northeast Colombia—a country bogged down in a long-running civil war—and has had to deal with lots of problems there. Drummond's corporate presence in Colombia—Drummond Limited—ships its Colombia coal all over the world. Interestingly, one of Drummond's largest customers is the Southern Company, which receives the Colombian coal through the Port of Alabama in Mobile for its electric-generating plants throughout the Southeast, including those operated by Alabama Power Co. Other coal-burning electric plants around the United States also buy coal from Drummond. On the international stage, Drummond's largest international customer is Israel.

The U.S. State Department has designated the right wing paramilitary as terrorists. Insurgents operate throughout Colombia and pose threats to Drummond's coal mining and shipping in northeast Colombia. According to media reports, Garry Neal Drummond has admitted in an affidavit that he pays the Colombian military "stipends" to

protect his Colombia mine. At a court hearing, a Drummond lawyer reportedly said that some of the Colombia military are known as moonlight as paramilitary. But, Drummond insists that "there is no definite proof" of this in the killings of the three union leaders. The lawyers for the Colombia Union told Judge Bowdre that "all of our evidence shows that the paramilitary were in and around the coal mining compound and receiving logistical support from Drummond." In any event, all of this sounds more like something from a James Bond movie than a lawsuit. According to a source very close to the case, attending this trial will be worth the price of admission. Terry Collingsworth of Washington, DC. Collingsworth, of the International Labor Relief Fund, along with Bob Childs and Rusty Johnson of Birmingham, are lawyers for the Colombia labor union.

Source: *Associated Press*

#### ***AN UPDATE ON BP'S SAFETY PROBLEMS IN TEXAS***

The Justice Department has issued grand jury subpoenas for documents and testimony in its investigation of whether criminal conduct was involved in the March 2005 explosion at BP's Texas City refinery that killed 15 people and injured scores more. In addition to the Justice Department, the Environmental Protection Agency and the U.S. Chemical Safety and Hazard Investigation Board are investigating the incident and BP's safety record. The Justice Department opened an investigation after the U.S. Occupational Safety and Health Administration issued citations alleging more than 300 violations of OSHA standards, imposed a \$21.3 million fine, and ordered a series of actions intended to improve safety at the plant. OSHA referred the matter to the Justice Department after concluding its probe into the blast.

An independent panel chaired by former Secretary of State James A. Baker

III released a report of an extensive review of BP's safety culture at its U.S. refineries. The report found that BP had serious lapses in "process safety," or that of equipment and operations. BP has pledged to spend \$1.7 billion a year at its U.S. refineries for the next four years to improve safety. The bottom line is that years of cost-cutting, operator mistakes, and a corporate culture that didn't make safety a top priority are the real culprits. BP has settled hundreds of lawsuits related to the blast, including all that involved deaths. But hundreds more are pending that involve workers who were injured or nearby residents who claim property damage. March 23rd was the two-year anniversary of the blast. That is significant because after that date, the deadline for potential plaintiffs to sue will have expired.

It should be noted that BP successfully lobbied against tighter environmental controls by regulators in Texas, saving \$150 million in monitoring and equipment upgrades before the explosion at the Texas City refinery. The proposed controls would have forced BP to invest in upgrading the exhaust system on the unit at the refinery that exploded, to include a flare. According to the US Chemical Safety Board, the upgrade would have prevented—or at least mitigated—the deadly blast. It's conduct such as we have seen in this tragic case, resulting in 15 deaths with hundreds more being injured, that Corporate America, with the help of the Bush Administration, has tried to protect over the past several years in the name of "tort reform."

Source: *Houston Chronicle*

#### ***GUARDING MACHINES IS NECESSARY TO AVOID INJURIES***

We have learned from experience in handling lawsuits that moving machine parts have the potential for causing severe workplace injuries, such as crushed fingers or hands, amputations, burns, or blindness. We have also learned

that safeguards are absolutely essential for protecting workers from these needless and preventable injuries. Any machine part, function, or process that may cause injury must be safeguarded. When the operation of a machine or accidental contact with it can injure the operator or others in the vicinity, the hazards must be either eliminated or controlled. The various hazards of mechanical motion and techniques for protecting workers are the subjects of numerous publications and OSHA rules and regulations. Machine guarding hazards are addressed in specific standards for the general industry; marine terminals; longshoring; the construction industry; and the agriculture industry. Any machine that has moving parts must be guarded to avoid injury to users. Common hazards occurring around moving parts include: Pinch Points; Wrap Points; Shear Points; Crush Points; Pull-in Points; and Thrown Objects.

A working knowledge of OSHA standards, Federal Registers (rules, proposed rules, and notices), directives (instructions for compliance officers), standard interpretations (official letters of interpretation of the standards), and national consensus standards related to machine guarding is necessary in order for a lawyer to handle cases dealing with injuries or deaths caused by a failure to provide guards for machines.

Source: OSHA

#### ***LABOR DEPARTMENT TO ACT ON EMPLOYEE SAFETY EQUIPMENT***

The Labor Department has finally agreed to issue rules outlining an employer's responsibility for the cost of workers' safety equipment. This comes about two months after a lawsuit was filed by the AFL-CIO and the United Food and Commercial Workers seeking such regulations. According to Peg Seminario, Safety and Health Director for the AFL-CIO, the Department agreed that the rule would be issued in November 2007. The unions agreed to the Labor

Department's request to delay consideration of the lawsuit, which was filed in the U.S. Court of Appeals for the District of Columbia Circuit, because of the department's plan to issue those rules this November.

An Occupational Safety and Health Administration rule, proposed in 1999 but never adopted in final form, would require employers to pay for protective clothing and other equipment used by millions of workers to protect them from job hazards. The lawsuit claimed that failure to adopt those rules was endangering workers in industries such as meatpacking, poultry and construction. Although it shouldn't have taken a lawsuit to get the Department of Labor to do the right thing, it's good to see that the Department now plans to require employers to take simple steps to protect workers from everyday workplace hazards.

Source: *Associated Press*

#### ***LAWSUIT ARISING OUT OF THE DEATH OF EMPLOYEE FILED IN OHIO***

A wrongful death lawsuit has been filed in an Ohio state court against Insulfoam and Remedy Intelligent Staffing as the result of the death of an Insulfoam employee. It's alleged that an Obetz manufacturer knowingly operated machinery in an unsafe manner and caused the death of an employee. According to allegations in the lawsuit, Molly M. Glover, a temporary employee, was crushed at Insulfoam by a machine that cut and crushed large blocks of Styrofoam. The lawsuit, which seeks unspecified damages, was filed in Franklin County Court of Common Pleas by the worker's husband.

In order to meet production quotas, Insulfoam and its staffing service allegedly "removed or circumvented" safety guards used to turn off the cutting machine during cleaning. That action would have violated both federal law and safety rules of Remedy, the staffing agency. Mrs. Glover, who was 53

years of age, had been assigned to Insulfoam as a forklift operator. On her second day on the job, she was told to clean and unjam the cutting machine. The temporary employee had not been trained to do that type work on the machine. Workers had to actually "crawl underneath or around" the machine to clean it, according to the complaint filed. A few minutes after Mrs. Glover got the order, other employees heard her scream and they subsequently found her being crushed by the machine. No one could get the machine off her head and torso. As a result, the machine "continued to crush down on her body, chest and head while she was alive and conscious for at least 10 minutes," according to the lawsuit.

Insulfoam's Obetz plant is one of 15 owned by Premier Industries of Tacoma, Washington. The company makes block-molded expanded polystyrene for construction and insulation. Interestingly, the lawsuit also seeks to void the Ohio law that restricts lawsuits in industrial accidents to cases in which the employer **deliberately** caused the injury of an employee or **knew** the injury was **substantially certain** to occur. Mr. Glover is seeking damages for loss of earnings from his wife, mental anguish, and loss of companionship, and funeral and burial expenses. Insulfoam was fined \$155,000 by the Occupational Safety and Health Administration in connection with Mrs. Glover's death. OSHA said the company ignored and failed to enforce procedures that require electronic or physical guards on moving machinery. Insulfoam also failed to give the required safety training to employees and also failed to perform an annual check to make sure the guards were in place, according to OSHA.

Interestingly, two former employees from Remedy Intelligent Staffing joined the suit as plaintiffs, saying they were wrongly discharged after complaining about the problems that led to Mrs. Glover's death. The temporary employee had been assigned to work in place of one of the employees place.

Those two plaintiffs are seeking unspecified compensatory damages and punitive damages.

Source: *The Columbus Dispatch*

### **FIRST COAL MINE SHELTERS APPROVED IN WEST VIRGINIA**

It was announced recently that emergency shelters will become a reality in West Virginia coal mines. The state Office of Miners' Health, Safety and Training has approved the first underground shelter designs. The milestone is a first step toward installing airtight shelters in every underground coal mine in the state. All are required to install shelter chambers under a state law passed in January 2006. The requirement is part of a flurry of rules passed after 12 miners died in the Sago Mine explosion and two others were unable to escape a conveyor belt fire at a Logan County mine in January 2006. One Sago miner was killed in the January 2, 2006, explosion, but 11 others were trapped underground and died of carbon monoxide poisoning. A 13<sup>th</sup> miner was rescued after more than 40 hours underground.

The concept of airtight shelters has been discussed around coal mining for decades. It has long enjoyed support from the United Mine Workers union. Congress first gave the federal Mine Safety and Health Administration authority to require them in coal mines in 1969, but for some reason the agency has never taken that step. Nor have other coal states, including Alabama, although shelters have been used in other types of underground mines for years. Even supporters, however, say shelters are a last resort for miners who find escape impossible. To be approved, shelters must supply enough oxygen, food, water and other necessities to keep miners alive for at least 48 hours.

Source: *Insurance Journal*

### **EEOC SAYS WALGREENS DISCRIMINATED AGAINST BLACK MANAGERS**

The federal government has sued Walgreen Co., alleging widespread racial bias against thousands of black workers throughout the nation's largest drug-store chain. The U.S. Equal Employment Opportunity Commission (EEOC) alleged in a class action lawsuit that Walgreen, based in Deerfield, Illinois, makes decisions about employee assignment and promotion based on race. Most of the complaints that led to the lawsuit, filed in U.S. District Court in East St. Louis, Illinois, came from employees and former employees in St. Louis, Kansas City, Detroit, and Tampa, Florida. But EEOC officials in St. Louis said they have found evidence of the same trend around the country.

The lawsuit alleges that Walgreen assigns black managers, management trainees, and pharmacists to low-performing stores and to stores in black communities, and denies them promotions, based on race. EEOC regional attorney Robert Johnson in St. Louis had this to say about the lawsuit:

*Black managers are assigned to stores in black neighborhoods more often than one would expect, and black employees are not being promoted to management and within management as often as similar white employees.*

Walgreen is the nation's largest drug-store chain by sales. It has more than 5,638 stores in 48 states and Puerto Rico. It had sales of \$47.4 billion in the 2006 fiscal year. The suit followed an investigation by EEOC's St. Louis and Miami district offices into complaints from two dozen current and former employees from around the country. Attempts to reach a voluntary settlement had failed. The claims are similar to those in a private federal lawsuit filed in East St. Louis by many of the same black managers and employees in June 2005. That case is still pending. The EEOC will ask the court to consolidate

the two cases. The lawsuit, which alleges Walgreen engaged in unlawful employment practices since at least January 1, 2001, seeks back pay, compensatory and punitive damages, and an end to the practices.

Source: *Associated Press* and *Chicago Tribune*

### **MORGAN STANLEY TO SETTLE SEX BIAS SUIT**

Morgan Stanley has agreed to settle claims in a class action suit alleging the brokerage firm discriminated against thousands of its female financial advisers in compensation and promotion. The suit, filed in June in the U.S. District Court for the District of Columbia by six former Morgan Stanley female brokers, will have more than 3,000 claimants who worked at the firm's retail brokerage unit from August 5, 2003. Formal settlement papers and a request for preliminary approval of the agreed terms will be filed with the Court within four to six weeks.

Source: *Houston Chronicle* and *Associated Press*

### **JURY AWARDS IOWA MAN \$10 MILLION IN BAD FAITH CLAIM**

A federal jury in Iowa has awarded \$10 million to a man after ruling that his employer's insurance carrier acted in bad faith in denying his claim for benefits from a 1999 back injury. All that amount was for compensatory damages as I understand it. At press time, we had not been able to learn whether the jury awarded the man punitive damages. Kris Zimmer, 47, a computer technician for Norwest Financial, was on the job when he injured his back. Doctors diagnosed him as being in severe pain, but Travelers Insurance Co. denied his worker compensation claim. The insurance adjusters argued that Zimmer had a history of back problems that included at least two surgeries before the latest incident. They said the injury worsened Zimmer's already existing psychological conditions. The \$10 million judgment was to compensate Mr. Zimmer for his emo-

tional distress and pain and suffering for what the jury found was bad faith denial of his claim for medical assistance.

Source: *Insurance Journal*

## XIV. TRANSPORTATION

### ***SIMILAR WRECKS REPORTED AT SITE OF RECENT GEORGIA FATAL BUS CRASH***

There have been a number of bus accidents on U.S. highways recently. One such accident occurred on an interstate highway in Atlanta. It now appears there have been several motor vehicle accidents at the very same location previously. A bus carrying a baseball team from the Bluffton University, a small Ohio college, were involved in the March crash in Atlanta. That accident tragically resulted in eight deaths. The driver of the Bluffton team bus apparently mistook the exit ramp at that location for a highway lane and overshot a stop sign at the top of the ramp. The bus slammed into the concrete barrier, rolled over, and fell 30 feet onto the pavement below. In addition to the deaths, 28 passengers on the bus were injured and required hospitalization. *The Associated Press* obtained three reports on accidents at the intersection of Interstate 75 and Northside Drive from 2002 to 2003. The information was available through the Georgia's Open Records Act, which is a good law.

All of the accidents at this exit involved drivers who didn't know they had left the I-75 high occupancy vehicle lane. In all three, the drivers said they were either confused by the exit or didn't realize they had left the highway. According to the Georgia Department of Transportation, there had been two deaths from seven accidents involving that exit ramp in the last nine years. Based on the history of accidents, it's obvious that something must be done to make the location safer. Corrective action must be taken immediately.

Source: *Associated Press*

### ***PILOT STUDY OF SCHOOL BUS SEAT BELTS IN ALABAMA RECOMMENDED***

The study group appointed by Governor Bob Riley after the school bus accident in Huntsville has recommended that the state fund a \$1.4 million pilot study over three years to determine whether seat belts on buses would make children safer. The seven-member group also recommended that Governor Riley lead a state charge pressuring the National Highway Traffic Safety Administration to move faster regarding bus safety. The federal regulatory agency, which makes safety recommendations and sets requirements, submitted a report to Congress on bus safety belts in 2002, but new regulations aren't expected to be implemented before 2013. That's clearly too much of a delay, but is typical of NHTSA. State School Superintendent Joe Morton made this observation:

*We think that's too long a wait for improved guidelines for student safety. Under your leadership ... we think that would be a great cause to champion nationwide. Let's get NHTSA moving on issuing these standards.*

An Alabama university will be chosen to create and oversee the pilot program, which will last for three years and would include 10 new buses outfitted with lap-shoulder seat belts. The buses would be used at various school systems around the state. More than a dozen bus manufacturers, federal transportation safety experts, and officials from states that have dealt with the issue of school bus seat belts spoke at the two-day hearing in Huntsville back in February. It should be noted that California, Florida, Louisiana, New Jersey, and New York are the only five states that have seat belt requirements for buses.

Study group members said the pilot program would provide information about the extent to which students would use the belts and their behavior on buses that are equipped with the

restraint. I hope Alabama will be a front-runner in the national debate over seat belts in school buses, and provide information that could be used in NHTSA's guidelines. The study would cost: \$750,000 for the fiscal year that begins October 1st dropping to \$329,220 for the second year and \$342,050 for the third year.

As has been reported, four Huntsville students died after the school bus in which they were riding plunged over an overpass in downtown Huntsville and nose-dived nearly 30 feet on November 20<sup>th</sup>. The bus was not equipped with seat belts for passengers. Hopefully, legislators will approve funding the study, which is a step in the right direction. It's too bad it took a tragic event involving death of children to spur the state to act.

Source: *Associated Press*

### ***TOUGHER TRUCK REGULATION SOUGHT AS FATALITIES REMAIN HIGH***

Highway-safety groups want to cut down on how long drivers of large tractors and trailers can work without rest. The Truck Safety Coalition says more than 100 people a week are killed in large truck crashes in this country. It was good to see Alabama among three states to record a significant decline in 18-wheeler accidents, dropping from number three in the nation in 2004 to 13th in 2005. According to rankings, Wyoming, Arkansas, Oklahoma, New Mexico, and Mississippi are the deadliest states for big truck crashes. The safest states, according to the safety groups, were Rhode Island and Massachusetts. The Coalition released state rankings based on the number of fatalities per 100,000 residents during 2005, the most recent year with complete figures. The safety group is calling on the federal government to reduce the hours that truckers are allowed to drive without rest, increase safety inspections of big trucks, require on-board electronic monitors to ensure compliance with hours-of-service rules, and train drivers better.

Our firm has handled a great number of cases—involving both deaths and bodily injuries—in which the drivers of 18 wheelers were at fault over the past few years. In almost every one of these cases a combination of driver fatigue and speed was involved. Drug and alcohol use by drivers also were factors in some of the cases. Cole Portis, Mike Crow, Julia Beasley, Kendall Dunson and LaBarron Boone are the lawyers in our firm who routinely handle cases involving deaths and injuries resulting from highway crashes involving large trucks.

Source: *Associated Press*

### ***MEXICO-DOMICILED TRUCKS ON U.S. HIGHWAYS CONSTITUTE A SAFETY HAZARD***

Congress should put a stop to the Bush Administration's dangerous plan to provide access to all U.S. highways for Mexico-domiciled trucks under a program that fails congressionally mandated safety requirements. Public Citizen and other safety groups have been active opponents of the Bush plan and for good reason. The Administration's current strategy for implementing a 2001 NAFTA order to provide such access wrongfully re-labels a longstanding Administration border-opening plan as a "pilot project." There must be a number of needed safety improvements put in place before allowing cross-border trucking from Mexico. The so-called pilot project is just a way to open the door for Mexican trucks to cross over into our country.

This new pilot program—which would open the border to 100 hand-picked, Mexico-domiciled trucking companies—fails to comply with the congressionally mandated template for pilot programs conducted by the DOT. The program violates procedures requiring the Secretary of Transportation to provide public notice, seek public comment and design the project to evaluate the safety issues concerning these trucks. Congress must assure that the trial program complies with the law. The

DOT has not done its job concerning the Mexican truck problem, having failed to comply with specific mandates by Congress. It is believed by Public Citizen that Congress must now do the following:

- require DOT to document that every state will enforce state laws to issue out-of-service orders to foreign vehicles that do not have proper operating authority;
- provide that certification of compliance with U.S. safety standards is enforced for all commercial vehicles;
- increase the minimum level of insurance coverage required for Mexico-domiciled motor carriers engaging in commerce in the United States;
- require that commercial vehicles entering the country are equipped with electronic on-board recorders to document hours-of-service; and
- require National Transportation Safety Board investigations of fatal or injury-producing crashes involving cross-border trucks.

If you agree that the influx of Mexican trucks into this country is a safety problem, contact your U.S. Senators and members of Congress and ask them to take action. You can get more information on the problem, including the history of how we got into this mess, by going to Public Citizen's Web site, [www.citizen.org](http://www.citizen.org).

Source: Public Citizen

### ***PUBLIC CITIZEN URGES CONGRESS TO IMPROVE VEHICLE SAFETY FOR CHILDREN***

Even though motor vehicle crashes are the leading cause of death for children from the ages of 3 to 14 in the United States. I believe most all of our readers will be shocked to learn that the federal government has failed to enact safety standards and gather child safety information to adequately protect them. Public Citizen President Joan Claybrook

testified before the Senate Consumer Affairs, Insurance, and Automotive Safety Subcommittee—a subcommittee of the Senate Committee on Commerce, Science & Transportation—last month. Her testimony dealt with improving efforts to protect children from vehicle-related injury. The Cameron Gulbransen Kids and Cars Safety Act of 2007 is currently pending in the U.S. Senate and U.S. House of Representatives.

In her testimony, Ms. Claybrook criticized the current lack of child safety information available to policy makers and the public. She was also critical of the insufficiency of current vehicle safety standards in general and especially with regard to children. Her testimony addressed the risks children face inside the vehicle, outside the vehicle, and in school buses. According to the National Highway Traffic Safety Administration (NHTSA), 1,946 children were killed and 234,000 children were injured in motor vehicle crashes in 2005. Among the gaps in child safety in vehicle safety standards, Ms. Claybrook identified side impact crashes, rollover crashes and collapsing seat backs as particularly dangerous for children as well as adults. She also spoke about the need for greater safety standards and consumer information for child restraints, including making mandatory the installation of built-in restraints. I encourage our readers to obtain a copy of Ms. Claybrook's testimony and read it carefully by going to Public Citizen's Web site, [www.citizen.org](http://www.citizen.org). This will allow you to understand the full impact of the urgent need for Congress to act in this important area of concern.

Source: Public Citizen

## XV. ARBITRATION UPDATE

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### *THE PROTECTION CONGRESS HAS GIVEN OUR TROOPS ON MANDATORY ARBITRATION SHOULD BE EXTENDED*

A report recently released by the Department of Defense notes that predatory lenders target young service members who often possess little savings or flawed credit. The companies loan military personnel money at exorbitant interest rates exceeding 400% in some instances. Recently, Congress responded by inserting a provision in the defense authorization bill signed by President Bush that capped the interest on loans provided to military personnel at 36%. The new law also prohibits mandatory arbitration provisions in payday loan agreements with service members. Individuals entering into normal consumer transactions often do not realize they have signed away their constitutional rights. Mandatory arbitration language is often buried deep in the contract and escapes notice. Congress and the Bush Administration have taken a necessary step to halt this abuse for members of the military.

This is a tiny step that begs the question: if mandatory arbitration provisions are bad for military personnel, why aren't they bad for every American? The answer is simple: they are bad for everyone. Arbitration hurts all consumers because it eliminates their right to hold wrongdoers accountable. Congress recognized problems with mandatory arbitration before. Motor vehicle dealers were able to get Congress to pass a bill in 2002 entitled the "Motor Vehicle Franchise Contract Arbitration Fairness Act," which prohibits mandatory arbitration clauses in agreements between automakers and franchise sellers. Dealers can now sue Ford, GM, or others if they feel they have been cheated. To date, efforts to prohibit these provisions in consumer contracts

failed, leaving car buyers at an obvious disadvantage against the same car dealers who successfully complained how unfair arbitration was to them.

It's real good that Congress recognized the hypocrisy of requiring our servicemen to fight to establish and create individual and constitutional rights for persons in other countries, while being forced to sign their rights away in consumer contracts in their own country. The new Congress must take action to protect the constitutional rights of all consumers in this country by prohibiting mandatory binding arbitration. I have been somewhat surprised that no Democrat in Congress has really taken the evils of mandatory, binding arbitration in consumer transactions on as a project. Hopefully, somebody will do so soon.

Source: *AAJ Journal*

## XVI. HEALTHCARE ISSUES

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### *DEALING WITH A TRAUMATIC BRAIN INJURY IS EXTREMELY DIFFICULT*

We just handled a very sad case in Georgia involving a severe traumatic brain injury (TBI) and hopefully made things better for the family we represented. That case was just another classic example of how a TBI affects not only the patient, but also the injured party's entire family. Although TBI is a most serious medical problem, I have found that there is always hope for a person who has suffered such an injury. It's been my observation in handling a number of these cases, that, without hope, a person with a severe TBI simply wouldn't be able to survive. Too many folks take the approach that a TBI patient can never improve, but that isn't always true. Some doctors often present—by necessity—a very negative picture to a TBI family early in the process. On occasion, a doctor may seem pessimistic because a family has to

be prepared for the worst in case the worst actually happens. Unfortunately, that just comes with the territory. Because of the serious nature of TBI cases and the lack of understanding of the complexities involved, I am going to spend a little more space on the subject in this part of the Report.

It seems that the better and more experienced doctors are able to prepare a family for the worst, while still leaving them some realistic hope, and that's always good for the patient and family. The approach doesn't break their spirit. It's also important to understand that it's a natural reaction for a family whose loved one has suffered a severe TBI to resist the bad news they have been given. The doctors may come across as being very blunt, and somewhat pessimistic, in order to break through the defense mechanism that often is exhibited by the family. In any event, dealing with a severe TBI is very tough and is a real challenge for all concerned. Handling a lawsuit that involves a TBI is also quite a challenge for lawyers and their support personnel.

A factor that makes projecting the long-term outcome more difficult is that the medical community still doesn't know all there is to know about the brain, and that's no reflection on anyone. Reportedly, the brain is the least understood organ in the body. A doctor explained it well to me when he said that he can tell me with the CAT scans and MRIs where the brain has been damaged, but he couldn't tell me whether other areas of the brain would be able to take over some of the tasks previously performed by the damaged area. Recent studies have shown that the brain does indeed exhibit more plasticity than previously thought. I have been greatly impressed with all of the doctors we have dealt with who deal with TBI patients on a regular basis. One such doctor is Ronald Leslie, the Medical Director at the Shepherd Center in Atlanta, who—without question—is one of the very best in his field. This man is not only a great doctor,

but he really cares about his TBI patients and their families.

The following is a typical path many TBI patients take on their road to recovery. The main thing to understand is that each head injury is different, and as a result each recovery will be somewhat different. Below are the general steps that a TBI patient will generally follow after an injury:

- First, the Emergency Room is involved. That's where the medical team works to stabilize the patient.
- Next comes the Intensive Care Unit. A TBI patient will stay in the ICU until they move past the immediate danger of losing their life.
- The Neuro-ICU, which is sometimes called a step-down unit. It offers care by neuro-trained nurses. They, in conjunction with doctors, evaluate whether the patient is ready to move to the general neurological floor.
- The general Neurological floor has specially trained staff who help the patient recover to the extent possible and be prepared to go home as soon as medically possible.
- Intensive therapy in the Rehabilitation Unit helps the patients maximize their abilities and develop compensation techniques for any remaining deficiencies.
- Finally, the TBI patient goes back home where he or she will continue on the long and hard road to recovery.

Of course, the above steps assume that all of the intensive treatment and rehabilitation required will take place before a patient is discharged. Unfortunately, I have found that few lay persons really understand a TBI. The following is an overview from the National Institute of Neurological Disorders and Stroke that will help you understand what a TBI is all about. First, traumatic brain injury occurs when a sudden physical assault on the head causes damage to the brain. The damage can be focal, con-

finied to one area of the brain, or diffuse, involving more than one area of the brain. TBI can result from a closed head injury or a penetrating head injury. A closed head injury occurs when the head suddenly and violently hits an object, but the object does not break through the skull. A penetrating head injury occurs when an object pierces the skull and enters the brain tissue. Each of these injuries is a most serious event. These terms and those that follow are explained in more detail below.

Several types of traumatic injuries can affect the head and brain. A skull fracture occurs when the bone of the skull cracks or breaks. A depressed skull fracture occurs when pieces of the broken skull press into the tissue of the brain. This can cause bruising of the brain tissue, called a contusion. A contusion can also occur in response to shaking of the brain within the confines of the skull, an injury called "countrecoup." Shaken baby syndrome is a severe form of head injury that occurs when a baby is shaken forcibly enough to cause extreme countrecoup injury. Damage to a major blood vessel within the head can cause a hematoma, or heavy bleeding, into or around the brain. The severity of a TBI can range from a mild concussion to the extremes of coma or even death. As you know, a coma is a profound or deep state of unconsciousness.

Symptoms of a TBI may include headache, nausea, confusion or other cognitive problems, a change in personality, depression, irritability, and other emotional and behavioral problems. Some people may have seizures as a result of a TBI. Immediate treatment for TBI involves surgery to control bleeding in and around the brain, monitoring and controlling intracranial pressure, insuring adequate blood flow to the brain, and treating the body for other injuries and infection.

The outcome of TBI depends on the cause of the injury and on the location, severity, and extent of neurological damage. Outcomes in TBI areas range from good recovery to death. Doctors

often use the Glasgow Coma Scale to rate the extent of injury and chances of recovery. The scale (3-15) involves testing for three patient responses: eye opening, best verbal response, and best motor response. A high score indicates a good prognosis and a low score indicates a poor prognosis. For example a score of 3, or a 1 on each type response, is as bad as it gets.

It must be remembered that brain injuries can result from a number of causes. Motor vehicle accidents, falls, sport injuries, and near drownings, as well as medical causes such as strokes, brain tumors, aneurisms, seizure activity, or infectious diseases can cause brain injuries. Brain injuries or head injuries are classified into three categories: mild, moderate, or severe. The categorization is based on the Glasgow Coma Scale rating. The way that works is explained below:

#### **Mild Traumatic Brain Injury**—A

patient with mild traumatic brain injury is a person who has had a traumatically induced physiological disruption of brain function as manifested by at least one of the following: any period of loss of consciousness; any loss of memory for events immediately before or after the accident; any alteration in mental state at the time of the accident and focal neurological deficits that may or may not be transient but where the severity of the injury does not exceed the following: loss of consciousness of approximately 30 minutes or less; after 30 minutes, an initial Glasgow Coma Scale (GCS) of 13-15; and posttraumatic amnesia (PTA) not greater than 24 hours.

Most individuals with a mild brain injury will not have any major functional deficits. There may be some long-term impacts but they are typically more subtle such as headaches or cognitive or memory problems. Sometimes the cognitive symptoms

are not readily identified at the time of the injury. Instead, the cognitive symptoms may show up as the person returns to school or work.

**Moderate Brain Injury**—Brain injuries are classified as Moderate when the GCS score is between 9 - 12 and there is a loss of consciousness and/or post-traumatic amnesia of greater than 30 minutes but less than 24 hours and/or a skull fracture. There may be long-term physical or cognitive deficits as a result of a moderate brain injury. Much will depend on the type and location of the specific insults to the brain. Rehabilitation will help to overcome some deficits and help provide skills to cope with any remaining deficits.

**Severe Brain Injury**—A severe brain injury will present with a Glasgow Coma Scale score lower than 9 that is accompanied by a loss of consciousness or post-traumatic amnesia lasting more than 24 hours. Severe brain injuries are very life-threatening. If the person lives, they will typically be faced with long-term physical and cognitive impairments. The range of the deficits can vary widely from a vegetative state to more minor impairments that may allow the person to still function independently. The patient will require extensive rehabilitation to try to overcome some of the deficits and learn strategies to cope with others.

I believe that becoming familiar with the following terms will help give you a little better understanding of TBIs. I have found that having a basic understanding of the terminology is the first step in dealing with the complex issues involved in TBI cases.

- **GCS Scale**—The Glasgow Coma Scale (GCS) is the first assessment done with the brain injured patient. It attempts to give the medical team an

initial idea of the severity of the injury. The assessment is widely used because it is easily observable and can be pretty consistent. A score of 13 or higher is categorized as a mild brain injury, 9-12 moderate, and 8 or below severe.

- **Closed Head Injury**—A Closed Head Injury is an injury where the skull stays intact. The rapid movement of the head can be enough to significantly injure the brain. The brain can be slammed into the inside of the skull and there may also be rotational forces that cause shearing in the brain (see diffuse axonal injury). There may be bleeding in the brain, and swelling in the brain will follow.
- **Open Head Injury**—An Open Head Injury may be the result of some object penetrating into the brain or the skull being fractured by an impact. In the case of a penetrating wound the injury is usually located at a focal point in the brain so very specific identifiable problems will result. Gunshot wounds can cause more extensive damage as they move within the skull and cause shock waves inside the brain. Open head injuries leave the brain susceptible for infection in addition to the damage to the brain itself.
- **Coup Contrecoup**—This is a French term that describes the impact forces that can happen inside the brain. For example, in a car accident the momentum of the vehicle when it hits something may cause the brain to slam forward into the skull, the coup, then the momentum shifts and the brain then may be slammed again against the opposite side of the skull, the contrecoup. Both sites of impact may cause damage to the brain.
- **Diffuse Axonal Injury**—This term describes the injuries to axons located throughout the brain. Axons are long thin nerve fibers that may extend across different layers of the

brain. As the head moves violently, as in a motor vehicle accident, the brain may experience rotational forces, and the axons may become sheared. The shearing is made worse by the fact that the different layers of the brain have different densities and react at different speeds to the rotational force. The injured axons may also release chemicals that can factor into increased swelling in the brain. The resulting impacts may be widespread and encompass a number of body systems and functions. It is more difficult for doctors to initially assess the impacts of a diffuse axonal injury than a focal injury.

- **Hematoma**—A hematoma is a collection of blood that has pooled. Surgery may be necessary to remove the blood. Below are two types of hematomas related to brain injuries:
  - **Subdural Hematoma** - The brain is surrounded by a tough, leathery outer covering called the dura. When the brain is injured and blood accumulates within the space between the brain and the dura, it is called a subdural hematoma, or blood clot in the brain.
  - **Epidural Hematoma** - An epidural hematoma is when blood accumulates within the space between the dura and the skull.
- **Disabilities and impairments**—Those resulting from a brain injury depend upon the severity of the injury, the location of the injury, and the age and general health of the patient. Some common disabilities include problems with cognition (thinking, memory, and reasoning), sensory processing (sight, hearing, touch, taste, and smell), communication (expression and understanding), and behavior or mental health (depression, anxiety, personality changes, aggression, acting out, and social inappropriateness).
- **Communication Deficits**—Brain injuries can commonly cause a number of

communication-related deficits. Some are transient while others are permanent. Some of the deficits may result from the damage to particular communication centers in the brain causing one or more forms of aphasia. Other problems may be a result of motor problems or weaknesses caused by other complications. Some people may have difficulty with the more subtle aspects of communication, such as body language and emotional, non-verbal signals. Communication disorders are complex and need to be identified and treated by speech pathologists.

Having represented a good number of clients who have suffered severe TBI's, I have witnessed first-hand how difficult this type of injury can be for both the victim and the family. There are a great number of problems that are caused by a TBI. The following are some of the **speech-related problems** that a TBI patient may experience: Aphasia; Global Aphasia; Broca's Aphasia; Wernicke's Aphasia; Anomic Aphasia; Apraxia; Dysarthria; and Swallowing Disorders.

Brain injuries can cause a number of **movement disorders**. In addition, since so many brain injuries happen as a result of accidents, there may be other injuries contributing to the movement disorder. The following are examples of this type of problem:

**Paralysis**—You are probably familiar with Quadriplegia and Paraplegia. Another form of paralysis that is common with brain injury victims is Hemiplegia, which is paralysis to one side of the body.

**Spasticity**—Spasticity is a condition in which certain muscles are continuously contracted. This contraction causes stiffness or tightness of the muscles and may interfere with movement, speech, and manner of walking. Spasticity is usually caused by damage to the portion of the brain or spinal cord that controls voluntary movement. Treatment may include stretching, medications, and in some cases surgery.

**Apraxia**—Apraxia is a movement disorder characterized by the inability to perform skilled or purposeful voluntary movements, generally caused by damage to the areas of the brain responsible for voluntary movement.

**Ataxia**—Damage to a lower part of the brain, the cerebellum, can affect the body's ability to coordinate movement, a disability called ataxia, leading to problems with body posture, walking, and balance.

Many brain injury victims suffer from cognitive disabilities, which may include the loss of higher level mental skills. People may be easily confused or distracted and have problems with concentration and attention. The problems that result prevent a person with a TBI from being able to function in a normal manner even if their motor skills are not significantly impaired. The following are cognitive problems that can result from a TBI:

**Memory**—The most common cognitive impairment among brain injured patients is memory loss and the partial inability to form or store new ones.

**Executive Function**—There may also be problems with higher level, so-called executive functions, such as planning, organizing, abstract reasoning, problem solving, and making judgments, which may make it difficult to resume work or school related activities.

**Emotional problems** that may surface include depression, apathy, anxiety, irritability, anger, paranoia, confusion, frustration, agitation, insomnia or other sleep problems, and mood swings. Problem behaviors may include aggression and violence, impulsivity, disinhibition, acting out, noncompliance, social inappropriateness, emotional outbursts, childish behavior, impaired self-control, impaired self-awareness, inability to take responsibility or accept criticism, egocentrism, inappro-

priate sexual activity, and alcohol or drug abuse/addiction. Many TBI patients who show psychiatric or behavioral problems can be helped with medication and psychotherapy. Family members of TBI patients often find that personality changes and behavioral problems are the most difficult disabilities to handle.

Many TBI patients have **sensory problems**, especially problems with vision. Patients may not be able to register what they are seeing or may be slow to recognize objects. Also, TBI patients often have difficulty with hand-eye coordination. Because of this, TBI patients may be prone to bumping into or dropping objects, or may seem generally unsteady. TBI patients may have difficulty driving a car, working complex machinery, or playing sports. Other sensory deficits may include problems with hearing, smell, taste, or touch. Some TBI patients develop tinnitus, a ringing or roaring in the ears. A person with damage to the part of the brain that processes taste or smell may develop a persistent bitter taste in the mouth or perceive a persistent noxious smell. Damage to the part of the brain that controls the sense of touch may cause a TBI patient to develop persistent skin tingling, itching, or pain. Although rare, these conditions are hard to treat.

Finally, I hope this will give you a much better insight into what TBI patients face on a daily basis. My experience in handling these cases has made me realize how much the patients and their families have to deal with. It has also made me appreciate even more the medical community, including doctors, therapists, counselors, and vocational experts, nurses and others who are trained and available for TBI patients.

Source: National Institute of Neurological Disorders and Stroke, AHIF and The Shepherd Center.

## **HOSPITALIZED CHILDREN GET ADULT-ONLY DRUGS**

Almost 80% of children who are hospitalized in the United States are given drugs that have been approved only for adult patients, according to the results of a new study. Although the study didn't look at safety issues, the practice is potentially problematic. Dr. Samir S. Shah, lead author of the study and an attending physician in pediatric infectious diseases at The Children's Hospital of Philadelphia, observed:

*Any time you prescribe a medication, you ideally think the benefits outweigh the risks. The problem when you're using a drug off-label is, oftentimes, there may not be enough evidence to help you make that decision in an informed way. We think the benefits outweigh the risks, but we don't have enough evidence. Some of the drugs we currently use have been studied quite well and haven't received FDA [U.S. Food and Drug Administration] approval, and others have not been studied very well at all. This is the first step in a series of steps to try to get a better grasp on this problem.*

Using drugs "off-label" for conditions other than those for which they were originally approved is perfectly legal but causes concern among some experts. A 2001 U.S. government report concluded that, overall, about 21% of prescribed drug use was for conditions not indicated on the label. The practice is particularly prevalent with children. Few medications are studied in children or specifically approved for that age group, and evidence varies.

Previous studies in the United States had not looked at hospitalized children. For this study, published in the March issue of *Archives of Pediatrics and Adolescent Medicine*, the researchers analyzed patient records from 31 children's hospitals over the course of one year, 2004. Patients had to be 18 years old or

younger to be included in the study. Medications approved for use on the central or autonomic nervous system, as well as nutrients and gastrointestinal medications, were most likely to be used off-label. More than one quarter (28%) of patients in the database were given morphine, for example, even though it has not been approved for use in children. Cancer drugs were the least likely to be used off-label, possibly because many of these drugs have been tested and are approved for use in pediatric patients.

The children most likely to receive drugs off-label had undergone surgery, were more than 28 days old, and suffered more critical conditions, suggesting that, perhaps, other therapies had failed. At least one drug was used off-label in 297,592—78.7%—of 355,409 patients, the study found. Off-label use accounted for \$270 million, or 40.5% of the total dollars spent on medications for hospitalized children. Although the frequency of off-label prescribing was not particularly surprising, the dollars involved were.

Post-marketing surveillance, which is seeing how a drug is performing after it has been approved, might help define this uncharted territory. The FDA must mandate post-marketing surveillance so it will know exactly what's going on with the drugs the agency approves. It's necessary to know the risks of drugs that are on the market. A lot of medications simply do not have enough information for doctors to make the informed decisions that they need to make. Patients and parents of children are entitled to have doctors prescribing medications that not only have been approved, but are safe. It's up to the FDA to make sure the drug companies are proving sufficient information to the medical community so that doctors can do this job.

*Source: Washington Post*

## **FDA WARNING IS ISSUED ON THE OVERUSE OF ANEMIA DRUGS**

The Food and Drug Administration (FDA) has issued strict new warnings about overuse of widely prescribed anemia drugs. A number of recent studies suggested these drugs might cause heart problems or hasten the death of cancer patients. A "black box" warning — the strongest kind — had been added to the labels of the drugs. As a result, doctors must now use the lowest possible dose needed to help patients avoid blood transfusions. The FDA is also re-evaluating the validity of claims in the labels and in advertisements that the drugs can raise energy levels or otherwise improve a patient's quality of life.

*Source: New York Times*

## **FDA APPROVAL OF ORLISTAT APPEARS TO HAVE BEEN RECKLESS**

At a time when colon cancer is a leading cause of death and disease in the United States, the decision by the Food and Drug Administration (FDA) to approve a diet drug that clearly causes pre-cancerous lesions of the colon (aberrant crypt foci or ACF) for over-the-counter (OTC) use is being criticized. Dr. Sidney Wolfe of Public Citizen describes the FDA's action as "the height of recklessness," which "shows a profound lack of concern for the public's health." This marks the first time, to my knowledge, that the FDA has approved a drug for over-the-counter use despite knowing in advance that the drug causes either cancer or pre-cancerous lesions. This decision raises very serious questions when you consider the FDA is allowing the approval of a drug that may well increase the incidence of colon cancer in this country. It's even worse when it's known by the FDA that the risk is not accompanied by any documented benefit. The label of the prescription version, Orlistat, has been required to state that "the long-term effects of orlistat on morbidity or mor-

tality associated with obesity have not been established.”

In opposing the over-the-counter approval a year ago, Public Citizen stated that “the switch of orlistat to OTC status would be a serious, dangerous mistake in light of its marginal benefits, frequent co-existence of other diseases, common, bothersome [gastrointestinal] adverse reactions, significant inhibition of absorption of fat soluble vitamins [A, D, K and E], and problematic use in the millions of people using the blood thinner warfarin (Coumadin)” (the latter because of orlistat-induced Vitamin K deficiency). Dr. Wolfe and Public Citizen strongly urge people not to use this potentially dangerous drug. They have predicted that, like the rapidly declining sales of the prescription version, the over-the-counter version will turn out to be a loser after enough people have a bad experience with it.

The connection of ACF with carcinogenesis is so well-recognized, according to Dr. Wolfe, that the appearance of ACF in rats is used by many groups to test the potential carcinogenicity of chemicals. For example, the Environmental Protection Agency uses an ACF assay in its tests of possible carcinogens. In April 2006, after opposing the OTC switch, Public Citizen petitioned the FDA to ban the prescription version of orlistat, Xenical, because of the two studies documenting its ability to cause ACF. According to Dr. Wolfe, there are no human studies of long enough duration or follow-up to make any acceptable statement allaying concerns about human cancer from orlistat.

Source: Public Citizen

#### ***STUDY FINDS THAT ANTIOXIDANT SUPPLEMENTS DON'T EXTEND LIFE SPAN***

Millions of Americans take all kinds of supplements in their desire to stave off disease and to slow the aging process. But, it now appears those supplements not only don't boost longevity, but may actually increase the risk of dying. At

least those are the findings of the most comprehensive study so far of whether popular “antioxidants” help users live longer. The analysis, which pooled data from 68 studies involving more than 232,000 people, found no evidence that taking beta carotene, Vitamin A, or Vitamin E extends life span. In fact, the study results indicated that the supplements increase the likelihood of dying by about 5%. Vitamin C and selenium appeared to have no impact—either way—on longevity.

Based on the findings, published in the February 28<sup>th</sup> issue of the Journal of the American Medical Association, the researchers warned that consumers should be cautious about taking supplements containing the nutrients. At least 150 million Americans regularly take dietary supplements that often include antioxidants. Dr. Christian Gluud of the Copenhagen University Hospital in Denmark, who led the study, had this simple word of warning: “We shouldn't be putting anything in our mouths until we know whether it works. It appears as if these substances may be harmful.” Since Antioxidant supplements have become a multibillion-dollar business, the industry that is ranking in the profits won't fold its tent and give up that market.

Source: *Washington Post*

#### ***FDA REQUESTS LABEL CHANGE FOR ALL SLEEP DISORDER DRUG PRODUCTS***

The U.S. Food and Drug Administration has requested that all manufacturers of sedative-hypnotic drug products, a class of drugs used to induce and/or maintain sleep, strengthen their product labeling to include stronger language concerning potential risks. These risks include severe allergic reactions and complex sleep-related behaviors, which may include sleep-driving. As you may know, sleep driving is defined as driving while not fully awake after ingestion of a sedative-hypnotic product, with no memory of the event. After reviewing

the available post-marketing adverse event information for these products, the FDA concluded that labeling changes were necessary to inform health care providers and consumers about risks.

Along with the labeling revisions, FDA has requested that each product manufacturer send letters to health care providers to notify them about the new warnings. Manufacturers should have started sending these letters to providers late last month. In addition, the FDA has requested that manufacturers of sedative-hypnotic products develop Patient Medication Guides for the products to inform consumers about risks and advise them of potential precautions that can be taken. Patient Medication Guides are handouts given to patients, families, and caregivers when a medicine is dispensed. The guides will contain FDA-approved information such as proper use and the recommendation to avoid ingesting alcohol and/or other central nervous system depressants. The medications that are the focus of the revised labeling include the following 13 products: Ambien/Ambien CR (Sanofi Aventis); Butisol Sodium (Medpointe Pharm HLC); Carbrital (Parke-Davis); Dalmane (Valeant Pharm); Doral (Questcor Pharms); Halcion (Pharmacia & Upjohn); Lunesta (Sepracor); Placidyl (Abbott); Prosom (Abbott); Restoril (Tyco Healthcare); Rozerem (Takeda); Seconal (Lilly); and Sonata (King Pharmaceuticals).

Source: *FDA News*

#### ***A DEATH THAT SHOULD HAVE BEEN PREVENTED***

Deamonte Driver, who was only 12 years old, died because of a succession of breakdowns in a system set up to ensure that children get basic dental care that is critical to their health. Deamonte's death, as reported by *The Washington Post*, happened because he didn't get timely treatment for a decaying tooth. Bacteria from the problem

tooth migrated to his brain. After two operations and more than six weeks in the hospital, the young boy died. There was a breakdown here with the system. The states, the federal government, and the dental profession have to do more. Medicaid requires dental coverage for children who qualify. But unfortunately there aren't enough dentists who are willing to either treat children or to accept Medicaid. It has been reported that this is a nationwide problem. States such as Virginia and Tennessee have developed programs to increase the number of dentists willing to serve the needs of people on the margins.

Although not required, most states provide dental care under the State Children's Health Insurance Program to low-income children who don't qualify for Medicaid. That act is now up for reauthorization. Congress should include dental care in the menu of benefits, and has a duty to help out states that face budget shortfalls. The cost involved in attempting to save the young boy's life will likely top \$250,000. There can't be a more vivid reminder of how shortsighted our system is in not fostering access to preventive health care that saves not only money but lives. It would have cost much less to provide dental care for him and he would be alive today had that happened.

Source: *Washington Post*

### ***TEXAS GOVERNOR STEPS INTO DEEP WATER***

Texas Governor Rick Perry recently bypassed the Texas Legislature and signed an order requiring all school girls to get vaccinated against sexually transmitted viruses that could cause cervical cancer. This decision caused a firestorm of criticism, but little praise, for his action. By issuing an executive order, Governor Perry sidestepped opposition in the Legislature from parents' rights groups who feared such a requirement would condone premarital sex and interfere with the way parents raise their children.

Beginning September 2008, girls

entering the sixth grade—meaning, girls ages 11 and 12—will have to be vaccinated with Gardasil, Merck's new vaccine against a strain of virus that may cause cervical cancer. In his defense, the Governor states that "the HPV vaccine provides...an incredible opportunity to effectively target and prevent cervical cancer." He pointed out that if there are diseases in our society that are going to cost large amounts of money, it just makes "good economic sense, not to mention protecting the health and well-being of these individuals" to have these vaccines available. Unfortunately for the Governor, however, a majority of parents disagreed with his logic. I have to wonder whether Governor Perry is really concerned about the welfare of the children in our society. Using his same argument, he could issue an executive order banning the use of tobacco, and could shut down many fast food restaurants. How could the Governor have come to his conclusion without considering all of the ramifications?

It's rather interesting to learn that Merck doubled its lobbying budget in Texas and funneled money through Women In Government, an advocacy group made up of female state legislators around the country, to some politicians in Texas. In fact, it's reported that Governor Perry has close ties to both Merck and Women In Government. One of the drug company's three lobbyists in Texas is Mike Toomey, who just happened to be Governor Perry's former Chief of Staff. The mother-in-law of Governor Perry's current Chief of Staff is connected to the women's group. Texas Republican State Representative Diane White Delisi is a state director for Women In Government. Governor Perry also received donations from Merck's PAC during his reelection campaign. But, all of this could just be another "political coincidence" and Governor Perry could really be concerned about the children. I hope he really is looking out for their welfare.

The FDA approved Gardasil in June 2006. As we have previously reported,

according to Dr. Sidney Wolfe of Public Citizen, many long-term effects of medications are not known for years after a drug has been approved and put on the market. For example, the largest recall in history was of Merck's arthritis medication Vioxx, which proved to cause many heart attacks and deaths after it came on the market. But, in that case Merck knew about the dangers long before Vioxx was pulled from the market. I find it difficult to understand how the Governor could have made his decision without at least consulting the duly elected legislators in Texas who represent the parents of girls who will be affected. In any event, the Texas Legislature has now passed a law that undoes the Governor's executive order. Maybe Governor Perry learned a good lesson from all of this.

Source: *Associated Press and Houston Chronicle*

## **XVII. ENVIRONMENTAL CONCERNS**

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### ***WHITE HOUSE SHOULD TELL THE TRUTH ABOUT CLIMATE REPORTS***

It appears that misleading the news media and the public has become a way of life in the Bush Administration. Documents were released last month that showed hundreds of instances in which Philip Cooney, then a key White House official, edited government climate reports. This was an obvious effort to play up uncertainly or to play down evidence of a human role in global warming. Cooney, who left his government position in 2005, had been the chief of staff of the White House Counsel on Environmental Quality. This gentleman, who was an administration spokesman on the environmental issue, including global warming, had been an oil industry lobbyist prior to joining the Bush White House. In his prior life, Cooney was the Climate Team Leader for the American Petroleum Institute.

Since leaving the Bush White House, you can guess where Cooney landed? You shouldn't be surprised to learn that he has been hired by ExxonMobil.

### ***PUBLIC HEALTH STANDARDS MUST BE IMPROVED***

Last month, we discussed the critical state of Alabama waterways. Now, a recent report illustrates the polluted streams and extinct and threatened species in Alabama. That report also was a wake-up call for citizens to force the Alabama Department of Environmental Management (ADEM) to develop and implement a better method for applying state fines and fees arising toward water protection and restoration. After our March issue came out, the Alabama Rivers Alliance led a coalition of other organizations who wanted improvements from ADEM relating to cancer risks and public health. At a planning meeting a lawyer for the Alabama Rivers Alliance previewed three petitions for rulemaking that were submitted to ADEM to improve "human standards and environmental health." Proposed rule changes that were discussed include:

- Revision of the cancer risk level in formulas used to calculate water quality criteria for 58 carcinogens. If passed, this revision would reduce pollution levels by 90%. The majority of states have already adopted this cancer risk level.
- A "relative source contribution" factor in order to reduce authorized pollution levels for non-carcinogens by 80%. The U.S. EPA recommends that states implement this factor.
- Revision of the Reference Dose values for Acrolein and Phenol, which would result in a 97% reduction in Acrolein and 50% reduction in Phenol.

Alabama's waterways need some provisions that will minimize the risk of Alabama citizens developing cancers and other illnesses and reduce that risk

to an acceptable level. If ADEM implements the new provisions, the level of pollution in Alabama's surface waterways would be greatly reduced. Although reducing pollutants will cost money and time, in order to save lives, it simply must be done. Like I said before, we are blessed in Alabama to have an abundance of rivers, creeks, and waterways, and they must be protected. I hope that ADEM will finally step up and implement and enforce the new provisions so polluters will not go unnoticed and unpunished.

Source: Alabama Rivers Alliance

### ***TVA PUTS ALABAMA ON THE BACKBURNER WITH COAL PLANT SCRUBBERS***

The Tennessee Valley Authority (TVA) is adjusting its multibillion-dollar strategy for cutting smokestack emissions under the force of potentially tough environmental standards. TVA has deferred the installation of scrubbers for a Tuscumbia, Alabama, coal-fired power plant. TVA claims that the Colbert plant in Tuscumbia will eventually receive new scrubbers, but not until 2014. Claiming the plant's scrubbers are not dead, the TVA will take a \$17 million write-down for engineering work done at the Tuscumbia plant. Colbert was scheduled to receive new scrubbers under TVA's plan to reduce sulfur dioxide emissions that cause haze and acid rain.

In 2002, TVA announced that five power plants would get scrubbers by the end of the decade, and Colbert was the last on the list. TVA has bumped Colbert's need for scrubbers behind a local fossil plant, Sevier, in Rogersville, Tennessee. TVA will begin work on a \$350 million scrubber for Sevier in 2008 and the project should be complete by 2012. The Sevier plant is currently being operated without a scrubber and the plant rests in the protected areas of the Great Smokey Mountains National Park, on the border of Tennessee and North Carolina. The scrubber installation at Sevier is probably in response to a

lawsuit brought by the state of North Carolina against TVA over air pollution from the coal-fired power plants.

Source: *The Birmingham News*

### ***ALABAMA'S LOW POLLUTER FEES MAY BE COSTING THE STATE***

According to another new report, ADEM may be losing more than \$3 million annually because it fails to charge power plants and other major air polluters the federally required minimum in emission fees. In the report, a Washington, D.C., watchdog group has reached this conclusion. But, their findings are disputed by both state and federal regulators. Under a federal Clean Air Act program, states are supposed to charge such polluters at least \$39.48 per ton of sulfur dioxide and several other types of pollutants, according to the report released by the Environmental Integrity Project (EIP).

The report says ADEM charges only \$23.50 per ton. If that is true, the difference would potentially cost the State of Alabama about \$3.6 million per year. The group says that estimate is based on 2002 emissions data, which are the most recent available. Alabama was one of at least 18 states whose fees fell below the federal threshold, the report says. EIP Director Eric Schaeffer said in a statement:

*Only the polluters come out ahead of the game under an arrangement where states let them off the hook rather (than) doing what they are supposed to under federal law that requires the industry to foot the bill for these vital monitoring and enforcement efforts.*

Schaeffer once headed the U.S. Environmental Protection Agency's (EPA) Office of Regulatory Enforcement, but left in 2002 in a public fight with the Bush Administration over enforcement of air pollution rules. Both ADEM and EPA officials contest his organization's findings and claim the number cited is incorrect. I hope that the agencies are

correct in their stand, but at least the report will highlight the need for both the state and federal government to do a better job of protecting the health and safety of the people of Alabama.

Source: *Mobile Press Register*

### ***EPA ISSUES NEW RULES TO REDUCE BENZENE LEVELS IN FUEL***

After extensive pressure from environmental groups, the Bush Administration has finally issued new benzene requirements that will go into effect between 2009 and 2011. The requirements were designed to reduce toxic emissions of benzene and other pollutants from automobiles by up to 80%. A court order requires the Environmental Protection Agency (EPA) to meet an average 0.62% benzene fuel limit by 2011. But, the order also allows refineries to buy emissions credits to meet the new average limit. The current benzene limit is at an average of 0.97%.

The EPA claims that the new standards require cleaner starting engines in cold temperatures and reduces evaporation of toxic exhaust and fumes. Benzene is known to cause cancer, and critics are worried that the adopted credit-trading plan will allow refineries to avoid reducing benzene levels in gasoline. The program is argued to be a costly one since benzene levels vary at different refineries. People along the Pacific coast complained that their benzene levels are more than the national average because of the gasoline production in Alaska.

Earthjustice, an environmental law firm, represented two environmental groups in 2005 that won a court order forcing the EPA to issue a final rule of mobile source air toxic regulations. The new standards are provided by the order. It's pretty sad that it takes court involvement in order to get the EPA to do its job. Because benzene is extremely toxic and poses a great cancer risk, this court order at least is a start in the right direction. But, the simple truth is that

federal lawmakers ultimately must pass more stringent legislation if there is to be any lasting reduction in the levels of benzene that we are forced to breathe each and every day.

Source: *Associated Press*

### ***STATE OFFERS TO SETTLE WITH MONTGOMERY HOMEOWNERS AFFECTED BY CONTAMINATION***

The Alabama Department of Transportation (ALDOT) has offered a cash settlement to approximately 600 Montgomery households and businesses affected by a trichloroethylene ("TCE") contamination plume. ALDOT proposes to pay each landowner 5.1% of his 2006 property tax valuation if the landowner will agree to release their claim. If accepted by all of the landowners, the total payments are expected to be about \$4.5 million. In 2005, ALDOT settled with residents in the Chisholm, Eastern Meadows, and Vista View neighborhoods in Montgomery whose homes were located above the TCE contamination plume. This came after a lawsuit was filed. Although that settlement also gave residents 5.1% of their property's value, no commercial property owners were included in the settlements.

The current settlement offer includes the business owners and some additional residents who could be affected by the plume in the future. ALDOT officials have indicated that they will continue to monitor the site, but that the plume should stop expanding after 30 years. Unfortunately, that's a pretty long time. Alfa Realty discovered the TCE contamination in 1999 while conducting building foundation tests. ALDOT admitted that it had improperly disposed of TCE. Although ALDOT no longer uses TCE, it claims that TCE is not a health risk as long as the groundwater remains underground. The highest concentration of TCE is 23 parts per million and the smallest concentration along the edges of the plume is 1 part per billion. ALDOT says the safe level for drinking water is 5 parts per billion.

ALDOT claims the residents are safe because all properties receive water from the Montgomery Water Works, whose well fields are located away from the plume. But, residents within the plume have been instructed not to install any private wells within the 600-acre contaminated area.

Although the ALDOT settlement proposal may not provide all of the relief that the affected property owners may have hoped for and most likely deserve, it is at least a step in the right direction. I would personally like to encourage our elected state officials to continue to monitor this situation closely and do everything that they can to protect the health and safety of these Montgomery residents and business owners. This is a problem that won't go away any time soon.

Source: *The Montgomery Advertiser*

### ***EPA SUES EXXON FOR TOXIC CLEANUP***

The Environmental Protection Agency (EPA) has sued ExxonMobil Corp. and 95 other companies and cities to recover cleanup costs from a Superfund site in Plaistow, New Hampshire. The EPA said Beede Waste Oil illegally dumped oil and toxic chemicals at the 41-acre site before it was shut down in 1994. A brook that feeds into the Merrimack River is near the property. One of the companies, Beede Waste Oil, filed for bankruptcy and did not contribute to the cleanup costs. The federal Superfund law allows the EPA to pass the cleanup costs on to Beede's customers. Since then, the EPA has gone after small businesses, schools, and churches who used Beede to haul away used chemicals. But its largest polluters so far haven't been willing to settle, which led to the lawsuit being filed. The EPA estimates cleanup costs at \$48 million or more.

Officials have said the site contained large piles of contaminated soil, pools of petroleum products contaminated with solvents, metals, and hundreds of drums of hazardous waste. Beede's owner, Mark Henry, was convicted in 2002 in U.S. Dis-

strict Court on several counts of fraud and conspiracy to transport hazardous waste. According to officials at EPA, Henry falsely told customers he was converting contaminated soil into asphalt, but instead dumped it on the property. ExxonMobil tops the list of offenders at the site. Cities and towns named in the suit include Boston, Massachusetts, and Providence, Rhode Island. When the EPA started cleanup operations in 1996, it found 6 feet of petrochemical muck floating on the water table. Since then, workers have been pumping out waste, and EPA is slowly reaching out-of-court settlements with hundreds of smaller contributors to the pollution. The “polluter pays” principle was one of the cornerstones of the 1980 Superfund law, regardless of blame. Advocates believe the law has helped protect the environment and saved taxpayers billions of dollars.

Source: *Associated Press*

## XVIII. THE CONSUMER CORNER

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### ***POOLSIDE ACCIDENTS POSE A MOST SERIOUS SAFETY ISSUE***

Most of the folks I know, and that certainly includes my wife, Sara, are ready for springtime weather. The arrival of spring means warmer temperatures and more outside activities for folks, including young children. It also will mean more children in swimming pools. It should be noted that poolside and other swimming related accidents are the second leading cause of death of children under 14 years of age. From drowning to accidents involving poolside apparatuses such as diving boards or maintenance equipment, a pool can be a dangerous place for children. Each year over 1,000 children, including about 250 under the age of 5, die in swimming-related accidents. In addition, over 5,000 others are hospitalized. Additionally, spas and whirlpools kill over 200 children annually. In 2002,

according to the Consumer Product Safety Commission (CPSC), an estimated 1,600 children were treated in hospital emergency rooms for submersion injuries. Many of these deaths and injuries occurred in residential pools.

Although children are more at risk for obvious reasons, adults are not immune from aquatic accidents. Many adults suffer severe injuries when they combine alcohol and swimming. Furthermore, severe spinal cord injuries can result from diving into water that is too shallow. A pool owner can be legally responsible if adequate warnings regarding water depth aren't posted. The CPSC recommends using layers of protection in an effort to avoid deaths and injuries, including:

- Constant supervision of young children;
- Owners placing barriers such as a fence with a self-closing, self-latching gate around their pool to prevent access; and
- Pool owners being fully prepared in case of an emergency.

Close supervision of young children is essential for families with a home pool—and not just when outside using the pool. A common scenario is that young children leave the house without a parent or caregiver realizing it. History tells us that children are drawn to water, not being aware of the terrible dangers that pools can pose, and that's easily understood. It should be noted that, just because children know how to swim, that doesn't mean they are always safe. All children should be supervised constantly while they are in and around the pool. The CPSC offers these additional tips to prevent drowning:

- Fences and walls should be at least 4 feet high and installed completely around the pool. Fence gates should be self-closing and self-latching. The latch should be out of a small child's reach. Keep furniture that could be used for climbing into the pool area

away from fences.

- If your house forms one side of the barrier to the pool, then doors leading from the house to the pool should be protected with alarms that produce a sound when a door is unexpectedly opened.
- A power safety cover — a motor-powered barrier that can be placed over the water area — can be used when the pool is not in use.
- Rescue equipment must be kept by the pool. A phone should be placed poolside with emergency numbers posted. Knowing cardiopulmonary resuscitation (CPR), which can be a lifesaver, is essential.
- Never leave pool toys and floats in the pool or pool area that may attract young children to the water.
- For above-ground pools, steps and ladders to the pool should be secured and locked, or removed when the pool is not in use.
- If a child is missing, always look in the pool first. Seconds count in preventing death or disability.
- Pool alarms can be used as an added precaution. Look for alarms that meet the requirements of the ASTM standard. The Commission advises that consumers use remote alarm receivers so the alarm can be heard inside the house or in other places away from the pool area.
- To prevent body entrapment and hair entrapment/entanglement, have a qualified pool professional inspect the drain suction fittings and covers on your pool and spa to be sure that they are the proper size, properly attached, and meet current safety standards. If your pool or spa has a single drain outlet, consider installing a safety vacuum release system that breaks the vacuum to avoid potential entrapment conditions.

Source: CPSC

### **WHAT CONGRESS DID ON A BADLY NEEDED SWIMMING POOL SAFETY BILL SHOULD BE CRIMINAL**

In June of 2006, we reported on a bill that was being considered by Congress. This was a piece of legislation that I believed would have surely passed with minimal opposition. The bill dealt with swimming pool safety and had widespread support from numerous safety and consumer groups. You may recall that James A. Baker, III, the former Secretary of State, and a prominent Texas lawyer, was a strong supporter of the legislation. His granddaughter had been a drowning victim. Actually, the child's mother, Nancy Baker, led the fight to bring about passage of the bill which contained the badly needed safety standards. If passed, the bill would have brought about a new level of safety in the swimming pool and spa industry. Unfortunately, the Republican members of the House of Representatives—with the active help of the Speaker—killed this bill on the very last day of the session in 2006 at the very last hour. The Senate had passed the bill overwhelmingly, but the swimming pool and spa industry lobbying efforts killed it in the House. I don't see how the folks responsible for killing this badly needed legislation can sleep at night—what they did was reprehensible! You can learn more about the need for this legislation by going to our Web site and reading the issue referred to above, or by going to the Web site of SafeKids, a lending proponent of safety for children ([www.safekids.com](http://www.safekids.com))

### **JURY AWARDS \$17 MILLION AGAINST AMERICAN FAMILY INSURANCE COMPANY**

American Family Mutual Insurance Co. was ordered recently to pay \$17 million as part of a class action lawsuit over aftermarket vehicle parts in Missouri. A Jackson County jury determined American Family wrongly paid automobile damage claims based on the use of non-original replacement parts. The

verdict covers 315,000 Missouri customers who filed claims between May 1990 and December 2004. Insurance companies that force inferior aftermarket parts on their insureds as part of their claims practices should take note of this result. But, American Family says it is blameless and will appeal. The case was filed in 2000 and certified as a national class action in 2001. But the Missouri Supreme Court in 2003 ruled that it could apply only to Missouri customers because other states differed in how they regulate insurance company's use of aftermarket parts. There will likely be similar lawsuits filed in other states.

Source: *Insurance Journal*

### **FISHER-PRICE FINED FOR ITS FAILURE TO REPORT CHOKING HAZARD**

Fisher-Price Inc. has agreed to pay a \$975,000 civil penalty for failing to report to the government that one of its toys posed a choking hazard to young children, according to the U.S. Consumer Product Safety Commission. The Commission provisionally accepted the agreement with the East Aurora, New York, company to settle allegations that the company failed to report that a nail fastener in the Little People Animal Sounds Farm could separate from the toy and "pose a serious choking or aspiration hazard to young children." In agreeing to the settlement, Fisher-Price denied it knowingly violated the law.

About 67,000 of the toys were sold nationwide in June and July of 2002. In September 2002, the company received its first report of a nail fastener coming loose from one of the toy barn's stall doors and over the next two months received nine additional reports, the agency said. It said the company received two reports of parents concerned that this problem posed a choking hazard to children and a report of a December 30, 2002, incident in which a 14-month old child aspirated a nail fastener into his lung. The child was taken to the hospital and underwent an

emergency surgical procedure to have the metal nail fastener removed, the agency said.

The agency said the company did not report the safety hazard to the government until March 2003. By that time it was aware of at least 33 reports in which the nail fastener came loose from the stall doors. These included four reports of children who put the metal nail fastener in their mouths and the one case of the child who aspirated the nail fastener. Federal law requires firms to report to the Consumer Product Safety Commission within 24 hours after obtaining information that a product contains a defect that could create a substantial risk to the public or violates a federal safety standard. Fisher-Price announced a recall of the toys in April 2003 and recommended that consumers take the toy away from young children immediately and contact the company to receive a free repair kit. Consumers can still call Fisher-Price anytime at (866) 259-7873 or order the repair kit online at [www.service.mattel.com](http://www.service.mattel.com).

Source: *Associated Press*

### **SOME GOOD RULES TO FOLLOW RELATING TO ONLINE SAFETY FOR CHILDREN**

It has become quite obvious that children are much more computer-savvy than are most of their parents. This includes the ability to engage in online activity which can lead to serious problems. Many adults have no clue about this sort of thing. Lack of experience, however, doesn't mean that parents can avoid their obligation to control online activity by their children. In order to control their children, parents have to understand the Internet and how to go and operate online. The following are some very good rules that parents should make sure their children follow when it comes to online activity.

- Never give out personal information such as your address, telephone number, parents' work address/tele-

phone number, or the name and location of your school without your parents' permission.

- Tell your parents right away if you come across any information that makes you feel uncomfortable.
- Never agree to get together with someone you "meet" online without first checking with your parents. If your parents agree to the meeting, be sure that it is in a public place and always bring your mother or father along.
- Never send a person your picture or anything else of a personal nature without first checking with your parents.
- Never send personal information to any person.
- Never respond to any messages that are mean or in any way make you feel uncomfortable. It is not your fault if you get a message like that. If you do, however, always tell your parents right away so that they can contact the service provider.
- Talk with your parents so that all of you can set up rules for going online. Decide upon the time of day that you can be online, the length of time you can be online and appropriate areas for you to visit. Do not access other areas or break these rules without their permission.
- Do not give out your Internet password to anyone (even your best friends) other than your parents.
- Check with your parents before downloading or installing software or doing anything that could possibly hurt our computer or jeopardize your family's privacy.
- Be a good online citizen and don't do anything that hurts other people or is against the law.
- You must help your parents to understand how to have fun and learn

things online and teach them things about the Internet, computers, and other technology.

There are also some rather simple and easily understood guidelines for parents. In fact, all parents must become knowledgeable before they can deal effectively with their children's involvement online. Parents must set reasonable rules and guidelines for computer use by their children and then enforce them. Failure to monitor compliance with these rules can result in major problems. To get more information on this subject, our readers can go to children [www.safekids.com/kidsrules.htm](http://www.safekids.com/kidsrules.htm). There are some very good rules for parents to follow that should be read and put into practice. I can't emphasize too strongly how important the issue of online activity in your family really is. It can literally be a life or death situation taken to the extreme possibilities.

Source: SafeKids

## **XIX. RECALLS UPDATE**

This month we will again list some of the more significant recalls in this section. By no means are the following recalls all of the product recalls that have occurred in the last few weeks. You should check with the National Highway Traffic Safety Administration (NHTSA) and the Consumer Product Safety Commission (CPSC) Web sites for others. I have listed some of those that are considered most significant.

### ***HONDA RECALLS 166,000 VEHICLES IN U.S.***

Honda Motor Co. is recalling approximately 166,000 vehicles in the United States, including the popular Accord and Odyssey, to fix a faulty component in the fuel pump. The defect in the fuel pump

could cause the engine to stop and fail to restart, according to a Honda spokesman. No accidents have been reported as a result of the faulty fuel pump. Obviously, if a vehicle stalled while being driven, a serious safety issue would be involved. Vehicles involved in the recall include the Accord, Accord hybrid, Odyssey, Acura TL, Acura RL, Acura TSX vehicles from the 2005 model year, and some 2006 Honda Ridgeline pickups. The cost of the recall was unknown at press time.

### ***CHRYSLER RECALLING MORE THAN 489,000 VEHICLES***

Chrysler Group is recalling over 489,000 vehicles, including recent models of the Jeep Liberty, Dodge Durango and its all-new Dodge Avenger sedan. Chrysler said it was recalling 328,424 Durango SUVs because of the risk of overheating linked to an integrated circuit in the instrument cluster of the vehicles. The recall covers 2004 to 2006 model year SUVs. Chrysler, which faces a possible sale by its German parent company, also said it was recalling 10,994 of its recently released 2008 model Dodge Avenger sedans because of a problem with the door latches on the new cars.

### ***FORD TO RECALL POLICE CARS DUE TO POSSIBLE WHEEL CRACKS***

Ford Motor Co. has recalled 109,664 Crown Victoria police cars because cracks can develop in their steel wheels that could cause rapid air loss during high-speed pursuits. The recall affects certain 2003-2005 models, but the cracks have been reported in only a small percentage of the wheels. The wheels previously were covered by an extended warranty program. The cracks can form

near the weld line that connects the rim to the wheel disk, according to NHTSA. Dealers will inspect and replace the wheels and the spare based on the wheel part numbers. Owners will be notified and told to take the cars to a dealership.

The Crown Victoria Police Interceptors were built from October 10, 2001, through December 8, 2004, at an assembly plant in St. Thomas, Ontario. Police departments can call Ford at 800-392-3673 or contact their local dealers to see whether the recall applies to their cars. In August 2003, Ford voluntarily recalled wheels on the cars made before September 23, 2002, and extended the wheel warranties on those made from that date until April 23, 2003. NHTSA opened an investigation into the recall in December of 2004.

#### ***FORD PICKUPS AND SUVs RECALLED***

Ford Motor Co. has recalled about 155,000 pickup trucks and sport utility vehicles to repair a cruise control switch system that already had led to millions of recalls. Ford said the latest recall involved 2003 versions of the F-150, F-250, F-350, F-450 and F-550 Super Duty truck, the Ford Excursion SUV, and the Lincoln Blackwood pickup.

The automaker previously had recalled 5.8 million vehicles in the past two years because of engine fires linked to the cruise control systems in trucks, SUVs, and vans. That recall, one of the largest in history, covered vehicles from the 1994-2002 model years. Ford says an internal check found the switch systems in some early 2003 trucks and SUVs. The switch system could corrode over time, overheat, and ignite. There had been no reports of fires in the 2003 vehicles, according to Ford.

The National Highway Traffic Safety Administration completed an extensive investigation last year into the cause of the fires. Through August of last year, the most recent data available, the agency had received 1,472 complaints connected to the problems, including 65 reports of fires. The safety agency has said there have been no confirmed deaths or injuries, but lawsuits were filed in Iowa, Georgia, and Arkansas over deaths allegedly tied to the fires. As reported, the automaker reached a settlement in the Iowa case in December. Ford said last year its review found that brake fluid could leak through the cruise control's deactivation switch into the system's electrical components, leading to corrosion. That could produce a buildup of electrical current that could cause overheating and a fire.

To fix the problem, as I understand it, dealers install a fused wiring harness to the cruise control deactivation switch to prevent the risk of fire if the switch leaked. Ford says about 45% of the vehicles under the previous recalls have been repaired. Owners of the newly recalled vehicles will receive notices, and dealers will make the repairs at no cost to the owner. For more information, customers can contact Ford at 1-800-392-3673.

#### ***HYUNDAI ISSUES RECALL***

The Hyundai Motor Company is recalling some Hyundai Tucsons. The recall affects the 2005, 2006, and 2007 model SUVs. Safety tests show the air-bag in those models may not deploy in a manner that meets certain safety standards. This could put drivers who are not wearing a seatbelt at greater risk of injury. Hyundai encourages drivers of the 2005 to 2007 model Tucsons to take their vehicle to the nearest

Hyundai dealer for an inspection and possible replacement of the airbag material.

#### ***LENOVO RECALLS THINKPAD BATTERIES***

About 100,000 battery packs used in ThinkPad notebook computers are being recalled because they can pose a fire hazard if the battery is struck forcefully on the corner, such as from a direct fall to the ground, according to the U.S. Consumer Product Safety Commission. The commission said Lenovo Inc. is recalling about 100,000 lithium-ion extended-life batteries after it received four reports of batteries overheating and damaging the notebook, causing minor property damage and in one case, minor eye irritation. The CPSC says there is not an internal battery cell defect. Lenovo sold the batteries with new ThinkPad notebook PCs or as optional or replacement batteries for the following ThinkPad models: R Series (R60 and R60e), T Series (T60 and T60p), and Z Series (Z60m, Z61e, Z61m, and Z61p). The recalled 9-cell batteries have the part number FRU P/N 92P1131, which can be found on the battery label. Customers should stop using the recalled batteries and contact Lenovo to receive a free replacement battery. Lenovo can be reached at (800) 426-7378 or at a [www.lenovo.com/batteryprogram](http://www.lenovo.com/batteryprogram).

#### ***BAUSCH & LOMB RECALLS 1.5 MILLION BOTTLES OF ReNu MULTIPLUS CONTACT LENS SOLUTION***

Bausch & Lomb Inc. is recalling about 1.5 million bottles of its ReNu MultiPlus contact lens solution off shelves because trace amounts of iron could cause the cleaner to lose effectiveness earlier than normal. You will recall that a recall of its ReNu with MoistureLoc solution, which was blamed for an outbreak of severe fungal eye infections, took place last spring. The

company has carried out a limited voluntary recall of 12 lots of its ReNu MultiPlus solution after getting three customer reports of discolored solution. No one was reported to have been hurt, according to the company.

About a million bottles of the popular brand were distributed in the United States and another 500,000 in Canada, Korea, Taiwan and Latin America. The company notified the Food and Drug Administration and regulators in the other affected countries of the recall. The company says that this recall is completely unrelated to and different from the MoistureLoc recall. They claim there is an extremely low risk to consumers.

Bausch & Lomb says it determined the discoloration was caused by trace amounts of iron found in a single batch of raw material from an outside supplier. As a result, it said that the affected lots could have a shorter shelf life than the two-year expiration date. A recall and eventual discontinuation occurred last spring of ReNu with MoistureLoc after the product became associated with an eye fungus that could blind users if left untreated.

#### ***Frito Lay Recalls Mispackaged Chips***

Frito-Lay recalled 92 cases of mispackaged chips that could pose a threat to people with food allergies. The Plano-based company announced the recall of about 55-hundred bags of Fritos Original Corn Chips that were distributed in Texas and Louisiana. The bags are marked as Fritos Original Corn Chips but may contain Fritos Chili Cheese Flavored Corn Chips. The chips could cause a serious reaction for people who are allergic or sensitive to milk or wheat. The affected

bags are dated May 8th on the upper right hand side of the package and have a 10 digit code number of 62730483692, 62730483592, or 62730483992 beneath the date. Consumers can return the product where they bought it, or they can contact Frito-Lay Consumer Affairs at 1-800-352-4477.

#### ***Major Recall of Pet Food Has Animal Owners Frantic***

Menu Foods, a Ontario, Canada-based company, has recalled dog food sold throughout North America under 48 brands and cat food sold under 40 brands including Lams, Nutro, and Eukanuba. The food was distributed by major retailers such as Wal-Mart, Kroger, and Safeway. An unknown number of cats and dogs had suffered kidney failure and about 10 have died after eating the affected pet food, according to the company. Two other companies —Nestle Purina PetCare Co. and Hill's Pet Nutrition Inc.—as a precaution, have voluntarily recalled some products made by Menu Foods. Many stores that sold the affected brands have pulled packages off shelves. The recall covers the company's "cuts and gravy" style food, which consists of chunks of meat in gravy, sold in cans and small foil pouches from December 3rd to March 6th. Menu Foods makes pet food for 17 of the top 20 North American retailers. It is also a contract manufacturer for the top branded pet food companies, including Procter & Gamble Co.

A complete list of the recalled products along with product codes, descriptions and production dates was available from the Menu Foods Web site, <http://www.menufoods.com/recall>. The company also designated two phone numbers that pet

owners could call for information — 866-463-6738 and 866-895-2708.

## **XX. SPECIAL RECOGNITIONS**

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#### ***Head Injury Foundation Holds An Important Meeting***

As reported in the Capitol Comments Section of this issue, we recently settled a case in Houston County, Georgia, on behalf of a 49 year old man who had suffered a severe traumatic brain injury (TBI). That case was a classic example of the effects of a severe TBI on both the patient and his family. As we have previously reported, TBI is the fastest growing disability in the nation. I am pleased to report that the Alabama Head Injury Foundation (AHIF), a nonprofit foundation headquartered in Hoover, Alabama, has become one of the leaders in the effort to help those who suffer from TBI. In my opinion, AHIF does outstanding work and provides valuable services to folks who badly need help. Currently, AHIF has two primary focuses, which are brain injury and behavioral disorders and brain injury with vision impairment.

AHIF, along with the Alabama Department of Rehabilitation Services (ADRS), recently held the first annual State of the State in Traumatic Brain Injury Conference. Top experts in their field, both locally and from across the nation, spoke at the conference. I understand that annual conferences will be held each year by AHIF. Thomas Novack, Ph.D., co-director of the Head Trauma Treatment Team at UAB Spain Rehabilitation Center, who was the keynote speaker, described TBI as being more prevalent than any other medical condition, including cancer. Between 50,000 and 70,000 people per year have permanent TBI problems. Dr. Novack noted that Alabama has a higher rate of TBI cases than most other states. Those are usually caused by motor vehicle acci-

dents. Having represented clients in a good number of TBI cases, I have witnessed how a TBI can change a person's life in an instant. Nothing is ever the same after a person suffers a severe TBI.

Relative to other disabilities, brain injuries can pose more challenges for victims. Head injury victims often don't have full awareness of their problems because their brains are affected, and that makes the condition much more difficult for them and for family members. The reality of their condition may not sink in immediately with the patient. They think they can resume normal activities. Once the realization of their disability sets in, in most cases a TBI victim suffers extreme emotional distress.

The Alabama Head Injury Foundation has helped many people, including children, by offering counseling and other services. AHIF is always open for those who need help for themselves or for their loved ones. More information can be obtained by contacting AHIF at 823-3818 or toll free 1-800-433-8002. The AHIF headquarters is located at 3100 Lorna Road, Suite 226 in Hoover. I encourage our readers to visit their website at [www.AHIF.org](http://www.AHIF.org).

Source: AHIF

### ***ALABAMA ARISE DOES OUTSTANDING WORK***

Alabama Arise, a group that works hard and effectively for low income Alabamians and consumers, is owed a huge debt of gratitude for its outstanding work in recent legislative sessions. The group has taken on the cause of folks, who in the past really haven't had an effective voice working on their behalf in legislative circles. Alabama Arise has performed extremely well. Now, the landscape—because of their presence—is quite different at the State House. A great deal has been accomplished, such as some **real** tax relief for those who **badly** need it. The passage of the tenant's bill of rights legislation was also a prime example of the newly-acquired influence of Alabama Arise.

Without any doubt, the hard work of Kimble Forrister and his staff are paying off and they are to be commended. Alabama's regressive tax system is still in need of reform so there's much more to be done in that arena. A more level playing field and a better quality of life for folks in need are most worthy goals. Once the goals set by Alabama Arise are reached, all Alabama citizens will be better off for it.

### ***THE CHRISTIAN LEGAL SOCIETY***

I would like to encourage our readers who are lawyers to consider joining and supporting the Christian Legal Society (CLS). Before 1959, Christian lawyers had no network for sharing their problems and finding fellowship with other believers. Pastors and church groups found it difficult to locate Christian lawyers who were willing and able to offer legal counsel from a Christian perspective. Interestingly, at that time, Christian doctors had the Christian Medical Society to assist them to integrate their faith and profession. To make a long story short, in an effort to bring Christian lawyers together, the CLS was created in 1962 and has grown steadily since that time. The purposes of the Christian Legal Society, as listed in the organization's Vision and Mission Statement, are:

- To provide a means of society among Christian lawyers.
- To clarify and promote the concept of the Christian lawyer.
- To encourage and aid deserving young students in preparing for the legal profession.
- To provide a forum for the discussion of problems relating to Christianity and law.
- To cooperate with bar associations and other organizations in asserting and maintaining high standards of legal ethics.

There are currently almost 100 lawyers and 165 law student chapters across the country that are now affiliated with CLS. As CLS heads into its 45th year, it's simply amazing what the Lord has done and is now doing through this organization. The lives of many people have been changed because of the influence and opportunities afforded by CLS. Since the next generation of Christian lawyers will come out of the law schools, it's real important to reach law students and get them involved.

We can all thank our Lord for His great faithfulness. My prayer is that He will provide the grace and provision CLS needs to grow in prayer and service to its members and to the body of Christ. Doing Justice, tempered with the Love of God is really how all lawyers, and especially those of us who try lawsuits in the courtrooms of America, should approach their work. The mission of CLS today, which I believe is a worthy one, is:

*To be the national grassroots network of lawyers and law students, in association with others, committed to proclaiming, loving and serving Jesus Christ, through all we do and say in the practice of law, and advocating biblical conflict reconciliation, public justice, religious freedom and the sanctity of human life.*

CLS is a unique ministry dedicated to addressing the problems of integrating Christian faith into the legal profession, providing fellowship for Christian lawyers, and defending religious freedom and the sanctity of human life. As commanded by our Lord, all of us who call ourselves Christian lawyers must be concerned for the needs of the poor and alleviating the causes of poverty. We must continue to present Jesus Christ to lawyers and non-lawyers alike on a daily basis. For more information on CLS you can visit their Web site at [www.clsnet.org](http://www.clsnet.org). Again, I encourage our readers who are lawyers to consider becoming active members.

## **TRIAL LAWYERS REACH OUT TO TORNADO VICTIMS**

The Alabama Trial Lawyers Association, soon to be the Alabama Association for Justice, is offering free legal assistance to victims of the horrific tornadoes that affected Alabama on March 1<sup>st</sup>. In addition, to help prevent a similar tragedy from reoccurring in the future, ATLA is helping provide storm-alert radios to citizens in areas lacking sufficient early-warning devices. ATLA President Ralph Cook observed:

*In this time of tragedy, we want to offer our prayers, but we also want to offer a helping hand to the victims of the tornadoes that swept across our state. We will provide free legal advice to any and all victims who are encountering problems or just simply have questions or need clarification of their legal protections. Our motto is serving and protecting the public. With these combined efforts we simply hope that we can continue to live up to our basic goal of serving and protecting people when they need help.*

More than 25 individual lawyers and firms in Alabama responded to ATLA's request for assistance and were ready and willing to help victims with legal issues they may have relating to the storm. To obtain free legal advice, storm victims may either call the ATLA office at (334) 262-4974 or visit the ATLA website, [www.atla.net](http://www.atla.net). From there, by filling out and submitting an online form, victims will be provided with free legal assistance to help them during this difficult time. In addition to providing free legal advice, ATLA has also partnered with WSFA television in Montgomery to raise money through ATLA's charity organization, the Alabama Civil Justice Foundation (ACJF), for NOAA Weather Alert Radios.

By providing citizens with inclement weather alert radios, ATLA is helping limit the losses from weather disasters

to only those of property and not human life. In many parts of the state, particularly areas like the Black Belt, inclement weather early-warning devices are few and far between or non-existent. To help make citizens in these areas aware of bad weather before it hits, \$4,400 has been raised to date for weather-alert radios. For those still interested in contributing to the fund, contributions may be sent to: ACJF, P.O. Box 1549, Montgomery, AL, 36102.

## **YOUNG LAWYERS ALSO GET INVOLVED TO HELP THOSE IN NEED**

The Alabama State Bar's Young Lawyers Section has also pitched in to help storm victims. Roman Shaul, a shareholder in our firm, serves as President of the Young Lawyers Section. Volunteer lawyers from the Section are providing free legal information to victims and families in the aftermath of the recent tornado that struck Enterprise, Miller's Ferry, and surrounding areas. A Disaster Legal Helpline (1-800-354-6154) has been created to aid the residents of Coffee and Wilcox counties, which have been declared a disaster area by federal authorities. A good number of people with damaged homes have questions about their insurance policies. Landlords and tenants want to know their rights when their properties become uninhabitable because of failures in water and gas lines. Alabama lawyers render service and are volunteering to help their neighbors in a time of need. In a unique partnership with the Federal Emergency Management Agency, members of the Alabama State Bar's Young Lawyers Section are working to assist the families, who are having problems resulting from the storm.

## **BIBB ALLEN WAS A GREAT LAWYER AND AN EVEN BETTER PERSON**

Over the years, I have had the opportunity to work with and against some very good lawyers. One of those lawyers

was Bibb Allen. The Alabama Bar lost a real giant when Bibb died recently. Without a doubt, this Birmingham lawyer was one of a kind. To say that Bibb led a most interesting life is about as true as truth gets. Bibb attended Birmingham-Southern College and enlisted in the U. S. Army Air Corps during World War II. He flew over 100 missions in the Aleutians and the European Theater, receiving 7 Bronze Stars, the Distinguished Flying Cross, and the Belgian Croix de Guerre. Upon his discharge Bibb attended Auburn University, receiving a Bachelor of Science degree. He then attended the University of Alabama School of Law, where he was a member of the Law Review, Farrah Order of Jurisprudence, Order of the Coif, Phi Delta Phi and ODK, graduating in 1950.

Bibb began the practice of law with London, Yancey, Clark and Allen, and later joined the firm of Christian and Small, where he practiced with my friend Clarence Small right up until his death. During his 57 years as a lawyer, Bibb served as President of the Birmingham Bar Association, the Alabama Bar Association, and the Alabama Defense Lawyers Association. He was a Fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, and the American Bar Foundation, and was a member of the International Association of Defense Counsel and the American Board of Trial Advocates. Bibb was honored as Lawyer of the Year by the Birmingham Bar Association and was also honored when Birmingham Southern College created an endowed scholarship in his honor. In 1950, this busy lawyer began teaching Sunday School at Highlands Methodist Church. In 1957, Bibb continued his teaching at First United Methodist Church where he led the McDorman-Allen Class for over 20 years.

I can say without reservation that Bibb Allen was a great lawyer and an even better person. To say that he was a living legend—a lawyer who was both feared and respected by his courtroom opponents—would be a gross under-

statement. Few if any lawyers could equal Bibb's courtroom skills, and I dare say there may never be another Bibb Allen. My profession has lost a real giant—a man who practiced law in the right way—and who left a real legacy that his family and all of his friends can be justly proud of. While we will miss this giant from Jefferson County, we will never forget him.

## XXI. FIRM ACTIVITIES

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### *THE LOCKLAR HOME WAS DESTROYED*

The deadly tornadoes ripped through parts of Alabama on March 1st leaving death and devastation in their path. The most devastating losses were to the families of those who lost children at Enterprise High School and to the family of the man who was killed in Wilcox County. Our hearts and prayers are with each of the families who suffered these losses. Our firm didn't totally escape the storms unscathed. One of our own, Ben Locklar, a lawyer in the Mass Torts Section, suffered tremendous property losses. His home in south Montgomery County was destroyed by an F-2 tornado. In addition, Ben and his family lost their barn, many beautiful hardwood trees, and most of their fences. Thankfully, Ben and his family are safe and all of his animals are accounted for. Only one of his horses suffered a minor injury.

Despite the damage suffered to their property, Ben knows that his family is blessed. None of his family were hurt and that's the main thing to remember since it was a close call for Ben and his wife. They were in a tub in a bathroom when the tornado struck their house. Ben says although it is painful to think about losing so much, in the end what they lost was just "stuff," all of which can all be rebuilt or replaced. Ben reports that the cleanup process is almost complete. We are grateful that the Locklar family only suffered the loss of things

that can be replaced and that they survived the storm.

### *EMPLOYEE SPOTLIGHTS*

#### **Kendall Dunson**

Kendall Dunson is a shareholder in our Personal Injury Section. He is currently President of the Alabama Lawyers Association and Immediate Past President of the Capitol City Bar Association, and is on the Board of Directors of the Montgomery County Bar Association. Kendall, a graduate of the University of Alabama Law School, is licensed to practice in Alabama and Georgia. He was named a shareholder in the firm in 2003. Before coming to work with us, Kendall worked for a very good defense firm for two-and-a-half years in its Litigation section. Kendall's practice includes cases involving product liability, general personal injury, workers compensation, and accidents involving defective industrial machinery.

In addition to a busy law practice and constant involvement in legal organizations, Kendall is active in numerous community organizations. Recently, he worked on a task force charged with reconfiguring Alabama's method of rendering legal services to the state's underprivileged. Kendall is currently partnering with local high schools to organize a board for Partners in Education to assist local schools with securing additional funding to allow students to engage in educational and recreational extracurricular activities.

Kendall was a charter member of the 100 Black Men of Birmingham and recently concluded a two year term on the board of Cornerstone Community Foundation. He regularly takes time from the busy practice of law to speak to high school and grade school students about the law, college, and life in general. Kendall regularly attends First Baptist Church in Montgomery. Kendall is an outstanding lawyer and represents his clients in extremely complex litigation. He has become recognized as one

of the bright stars in Product Liability Litigation.

#### **Dana Taunton**

Dana Taunton, who is now a shareholder, came to work with the firm in 1998. She currently works in the Personal Injury Section, where she oversees this Section's appellate practice. Dana handles most of the research and writing projects for the Section. Dana received her law degree in 1993 from the University of Alabama. She has spoken at several legal seminars on various topics related to personal injury law and has given updates on tort law on numerous occasions. Before coming to work for the firm in 1998, Dana worked for a prominent defense firm and had a brief stint with the Alabama Attorney General's Office. She also clerked for my good friend, the Honorable Ira DeMent, United States District Judge for the Middle District of Alabama, who is one of the very best. Working for Judge DeMent was great training for Dana, as it would be for any young lawyer.

Since coming to work for the firm, Dana has handled complex business and commercial litigation, products liability and personal injury litigation. She is married to Derrick Taunton and they have two daughters, Betsie and Abigail. The Taunton family attends Frazier Memorial Methodist Church in Montgomery, where they teach a 4-year-old Sunday School class. They also assist in organizing mission projects for their own Sunday School class. Dana is an outstanding lawyer and is a most valuable member of the firm.

#### **Leslie Ellis**

Leslie Ellis, a native of Smut Eye, which, as a few of you may know, is in rural Bullock County, Alabama, has been with our firm for almost seven years. Leslie, who clerked for us while she was a student at Jones School of Law, moved to Montgomery when she started working with us in 2000. After finishing law school and passing the Alabama bar in 2002, Leslie worked in

the graphics department, helping with courtroom technology. She attended trials and assisted in the presentation of evidence in the courtroom. Leslie has taught at CLE seminars and other functions on the subject of courtroom technology. After working in graphics for four years, Leslie recently came "back to her roots" and started working as a Legal Research Associate. She is currently assigned to the Personal Injury Section doing research and legal writing along with Dana Taunton. We have found that having qualified lawyers working in this most important area is beneficial to the firm and our clients. Leslie is doing an outstanding job in her new role.

#### Larry Golston

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

In the past, Larry's area of practice has included business litigation. Specifically, Larry has represented entrepreneurs, investors, businesspersons, and corporations in civil litigation. In September 2002, he tried a case filed by England Logging Co. against John Deere Construction Equipment Co., Inc., which resulted in a \$1.785 million dollar verdict in favor of his business client. His current focus is now in consumer fraud, employee rights, and white-collar fraud litigation.

Larry currently serves as the President of the Capitol City Bar Association and Treasurer of the Alabama Lawyers Association. He is also chairman of the Alabama Trial Lawyers Association Minority Caucus and serves on the ATLA Board of Governors. Larry is married to Danielle Golston, and they have two children, a daughter Lauren and a son Larry Kyle. Larry was recently selected

by MOCHA Magazine as one of the top 25 rising stars in the Montgomery, AL/ River Region. In addition, in February Larry successfully prosecuted a lawsuit against homeowner insurance carrier State Farm Fire & Casualty Company in federal court that resulted in a verdict for his clients. Larry has developed into a very good lawyer and we are proud of his accomplishments and for the work he does for his clients.

#### Angela Frazier

Angela Frazier has been with our firm for over 2 years. She currently works as a Staff Assistant for Frank Woodson in our Mass Torts Section. In this position Angela works in all phases of the work-up of cases. Most of the cases in this section involve multiple clients and deal with complex issues. Angela previously worked for Winn Dixie where she retired after 29 years of service.

Angela has been married to Gary for 27 years, and they have 3 children: Adrian, who works at Montgomery Cancer Center as a Pharm Tech; Holly, who works at Alfa and goes to AUM; and a son, Gary Jr., who attends L.B. Wallace in Andalusia, where he plays baseball. Angela also has 3 grandchildren: Destiny, James, and Bryant. These children have been a blessing to Angela. Angela is a very hard worker who does a real good job in the Mass Torts Section. According to Angela, there is never a dull moment in that section. We are fortunate to have this dedicated employee with the firm.

#### Gwyn Harris

Gwyn Harris started with the firm over 6 years ago working in our Consumer Fraud section on insurance and finance cases. She currently works as a Legal Assistant in our Mass Torts Section working on the hormone replacement therapy cases. Gwyn has been married to Heath for 2½ years. They have two dogs, Allie & Gator. Heath works for Montgomery Water Works. Gwyn graduated from Auburn University Montgomery with a degree in Justice & Public Safety and an emphasis on Legal

Assistant. She enjoys reading, gardening, and playing with her dogs. Gwyn is a hard worker who does very good work, and we are fortunate to have her with the firm.

#### Tina Nix

Tina Nix, who came to work with us in September of 2002, currently works with Mike Andrews in our Products Liability Section. She serves as both Mike's Legal Assistant and Secretary, and assists him on a multitude of tasks. Tina assists in trial preparation, and that is always a time-consuming task. Tina graduated from South University in June of 2002 with an Associates Degree in Paralegal Studies. She enjoys cross stitching, spending time with her parents, friends, and 2 dogs and cat. Tina is a very good and dedicated employee who works hard for the clients Mike represents. She is an asset to the firm and we are very glad Tina is with us.

#### Valerie Scroggins

Valerie Scroggins, who has been with our firm for almost 7 years, is currently a Legal Secretary for Larry Golston in our Consumer Fraud Section. Valerie came to us as a receptionist and at one time served as the Database Administrator for this Report. She then moved on to the Consumer Fraud Section. She is married to Mike Scroggins, who is the manager of L.L. Hodge Machine Works, located on North Court Street in Montgomery. Valerie has two children: Shanna Culp, who is 23 years old and currently living in Newport News, Virginia, with her husband Jud Culp; and Trevor Stange, a senior at Prattville High School. Trevor is planning to attend Nashville Auto Diesel College in Nashville, Tennessee, in June of this year.

Valerie, who lives in Millbrook, worked for 15 years in the medical field before coming to our firm. She and her husband are members of Mt. Hebron West Baptist Church in Elmore, Alabama. They serve on the Welcome & Usher Team Ministry at their church and according to Valerie, they enjoy it very much. Valerie has three step-children

and seven step-grandchildren. Her family keeps her pretty busy on the home front. We are most fortunate to have Valerie, who is a hard, with us. She does a very good job in a most challenging position with the firm.

Wendy Thornton

Wendy Thornton, who has been with the firm for 10 years, currently serves as Legal Assistant to Kendall C. Dunson in our Personal Injury Section. Wendy primarily works on product liability cases regarding industrial accidents, workplace accidents, and defective machinery. She is involved in all aspects of case work-up and trial preparation. Wendy and her husband Jeff have been married for 11 years. The Thornton's enjoy hunting and fishing. Wendy, a very good employee, is a valuable asset to our firm. She cares deeply about the clients represented by Kendall and that's a very good trait for any person who works in the legal field. We are most fortunate to have Wendy with us.

## XXII. SOME CLOSING OBSERVATIONS

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### *THE MARCH TORNADOS THAT HIT OUR STATE LEFT DEATH AND DESTRUCTION IN THEIR PATH*

Our prayers go out to the victims of the tornadoes that roared through Alabama last month, leaving massive destruction in their path. The powerful storm resulted in 9 deaths, with 8 persons being killed in Enterprise, Alabama. Most of the victims there were students at Enterprise High School. There was also one death reported in Wilcox County in the Miller's Ferry community. This was one of the worst storms resulting in powerful tornadoes to hit Alabama in recent years. There has been tremendous support from people all over the state for the areas hit by the storm and for those who were victims. The loss of lives made this one of the

worst storms in the last few years. It's good to know that people still care about their fellow man when tragedy strikes. Our firm sent supplies and a work crew to Enterprise and were blessed to have been able to help out. A great deal of needed work was done for local residents who were victimized by the storm. Mike Bailey led our work crew that went to Enterprise, and he and all who went down for several days are due special recognition for all of the hard work they did.

### *MY AUNT SARA CAMP FORT IS CONCERNED OVER WHO WILL BE OUR NEXT PRESIDENT*

My last living aunt, Sara Camp Fort, who lives in South Carolina, called me last month and just wanted to talk a little about "family" and "national politics." Sara, who was the youngest of the Camp children, will be 94 this year. While this beautiful lady, who is still as "sharp" mentally as ever, has slowed down a bit physically, she still manages to get around quite well.

During our rather lengthy conversation, we discussed my recent trip to Campton—our families—with a little bit of national politics thrown in. It's good to know that Sara is still concerned about the future of our country. She had some most astute observations concerning a few of the candidates for President. We were in agreement that the GOP is really hurting for quality candidates this time.

By the way, Sara reminded me that there were seven Camp children and that I needed to correct what I had written last month. I had forgotten all about my uncle, James Camp, who in his younger years, was a very good professional baseball player. He even played for the old Atlanta Crackers, a minor league team that was very popular. James was the youngest male child in the Camp family. All my mother's brothers and sisters were very special, but I must say that Sara Camp Fort has been and still is quite a lady!

## XXIII. SOME PARTING WORDS

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I had been struggling with how to wind up things this month and I really couldn't decide what to write. Sara and I were watching a movie on television on a Friday night recently after going out to eat with some friends at The City Grill, my favorite restaurant. The movie, "A Time to Kill," really got my attention. It was a novel about a criminal trial that took place in Mississippi. It involved the trial of a black man who shot and killed the two white men who had brutally raped and savagely beaten his young daughter. When the movie ended, I realized what I would write about for this issue. I immediately thought about a recent trip I made to the little town of Clayton, Alabama.

Sara and I had gone down to my hometown of Clayton a few weeks ago to see "The Wallace Years," a play put on by the Barbour County Governors' Trail Council. We took some friends down who had heard lots about Clayton and probably didn't believe any of the stories that I had been telling them about my early days growing up there. Before attending the play, we had supper at the Magnolia Inn and saw lots of folks most of whom I hadn't seen in years. In fact, many of them were from other Alabama counties. The play was great with my friend, Alva Lambert, playing the role of Judge George Corley Wallace. The role of Lurleen Wallace was played by the daughter of Jean Spivey Self and the granddaughter of Durwood and Dixie Merle Spivey.

Something happened that Saturday night in Clayton that made me realize that what I have done for a living over the past 27 years has really made a difference in the lives, not only of the clients my firm has represented and their families, but on the lives of thousands of others throughout the country. I believe that God has given me a gift

that is simply to help others who need help and who generally have to fight an uphill battle against great odds when they are victimized as the result of wrongdoing in Corporate America.

After the play, Jean reminded me of the case Greg Allen and I handled against Kubota Tractor Co. several years ago. Durwood Spivey, her father, had been killed when a Kubota tractor rolled over on a very slight incline, pinning Durwood underneath. He was left to slowly die in the hot afternoon sun with ants all over his body. The tractor Durwood was operating wasn't equipped with what is referred to as ROPs protection (a roll bar and seat belts) even though Kubota knew that thousands of people were being killed in tractor rollovers. The Spivey family came to us, but only after Kubota had refused to even discuss the matter with them.

We settled the Spivey case for \$10 million dollars, but not in the way that Kubota had demanded it be settled. The company had demanded total confidentiality, a return of all damaging company documents that we had obtained during pretrial discovery and a sealing of the court record. We had tried the case for four days before the offer was made on the 5th day of trial. I was fully aware that the trial had gone very well for our side and wasn't surprised that Kubota wanted to settle. We told Ms. Spivey that the offer had been made, but that there were conditions she would have to accept in order for her family to receive that money. This brave lady—who had lost her husband and the father of her children because Kubota had put their

profits over safety—told me that she didn't want the money if they couldn't tell the public about how bad Kubota had been. She polled her children, who were all in the room, and each one stood with their mother.

Greg and I then went down to the judge's office where Bibb Allen and the team of Kubota lawyers were waiting. I explained to Bibb that the Spivey family was refusing their offer and would continue with the trial if any type confidentiality was made a condition of settlement. After a few hours, Kubota agreed to settle with no conditions and the settlement was agreed to by the Spivey family.

The next morning we held a news conference on the front steps of the Montgomery County Courthouse and told the Spivey story. We showed the representatives of the media all of the Kubota documents which included how many deaths would occur if no ROPs protection was put on tractors and the actual cost of defending claims in the future. News spread around the U.S. and even into some foreign countries about the need for ROPs protection. The story we were able to tell based on internal documents from Kubota was most compelling. Today, Kubota tells the world that it has been the leader in providing ROPs protection on tractors. That's a direct result—in my opinion—of the courage of the Spivey family in taking on a corporate giant and holding the company to full responsible for its actions.

But that's not the end of the Kubota story—Jean told me that her brother

Lawton had seen a Kubota tractor rollover on a local farm just a few days before the Wallace play. However, this farmer survived because the tractor he was operating had both a roll bar and seat belts. Unlike Durwood Spivey, this fortunate man walked away from the incident unhurt. After hearing this account, it hit home to me at that very moment that what we had done in the Kubota case had been very important and had resulted in having a profound effect on tractor safety. But for the courage of Dixie Merle Spivey and her children in putting the welfare of others over their own personal needs—Kubota may never have seen the need to put ROPs protection on their tractors—and that left me with a very good feeling.

In any event, I will never forget that night in Clayton and it made me realize that I must continue with my life's work. Retirement is not an option for me because there are many more battles to fight. God has blessed me and I sincerely believe that it is His will that I continue to be a trial lawyer and represent folk like the Spivey family. That is exactly what I intend to do!

Finally, as we approach the Easter Season, all of us must acknowledge that Jesus' death and resurrection are what makes Easter so critically important. The gift of eternal life was guaranteed to all mankind on the day of His resurrection for all who would accept Jesus as Lord and Savior. That is the best news that all of us could ever read or hear!

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