



THE
JERE BEASLEY REPORT MAY 2008

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I. CAPITOL OBSERVATIONS

GOOD RULING FROM THE ALABAMA SUPREME COURT

On June 16th, we will try the next round of Alabama's lawsuits against more than 70 pharmaceutical companies for overcharging the state's Medicaid program. That trial will be against Novartis Pharmaceuticals and SmithKline Beecham Corp. It had been scheduled for April 7th, but was continued by Judge Charles Price, awaiting a ruling from the Alabama Supreme Court. These two defendants had filed a petition seeking to have each company tried separately. An order came out from the Court on April 18th which will allow the trial in June to proceed against both companies, which was good news for the state.

As you know, in the first trial in February, a Montgomery County jury awarded the state \$215 million in the case against AstraZeneca Pharmaceuticals LP. That case was based on fraudulent conduct, which is essentially the same as the conduct of Novartis and GlaxoSmithKline. Judge Price has scheduled the state's case against another pharmaceutical company, Bristol Myers Squibb, for trial on August 4th. We will continue to get these cases ready for trial. Judge Price has indicated that he will assign other cases to different judges in the near future.

LEGISLATURE SHOULD PASS THE GAS WELLS TAX BILL

I was really surprised when I learned that a House Committee had killed Gov. Riley's original bill that would have doubled the state taxes paid by oil companies for natural gas wells along the Alabama coast. The House Government Appropriations Committee, with most of the Republicans on the committee joining Democrats, voted 11-4 against the bill. The powerful lobbyists for the oil companies were out in force against this bill and because of their

influence were able to carry the day. This bill would have changed the state severance tax on natural gas wells along the coast from a value-based tax to a volume-based tax. It would have raised the amount oil companies pay annually from \$40 million to \$80 million. As expected, the strongest opposition came from none other than ExxonMobil. When you consider the sad shape the general fund budget is in at present and the fact that this giant oil company makes over \$44 billion a year in profits, it makes me wonder how anybody could have voted against this bill.

Fortunately, the battle between Gov. Riley and ExxonMobil has now turned in the state's favor. At least, it appears that is the case. The same legislative committee approved another version of the Governor's bill on April 3rd and sent it to the full House for consideration. The committee's reversal took place after the Riley Administration agreed to change the tax proposal from a permanent tax to a temporary tax surcharge. Revenue Commissioner Tim Russell says the legislation would ensure that oil companies pay the amount of taxes to the state that they agreed to pay when Alabama allowed drilling along its coast.

It should be noted that Gov. Riley and ExxonMobil are engaged in a legal dispute over what expenses the oil company could deduct before paying state taxes on the value of the natural gas it gets from wells along the Alabama coast. State revenue officials said that if ExxonMobil prevails—and an administrative law judge has already ruled against the state—the company would get \$41 million in immediate refunds. Refunds for all companies covering all years could push the total refunds to as much as \$200 million.

Unfortunately, the new bill, which the committee approved, keeps the current value-based tax. It reduces the tax rate from 10% to 8% and eliminates some expenses that oil companies deduct before paying the taxes. Legislative fiscal experts say it would produce the same \$40 million annually the state now receives. But the bill also levies a temporary 6% tax on gross proceeds

that would stay in place until the state collected enough money to cover all the refunds at stake in the current legal dispute with ExxonMobil. The legislation must win approval in the House and Senate and be signed by the Governor before taking effect. Thus far, the bill hasn't made it on the special order calendar and that's rather difficult to understand. It's too important a matter for it to be put on the back-burner and die a slow, but painful death.

I believe that a volume-based tax would be the proper way to resolve this matter. The original bill would have effectively kept the oil companies

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from playing games with the deductions they take. For example, in the past ExxonMobil has deducted a company trip to a gambling casino in Mississippi as well as some other weird deductions. That couldn't happen if the tax was based on volume. Hopefully, the legislators will be able to withstand the lobbying efforts by ExxonMobil and look out for the people's interest in this battle.

Source: *Associated Press*

LILLY SETTLES ZYPREXA CASE WITH ALASKA FOR \$15 MILLION

After the April issue went to the printer, Eli Lilly agreed to pay \$15 million to settle Alaska's Zyprexa lawsuit. We had written about the trial which was in progress at the time. It should be noted that Alaska was able to get a "favored nation" provision in the settlement. As a result, that state will be treated as well as any other state that resolves similar claims in the future. That means that if any other state receives a larger jury verdict or settlement, Alaska will get an additional amount to bring its total up to that amount.

As we reported, Alaska had accused Lilly in the lawsuit of failing to properly warn the state and healthcare providers that using Zyprexa could result in weight gain, high blood sugar and diabetes. Connecticut also had sued Lilly on March 11th over Zyprexa, accusing the drug company of concealing side effects and promoting the drug for unapproved uses, including the treatment of children. Other states will file similar suits in the next few weeks.

Source: *Reuters*

ALABAMA ATTORNEY GENERAL SUES INTERIOR DEPARTMENT OVER INDIAN GAMBLING

Attorney General Troy King has filed suit against the U.S. Department of Interior in an effort to keep it from allowing the Poarch Creek Indians to expand their gambling operations in Alabama. The federal court suit, filed in Mobile, seeks to block the Department

from negotiating with the Indians to have new types of gambling. The tribe currently operates electronic bingo games in Atmore, Wetumpka and Montgomery, but does not have slot machines and table games commonly found in casinos. The Attorney General said the Department of the Interior intends to resume informal talks with the Creeks despite opposition from Alabama state officials.

Federal law allows federally recognized Indian tribes to conduct any type of gambling that is legal in a state, which in Alabama includes paper and electronic bingo. State governors and Indian tribes can reach a compact allowing Indians to conduct other types of gambling. The Poarch Creek Indians first sought to negotiate with Gov. Guy Hunt in 1991, but those talks broke down. Since that time, no governor has agreed to a compact to expand the Creeks' gambling to casino-style games.

Source: *Associated Press*

SUPREME COURT ALLOWS CONNECTICUT'S DAMAGES SUIT AGAINST MARSH

The Connecticut Supreme Court has ruled that Attorney General Richard Blumenthal can attempt to recover damages from Marsh & McLennan, Inc. for harming the economy of the entire state. The Attorney General filed suit in 2005 on behalf of the state against Marsh, alleging the mega-brokerage firm rigged bids and colluded with insurers in a "pay to play" scheme in which it set prices for commercial insurance in the state.

Connecticut is one of only a few states that allow regulators to seek damages for anti-competitive business practices that harm the general economy of the state. The Attorney General contends Marsh's unfair business practices raised the prices of insurance for all consumers and harmed both policyholders and non-policyholders. Major corporations in Connecticut, which were or remain policyholders with Marsh, include Kaman Corp., Bic Corp., United Technologies Corp., Xerox Corp. and

General Electric Co.

The Supreme Court ruling overturns part of a ruling by a lower trial court, which kept the Attorney General from recovering damages to the general economy. Lawyers for the state contended "Connecticut is the home of many insurance companies as well as other large private employers" which have "a substantial impact on the general economy of Connecticut." The insurance industry plays a considerable role in Connecticut's economy, employing approximately 70,000 persons and representing 7% of the state's gross product. New York auditors have reported that Marsh has paid \$850 million to policyholders as part of a massive regulatory settlement arising out of the allegations.

Source: *Insurance Journal*

II. POLITICAL OBSERVATIONS

JOHN MCCAIN IS BEHOLDEN TO POWERFUL CORPORATE LOBBYISTS

It's sort of weird to hear Senator John McCain condemn the influence of special interest lobbyists when you consider that he has strong financial and political ties to dozens of corporate lobbyists. Perhaps the Senator's closest ties are to lobbyists for the telecommunications industry. Interestingly, that is an industry that the GOP standard bearer has helped to oversee in the U.S. Senate. Of the 66 lobbyists known to be working for McCain, 23 of them are directly connected to telecommunications companies. Fundraising has been at the forefront of their activities. It's difficult to calculate the total amount of money these 23 lobbyists have raised for the McCain campaign since 18 of them are "bundlers." However, I suspect the total amount is in the millions. Another matter of interest lies in that fact that Senator McCain has introduced or pushed a great deal of industry-backed legislation since 2000. Surely the fact

that the Arizona Senator is on the very Committee that controls legislation affecting the telecommunications industry is not just a coincidence.

In a recent story, *USA Today* identified the industry lobbyists who are involved in the McCain campaign. It was reported that the following people work, advise or raise campaign money for Senator McCain and also have lobbied for telecommunications companies since 1999: Rick Davis is now McCain's campaign manager; Christian Ferry is McCain's deputy campaign manager; Charlie Black is a chief advisor to McCain and he is one of the persons with the most influence over campaign decisions; Tom Loeff, a former Congressman, is co-chairman of the McCain campaign; Susan Nelson is finance director of the McCain campaign; Wayne Berman is a national finance co-chairman of the campaign; John Green is a key campaign worker; Tim McKone is a campaign fundraiser; David Crane, a former McCain aide, is now a key fundraiser; Carlos Bonilla is an economic advisor to the McCain campaign; John Timmons, another former McCain aide, is now a key fundraiser; Julianne Glover Weiss, a former spokesperson for Dick Cheney, is now a key fundraiser for the campaign; Judy Black, Bryan Cunningham, Peter Madigan, James Pitts, Kirk Blalock, Kirsten Chadwick, Aleix Jarvis, Alison McSllarrow, Michael Meece and Eric Burgeson are all additional fundraisers for the McCain campaign.

It's not hard to find the common denominator between John McCain and each of the persons listed above—each is a lobbyist for the powerful telecommunications industry—and that's not good news for ordinary folks. Senator McCain has carried water in the U.S. Senate for the companies in this industry, but that may be just another interesting coincidence. Nevertheless, it's certainly a bit disturbing, especially when you consider the vast influence and power of these lobbyists in Washington. Mark Blue, who is McCain's Senate Chief of Staff, is working closely with all of these lobbyists and is also very active in the campaign. It should be noted, however, that

the lobbyists from the telecommunications industry aren't the only lobbyists working for the McCain campaign. There are at least 43 others from different special interests groups who are directly involved in the McCain campaign. Political observers say these powerful Washington lobbyists have a vested interest in John McCain becoming president. What do you think?

I don't believe there is any way Senator McCain can be an instrument of change considering his very strong ties to the special interests that have controlled our Nation's Capitol for the past seven years. While the Senator talks one way to the media and the public about the undue influence of lobbyists, he has special interest lobbyists literally running his campaign and raising large sums of money in his race for the White House. This sort of thing simply doesn't meet the "smell test" and I believe voters will recognize that fact long before Election Day in November. If John McCain is elected president we can expect business as usual in our Nation's Capitol for the next four years.

Source: *USA Today*

McCain's Economic Advisor Has A TRACK RECORD

There is another key advisor for Senator John McCain who has a most interesting and somewhat disturbing track record. Senator McCain has admitted he knows little—if anything—about the economy and that's pretty scary considering the awful shape of our nation's economy. So the obvious question is: who is his number one economic advisor? It has been reported that former Senator Phil Gramm is McCain's economic brain, doing much of the policy thinking in regard to that subject for the Republican presidential nominee. For those who are familiar with Senator Gramm's background, that's even more reason to be concerned. It's one thing to have a man who wants to be president admitting that finance and the economy are his weaknesses, but it's quite another for him to depend on the former Texas Senator for advice and counsel on our

nation's economic policies.

Most of the American people have forgotten about Gramm's tenure in the Senate. As chair of the Senate Banking Committee in 2000, then-Senator Gramm attached a complex, 262-page amendment to an omnibus appropriations bill moving to final passage as Congress was headed toward its Christmas recess. Written by Wall Street investment-bank lawyers, "The Commodity Futures Modernization Act" didn't even have a congressional hearing before any committee. Neither did any member of Congress have an opportunity to read it, I am told. The Gramm Amendment mandated sweeping **deregulation** of investment banks, declaring off-limits to regulators most over-the-counter derivatives, credit derivatives, credit defaults, and swaps. Those terms meant little to the vast majority of American citizens prior to all of the problems that put our nation's economy into a steep nose-dive.

In fact, in 2000 those terms were known only to a small circle of investment bankers and brokers who created and traded the complex financial instruments the terms describe. The terms are familiar today because their **unregulated** trading had a great deal to do with the near-death experience of the Bear Stearns investment bank, which was only avoided when the Federal Reserve shelled out \$30 billion for JPMorgan Chase in backing to acquire Bear Stearns and avoid the international financial disaster that would have followed the bankruptcy of a large investment bank.

Maybe a little background on Phil Gramm would help us understand more about this man who advises a potential president. I first became aware of Gramm and his wife, Wendy, when we were looking into the Enron debacle a few years back. The current economic crisis is not the first one made possible by Phil Gramm's commodity futures act. Interestingly, the former Senator's wife served on the Commodity Futures Trading Commission from 1983 to 1993. As a commissioner, she helped develop many of the trading rules her husband turned into law in 2000. When Dr. Wendy Gramm left the Commission, she

actually joined the corporate board of Enron. I understand she owned a considerable amount of stock in the company. The gas-pipeline company at that time was reinventing itself as a commodities trading combine. Enron's on-line commodities trading got a major boost as the result of a specific provision in Senator Gramm's commodities futures act.

As we reported several issues back, the "Enron exception" that Senator Gramm included in the act protected all on-line derivatives from federal regulation, even when they were designed to defraud investors. Some felt that was a potential conflict of interest since the Senator was helping to pass a law that would benefit his spouse, who was being paid by a corporation that would reap enormous benefits from passage of the legislation. I'm not sure, however, whether Dr. Gramm had actually gone over to Enron when the bill became law. However, the possible conflict of interest was reported in some news outlets, but to my knowledge no inquiry of any sort was ever made.

Of course, we all know what happened to Enron. Tens of thousands of Enron employees and investors saw their pensions disappear when the company collapsed. Compare that to Bear Stearns, whose shareholders have been put in a similar position; shares worth \$145 two weeks before the company's collapse were acquired by JPMorgan for \$2 a share as I recall.

Fortune magazine describes John McCain's economic policy as "vintage Gramm." The Senator's recent argument against government relief for homeowners facing foreclosure recalls Phil Gramm's killing of a deregulation bill in 2000 that he had otherwise supported—because it would have provided reduced-rate mortgages for low-income government employees. The former Texas senator is now being mentioned as the next Secretary of the Treasury if John McCain is elected president. Dr. Wendy Gramm currently chairs the Regulatory Studies Program at the Mercatus Center, a free-market think tank housed at George Mason University. She too might be a candidate for some type of appointment.

Based on their history, I don't believe either Gramm should be calling shots that would shape economic policy for a McCain Administration.

WAL-MART SUDDENLY SAW THE LIGHT

Wal-Mart took Jim Shank all the way to the U.S. Supreme Court trying to take more than \$400,000 from the Shank family. As all America now knows, Deborah Shank had been in a car accident in 2000 and was severely brain damaged. Wal-Mart wanted Mrs. Shank's money and filed suit to get it knowing full-well her tragic condition and needs. When the case finally moved into the court of public opinion, the giant retailer changed its mind and retreated from the judicial system. As a direct result of all the negative media reports and the public outcry, Wal-Mart has now dropped its claim on the money. Wal-Mart's greed had threatened to push the Shanks into poverty and further despair. The world's largest retailer now claims to have been "moved by Ms. Shank's extraordinary situation," and has apologized to the Shank family. Frankly, I don't buy that public relations spin for a minute. The only reason Wal-Mart dropped its claim is the simple fact that the company was exposed as a corporation with no concern for the problems of people in trouble. It's a classic example of corporate arrogance and greed. Shame on Wal-Mart!

Until the weight of public opinion came down on the company in full force, Wal-Mart was unapologetic for its demand that the Shanks repay \$470,000 in medical expenses after the family received a settlement against the trucking company whose vehicle collided with Deborah Shank and caused her to be permanently injured, disabled and severely impaired. Prior to her 2000 accident, Deborah Shank had been employed by Wal-Mart to stock shelves. Wal-Mart's medical plan paid her expenses, but Wal-Mart wanted its money back after the Shanks received a \$1 million settlement from the trucking company. After payment of fees and other expenses, Deborah Shank's

husband was left with \$417,000 in trust for his wife and Wal-Mart wanted all of it. This was despite his pleas that Deborah Shank, who is now confined to a wheelchair in a nursing home, still needs millions of dollars in medical care.

Jim Shank watched for eight years as his family's world tragically unraveled. He was first hit with a devastating car crash that left his wife with a traumatic brain injury, and then had to deal with the death of his eldest son, a soldier in Iraq. After all of that, the man had to deal with Wal-Mart and its greedy corporate arrogance. I am convinced that the bosses at Wal-Mart would never have changed their minds in the Shank case if people all over the country demanded relief for the family. This is a classic example of what ordinary folks can do when they get involved in a just cause and join forces to overcome an unjust situation. Hopefully, this victory will energize folks and give them hope for future victories. While the Shank family still has a rough road ahead, at least Jim Shank has some hope for the future. In addition, Wal-Mart may have learned a lesson. Perhaps that lesson will cause the corporate giant to donate a few hundred thousand dollars to the Shanks' trust fund so that Mrs. Shank can have a better life.

Source: Associated Press and ABC News

AN OIL PRINCE BUYS A \$2.7 MILLION CAMEL

While American citizens are feeling the effects of a growing recession and especially the effects of high-priced gasoline, one of Vice-President Cheney's buddies is paying \$2.7 million for a camel. This purchase by Dubai's crown prince came during a desert festival celebrating Bedouin traditions in the emirate of Abu Dhabi. Included in the festival was a camel beauty contest. Regardless of which camel actually won the contest, it appears that camel sellers did pretty well. For example, Sheik Hamdan bin Mohammed bin Rashid al-Maktoum, the son of Dubai's ruler, Sheik Mohammed, bought 16 camels for \$4.5 million, including a \$2.7 million female camel. There was

no indication what Hamdan, Dubai's heir apparent, planned to do with his purchase. However, I understand from media reports that female camels are often used for racing. Owning fine camels is also a mark of prestige for the ruling elite in the Persian Gulf.

Abu Dhabi's ruling family organized the nine-day festival in a bid to preserve the nomadic way of life in the desert that predates the discovery of oil in the region in the 1960s. More than 17,000 camels from the oil-rich Gulf countries—the Emirates, Saudi Arabia, Oman, Qatar and Bahrain—were registered for the beauty contest, which gave out millions of dollars in prize money and more than 100 four-wheel-drive vehicles and pickup trucks. As you probably know, Dhahi is the capital of the United Arab Emirates and, with the lion's share of the country's oil resources, it's the richest of the seven semiautonomous emirates that make up the country. Dubai, the largest emirate in population, has become a major financial center. You might be interested in finding out how many American corporations have actually moved their headquarters to Dhahi. The numbers will likely surprise you.

Source: *Associated Press*

LOBBYISTS HAVE CONTROLLED CONGRESS FOR WAY TOO LONG

Lobbyists have controlled much of what has happened in Congress over the past several years and that hasn't been good for the vast majority of American citizens. Corporations, industries, labor unions, governments and other special interests spent a record \$2.79 billion in 2007 to lobby in Washington, according to the nonpartisan Center for Responsive Politics. This represents an increase of \$200 million over similar spending in 2006. For every day Congress was in session, industries and interests spent an average of \$17 million to lobby lawmakers and the federal government at large. Sheila Krumholz, executive director of the 25-year-old watchdog group, observed:

At a time when our economy is contracting, Washington's lobby-

ing industry has been expanding. Lobbying seems to be a recession-proof industry.

CRP, which tracks lobbying spending on its Web site, OpenSecrets.org, found that, for the second straight year, health interests spent \$444.7 million on federal lobbying, more than any other economic sector. The finance, insurance and real estate sector was second, spending about \$418.7 million. Looking more specifically within the larger sectors the Center tracks, the pharmaceuticals/health products industry outspent all industries by spending \$227 million for lobbying services for the 164 days that the 110th Congress met in 2007. The drug industry has spent \$1.3 billion on federal lobbying over the last ten years, more than any other industry, which shouldn't come as a big surprise. This industry's spending on its reported lobbying increased 25% in 2007.

The second-biggest spender among industries in 2007 was insurance, which spent \$138 million on lobbying, followed by electric utilities, which spent \$112.7 million, the computers/Internet industry, which spent \$110.6 million, and hospitals and nursing homes, which paid lobbyists at least \$90.5 million. The securities and investment industry, which ranked sixth, spent \$87.3 million, increasing its lobbying 40% over 2006. The biggest single spender in 2007 was again the U.S. Chamber of Commerce. The Chamber and its affiliates spent nearly \$52.8 million on in-house lobbyists and with K Street firms.

The American people should realize by now that their voice is seldom heard in Washington and that powerful special interests run the show in all branches of the federal government. Lobbyists are literally the unofficial fourth branch of government and they have more power than most folks could ever imagine. Until this stranglehold is broken, ordinary citizens will continue to struggle. Hopefully, we will see a clean break in this control after the November elections.

Source: *Insurance Journal*

III. LEGISLATIVE HAPPENINGS

POLLUTERS TO PROSPER WHILE CONSUMERS PAY THE BILLS

I'm not sure whether the average Alabama citizen realizes this, but every time we buy gasoline in this state, we are contributing to a fund that the petroleum companies use to clean-up gasoline spills at their retail service stations and convenience stores. A number of years ago, the Alabama Legislature approved an industry-sponsored bill that is now known as The Alabama Underground and Aboveground Storage Tank Trust Fund Act. This legislation established a trust fund to pay up to \$1 Million per-incident for investigative, clean-up, and third-party liability costs resulting from leaks or spills from motor fuel storage tanks. In order to pay for this "fund," the Department of Revenue has been collecting a one-cent per gallon fee for every gallon of gas sold in Alabama.

The Alabama Department of Environmental Management, through its Groundwater Branch and UST Corrective Action Section, handles all claims associated with the fund and oversees the response, assessment, monitoring and clean-up activities carried out at UST spill sites by environmental contractors hired by the UST owners. Additional oversight of the fund comes from a nine-member "Trust Fund Management Board" comprised of six people who operate gas stations or petroleum companies, two people who work for environmental contractors, plus the head of the American Petroleum Council. You won't find any consumers or consumer advocates on that board, which is no real surprise.

Owners and operators of USTs are required to report leaks and spills to ADEM within 24 hours of the time they are discovered. The reported release sites that are required to undergo additional investigative and corrective actions (paid for by taxpayer dollars in the trust fund) are assigned a UST

Release Incident Number by ADEM. How many gasoline “releases” are we talking about here? Well, consider this:

- Since 1988, when ADEM began tracking UST releases in Alabama, well over 10,000 release reports have been filed by petroleum distributors and convenience store operators.
- Of that number, over 4,000 releases have required site-specific soil and groundwater investigations and clean-up plans.

How many “active” UST leak sites exist in Alabama today? At the present time, there are approximately 1,600 active underground storage tank leak sites in Alabama — all of which are being cleaned-up with taxpayer dollars. Some of these sites involve a relatively small amount of gasoline being released into the environment. But many others—like the 15,600 gallon fuel spill that occurred earlier this year at an Alexander City convenience store—cause enormous damage to property and put the public’s health at serious risk. To clean-up those sites, ADEM is forced to authorize petroleum company contractors to undertake clean-ups that drain the \$1 Million trust fund limit. And apart from paying an initial \$5,000 deductible, the UST-owning company responsible for the spill makes no other contribution to the site clean-up effort.

In addition to paying for clean-up costs, the fund also pays the UST owner’s legal bills when cases are filed by third-party property owners harmed by the spill. And, to the extent that the site clean-up has not already exceeded the \$1 Million cap, the fund even pays the civil judgments that these third-parties obtain in court against the UST owner/company. If that sounds to you like a pretty good deal for the companies that distribute and sell gasoline in Alabama, then I couldn’t agree with you more—particularly when nearly every single gasoline spill in this state is the result of a petroleum company failing to properly maintain, inspect, repair and/or replace its tanks, pipes and dispenser equipment.

To add insult to injury, however, the

petroleum and convenience store industry is now trying to get new legislation passed that would modify the existing Trust Fund Act. Among other things, this proposed legislation would:

- Authorize ADEM, upon recommendation of the Trust Fund Management Board, to increase the limit of fund coverage to an amount not to exceed **\$2 Million**.
- Make this increased fund coverage available to **all** existing trust fund sites.
- Double the trust fund charge amount that consumers must pay, to two-cents per-gallon.
- Only provide money to pay claims filed by injured/damaged third-parties **after** past, present and even “projected” future clean-up costs have been covered.

Now, to be sure, the citizens of this state should be plenty mad about the prospect of paying even one more penny for gasoline, particularly when gas prices are at an all-time high and the petroleum industry is reporting record profits. But as upsetting as it might be to think that the average person is paying to clean-up environmental problems that UST owners have created through their own negligence and inattention, that’s not the part that upsets me the most. What really troubles me about this legislation is the fact that it would give innocent adjacent homeowners and business owners the short-end of the stick. As now worded, this new Trust Fund bill wouldn’t pay one dime to third-parties harmed by a UST gasoline spill until **all** of the UST owner’s legal costs and their contractors’ past and future “projected” charges and expenses have been paid in full. Of course, the problem there is that when you are dealing with a spill site that is significant enough to cause off-site harm to adjacent property owners and homeowners, the past and future “projected” costs for just the convenience store property clean-up alone can eat up nearly all of the available money in the fund. Obviously, that leaves the innocent third-party claimants holding the bag.

In fact, some of the language in the proposed bill suggests that the payment of third-party claims can only be made if past and future projected clean-up costs fail to exceed the first \$1 Million of trust fund coverage. If that is in fact the case, then this new industry-sponsored legislation truly is unconscionable. By definition, any site that has more than \$1 Million in past and future projected clean-up costs will have certainly caused damage to the property (and, potentially, the health) of nearby residential and significant commercial landowners. The current situation is bad enough, but the new legislation would make things worse for taxpayers and for persons injured or damaged because of spills from USTs.

The House bill (H. 753) has passed the House and is now being considered by the Senate. Hopefully, our state senators will give some very serious thought to the consequences of this bill, not only for taxpayers who are being asked to pay for the negligent acts of petroleum companies, but also for innocent landowners who suffer damage due to leaking USTs each and every day. This is a most serious matter and one that will affect all Alabama citizens. This bill should be killed in the Senate and if that doesn’t happen, Governor Riley should veto it.

ALABAMA SURVEY SUMMARY ON LEGISLATIVE ISSUES

The Capital Survey Research Center conducted a statewide survey of Alabama voters that dealt with important issues affecting Alabama citizens back in March. The survey was designed to determine how voters feel on a range of state tax issues and proposals that would be considered by the Alabama Legislature. Now that the current session is heading into the home stretch, it will be interesting to compare actual legislative results with the poll results. The following are some of the findings from this survey:

- **State and Legislature Satisfaction.** While a majority (55%) of Alabama voters are satisfied with the way

things are going in Alabama, voters are split (39%-38%) on how things are going in the Legislature.

- **State Taxes.** While voters are split on whether or not they believe their own taxes are fair or unfair, voters (62%) believe Alabama has unfair state taxes; support (59%) a progressive or graduated income tax; and, oppose (74%) the state sales tax on food items.

These positions on core Alabama tax system values would appear to provide a foundation of voter support for tax reform designed to make Alabama taxes fairer. However, according to the survey results, voter linkage of values to specific proposals is much less clear. For example, voters overwhelmingly support:

- four-year property tax appraisal;
- industry environmental tax to fund health care programs;
- providing and taxing bingo in Mobile and Birmingham to fund Medicaid; and,
- a corporation tax to fund public safety.

As expected, everything learned from the survey wasn't positive. However, some of the findings were somewhat of a surprise. The following issues are opposed by Alabama voters:

- an increased tax on automobile tags to hire more State Troopers;
- toll roads to fund building of roads and bridges;
- changing the state tax on gasoline from a per gallon to a per cent price; and,
- a gasoline tax increase to fund maintenance of roads and bridges.

The survey also dealt with a number of non-tax issues that directly affect Alabama citizens. The following is a summary of public support for other legislative proposals. According to the survey, voters support:

- non-partisan election of judges;

- labeling of foreign foods ;
- disclosure of campaign fund sources;
- business fines for hiring illegal immigrants;
- ban of smoking in most public places;
- Alabama Rural Development Commission;
- voluntary, state-funded pre-K education program;
- vote on Constitutional convention; and,
- a separate State Board of Education for Community and Technical Colleges.

The support of each of these non-tax proposals was extremely strong. It's quite evident that Alabama citizens are strongly in favor of each proposal. On the other hand, the survey tells us that Alabama voters oppose the following which are money-related:

- increased automobile taxes to hire State Troopers;
- banning public education employees from serving in the Legislature; and,
- toll roads.

Dr. Gerald Johnson, an extremely well-respected pollster, supplied this information. Over the years, I have found Dr. Johnson to be quite accurate in his polling of issues affecting Alabama citizens. It will be interesting to see how the future actions by members of the Legislature during the balance of the current session mirror the findings of this survey.

Source: Capital Survey Research Center

ALABAMA NEEDS A NEW CONSTITUTION

A recent survey indicates that 63.9% of likely voters in Alabama want their lawmakers to vote for a bill that would let the people decide whether they want a constitutional convention to draft a new state constitution. That is a pretty strong statement by the folks who sent the current members of the

Alabama Legislature to Montgomery. I am told by capital insiders that the chance of a constitutional convention happening is slim and none. It would seem at first blush that all Legislators would trust the people of Alabama to make this important decision. But the special interest lobbyists want no part of a convention where ordinary folks would have a say in decisions that affect their daily lives and the future of our state.

In my opinion, Alabama badly needs a new constitution. The 1901 Constitution is badly flawed and is in need of change. For example, local governments need more input in local issues that face their people. Much of our state's unfair tax system is firmly embedded in the 1901 Constitution and that results in unfair tax burdens on the poor and middle class. I hope that the current crop of legislators will see the light and vote for a constitutional convention. If you agree, contact your legislators and ask them to give the people of Alabama the right to vote on this important matter.

ALABAMA LEGISLATORS VOTE TO REMOVE GROCERY TAX

Two Alabama Legislative Committees voted last month for a bill that would remove the state sales tax on groceries. This was most welcome news for lots of folks in our state and it's something that is long overdue. The House Government Appropriations Committee and the Senate Finance and Taxation-Education Committees overwhelmingly approved identical constitutional amendments on April 2nd that would remove the state's 4% sales tax on groceries. To make up for the lost revenue, the constitutional amendments would end the state income tax deduction for federal income taxes paid. The full House then passed the Knight bill by a vote of 63 to 39.

The legislation would also raise the threshold at which low-income Alabamians start paying state income taxes by raising the standard deduction and personal and dependent exemptions. For a family of four, the threshold

would go from \$12,600 to about \$20,000. Rep. John Knight, sponsor of the House legislation, has worked long and hard for this legislation. John says the Legislature can do something for “the least of these” by passing this bill and that it’s a tax cut for the working families across the state. All states, except Alabama and Mississippi, remove all or part of their state sales tax from groceries or have a tax rebate for food purchases by the poor.

It’s high time Alabama corrected a burdensome tax on folks who need help from an economic perspective. The Alabama Legislature has talked about removing the sales tax on groceries for years. Alabama Arise, a lobbying group for the poor, should get lots of credit for this initial victory. It’s now up to the Senate to pass the House bill. If the proposed constitutional amendment is passed by the Legislature, it will only take effect if approved by a majority of voters statewide in the general election on November 4th.

I believe this legislation should be passed by the Senate so that the people of Alabama can decide whether it should become law. It’s my firm belief that the proposal becoming law would be a first step in the right direction. What our state really needs is a complete reform of our existing tax system. Hopefully, that can be accomplished one of these days. Until that happens, however, Alabama citizens will have to live with a tax system that is bad for low and middle income citizens and real good for the rich. This bill is a step in the right direction, but there is more that needs to be done. Rep. John Knight and Senator Hank Sanders, along with all of the folks at Alabama Arise, should be commended for their refusal to give up and for persevering in this fight. Hopefully, the end result will be a victory for lots of folks in Alabama.

Source: Associated Press

HOUSE PASSES \$1.9 BILLION BUDGET TO FUND STATE AGENCIES

On April 8th, the Alabama House approved a \$1.9 billion budget to fund

non-education state agencies for the fiscal year that begins on October 1st. The budget reduces funding for many state agencies by 11% because of the slow economy that has cut into tax revenues. The House voted 97-6 to approve the budget and sent the bill to the Senate. At press time, the Senate Finance Committee had reported the bill out for consideration by the full Senate. While it isn’t a good budget, it may be the best the legislators can do, considering the severe money problems facing state government.

I am told by knowledgeable sources that this budget—in its current shape—is grossly under-funded. If that’s true, we are heading for big problems in this state. This would be a good time for the Alabama Legislature to put our state’s fiscal house in order. Unfortunately, the prospects of that happening aren’t very good and we can thank the special interest lobbyists for that. The legislators are facing a real challenge with this budget. I suspect a conference committee will wind up writing the final budget. But, without more revenues, there will have to be more significant cuts in programs and services.

Source: Associated Press

CHIEF JUSTICE BACKS A BILL THAT SHOULD BECOME LAW

Chief Justice Sue Bell Cobb is supporting a bill that would set experience requirements for the state’s judges. The very popular Chief Justice is lending her support to the bill, introduced by Rep. Paul DeMarco, R-Homewood, which would set minimum experience requirements for people to become judges after Jan. 1, 2009. The bill requires three years experience as a licensed lawyer before becoming a district judge, five years before becoming a circuit judge, and ten years before becoming an appellate court judge. The bill passed in the House without a dissenting vote and is now in the Senate.

Alabama is one of 16 states that have no experience requirements for any level of judgeship. Some of those states even set minimum age requirements, but Alabama doesn’t do that either.

Rep. DeMarco’s bill has been endorsed by the Alabama Bar Association and has universal support from lawyers and non-lawyers alike. If there is any real opposition in the Senate, it’s been very quiet. This bill should be passed by the Senate and signed into law by Gov. Riley as soon as possible. Hopefully, that will have happened by the time this issue is mailed.

Source: Associated Press

IV. COURT WATCH

SUPREME COURT TURNS DOWN EXXON APPEAL OF \$112 MILLION VERDICT

Believe it or not, ExxonMobil Corp. suffered a defeat in the U.S. Supreme Court last month. The justices refused to consider an appeal by the oil giant of a \$112 million damage award in an environmental lawsuit. The court’s decision, without comment, effectively ends that litigation. The case began in 1997 when former Louisiana judge Joseph Grefer and his family sued Exxon, alleging that a contractor had contaminated the family’s land with radioactive waste. A contractor had cleaned pipes for ExxonMobil and other oil companies and left the waste, which occurs naturally as a result of oil and gas production, on the property. Fortunately for them, none of the Grefers became ill from the waste.

The Grefers were initially awarded \$1 billion in punitive damages and \$56 million in compensatory damages by a Louisiana jury. The Louisiana appeals court ultimately reduced the punitive award to \$112 million. Lawyers for the Grefers urged the Court to reject Exxon’s appeal. The company already had paid the compensatory damage award and ExxonMobil was contesting the punitive aspect. While this defeat for the powerful oil giant is not the greatest thing to have happened recently, at least it’s a victory for justice!

Source: Associated Press

FEDERAL PREEMPTION IS AS ANTI-CONSUMER AS IT GETS

The Bush Administration is making a final push to accommodate bosses in Corporate America who have been working hard for years in their attempt to destroy the civil justice system and thereby protect corporate wrongdoers. The years under the Bush Administration have been very bad for consumers. The current Administration's effort—if successful—could lead to a complete destruction of consumer rights. The name of the tort reform game in the last days of this Administration is "federal preemption." "Federal preemption" means that where a federal agency has acted—and sometimes even when it hasn't, if the area is within the agency's federal regulatory sphere—states are barred from taking stronger action, or any action at all, and consumers are barred from pursuing lawsuits under state law, where virtually all personal injury, defective product, consumer fraud and other consumer protection law has developed over many decades. That's something as anti-American as anything the tort reformers have done thus far. When you consider how weak and ineffective federal regulation has been by agencies such as the Food and Drug Administration, the National Highway Transportation Safety Administration, the U.S. Consumer Protection Safety Commission, and the Federal Aviation Administration, you see the fallacy in federal preemption.

I will first take a look at the FDA because the inept performance by that agency is a classic example of why preemption is bad for the American people. The following are some specific examples of how truly bad the FDA performance has been:

- Liver problems forced Pfizer to withdraw its diabetes drug Rezulin from the U.S. market in 2000.
- Bayer pulled Baycol in 2001 because it caused muscle damage in patients.
- Of course, the most prominent of all the drugs that had to be withdrawn for safety reasons was Vioxx, which

as we all know, was pulled by Merck & Co. in 2004 because it was causing heart attacks and strokes.

These and several other unsafe drugs all received approval by the FDA. If preemption is allowed, no person who is injured as the result of using these drugs will be allowed to file a lawsuit based on state product liability laws. A family who had a family member die as the result of a bad drug—even if it could be proved that the same drug had killed hundreds or even thousands—would not be able to file a lawsuit in a state court. That is the ultimate in protecting corporate wrongdoers and punishing their innocent victims.

The U.S. Supreme Court will soon hear a case that all Americans should become knowledgeable about because they have a vested interest in the outcome (*Wyeth v. Levin*, No. 06-1249). Those who realize that trusting Corporate America and federal agencies hasn't protected the public health and safety should hope and pray that the High Court will do the right thing in this case and reject federal preemption. The case before the Court involves Diana Levine, a professional pianist, who lost her right arm eight years ago because a drug company failed to warn of a known hazard. The prescription drug Phenergan had been administered through this woman's vein for a migraine headache. Ms. Levine filed a lawsuit against the manufacturer, Wyeth, alleging the company was aware that an arterial reaction was a risk in the intravenous technique that was used, but failed to mention it on the drug's warning label. She received a \$6.8 million judgment in her trial in a state court.

The issue before the U.S. Supreme Court in the Levine case is whether the existence of federal regulation regarding drug labeling by the FDA prohibits states from allowing victims to file state law product liability lawsuits in state courts. The High Court, in reviewing the case, must decide whether a regulatory agency can ignore Congress and actually ignore the constitutional rights of individual citizens. The case will not

be heard by the Court until sometime during its 2009 term, which does not begin until October of 2008. It's very clear that Congress never intended for preemption to become the law of the land in cases of this sort. There is nothing in any act of Congress that provides for federal preemption in cases like the Levine case.

For at least the past 15 years, the bosses in Corporate America have been pushing hard, and so far unsuccessfully, for Congress to adopt legislation that would literally destroy state court systems. Now they contend it's unfair to allow claimants to bring lawsuits in state courts, arguing that those claims should be exclusively federal matters. That is patently absurd when you put the issue in its proper perspective. The states have the right under the U.S. Constitution to establish and maintain a court system that provides a forum in which violations of state law can be litigated by victims of wrongdoing. In addition, a citizen of the United States has a right under the Constitution to a trial by jury—a basic right that often times is totally ignored.

The record of federal regulatory agencies is awful when it comes to protecting the public on safety and health issues. Clearly, the threat of civil litigation gives corporations a powerful incentive to make products that are safe for use. Suddenly, federal agencies, under pressure from the Bush Administration, have become very aggressive in unilaterally declaring that their regulations preempt state law. Such declarations often flout or even contradict the intent of Congress, which is the traditional standard of whether federal statutes or federal agency regulations override state law. In at least one instance the federal agency has snuck in preemption language after the proposed regulation was published for public comment. Traditionally, citizens of a state have had the right to pursue remedies in that state's courts where a wrongful act violates state tort law. Historically, any decision that would alter that has always been within the sole purview of Congress.

The reality is that preemption affects more than just drugs and medical

devices that fall under the FDA. It will also affect products of all sorts. The following are clear examples of how other federal agencies, at the direction of the Bush Administration, have attempted to protect corporations that commit wrongful acts that injure or kill innocent victims:

- **Auto safety (2005):** The National Highway Traffic Safety Administration promulgates rules on seat belts, roof-crush resistance and rear-object detection systems—and attempts to preempt state tort law in the preambles to those rules.
- **Mattress safety (2006):** The Consumer Product Safety Commission promulgates new flammability standards for mattresses that it predicts could save 270 lives a year. But, the Commission made a last-minute addition to the rule that attempts to preempt state tort law. This was the first such move in the Commission's 33-year history.
- **Chemical plants (2006):** The Department of Homeland Security issues new rules on chemical-facility safety that give state and local communities the responsibility for emergency response and clean-up—but attempts to preempt states from adopting and enforcing their own stricter laws to prevent accidents in the first place.
- **Railroad safety (2006):** The Federal Railroad Administration issued a rule that effectively grants immunity from state lawsuits to railroad companies in the event of a commuter train derailment. This came just four days after Congress approved a measure that preserved the right of victims to sue railroad companies in such instances.
- **The Airline Industry (2008):** Let's assume that the Federal Aviation Agency decided to issue a rule that gave commercial airlines immunity from lawsuits in the event of a crash of an airplane owned by a commercial airline. We have seen recently how poor a job the FAA has done in regulating the industry. Surely, we

wouldn't want federal preemption to apply in cases where airlines ignored the safety and welfare of passengers.

Preemption is a very bad thing for consumers because it takes away their rights and protects corporate wrongdoers. If the U.S. Supreme Court ignores tradition and established legal principles to allow preemption, persons who are injured or families who lose a family member will have no place to go for relief. In such an event, there will be no reason for a corporate manufacturer to put safe products on the market. You can imagine what would happen if there was no threat of a lawsuit when corporate marketing executives consider safety issues. If the High Court rules against the American people, it will then be up to Congress to remedy the situation and make it right.

So, the bottom line is that the FDA says you can't sue the maker of drugs or medical devices for injury if they meet agency standards; the CPSC says you can't sue a mattress maker if your mattress bursts into flames despite meeting CPSC standards; and carmakers making vehicles with weak roof structures would get similar protection from lawsuits brought by people injured or by the families of those killed in rollovers under NHTSA's roof crush standards. Most Americans have no concept of federal preemption and don't realize that it will be bad for them if it is upheld by the U.S. Supreme Court.

Those who are pushing federal preemption claim that Article 6 of the U.S. Constitution (The "Supremacy Clause") supports their position. But, this article has no application to the preemption issue unless Congress mandates it. In areas where there is no federal law, federal courts must defer to laws of the state where a lawsuit is filed. That well-defined legal principle includes product liability litigation. A developing body of judicial opinion could place new limits on the rights of those who buy or use products. It also could mean the savings of billions of dollars by companies insulated from lawsuits by the shield of preemption.

The assertions by federal regulatory agencies that their rules override state

product-liability laws are clearly contrary to law. It's significant that the agencies' claims are found in statements in the introductions to their rules, not in the rules themselves. There is no way to justify a federal agency making law that would preclude a state law claim being filed in a state court. That is even more true when the preemption language is found in the preamble to a rule.

One example of what this means to the average person is found in NHTSA's proposals for new SUV-rollover rules. Attorneys General from 26 states asked the organization in 2005 to drop lawsuit protection from the rules, which could go into effect as early as July 1st. As pointed out, state governments and the federal government will have to cover millions of dollars in health care costs, which they will pass along to taxpayers—costs that, by all rights, should be the responsibility of manufacturers. But, even in the face of strong opposition, NHTSA hasn't dropped the preemption provision. Senator Patrick J. Leahy of Vermont pointed out at hearings last fall that federal agencies have issued at least a dozen rules to shield drug and other product manufacturers from liability. All of this was done under explicit direction from the Bush Administration, and it was done quietly with little, if any, fanfare.

We were heavily involved in lawsuits in federal court against Merck & Co. and know first-hand how federal preemption, had it been allowed, would have affected this litigation. In suits claiming the painkiller Vioxx caused heart attacks or strokes, Merck & Co.'s defense included the FDA's claim that its approval of the label warning protected the company. A federal judge correctly rejected that defense and has since approved the \$4.8 billion settlement involving Vioxx. Had Merck really believed that its preemption defense was valid, the drug company would never have agreed to this settlement. The settlement is headed toward completion, and as they say, "the proof is in the pudding."

While preemption is being quietly pushed by the Bush Administration and

some of the bosses in Corporate America, it has the potential of literally destroying the states' civil justice systems. This is as un-American as it gets because a citizen of any state has the right under the U.S. Constitution to have these type cases litigated in the courts of his or her state. The U.S. Supreme Court should follow what has been an established legal principle and reject federal preemption. Unless Congress acts and authorizes preemption, a federal agency shouldn't be allowed to sneak it into a rule or standard or into the preamble to a rule or standard. It's sort of like the sneak attack on Pearl Harbor that triggered World War II. If our Supreme Court puts its stamp of approval on this attack on consumer rights, it will wake a "sleeping giant," the American people!

Source: *Washington Times*, *Insurance Journal* and *Associated Press*

A SIGNIFICANT COURT RULING WILL AFFECT LAWSUITS AGAINST GOODYEAR

I have never believed that corporate wrongdoing should be protected by confidentiality agreements or by sealing court files. The public should be made aware of things such as products that are defective and hazardous. Unfortunately, corporate defendants work hard to keep secret these known hazards and are successful much of the time. This is because victims are usually at their mercy and have to accept confidentiality when corporate defendants make confidentiality a condition of settlement. Recently, a federal judge ruled that in a case settled under strict confidentiality Goodyear Tire & Rubber Co. can't stop an accident victim's lawyer from telling about how a witness testified that the company knew its tires could fail when used on motor homes.

The witness, Kim Cox, who is a Goodyear claims administrator, testified under oath that the company "was aware" that its G159 tires "did not perform properly." Guy Ricciardulli, the lawyer who represented the plaintiff in the settled case, has given an affidavit setting out the testimony by Cox. This affidavit was filed in another pending

case against Goodyear. The tire manufacturer had abruptly stopped the 2003 deposition of Cox and agreed immediately to a confidential settlement of claims that tire failure had caused the accident at issue in the case. Ricciardulli disclosed Cox's testimony to another lawyer for use in that lawyer's case for a client. Goodyear then asked a federal judge to sanction Ricciardulli for revealing confidential information and data. Goodyear sought to prevent other accident victims' lawyers from questioning Ricciardulli and Cox about the alleged admission. Fortunately, Goodyear's attempt was unsuccessful. U.S. District Judge Rudi M. Brewster, who made this important ruling, wrote in his March 18th order:

Goodyear has not identified any public policy that supports the perpetuation of secrecy of a Goodyear employee's testimony concerning a possibly defective tire in certain usages. It would be repugnant to the public policy of protecting the health and safety of the public.

The testimony will help our firm in a pending lawsuit against Goodyear, the largest U.S. tire maker, involving its G159 model tire. It's most significant that a Goodyear representative admits there's a problem with this specific tire. The G159 tires, which are designed for much smaller vehicles than motor homes and are to be used primarily in an urban setting, are prone to failing when used on larger recreational vehicles. We will be able to prove in our case that there have been a number of similar accidents caused by the very same defective tire.

Interestingly, Cox's aborted deposition isn't available because the transcript wasn't finished and Goodyear destroyed the court reporter's notes from the deposition. The documents were unsealed by the judge's decision. The court order removes from confidentiality provisions any evidence of Cox's "deposition testimony regarding the fitness or safety of the G159 tire for use on motor homes." The ruling will allow us to call Cox as a witness in our case to discuss his previous testimony

to counter Goodyear denials of tire defects. We will also call Ricciardulli as a witness if Cox disputes the lawyer's recollections. The court order will allow us to question Goodyear about its stonewalling testimony relating to the tires that the manufacturer knew were defective. Our case is set for trial this month in an Alabama state court.

Source: *Bloomberg*

FORD LOSES APPEAL IN GAS-TANK EXPLOSION CASE

The family of a woman who burned to death when her car's gas tank exploded during a 1999 rear-end collision has won a significant victory in the Georgia Supreme Court. The court ruled in the family's favor in their case against Ford Motor Co. and Draw-Tite, the maker of a trailer hitch on the woman's car. The defendants lost their appeal when the Supreme Court unanimously upheld the verdict of a Georgia state court jury. Anne Marie Gibson died at the scene when a pickup slammed into the back of her 1985 Mercury Grand Marquis as it was stopped on U.S. Highway 129 waiting to make a left turn. Her car was hit again when it was forced into oncoming traffic. Bolts from the trailer hitch gouged into the car's gas tank, causing it to burst into flames as the passenger doors jammed. Ms. Gibson's seat collapsed, dropping her back into the flames. As many as 50 other people have been killed or seriously burned in similar accidents involving Ford vehicles. Even though Ford's exploding gas tanks remain on the road, Ford has not issued a recall. Neither has the automaker warned vehicle owners about the fire hazard. Having dealt with Ford in other cases, that really doesn't come as a surprise.

In the appeal, Ford was contesting a decision by the trial judge to punish the automaker for refusing to turn over records about crash tests it had conducted on that model. Ford contended the documents should remain confidential as attorney-client communications. The trial judge ruled that if the company wouldn't supply the files,

then the jury should consider that an admission that the seats and fuel tank were defectively designed. The Supreme Court, in a unanimous decision, concluded the trial judge was acting within his authority. It was stated in the court's decision:

Specifically, the requested evidence documented past car-to-car crash tests conducted by Ford on a line of vehicles that included the Mercury Marquis, and that had similar fuel tank locations and performance as the Mercury Marquis driven by Ms. Gibson at the time of the incident involving (the other) car. As evidence that could have shown Ford's prior, direct knowledge of fuel system, car door, and seat back design problems in car-to-car collisions such as the one that resulted in Ms. Gibson's death, we cannot say that the trial court clearly abused its discretion in concluding that Gibson had a substantial need for these documents.

Anne Marie Gibson was traveling through Clarke County, Georgia, in February 1999 when a Toyota truck slammed into the rear of her 1985 Mercury Marquis, leading to Ms. Gibson's death at the scene. Ford's design of Ms. Gibson's Marquis made the fuel tank too vulnerable and the design of a trailer hitch manufactured by co-defendant Draw-Tite involved dangerous bolts that punctured the tank, resulting in the fire. George W. Fryholfer, an Atlanta lawyer from the Butler law firm, represented the plaintiff in this case and did a very good job.

Source: Athens Herald Banner

CALIFORNIA APPEALS COURT REFUSES TO REDUCE JURY AWARD AGAINST FORD

A California state appellate court has refused to alter an earlier decision to award \$82.6 million in damages to a paraplegic who claimed faulty design caused her car to crash. The U.S. Supreme Court had ordered the state court to reconsider its original ruling in light of the case of *Philip Morris USA*

v. Williams, which had been decided by the High Court. In that decision, the Supreme Court held last year that jurors cannot punish defendants for harm to third parties when determining punitive damages.

Jurors originally awarded Benetta Buell-Wilson more than \$368 million in damages, of which \$246 million were punitives. In July 2006, the California court cut the total award to \$82.6 million, of which \$55 million were punitives. This new ruling affirmed that award, with the three justices unanimously saying there was nothing in Philip Morris that warranted a change in their judgment. Justice Gilbert Nares wrote in the 108-page ruling:

Based on our review of the record, plaintiffs' counsel was not asking the jury to punish Ford for harm done to third parties. Rather, counsel was discussing the repeated nature of Ford's actions in arguing the reprehensibility of Ford's conduct. That argument was entirely proper and did not create a 'significant risk' the jury would punish Ford for injuries to third parties.

Buell-Wilson, a mother of two, was injured in January of 2002, when her 1997 Ford Explorer fishtailed as she tried to avoid a metal object. The sport utility vehicle rolled four times before coming to rest on its roof. At trial, Buell-Wilson's lawyers argued that the Explorer's design defects were derived from Ford's rollover-prone Bronco II, but management ignored the risks. The jurors agreed and returned the verdict against Ford. The justices on the appeals court found the automaker's conduct reprehensible but reduced the award. The California Supreme Court denied review, but the U.S. Supreme Court granted cert before remanding to the 4th District.

In the latest ruling, the appeals court listed several reasons the high court's opinion in *Philip Morris* didn't compel a reversal or further reduction: The court said Ford had submitted misleading jury instructions on third-party harm at trial, didn't object in a timely manner to the plaintiff's closing argu-

ments during the punitive damages phase, hadn't requested a limiting instruction during the trial's liability phase and didn't raise instructional error on appeal. Ford plans to appeal again to the Supreme Court.

Source: The Recorder

THERE WILL BE LOTS OF LITIGATION OVER THE MORTGAGE INDUSTRY MELTDOWN

There will be a tremendous amount of litigation arising out of the mortgage industry meltdown that has caused severe problems for the U.S. economy and for the people who became victims as a result of the combination of corporate greed and weak or non-existent government regulation. Consumers who lost houses and investments will be filing lawsuits all over the country trying to recoup their losses. Bank failures, suspect lending practices and risky investments in mortgage-backed securities have hurt hundreds of thousands of consumers and businesses. With the drop in stock and property values, investors lost some \$5 trillion in value according to media reports.

Source: Reuters

V. THE NATIONAL SCENE

TV VIOLENCE MUST BE CURTAILED

It doesn't take an expert to convince me that the ultra-violent television programming to which young people are constantly being exposed has a direct correlation to the increasing acts of violence we are witnessing in this country. Hardly a week passes when we don't hear on the evening news that there has been an act of violence either in a school, in the work place, or in a home, resulting in multiple deaths. After watching the news accounts later that evening, during prime time hours, families are exposed to shows on both broadcast and cable channels where

extreme violence is featured. A prime example is the CBS show *Dexter* which features a serial killer as the main character. The Parents Television Council reported in a recent issue of *PTC Insider* that *Dexter* is a graphically-violent, sexually-explicit and profanity-laden program featuring a serial killer as the hero. *Dexter* was originally aired as a pay-for-view cable program and was for adults only, as I understand it. Now CBS has the program and it is being shown during prime time with no restrictions.

I am convinced that the behavior patterns of young children, who are constantly watching these violent programs where innocent and not-so innocent people are killed in a most violent manner, are affected adversely. Maybe it's just another coincidence—but the increases in both programming like *Dexter* and the senseless killings that are occurring in all parts of our country leads me to believe that this is much more than a coincidence. When you see a news report that third grade students in Georgia planned to kill their teacher because one of the students had been disciplined, it is most disturbing. These young children actually had the means of carrying out their plot. This sort of thing should get our attention. I suspect these children got their bizarre plan from some TV show.

The American people had better wake up and get involved with groups that are taking on the FCC and the television industry. Of course, it will take action by politicians to clean up the television industry and that is easier said than done. People putting pressure on the politicians will get their attention. We can't afford to sit back and do nothing. If you want more information on this subject, go to the web site of the PTC. I would also encourage our readers to join this organization, which has been fighting an uphill battle to keep programs like *Dexter* off the air. All of us who love our country and want to protect our children and grandchildren must get involved in this fight. Parents can do their part by not only monitoring what their children watch on television, but also by refusing to buy products or

services from corporations that sponsor programming like *Dexter*. The politicians had better wake up and join the battle. It will take more than talk from them—it requires action!

Source: Parent's Television Council

AL GORE LAUNCHES CAMPAIGN TO FIGHT GLOBAL WARMING

Al Gore, who has taken on a new role since removing himself from the political arena as a candidate, has launched a three-year, multimillion-dollar advocacy campaign calling for the U.S. to reduce its greenhouse gas emissions. The Alliance for Climate Protection's campaign, dubbed "WE," will combine advertising, online organizing and partnerships with grass-roots groups to educate the public about global warming and urge solutions from elected officials. The group will attempt to get a movement happening to switch public opinion so that public officials will make this issue a top priority. An advertising campaign will equate the climate-change movement with other grand historic endeavors, like stopping fascism in Europe during World War II, overcoming segregation in the United States, and putting the first man on the moon. Hopefully, this effort will result in the bipartisan support needed to do something about a serious problem. There is a real need for a bipartisan approach to climate change.

The alliance will initially spend \$300 million over three years. Some of the money for the campaign comes from Gore himself, who has contributed his personal profits from the book and movie *An Inconvenient Truth*. He has also given \$750,000 from his share of the Nobel Peace Prize and has made a personal matching gift. Research suggests that many Americans are concerned about climate change, but simply don't know what to do about it. The "WE" campaign website hopes to change that by offering ideas on conserving energy at home and work and guidance for those who want to do more, like writing to their elected officials. Cathy Zoi is the CEO of the group and has lots to do. Most folks see this as

only an environmental issue. However, it's actually much more. It's an issue of energy independence and it's an issue of national security. Regardless of how you may feel about Al Gore as a political figure, it's evident he's been responsible for bringing these important issues into the international spotlight.

Source: Associated Press

STRONG REGULATION OF WALL STREET IS NEEDED

It's quite apparent that Congress must take immediate action to strengthen the regulation of Wall Street firms. Something must be done to clean up what has turned out to be a real mess as soon as possible. Unless this broken system is fixed, I fear that there will be more situations similar to the virtual collapse of Bear Stearns and the meltdown of the mortgage markets. While Congress must strengthen oversight of financial institutions, getting it done won't be easy. We have seen what a colossal mess resulted from deregulation and it's obvious that approach hasn't worked and won't work in the future. The meltdown in credit markets exposed significant weaknesses in the nation's tangled web of federal and state regulators.

There is too much wrong in the existing regulatory structure to fix it and that is quite evident. Overseeing the practices across the entire array of commercial banks, Wall Street firms, hedge funds and nonbank financial companies will be a real challenge. Nevertheless, we must have tighter control over all financial markets. I am not sure what form the fix should take, but an overhaul is in order.

I really don't expect anything of significance to be finalized so long as George Bush and Dick Cheney are in office. However, Congress can't afford to wait for the next president to start his or her work. It's time for the leadership of the House and Senate to get down to some serious work in this critically important area of concern.

Source: New York Times

OUTSOURCING PASSPORT MANUFACTURING TO FOREIGN FIRMS IS JUST PLAIN DUMB

When I think the federal government has already done the dumbest possible thing it could do, something pops up that tops the list. When I learned that a U.S. government agency uses foreign firms to make new e-passports I almost fell out of my desk chair. On top of that the firm is apparently overcharging for them. The *Washington Times* reported that the Government Printing Office outsourced the manufacturing of U.S. passports to foreign firms which charged the U.S. State Department nearly twice what it would have cost the GPO to have them made. The law that established the printing agency states that it can only charge what it needs to recover its costs. Security agencies and the GPO said it has protective measures in place to keep blank passports out of the hands of U.S. enemies but the agency's inspector general, J. Anthony Ogden, said in October that there are "significant deficiencies" in the security of the manufacturing process. Ogden's report said the GPO stated it couldn't overcome the "significant deficiencies" because of "monetary constraints," according to the *Times*.

The *Times* investigation and subsequent report indicates the blank passports travel to Europe where a microchip is inserted in the back cover and then on to Thailand where they are fitted with a radio antenna. The Netherlands company that makes the covers for the passport said in October that China stole the technology for the microchips. Surely the possibility of blank passports getting into criminal hands has been considered by our national leaders as at least a possibility. If that were to happen, all sorts of problems would be in store for American citizens.

Source: UPI

FEMA HAS BEEN A NATIONAL DISASTER

While the Federal Emergency Management Agency is supposed to deal with **natural** disasters, it appears that

the agency itself has actually become a **national** disaster. A prime example of how bad FEMA has been involves how the agency dealt with Hurricane Katrina. Hundreds of millions of dollars have been wasted by FEMA since Katrina. People in New Orleans and along the Gulf Coast are still hurting. One of the problems has been finding the formaldehyde in FEMA trailers. In addition to the thousands of trailers in use, there are thousands of mobile homes stored for possible use by disaster victims.

Formaldehyde, a preservative commonly used in building materials, can cause respiratory problems and has been classified as a carcinogen by the International Agency for Research on Cancer and a probable carcinogen by the U.S. Environmental Protection Agency. There is no federal limit for formaldehyde, but officials in Alabama, Arkansas, Louisiana, Mississippi and Tennessee are discussing whether they should set a uniform standard of what an acceptable level of formaldehyde in emergency housing should be.

A federal scientist says his bosses ignored pleas to alert the hurricane victims about formaldehyde dangers in the trailers. He says they urged him not to go public with any warnings. Christopher De Rosa of the Centers for Disease Control and Prevention told a House subcommittee his bosses told him such warnings could be misinterpreted if released to the public. De Rosa was one of the specialists who testified before the House Science and Technology subcommittee on how the CDC and other agencies handled health complaints linked to the trailers that FEMA provided to victims of hurricanes Katrina and Rita. It certainly appears that FEMA is guilty of playing down the health hazards. That is pretty clear, considering that the CDC felt in February that the formaldehyde levels in the FEMA trailers was a real problem.

After years of fumbling and stumbling, FEMA has finally seen the light and is now setting strict new limits on formaldehyde levels in the mobile homes it buys for disaster victims. After insisting for months that existing trailers were safe, the agency now says it

will take "extraordinary precautions" by buying trailers with formaldehyde emissions comparable to that of a conventional house. FEMA itself has been a national disaster, and the more we see and hear of how this agency operates, the more I realize that all of the political hacks must be removed from this outfit and replaced with folks who understand their duties and responsibilities to the American people.

Source: USA Today and Associated Press

FAMILIES OF VIRGINIA TECH VICTIMS REACH A SETTLEMENT

Most families of victims of the mass shootings at Virginia Tech that left 32 people dead have agreed to an \$11 million settlement of their claims. The settlement was said to compensate families who lost loved ones and pay survivors' medical costs. According to Virginia Gov. Timothy M. Kaine, a "substantial majority" of families of victims of the shootings agreed to the settlement. Families who have not agreed to the settlement can file suit. However, notice had to be filed by April 16th in order to sue the state or the university.

As you will recall, 32 persons were killed and about two dozen others were wounded on April 16, 2007. Forty families had previously filed notice with the state that they might file suit. University officials were criticized for waiting about two hours before informing students and employees about the first shootings, which police initially thought were an act of domestic violence. The gunman had been ruled a danger to himself during a court commitment hearing in 2005 and was ordered to receive outpatient mental health care, but never received treatment.

By accepting the settlement proposal, family members gave up the right to sue the state government, the school, the local governments serving Virginia Tech and the community services board that provides mental-health services in the area. Settlements on behalf of those killed must be submitted for court approval. In October, the families and surviving victims received payments ranging from \$11,500 to

\$208,000 from a fund set up in the days after the shootings to handle donations that poured into the school. As I understand it, that fund will remain open for contributions to scholarships for five years. Families originally were told they had to respond to the state's offer by March 31st, but the deadline was extended. It will be interesting to see how the settlement works out. A global settlement of all claims is a most difficult thing to accomplish, considering the setting of the events and the potential defendants.

Source: *Insurance Journal*

WAL-MART AGREES TO TOUGHEN POLICIES FOR GUN SALES

Regardless of how one feels about gun control and the right to bear arms, it's pretty obvious that something must be done to keep guns out of the hands of criminals. We have experienced so many acts of senseless violence—resulting in deaths where guns were involved—that it has become almost a daily event on the nightly news. There are efforts underway by a number of groups that are designed to curb the violence that is widespread in the U.S. these days. As the result of the work of one of these groups, it appears that Wal-Mart, the nation's largest seller of firearms, will now toughen its rules for gun sales. Many believe this is long overdue. Changes to come at about 1,100 Wal-Mart stores selling guns include:

- Creating a record and alert system to record when a gun sold at Wal-Mart is later used in a crime. If the purchaser of that gun later tries to buy another gun at Wal-Mart, the system would alert the sales clerk of the prior buy. The clerk could then refuse to make the sale.
- Retaining the recorded images of gun sales in case law enforcement wants to view them later as part of an investigation.
- Expanding background checks of employees who handle guns and expanding inventory controls.

The action by Wal-Mart was brought

about by a group of mayors—headed by New York Mayor Michael Bloomberg—who have been working hard to keep guns out of the hands of criminals. The group, which is being funded largely by Mayor Bloomberg's personal fortune, is trying to gather support in Congress to:

- End the gun show loophole.
- Require gun dealers to perform criminal background checks on all gun-handling employees.
- Close a so-called fire-sale loophole that allows gun dealers whose licenses have been revoked by the government to sell off their inventory without background checks.
- Add those placed on the terrorist no-fly list to the list of people prohibited from purchasing a firearm.

I fully realize that the NRA has members of Congress afraid to do anything that would make them look weak on the "gun issue." Nevertheless, it's obvious something must be done. Hopefully, others will follow these mayors and Wal-Mart in their efforts to protect the American people in their homes, at schools and in workplaces. No politician should play "political games" on this important issue. We can have reasonable gun control and still protect the constitutional right to own a gun. I say this, having had a personal history of gun ownership and hunting. While I have been critical of Wal-Mart on other issues, I commend them for having the courage to take a positive step toward curbing violence in this country.

Source: *USA Today* and *Associated Press*

VI. THE CORPORATE WORLD

CITIGROUP WILL PAY \$1.66 BILLION TO SETTLE ENRON CREDITORS' CLAIMS

Citigroup has agreed to pay Enron Corp. creditors \$1.66 billion as the final

part of a settlement of a lawsuit over several banks' responsibility in the energy trading firm's downfall. In addition to the payment, Citi has agreed to waive and release additional claims. Enron Creditors Recovery Corp., Enron's successor corporation, agreed to the settlement which is alleged to represent a huge step toward the final settlement of litigation Enron brought against 11 banks, accusing them of conspiring with former Enron officials to manipulate the energy company's finances. The banks allegedly helped set up structured finance transactions with Enron that buried the company in debt, forcing it into bankruptcy.

Interestingly, Enron was seeking \$18 billion in damages from Citigroup and wanted to recover an additional \$3 billion in prebankruptcy payments made to Citigroup. The settlement calls for Citigroup paying \$1.66 billion, with indemnification claims and an additional \$249.4 million of claims Citigroup made against Enron being waived. The deal will allow the release of an additional \$1.7 billion of cash held in a disputed claims reserve. Both payments will be part of a special distribution to creditors after the settlement gets U.S. bankruptcy-court approval. The funds won't be part of the creditor distribution on April 1st, estimated at more than \$1 billion.

Enron will allow claims of parties holding some \$2.4 billion in Enron credit-linked notes to proceed. To reduce its exposure to the company, Citigroup approached major institutional investors, including insurance companies and mutual funds, to invest in a series of notes. Those holders will receive \$2.1 billion plus interest, gains and dividends. According to Citigroup, separate litigation with the noteholders has been settled. It says reserves will cover all of the settlements.

Source: *Insurance Journal* and *Wall Street Journal*

KPMG MAY HAVE CONTRIBUTED TO THE FALL OF NEW CENTRAL FINANCIAL

A five-month investigation into the collapse of New Central Financial, one of the nation's largest subprime

lenders, points a finger at accounting firms as a possible new culprit in the ongoing mortgage fiasco. New Century, whose failure just a year ago came at the start of the credit crisis, engaged in “significant improper and imprudent practices” that were condoned and enabled by auditors at the accounting firm KPMG, according to an independent report commissioned by the Justice Department. E-mail messages uncovered in the investigation showed that some KPMG auditors raised red flags about the accounting practices at New Century, but that the KPMG partners overseeing the audits rejected those concerns because they were afraid of losing a client.

New Century, once one of the nation’s leading subprime lenders, was forced into bankruptcy last April because of a surge in defaults and a loss of confidence among its lenders. The report lays bare the aggressive business practices at the heart of the mortgage crisis. KPMG disputes the report’s allegations. The report zeros in on how New Century accounted for losses on troubled loans that it was forced to buy back from investors like Wall Street banks and hedge funds. Had it not changed its accounting, the company would have reported a loss rather than a profit in the second half of 2006.

According to the report, investigators “did not find sufficient evidence to conclude that New Century engaged in earnings management or manipulation, although its accounting irregularities almost always resulted in increased earnings.” Even so, the report contends the profits were the basis for significant executive bonuses and helped persuade Wall Street that the company was in fine health when in fact its business was coming apart. In bankruptcy court, creditors of New Century are claiming they are owed \$35 billion. The company’s stock peaked at nearly \$65.95 in late 2004, but it was trading at a penny in late March of this year.

The investigation was led by Michael J. Missal, a lawyer, who has had extensive experience in matters of this nature. He was hired by the United States trustee overseeing the case in United States Bankruptcy Court in

Delaware. Missal, a former investigator in the enforcement division of the Securities and Exchange Commission, who also worked on an investigation of WorldCom’s accounting misstatements, concluded that KPMG and some former New Century executives could be liable for millions of dollars in damages because of their conduct. According to the report, KPMG auditors had deferred excessively to the lenders. It appears that KPMG was afraid it would lose New Century’s business if its auditors didn’t acquiesce to their client’s demands. New Century and its executives are the subjects of a federal investigation by the Justice Department. Investors have filed numerous civil lawsuits against the company and it appears that KPMG will be a defendant.

Source: *New York Times*

GEN RE BOSS RESIGNS UNDER FIRE

The chief executive officer of General Re Corp. has resigned. Federal prosecutors had been pushing for his removal. Joseph Brandon, who led one of Berkshire Hathaway’s largest reinsurance subsidiaries, will be replaced by General Re’s President Franklin Montross. Pressure for Brandon to step down had increased greatly after four former executives at the company were convicted on fraud charges in February.

A Connecticut jury found the four former executives of General Re Corp. and a former executive of American International Group guilty of participating in a reinsurance agreement that inflated AIG’s reserves by \$500 million and helped prop up its stock price. Berkshire owns more than 60 different businesses, including furniture, insurance, jewelry and candy companies, restaurants, natural gas and corporate jet firms. And Berkshire has major investments in such companies as The Coca-Cola Co. and Wells Fargo & Co.

Source: *Associated Press*

BIOVAIL CORP. WILL PAY A \$10 MILLION FINE

Canadian drug maker Biovail Corp. has agreed to pay a \$10 million fine to resolve federal regulators’ charges of civil accounting fraud and deceiving investors and analysts. The Securities and Exchange Commission announced the settlement with Biovail. A civil lawsuit had been filed in a New York federal court. The company must also refrain from future violations of federal securities laws. Toronto-based Biovail also agreed to hire an independent consultant to oversee its accounting. The SEC’s charges remain pending against current and former officers of Biovail.

The Ontario Securities Commission filed related allegations against the four executives and scheduled a public hearing for April 22nd. It was alleged in the SEC’s lawsuit that Biovail and senior executives “engaged in a pattern of systemic, chronic fraud” that distorted its quarterly and annual reports filed over four years. To conceal the fraud, the executives “intentionally misled the company’s auditors and the investing public, showing their complete disregard for their responsibilities to shareholders,” according to the SEC.

In October 2003, according to the SEC, Biovail and several executives deceived investors and analysts by falsely attributing nearly half of the company’s failure to meet its third-quarter earnings target to a truck accident involving a shipment of Biovail’s antidepressant Wellbutrin XL. The accident in fact had no effect on earnings for the quarter, the SEC said. The agency also accused the company of three fraudulent accounting schemes between 2001 and 2003: shifting around \$47 million in expenses for drug research and development onto the books of a “special purpose entity,” concocting a phony transaction to record \$8 million in revenue, and intentionally misstating losses from foreign currency transactions to understate a quarterly loss by some \$3.9 million.

Source: *Associated Press*

TJX AND MASTERCARD SETTLE DATA BREACH LAWSUIT

TJX Cos. and MasterCard Inc. have agreed to settle a lawsuit over a massive data breach at the discount retailer. As you may know, TJX owns about 2,500 stores including T.J. Maxx and Marshalls. The breach resulted in the theft of millions of credit-card numbers. Under the agreement, TJX will provide up to \$24 million to settle loss claims made by MasterCard issuers in connection with the data theft. In December, TJX won support from Visa Inc. card-issuing banks to go ahead with plans to pay them as much as \$40.9 million to help cover costs from the data breach. Consenting banks agreed not to sue TJX and Fifth Third Bancorp, which processed card payments for TJX.

Under the terms of the most recent agreement, MasterCard card issuers that filed claims for operational expenses or reimbursement of fraud losses on accounts used at TJX during a period to be determined by MasterCard will be eligible to receive restitution in the second quarter. Numbers and personal data stored in TJX's computers on as many as 100 million cards were stolen by hackers, who remotely tapped into the computers beginning in July 2005. It should be noted that this theft was the largest of its kind to date.

Source: *Wall Street Journal*

FORMER CEO OF NATIONAL CENTURY GUILTY OF WITNESS TAMPERING

A federal jury in Ohio has convicted the former chief executive of National Century Financial Enterprises of interfering with a witness in a criminal fraud case involving the bankrupt company. Lance Poulsen, the former CEO of the health-care finance company, was found guilty by the jury. The witness tampering charge was linked to a key witness who was scheduled to testify in the trial of Poulsen and other executives for an alleged \$2 billion fraud at National Century. The Ohio jury convicted Poulsen and Karl Demmler of trying to tamper with the

testimony of Sherry Gibson at the separate National Century fraud trial, which ended in March with the conviction of five other company executives.

Those five executives were found guilty of scheming to deceive investors and credit rating agencies about the financial health of National Century. Poulsen will be tried on fraud charges in August, according to the Justice Department. Poulsen and Demmler each face up to 35 years for the witness tampering, conspiracy and obstruction of justice convictions. National Century filed for bankruptcy in November 2002 after an auditor refused to sign its financial statements and lenders stopped advancing funds. The Ohio-based company was once a multibillion dollar business that bought patients' bills from health-care providers and packaged them into bonds for investors.

Source: *Reuters*

BLACKROCK SHOULD BE INVESTIGATED

A Congressional panel has asked the Federal Reserve for details on its decision to hire BlackRock Inc. to manage \$30 billion in assets held by the Fed after JPMorgan Chase & Co.'s buyout of Bear Stearns Cos. Rep. Henry Waxman, who is the chairman of the House Oversight and Government Reform Committee, wrote a letter asking New York Federal Reserve Bank President Timothy Geithner to explain how officials decided to pick BlackRock, the terms of their agreement with the firm and what plans the Fed has to oversee its handling of the portfolio. Rep. Waxman, who is becoming a real champion for consumers, which include investors, observed:

It appears that BlackRock is serving as a government contractor providing complex financial services to the Federal Reserve. If BlackRock does its job well, the taxpayers will be made whole or even experience a gain. If BlackRock is not successful, the taxpayers stand to lose billions of dollars.

The Fed, attempting to stave off the bankruptcy of Bear Stearns, agreed to

take illiquid assets off the company's balance sheet to encourage JPMorgan to buy the firm. Most of the investments were mortgage-backed securities and "related" items. BlackRock will attempt to sell the assets to pay back the Fed and JPMorgan. Federal Reserve Chairman Ben S. Bernanke tried to justify not taking bids on this contract when he told the Joint Economic Committee of Congress last month that it was "simply not practical" to put the job out to competitive bidding "given the short time period" for brokering the Bear Stearns agreement. Congress is entitled to know, according to Rep. Waxman, whether the Fed intends to eventually open up "this potentially lucrative position" to competitive bidding in order to ensure that "taxpayers are getting the best value for their money." Rep. Waxman is also concerned about what he called the bank's "apparent lack of concrete terms" with BlackRock, noting that Bernanke told Congress on April 2nd that the firm is working "on a fee-to-be-determined-later basis." Rep. Waxman says his committee's investigations have shown that "when contract terms are not defined in advance, it is usually the taxpayer—not the contractor—who suffers." I certainly agree with that assessment. A no-bid contract with no set fee agreement in place can't be a good thing for taxpayers who will foot the bill. What do you think?

Source: *Bloomberg*

NEW ENGLAND JOURNAL OF MEDICINE DISCLOSES CANCER STUDY BACKERS

It's come to light that a 2006 study claiming 80% of lung cancer deaths may be prevented with CT scans was actually funded by a tobacco company. The *New England Journal of Medicine* made this known last month. Interestingly, it appears that the *New York Times* prompted the *Journal* to act. The source of funding for the study in the October 26, 2006, issue of the *Journal* was reported by the *Times* on March 26th. The *Journal* wrote in its recent editorial:

We and our readers were surprised to learn that the source of the funding of the charitable foundation was, in fact, a large corporation that could have an interest in the study results. It is important to ask whether a study on clinical outcomes in lung cancer should be directly underwritten in part by the tobacco industry.

It appears that Vector Group Ltd., parent of Liggett Tobacco, contributed \$3.6 million, or “virtually all” of the funding for the Foundation for Lung Cancer, which backed the study. The researchers had disclosed receiving royalties from Cornell Research Foundation, which had invented some scanning tests and licensed them to General Electric Co., which makes computed tomographic, or CT, scanners. The *Journal* did not include that disclosure in the 2006 publication, but has now corrected that oversight. Frankly, I am not at all surprised that a tobacco company funded a study that directly affected its business. That sort of thing has happened before in industries other than the tobacco industry and those companies have gotten away with it. In fact, our firm often has to deal with studies financed by companies that have a vested interest in the results. Such studies are used against our clients in lawsuits and are less than objective.

Source: Bloomberg

VII. CONGRESSIONAL UPDATE

CONGRESS MUST HOLD BIG OIL ACCOUNTABLE

Executives of the five largest oil companies operating in America — Exxon-Mobil, BP, Shell, ChevronTexaco and ConocoPhillips—testified last month before the House Select Committee on Energy Independence and Global Warming. As we all know, the oil companies are raking in record profits.

Crude oil consistently has exceeded \$100 a barrel and a gallon for gasoline will soon cost \$4. The oil industry executives tried to explain why they should continue to receive billions of dollars in subsidies and tax breaks from the American people when the money could be better spent on renewable energy and energy efficiency investments needed to combat climate change. Their answers were pretty weak and not at all convincing.

Oil companies are spending more on stock buybacks than capital investment and that makes no sense. Oil exceeding \$100 a barrel should provide the industry with all the incentive necessary to re-invest in energy infrastructure. But since 2005, the largest five oil companies have had cumulative profits of \$345 billion and spent \$252 billion buying back stock and paying dividends to shareholders. In addition, these companies are sitting on \$53 billion in cash. In 2007, ExxonMobil spent \$3.34 billion on capital expenditures in the United States, while spending 850% more—\$31.8 billion—buying back stock. If the oil industry is unwilling to use \$100 a barrel oil to make necessary investments in this country, then Congress is justified in revoking recently awarded tax breaks worth billions of dollars.

Tax breaks slated for repeal were enacted during a period of record profits. The primary Big Oil giveaway that H.R. 5351 targets for repeal was enacted into law in 2004. By freezing the domestic production deduction only for major integrated oil companies, Big Oil companies will rightly be denied \$13.6 billion in tax breaks over the next decade. In addition, the legislation would close a loophole that allows some oil companies with foreign operations to pay substantially less in U.S. taxes. Closing this loophole will require oil companies to pay \$4 billion more to the U.S. Treasury over the next decade.

Energy futures markets where prices are set must be re-regulated. Two regulatory lapses are enabling anti-competitive practices in energy trading markets where prices of energy are set:

- Oil companies, investment banks and

hedge funds are exploiting recently deregulated energy trading markets to manipulate energy prices.

- Energy traders are speculating on information gleaned from their own company’s energy infrastructure affiliates, a type of legal “insider trading.”

In October 2007, BP agreed to pay more than \$300 million to settle allegations that the company manipulated American propane futures markets. Closing the “Enron Loophole” to restore transparency and reduce speculative abuses will help bring down prices. It’s high time for Congress to protect the American people from the powerful oil industry. The “tail has been wagging the dog” when it comes to the federal government and the oil companies for much too long and that trend must be reversed.

Source: Public Citizen

SENATORS ATTEMPT TO OVERTURN FCC’S MEDIA OWNERSHIP RULE

Several bi-partisan senators are working to nullify the FCC’s December decision to allow single companies to own newspaper-broadcast combinations in the nation’s top 20 markets. If the decision is overturned, the Tribune Co. and other affected companies will fight any new legislation. The “legislative veto” push is being led by Senator Byron Dorgan (D-ND), along with 14 other senators, according to the *Los Angeles Times*. The National Association of Broadcasters plans to file suit against the FCC in federal court over the loosening of the ownership rules.

In passing the media ownership proposal in December, the FCC disregarded 25 U.S. Senators who said they would block the decision should the FCC pass it. In defense of the decision, FCC chairman Kevin Martin claims that the media marketplace is considerably different than when the original media ownership rule was put into place in 1975. He defends cross-ownership, saying it will “help to forestall the erosion in local news coverage by enabling companies to share news-gathering costs across media plat-

forms.” I really don’t buy that argument and neither should Congress. Hopefully the Senators will be able to push through legislation that will correct what the FCC has done.

Source: *Los Angeles Times*

VIII. PRODUCT LIABILITY UPDATE

A NEW REPORT DEALING WITH THE ROLLOVER ISSUE

A new study reveals what we have known for years: weak roofs are the main cause of death and serious injuries in rollover accidents. The study, conducted by the Insurance Institute for Highway Safety, found that the stronger a roof, the lower the risk of injury to occupants of a vehicle. This study confirms what the lawyers in our firm who handle rollover cases have been contending all along. But, the car-makers have contended for years that roof crush really doesn’t matter and NHTSA has largely put its regulatory head in the sand—taking the ostrich approach. Clarence Ditlow, executive director of the Center for Auto Safety in Washington, D.C., says:

This report rebuts the long-standing industry argument that roof crush doesn’t matter.

It’s well known that 30,000 people die or are seriously injured in rollover crashes each year. As we have reported in prior issues, a proposed change to roof strength standards by NHTSA has also created controversy because it includes language suggesting that a new rule would preempt state law. That proposed rule would increase the current roof strength standard, which has been in effect since 1971.

The Insurance Institute study looked at 11 mid-sized SUVs, including Jeep Grand Cherokee, Nissan Xterra, Chevrolet Blazer, Dodge Durango, Ford Explorer, Toyota 4Runner, Mitsubishi Montero and others. Researchers tested them by measuring the amount of

force required to crush the roof two inches, five inches and ten inches, taking into account a vehicle’s weight. Under current safety standards, a vehicle must support 1.5 times its weight. The study concluded that the 2000-04 Nissan Xterra had one of the strongest roofs, withstanding a force of 2.93 times its weight for its 4-door model and 3.16 times its weight for its 2-door, at five inches of crush. The Jeep Grand Cherokee had the worst results, supporting 1.64 times the weight of its 4-door and 1.72 times the weight of its 2-door. The study also analyzed about 23,000 real-world rollovers in accidents involving the same 11 vehicles across 12 states. It concluded that at each measure of crush, there was a consistent relationship between roof strength and injury risk.

The study estimated that at five inches of crush, there was a 28% difference in the risk of injury between the Grand Cherokee and the Xterra, and at two inches the difference in predicted injury risk between the two vehicles was 51%. It also estimated that raising the current federal roof crush standard from a 1.5 strength-to-weight ratio to a 2.5 ratio would “reduce the risk of serious and fatal injury in a rollover crash by 28%,” and that “increasing roof strength requirements beyond 2.5 times vehicle weight would reduce injury risk even further.”

The study should be admissible in evidence in litigation, but if it’s not, it definitely bolsters causation and disputes the “diving” defense—that an occupant in a rollover would have been injured by the downward force in a rollover even before a roof could have intruded on him or her—a defense which is routinely used by car-makers. However, even if the report cannot be used in evidence during a plaintiff’s case, all defense experts can certainly be questioned on cross examination as to the results of the study if they have read it. If they haven’t read it—considering the excellent reputation that the Institute enjoys—the study results will be great cross examination material.

A proposed change to NHTSA Standard 216 would require a roof to

support 2.5 times the vehicle’s weight, up from the current standard of 1.5 times the car’s weight. The current standard is so old that most new cars already conform to 2.5 and most all consumer advocates say that it should be raised even higher, to 3.5. Stronger roofs also prevent injuries from partial ejection, something that government tests do not take into account. NHTSA has also sought comments about upgrading its testing protocol, such as testing both sides of a vehicle, performing testing that simulates real world conditions or using dummies to test roof incursion on an occupant. Currently, tests are performed only on one side and use static testing that presses a metal plate against the vehicle. The comments period ended March 29th.

The proposed rule also included controversial language that suggested the new federal standard would preempt state tort claims. This provision clearly is in conflict with language in the enabling statute for NHTSA that says safety standards proposed by the agency should not preempt state common law. Some U.S. Senators have written to NHTSA expressing their concern over this issue. The preemption language should be taken out of the final rule, but so long as George Bush is president and Karl Rove is still lurking around in the shadows of the White House, the preemption language will stay in. It’s clearly unconstitutional and the courts will have to acknowledge that if the final rule contains preemption of state tort claims. A challenge of constitutionality of the preemption issue is a certainty if NHTSA caves in to the pressure being put on the agency by the Bush Administration and the carmakers.

Source: Law.com

MORE TROUBLE FOR THE YAMAHA RHINOS

For the last several months, we have written about one of the most dangerous ATVs on the market—the Yamaha Rhino. Its defective design has led to many adults and children being seriously injured and in some cases killed. Yamaha designed the Rhino to be

narrow and top heavy and then the company selected small tires for the narrowly-designed ATV. These design features make the Rhino very unstable and easily prone to roll over. Rollovers of these ATVs occur even when the terrain is flat and the driver is turning at low speeds.

Now there appears to be another serious problem with the Rhino. Recently, Yamaha announced that it was recalling about 7800 Rhinos due to problems with the brakes. According to Yamaha's recall announcement, the brake caliper on the left front wheel of the Rhino could have been made incorrectly, resulting in a brake fluid leak. This can cause a loss of braking and control of the vehicle, which poses a serious safety risk to the drivers and passengers of these vehicles. The recall involves 2008 Rhino YXR450 and YXR700 Side-by-Side vehicles sold nationwide from October 2007 through March 2008. Anybody who has one of these Rhinos should immediately stop using it and contact any authorized Yamaha Rhino dealer to schedule a free repair.

Unfortunately, the recall still does not address the safety and design defects of the older Rhinos, as discussed above, that continue to cause serious injuries and death. These Rhinos have been a source of controversy ever since they entered the market in 2003. Yamaha rushed the models to the market before it properly tested them. Yamaha has admitted that it did not do any dynamic testing of the Rhino to see what would happen to passengers in the event there was a rollover. In other words, Yamaha did not do the kind of testing it needed to keep drivers and passengers safe while in this ATV. Yamaha knew the Rhino had a high center of gravity, yet never asked the important question of what would happen to those who were inside this unstable vehicle when it rolled over. Yamaha failed to design doors or passenger handholds into the ATVs that would help protect occupants during a rollover. This lack of basic safety features will continue to cause severe injuries to uninformed consumers. Simply put, Yamaha has not done

enough to address the Rhino's defective design and people will continue to suffer traumatic injuries until more is done.

Our firm is currently looking at a number of Rhino cases. Mike Andrews is the contact lawyer on those cases for the firm. If you have any questions or need any information feel free to call him at 800-898-2034 or email him at Mike.Andrews@beasleyallen.com.

PROBE OF UNINTENDED ACCELERATION IN TOYOTA SIENNA MINIVAN

Federal safety regulators are currently investigating a complaint of unintended acceleration in the Toyota Sienna. The Office of Defect Investigation (ODI) at the National Highway Traffic Safety Administration has acknowledged receiving the complaint. The Complainant reported that he applied the accelerator pedal to accelerate the vehicle and experienced unwanted acceleration upon release.

According to the safety regulators, the field data indicates that when a retainer pin is missing from the driver's side center stack/console trim panel, the panel can detach from the console and the accelerator pedal can become entrapped under the trim panel causing unwanted acceleration. The trim panel was used on Toyota Sienna minivans produced from January through June of 2003, according to the ODI. The new component used after June 2003 apparently does not "entrap the throttle," according to the safety agency. The ODI has launched a preliminary investigation to assess the scope, frequency and potential safety related consequences of unintended acceleration in the Sienna. Our firm is currently handling cases dealing with the problems with other Toyota vehicles. Graham Esdale is the contact lawyer on those cases for the firm. If you have any questions or need any information feel free to call him at 800-898-2034 or email him at Graham.Esdale@beasleyallen.com.

Source: ODI Web Site

VERDICT IN 1999 JEEP GRAND CHEROKEE CASE INVOLVING THE DEATH OF A BABY

Recently, a jury in Chalmette, Louisiana, returned a verdict in a case involving the death of an unborn baby who was fatally injured when the family's 1999 Jeep Grand Cherokee went from park to reverse, pinning the mother against a brick carport column. The jury awarded nearly \$2.8 million to Judi Guillot, the baby's mother, \$2.1 million to the father, \$80,000 to the two together, and \$125,000 to Madison Guillot, the couple's daughter who was three years old at the time and who witnessed the accident from her car seat.

Judi Guillot was on her way to a hospital to give birth in May 1999. As she and her husband were about to leave their home, Mrs. Guillot stepped out to retrieve her young daughter's song book. Her husband got out to get his cell phone from the SUV's hatchback. As he approached the rear, the SUV began rolling backward and pinned his wife. The Cherokee was in park, according to trial testimony, but spontaneously shifted into reverse. The baby, Collin Jacob, was delivered alive, but died 2 1/2 weeks later. Doctors attributed the death to brain injuries sustained when the Cherokee pinned the mother. The carmaker blamed the father saying he left the car in reverse when he went to retrieve his cell phone. There was some controversy over this issue.

As you may know, Chrysler recalled 1.6 million 1993-1998 model Grand Cherokees after complaints that the vehicles could shift suddenly from park to reverse. However, the company says neither its own investigation nor one by the National Highway Traffic Safety Administration found any defect. The Guillots' SUV was a 1999 model, not part of the recall. But the jury found its design was unreasonably dangerous. The family said they wanted to hold the company accountable. Chrysler says it will appeal.

Source: Associated Press

AG COMPANY SETTLES BIRTH DEFECT LAWSUIT

A lawsuit was settled recently involving a three-year-old child who had a birth defect that left him with no legs, no right arm and a short bud for a left arm. The child's migrant worker parents settled their lawsuit last month with Ag-Mart Produce, a Florida-based agricultural company. The company sells fruits and vegetables under the name Santa Sweets. It was alleged that the parents' working in Ag-Mart tomato fields and exposure to pesticides caused their child's defects.

The child's parents say their son is representative of many more children affected by pesticides, but their families are afraid to come forward. Deplorable conditions in farm work were disclosed by this lawsuit. It was said that farm workers in many states are exposed to pesticides on a daily basis. The parents picked tomatoes in Florida and in North Carolina for Ag-Mart before and after the mother became pregnant. The couple filed suit in 2006. The confidential settlement was approved by a state court judge. The terms of the settlement were sealed by the court with the settlement dollars put in protected trust funds for the benefit of the child.

This child was one of three babies born with severe birth defects within a seven-week period. All three of the mothers worked in the same tomato field and all three lived within 100 yards of one another. It was alleged that Ag-Mart managers did not adhere to seven-day waiting periods after spraying and before sending workers to pick crops. Sometimes, according to the plaintiffs, workers were sent into the fields the day after spraying. At other times, it was said that crops were sprayed with pesticides while workers were in the fields.

Agricultural officials said spot checks found no illegal pesticide residues. In 2005, North Carolina and Florida hit Ag-Mart with nearly 400 citations and fined the company about \$300,000 for pesticide mis-use from 1999 through 2003. In December, a judge in North Carolina recommended the dismissal of 271 of the pesticide violations. In

March, an administrative judge in Tampa threw out almost all of the Florida charges, citing a lack of evidence. Ag-Mart has changed its pesticide practices. In 2005, company officials said Ag-Mart would discontinue use of five of the six traditional agricultural chemicals known to cause birth defects.

Source: *Tampa Tribune*

CALIFORNIA JUDGE APPROVES FORD EXPLORER SETTLEMENT

A California judge has approved the settlement of a class-action lawsuit that will compensate about 800,000 Ford Explorer owners whose vehicles lost value because of a perceived rollover danger. The settlement brings to end lawsuits against Ford Motor Co. in California, Connecticut, Illinois and Texas. Those lawsuits claimed that Explorers lost about \$1,000 in resale value because of publicity stemming from a series of rollover accidents involving the popular SUV. It should be noted that the class action over the loss in value is separate from the numerous death and personal-injury lawsuits involving earlier models of the Explorer that are pending across the country.

Under the settlement, those who bought Explorers in model years 1991 through 2001 are eligible for \$500 vouchers to buy new Explorers or \$300 vouchers to buy other Ford or Lincoln Mercury vehicles. Consumer groups and some plaintiffs objected to the settlement. They said few owners will be able to take advantage of the vouchers, in part because of the poor economy and high gas prices. They also were upset about the fee amounts lawyers in the case will receive.

The Washington, D.C.-based Center for Auto Safety formally objected to the settlement on behalf of about 450,000 owners of Explorers in California, 350,000 in Texas, 150,000 in Illinois and 50,000 in Connecticut. In ruling for the settlement, the trial judge said fewer than 70 plaintiffs had filed written objections to the settlement. The judge acknowledged the agree-

ment's shortcomings but said it was a reasonable end to seven years of litigation. Frankly, Ford came out the winner in this settlement and will sell lots of vehicles if the coupons are used by the plaintiffs.

Source: *Forbes* and *Associated Press*

IX. MASS TORTS UPDATE

DRUG COMPANIES WANT A LEGAL SHIELD

I wrote extensively about federal preemption in the Capitol Observations Section. However, the *New York Times* recently carried an excellent story by Gardiner Harris and Alex Berenson on federal preemption and how it protects the drug manufacturers. Because of the seriousness of the issue, the article warrants mention here. After decades of being dismissed by courts, federal preemption could be on the verge of becoming the law. As a payback for huge campaign funding, the Bush Administration has worked hard for the doctrine. They claim the FDA is the only agency with enough expertise to regulate drug makers and that its decisions should not be second-guessed by courts. The U.S. Supreme Court is to rule on a case next term that could make preemption a legal standard for drug cases. More than 3,000 women and their families have sued Johnson & Johnson, asserting that users of the Ortho Evra patch suffered heart attacks, strokes and even death. From 2002 to 2006, the FDA received reports of at least 50 deaths associated with the drug. The agency did not warn the public of the potential risks until November 2005—six years after the company's own study showed the high estrogen releases. At that point, the product's label was changed, and prescriptions fell 80%, to 187,000 by last February from 900,000 in March 2004.

As we have reported, the FDA is poorly organized, scientifically deficient and woefully short of money. In February, the agency's commissioner,

Andrew C. von Eschenbach, admitted that the FDA faces a crisis and may not be “adequate to regulate the food and drugs of the 21st century.” The *Times* article pointed out that the FDA doesn’t even test experimental medicines. Instead, the agency relies on drug makers to report the results of their own tests completely and honestly. Even when companies fail to follow agency rules, officials rarely seek to penalize them. The FDA receives a tremendous amount of money each year from the drug companies—the very companies it is supposed to be regulating—which is part of the problem. Lawyers for Johnson & Johnson say that patients should not be allowed to sue the company because the FDA approved the patch and its label. When you consider the FDA’s poor record of approving drugs that turned out to be extremely dangerous and had to be withdrawn from the market, it’s difficult to have any confidence in the agency’s ability to regulate a politically powerful industry. That’s why preemption is so bad for people and so good for the drug industry.

Source: *New York Times*

PATIENT AWARDED \$40 MILLION AFTER MONITOR DESTROYS HEART

A jury has awarded a 54-year-old Washington man \$40.1 million against a medical device manufacturer. Paramjit Singh went to a hospital in 2004 following a minor heart attack. The man’s heart was seriously burned during a bypass procedure at the hospital. Doctors could not get his heart to continue beating voluntarily, and couldn’t determine what was causing the problem. They eventually learned the cause of the malady. A Vigilante cardiac catheter designed to monitor Singh’s blood flow overheated, reaching more than 500 degrees and melting into his heart. After the operation seared his heart, Singh couldn’t be awakened from the anesthesia. He was then placed on life-support and remained in a coma until a matching heart was found and transplanted nearly three months later.

Ever since the botched surgery, which was not the fault of the doctors or the hospital, Singh has faced a barrage of medical problems. The drugs he takes for his heart have left him susceptible to cancer and he is at constant risk of kidney failure. Doctors believe he will someday require another heart transplant. The manufacturer, Edwards LifeSciences, accepted all responsibility for the faulty monitor at trial, leaving the jury to determine damages. Extensive evidence of the manufacturer’s pattern of negligence with the machine going back more than half a decade was presented during the trial. From all accounts, the evidence was devastating for the manufacturer.

Rather than recall the defective product, the corporation simply fixed the machines one-by-one as they were sent back for maintenance. Neither the hospitals that used the monitors nor the FDA were ever informed of the problem or the company’s response to it. Only after the Singh incident in 2004 was the issue reported to the FDA—and that was only after the agency just happened to find out during a visit to the manufacturer’s plant. The FDA was on the premises at Edwards on another matter when they found out what had happened to Singh.

The FDA then conducted a full investigation and in July 2006 thousands of the Vigilante monitors were recalled. One of the doctors who performed Singh’s surgery testified it was “unconscionable” that Edwards had not reported the problem and allowed surgeries to proceed with faulty machines. The doctor had been told the machines were perfectly safe. The FDA investigation turned up thousands of documents establishing that Edwards was having problems with the monitor going as far back as 1998. A piece of computer code discovered that year, called “Layout Six,” had been added to the machines to allow the flexibility to add additional features. The code subsequently caused the monitors to crash.

Edwards had originally blamed the hospital, and specifically the two doctors who carried out the procedure, for Singh’s problems. The hospital sued Edwards for attorneys’ fees and

other damages, claiming fraud and breach of contract. The hospital was awarded \$100,000 in punitive damages on its claim. Paul Luvera, a very good lawyer from Seattle, Washington, represented the Singh family and did an exceptional job in the case. Do you think that this case would be a pretty good argument against federal preemption? After all, the FDA approved the defective medical device.

Source: *Florida Lawyers Weekly*

PAIN PUMPS AND CARTILAGE DAMAGE

Pain pumps are medical devices, approximately the size of a cell phone, that are used to manage post-operative pain. These devices are used following surgery to deliver, by way of a catheter, continuous doses of pain relief medication. The pump delivers anesthetic pain medication directly into the operative site for a period ranging from 12 hours to five days, depending on the device brand and recommendation of the physician. Prior to 2000, it was common for doctors to use pain pumps in muscle tissue following shoulder surgery. After 2000, they began inserting pain pump catheters into the shoulder joint space (synovial space).

Soon thereafter, reports in the medical literature emerged, describing cases of chondrolysis in patients after shoulder surgery. Glenohumeral chondrolysis is a painful and permanent condition that results from the disintegration of the cartilage covering the bones in the synovial joint. The loss of cartilage causes severe pain, both in movement and at rest, as well as stiffness, decrease in range of motion, and a significant loss of strength. Injured patients usually require additional surgeries, including complete shoulder joint replacement.

Recently, Doctors Brent Hanson and Charles Beck published a review of 12 of their own patients who developed chondrolysis following shoulder surgery between August 2003 and March 2005. All 12 patients had received pain pumps with infusions of bupivacaine and epinephrine directly into the synovial cavity. The authors

noted that they had not experienced chondrolysis in any of their patients before this time frame. Describing chondrolysis as a “devastating complication” for which there is no effective treatment, the authors found that the incidence of this condition among their patients was “startlingly high.” Of those who received pain pump therapy in the synovial space with bupivacaine and epinephrine, 63% developed chondrolysis. The authors emphasized the importance of this information to the orthopedic community at large and concluded:

We have identified a concerning and strong association between post arthroscopic chondrolysis and intra-articular pain pump catheter use with bupivacaine and epinephrine... Until further investigation has been done, the authors recommend that the use of intra-articular pain pump catheters in combination with bupivacaine with or without epinephrine be avoided in all joints with an intact cartilage surface. Furthermore, the effective treatment of chondrolysis remains elusive. We believe that further investigation of the possible association of pain pump use with chondrolysis is warranted.

In 1998, prior to licensing its product to one pain pump manufacturer, Stryker Corporation, McKinley Medical, LLP asked the FDA for permission to let it market its pain pumps for infusion into the synovial cavity. McKinley told the FDA that using the pain pump in this manner posed no harm to the joint space. In response, the FDA asked McKinley for safety and efficacy studies to support this new marketing claim. Later, the FDA approved labeling indications for the pump to be used for continuous infusion of a local anesthetic “directly into the intraoperative site,” but not into the synovial cavity.

Thus, when Stryker obtained the rights to market McKinley’s pain pumps, it knew or should have known that there were no adequate studies to support the safety of pain pumps when used to administer bupivacaine directly,

under continuous pressure, to the shoulder joint space. More importantly, Stryker knew or should have known that the FDA had rejected this new proposed use of McKinley’s pain pumps.

Stryker’s marketing strategy is especially relevant and important because the company was recently prosecuted for paying orthopedic surgeons hundreds of thousands—if not millions—of dollars for using its hip and knee replacement products exclusively. Stryker engaged in this illegal scheme from at least 2002—2006, during the same timeframe that surgeons began using pain pumps in the shoulder joint. Stryker has lots of answering to do relating to its marketing of the pain pumps as well as how little it spent on scientific studies to determine the safety of pain pumps and bupivacaine in humans.

Until surgeons were warned—and it appears that most have still not been warned—they had no way of knowing this new use of pain medicine was dangerous. Not only were surgeons denied knowledge of the dangers of using pain pumps in this manner, but they were strongly encouraged to use them by the device companies. When the manufacturers learned of the specific adverse outcomes of using their pain pumps in this new way they should have sounded the alarm immediately. Instead, they recklessly pushed this new use of their products to expand their market and make more profits. Because an alarm was never sounded, ‘Dear Doctor’ letters were never sent out, and no attention was called to the problem. Some surgeons unknowingly continue, to this very day, to use these pumps in this perilous way.

Our firm is currently investigating and litigating cases of this type throughout the country. We are working with firms in Oregon which have a case set for trial in September of this year. Ted Meadows is the contact attorney in these cases. If you need additional information, feel free to contact Ted or his Legal Assistant, Kathy Farmer at 800-898-2034. You can also contact Ted by email at ted.meadows@beasleyallen.com

VIOXX SETTLEMENT UPDATE

The Vioxx Resolution Program is proceeding smoothly and efficiently in accordance with the schedule agreed upon by Plaintiffs’ Negotiating Counsel and Merck & Co. The first step in cementing the \$4.85 billion dollar settlement deal was the registration of all Vioxx claims which were filed in court or tolled with Merck prior to November 9, 2007. Currently, 58,241 claims have been registered and 921 separate law firms have registered claims related to Vioxx. Registered claims are designated as either involving a heart attack, stroke, or other injury. In addition, claimants were required to disclose if the injury in question caused death and/or if the Vioxx user had ingested Vioxx for more than 12 months prior to the injury in question.

The second step in effectuating the settlement is the enrollment of eligible claims. Only cases alleging a heart attack or stroke and filed or tolled prior to November 9, 2007, are eligible to enroll or participate in the Program. In order for the Settlement Program to become effective, 85% of all eligible heart attack and stroke claims must be enrolled in the program. To date, approximately 46,700 of those alleging an eligible injury have taken steps to enroll. This means that over 93% of eligible claims have been enrolled. Though analyses of enrollment documents are ongoing, it appears certain that the Vioxx Resolution Program will become effective and any rights Merck has under the settlement agreement to walk away from the settlement will be extinguished.

Following the enrollment stage, the third step will be for Claimants, or their Counsel, to submit medical records to the Claims Administrator, including hospitalization records and pharmacy records which prove that they suffered heart attacks or strokes while using Vioxx. The Claims Administrator will determine if the claims pass through the three gates necessary for compensation: injury, duration of Vioxx usage, and proximity of usage. The deadline for the submission of claims information or packages is July 1, 2008. Over

1300 packages have been submitted to the Claims Administrator at this time, involving claimants represented by 44 law firms.

The Vioxx Resolution Program is proceeding very efficiently. One of the hallmarks of the Program is that eligible plaintiffs with legitimate claims will be compensated as fairly and quickly as possible. Many Vioxx victims have had pending lawsuits for more than five years, some even having won large jury verdicts, but have not been compensated one dollar to date. Thanks to the insight of Plaintiffs' Negotiating Counsel, eligible claimants with compensable claims will receive an interim payment as early as August of this year. This is unheard of in a large mass tort settlement and very good for the individuals and their families who were injured by Vioxx. Andy Birchfield, Leigh O'Dell, Roger Smith and staff in the Mass Torts Section are doing a tremendous job in bringing this monumental undertaking to a conclusion.

TWO DRUG MAKERS FACE MULTIPLE CLASS ACTION SUITS

AstraZeneca Plc, the United Kingdom's second-biggest drug maker, and Bristol-Myers Squibb Co. face multiple class-action lawsuits accusing them of overcharging for some medicines in the United States. A federal judge will consider grouping the claims against the drug companies based on similarities between state statutes. A single nationwide class action might be difficult because many claims fall under consumer-protection laws that differ by state. The lawsuits accuse AstraZeneca and Bristol-Myers of overcharging insurers, pension funds, and others for medicines such as cancer drugs that must be administered by physicians. The judge had been asked to certify a national class, based on Massachusetts case law.

You may recall that in November, the same judge in Boston ordered AstraZeneca to pay \$12.9 million and Bristol-Myers \$696,000 after concluding that they sold cancer drugs to doctors in the state at discounts to pub-

lished "average wholesale prices," while secretly encouraging them to bill insurers in full. Abbott Laboratories and ten other companies that were accused of inflating drug prices agreed last month to pay \$125 million to resolve similar claims.

Source: *Bloomberg*

MEDICATIONS APPROVED LATE MORE LIKELY TO CAUSE SAFETY PROBLEMS

Harvard researchers have found a disturbing pattern with drugs that have been pulled off the market. They found that medicines approved right on deadline by the Food and Drug Administration are more likely to cause safety problems later than those cleared with more time to spare. Congress has set deadlines for the FDA to speed the arrival of new medications. However, lots of folks believe that the drug manufacturers take advantage of the criteria used in connection with the deadlines. The Harvard analysis of decades of drug approvals, published in the *New England Journal of Medicine* last month, provides the first scientific evidence supporting some of the complaints relating to the system. As expected, the FDA challenges the findings. But, Dr. Steven Nissen, the Cleveland Clinic's influential cardiology chief, sees things differently. Dr. Nissen observed:

The article is a wake-up call. It puts the FDA in a very difficult situation when they're trying to make complex decisions under these very, very tight deadlines. We've got to reevaluate now whether that's good public policy.

The Congressional deadlines imposed on the FDA in 1992 allowed drug makers to pay millions of dollars in fees directly to the cash-strapped agency so it could hire more reviewers and clear a backlog of pending drug applications. In return, the FDA had to make a decision—either approve or reject—on 90% of all drug candidates within 12 months of their application. If it failed to meet the deadlines the agency would lose money. The deadline

was only six months for drugs that were classified as "lifesaving," which were given high priority. In 1997, Congress tightened the deadline for most drugs to ten months. As a result of the concern about risky drugs, Harvard professor Daniel Carpenter took a closer look at the impact:

- First, he found approval is 3.4 times as likely in the two months leading up to the user-fee deadline as at any other time.
- Drugs approved in that just-before-deadline period had a four- to five-fold higher rate of later being withdrawn or requiring serious safety warnings, compared with drugs approved faster or those that miss the deadline.

There are a number of drugs that were late date approvals that had to be pulled from the market. The following are among on-the-brink approvals that later caused problems:

- The painkiller Vioxx was pulled off the market in 2004 for increasing the risk of heart attacks and strokes;
- Bextra was gone in 2005;
- The diabetes drug Rezulin was withdrawn in 2000 for liver problems;
- Cholesterol-lowering Baycol was pulled in 2001 for causing muscle damage; and
- More recently, the diabetes blockbuster Avandia was linked to heart risks last year, getting a strict new warning label.

Dr. Carpenter acknowledged that lots of folks must work under deadlines, observing that for the FDA, "these deadlines are kind of stand-ins for pressure" to approve. Dr. Jerry Avorn of Brigham and Women's Hospital in Boston, who co-authored the study, observed:

FDA staffers by their own admission feel very much under the gun as these deadlines loom. If they're forced to make decisions prematurely, they may not make the right decisions. That needs to be debated openly.

Unfortunately, because of the tight budget climate in Congress, industry user fees are unlikely to be replaced with taxpayer dollars. In fact, Congress reaffirmed the user-fee provisions last year. According to reports, it's unclear if lawmakers would even revisit the deadline issue this year. The review process for new drug applications definitely needs to be fixed. If the industry user fee law is causing problems, it should be changed. There appears to be lots that is wrong at the FDA. It's pretty scary when you consider that the agency is charged with protecting the public from unsafe drugs.

Source: USA Today and Associated Press

ACCUSATIONS OF DELAYS IN RELEASING DRUG RESULTS

Information revealed last month to a Congressional committee relating to drug trials is very disturbing. The lead outside investigator on a crucial trial of two widely used heart drugs said in an e-mail message last July that Merck and Schering-Plough, the companies that make the drugs, were deliberately delaying the release of the trial results "to hide something." The companies failed to release the preliminary results of the trial, called Enhance, until January. That was almost two years after the trial was finished. When the results from the trials were finally released, they showed the drugs, Vytorin and Zetia, did not work to reduce plaque in arteries.

The results led a panel of cardiologists to recommend that the drugs be used only as a last resort. The new information was contained in e-mail messages to executives at Schering-Plough that were released on March 31st by Senator Charles E. Grassley of Iowa, the ranking Republican on the Senate Finance Committee. The committee has been investigating the delay in the release of the Enhance trial results. The controversy over the way that Merck and Schering-Plough handled the Enhance trial, as well as their heavy promotion of Vytorin and Zetia, has made lots of folks in the medical community very uneasy. The drugs are used

to lower cholesterol and are among the most widely prescribed medicines in the United States, with sales of \$5 billion last year.

The Enhance investigator, Dr. John J. P. Kastelein, also complained last July that Merck and Schering had failed to consult him on the reasons for the delay. He threatened to resign as the main study investigator. As we know from the barrage of television commercials, Zetia lowers cholesterol by blocking its absorption in the intestine. Vytorin combines Zetia with simvastatin, another cholesterol-lowering drug, which is sold under the brand name Zocor. Dr. Kastelein, a Dutch cardiologist and scientist, was hired by Merck and Schering to conduct the Enhance trial. The trial consisted of images of the arteries of 720 patients taking either Vytorin—the combination of Zetia and Zocor—or Zocor alone. Because Vytorin lowers cholesterol more than Zocor alone, apparently the companies believed that the trial would show that patients who took Vytorin had less growth of plaque in their arteries than those who took Zocor. It's widely known that arterial plaque is closely correlated with heart attack and strokes.

The trial ended in April 2006, and its results were initially expected in late 2006 or early 2007. But the companies repeatedly delayed releasing the results of the trial saying publicly that many of the images of the arteries were unclear and might need to be re-examined. That excuse is now highly suspect. According to his email messages, Dr. Kastelein had by July 2007 become upset with the companies for the delays. The next day, according to the text of the messages released by Senator Grassley, Dr. Kastelein complained that the companies seemed to be trying to slow the release of the results by including data that was not relevant and would take more time to compile. Dr. Kastelein's messages have raised new concerns over the nearly two-year delay in the release of the Enhance results.

Dr. Krumholz and three other cardiologists told more than 5,000 people at the annual American College of Cardiology scientific convention that Vytorin

and Zetia should not be used except as a last resort. The two major cardiology associations seconded those recommendations. The proof that a drug actually cuts the risks of heart attacks and strokes requires an expensive, multi-year clinical trial enrolling 10,000 or more patients. Those studies, called "outcomes trials," have been conducted for statins. As you know, they proved that patients taking statins do have a reduced risk of heart disease. Interestingly, no such outcomes trials exist for Vytorin and Zetia. In 2006, four years after Zetia reached the market, Merck and Schering began enrolling patients in their own outcomes study, which compares people taking Vytorin with those taking Zocor alone. But the results of the trial are not likely to be available until 2012, or possibly later. I am not sure what the FDA will do as a result of this controversy, but the agency has an obligation to look into the matter. After all—the FDA is supposed to protect public health and safety when it comes to drugs.

Source: New York Times

FDA LOOKS AT SUICIDE RISK IN MERCK DRUG

The Food and Drug Administration is probing a possible connection between Singulair, which is Merck & Co Inc's blockbuster asthma drug, and suicidal behavior in adults and children. The agency is reviewing the issue after receiving reports of mood and behavior changes, suicidal thinking and suicide in patients who took the drug. Singulair is used to treat allergy symptoms as well as asthma. Thus far no definite link to the drug has been established, according to the reports. However, the FDA hasn't disclosed how many post-marketing reports it had received and Merck apparently won't say how many reports had been submitted. The company did tell Reuters the reports did involve both adults and children. The behavioral risk is noted on Singulair's drug label. The FDA has asked the company to evaluate its data for more information. The review is expected to take up to nine months to complete.

The FDA approved Singular in the United States in 1998. Merck claims that its analysis of more than 11,000 patients in 40 clinical trials found no reported suicides or suicidal thoughts or behavior. Merck says it was working to inform doctors about the concerns. The FDA is also reviewing reports of behavioral changes in patients taking similar drugs, including AstraZeneca Plc's Accolate and Critical Therapeutics Zylflo. All three drugs are known as leukotriene agents that work by controlling leukotrienes—chemicals in the body that are released during an allergic reaction and can lead to inflammation, congestion and other symptoms.

Singulair is Merck's biggest selling product and one of the world's top selling medicines with 2007 global sales of \$4.3 billion—\$3.4 billion in the United States—which makes it a blockbuster drug. In comparison, Accolate took in \$57.4 million in U.S. sales in 2007, while Zylflo and Zylflo CR combined brought in about \$10 million, according to data from IMS Health. Those changes highlighted the risk of tremors, depression, anxiety and suicidal behavior on Singular's label. The FDA has urged patients to talk to their doctors. The agency wants healthcare professionals and caregivers to monitor patients taking Singular for suicidal thinking and behavior as well as changes in behavior and mood.

Source: Reuters

FDA TO SEEK MORE SAFETY DATA ON STENTS

The Food and Drug Administration has laid out new guidelines for the testing of drug-coated stents. This comes more than two years after safety concerns curtailed use of the devices. The proposed guidelines posted to the FDA's Web site recommend device makers conduct large, analytic studies of their stents both before and after they are submitted to the agency. The FDA said companies should be prepared to track patients for up to five years after their stents are approved to monitor blood clots, heart attacks and other potentially fatal events.

As most of our readers know by now, stents are tiny, mesh-wire tubes that prop open arteries after they have been surgically cleared of fatty plaque. The introduction of drug coatings to the devices quickly made stents a highly lucrative business. This was to prevent scar tissue from growing over the mesh-wire. But, data has suggested that the drug coatings may put patients at higher risk of blood clots. As a result, sales fell to about \$2 billion from a peak of \$3.1 billion in 2005. A series of studies in 2006 showed that months after they are implanted, stent coatings can increase the risk of life-threatening blood clots unless patients continue to take anti-clotting drugs.

Medical societies urge patients to continue taking the drugs for at least a year after implantation. It should be noted that while FDA guidelines are not legally binding, companies typically follow them to ensure approval of their devices. The regulatory agency will take comments on the proposed guidelines for four months before redrafting them and issuing final guidelines. The FDA has cleared three drug-coated stents: Boston Scientific Corp.'s Taxus; Medtronic Inc.'s Endeavor; and Johnson & Johnson's Cypher. Currently, about 650,000 patients in the U.S. have drug-coated stents. We will continue to follow this matter. Our firm is representing a number of clients who have had a bad experience with the stents.

Source: Associated Press

MORE CONCERNS OVER BLOOD THINNER FROM CHINA

Federal regulators have urged makers of many kinds of medical devices that contain Heparin, a contaminated blood thinner, to test their supplies. The products to be tested cover a wide spectrum of equipment and uses. They include kits that flush out intravenous lines, drug-coated stents for opening clogged arteries, and certain diagnostic tests that use heparin and could deliver inaccurate results if contaminated. The FDA has received two reports of serious allergic reactions linked to medical devices that contained heparin. The

reactions to the blood thinner are similar to those seen in some patients who received intravenous heparin that was recalled this year. The FDA has sent letters to 82 medical device manufacturers urging them to test their heparin for contamination.

The FDA also released statistics on deaths linked to intravenous heparin, the form of the drug in which problems were first detected. The numbers showed an increase in fatalities from November 2007 through February 2008. At last count, 81 deaths were associated with the use of heparin. As you may recall, Baxter Healthcare Corp. issued a recall for the product. The particular side effect that investigators are focusing on is a severe allergic reaction that can lead to a sudden and highly dangerous drop in blood pressure. The statistics showed that the number of reported deaths jumped from two in October to eight in November, and reached a peak of 16 in January. It was the sudden increase in such reports that was said to have prompted Baxter to alert the FDA to the problem. The FDA's statistics showed 62 deaths associated with the severe reaction in the 15 months from January 2007 through last month—an increase from the agency's previous count. Of these reported deaths, 47 came in the four-month period in which reports of problems suddenly shot up.

As people in the U.S. have learned, China is the world's leading supplier of heparin, a blood thinner often made from a substance in the intestines of pigs. As we have reported, it is commonly given to prevent blood clots in heart surgery and dialysis patients. Baxter's heparin was contaminated with a look-alike ingredient that mimicked heparin in standard tests of drug potency and purity. The FDA identified the contaminant as a modified form of a common nutritional supplement. That substance is cheaper to produce than heparin, leading to suspicions that it may have been intentionally added somewhere along a complex and poorly regulated supply chain in China. The look-alike substance was identified using special tests, which the FDA is now asking medical device manufacturers to employ.

The FDA is recommending that doctors and hospitals be alert to any serious side effects in patients using medical devices that contain heparin and to be prepared to deliver emergency treatment. The agency also urged doctors to be on the lookout for any puzzling test results in diagnostic kits that use heparin. It's also significant that the FDA Commissioner believes the contamination of heparin was most likely done for economic reasons and was fraudulent. The FDA is finally starting to deal with this problem. A good rule of thumb is that any product coming from China—or any component to a product made in the U.S. that came from China—should be suspect!

Source: *Los Angeles Times* and *Reuters*

X. BUSINESS LITIGATION

XEROX SETTLES SECURITIES LAWSUIT FOR \$670 MILLION

Xerox Corp., the world's largest maker of high-speed color printers, has received preliminary court approval to settle the investor lawsuit that has been in court for eight years for \$670 million. Xerox will pay the settlement into a fund in five installments this year and co-defendant KPMG LLP, Xerox's former auditor, will pay an additional \$80 million. The case, filed in 2000 in U.S. District Court in New Haven, Connecticut, claimed that Xerox misled investors about its financial health. The dispute concerns common stock and bonds bought from February 17, 1998, to June 27, 2002. Within that time frame, the company's stock closed as high as \$63.69 in May 1999 and as low as \$4.43 in December 2000 on a split-adjusted basis. The U.S. Securities and Exchange Commission levied a \$10 million fine against Xerox in 2002, saying executives led a four-year scheme to inflate revenue to meet analysts' growth estimates. The company restated results for 1997 to 2000 as a result of the SEC probe.

Source: *Bloomberg*

BUYOUT FIRMS SUE LENDERS OVER FAILED DEAL FOR CLEAR CHANNEL

Private-equity firms Thomas H. Lee Partners LP and Bain Capital Partners LLC have filed lawsuits against a syndicate of Wall Street banks over the deal for Clear Channel. In the suit, the plaintiffs want the lenders to fund the \$19.4 billion transaction. The pair of suits, one filed in New York State Supreme Court and the other in Bexar County, Texas, claim that the banks—Citigroup, Morgan Stanley, Credit Suisse, The Royal Bank of Scotland, Deutsche Bank and Wachovia—breached their contractual obligation to fund the deal. The New York suit alleges breach of contract and fraud. The Texas complaint, which was joined by San Antonio-based Clear Channel, claims that the banks have improperly interfered with the merger agreement. The litigation comes after a breakdown in negotiations over the financing terms on the deal.

The dispute is the latest instance of a major Wall Street deal that has landed in the courts in the wake of the credit crisis. The willingness of two of the world's biggest private-equity firms to sue some of their biggest backers points out how the extent of the financial crisis has undone Wall Street's traditional alliances. The New York lawsuit gets to some of the bedrock upon which deal-making rests. The banks face billions in losses if the transaction goes through because the credit-market turmoil has made it all but impossible for them to package leveraged debt and sell to investors. This type of debt has typically been marked down by about 15%, meaning the banks would take a loss of nearly \$3 billion. The banks committed to lend as much as \$22 billion to fund the deal, \$18 billion of it as senior secured loans. Clear Channel and the private-equity firms are taking a rather interesting position relating to the deal. Both say they are committed to the deal and expect it ultimately to go through. But, they also say if the deal doesn't close, they will have an extremely large tort claim against the banks.

The complaint filed in Texas asks the court to award the buyout firms and Clear Channel more than \$26 billion in

damages. Bain and Thomas H. Lee Partners have also asked the New York court to grant them an order that would force the banks to immediately provide financing. If that doesn't happen, the plaintiffs will ask for damages to cover, among other things, a \$500 million breakup fee that would be due Clear Channel. The banking firms said the financing terms they offered Bain and Thomas H. Lee Partners were consistent with the original commitment letter. I suspect we will see lots of similar litigation involving companies that were all riding high before the money problems facing Wall Street surfaced.

Source: *Wall Street Journal*

AIG SUES FORMER CEO GREENBERG AND SIX FORMER DIRECTORS

American International Group Inc., the world's largest insurer, has filed a lawsuit in New York Supreme Court against former Chief Executive Hank Greenberg and six other former directors and officers. The defendants are accused of breaching their fiduciary duty. The lawsuit marks another chapter in a complicated three-year battle between the insurer and its former chief who left the company in the midst of an accounting scandal.

AIG alleges in the complaint that Greenberg, former Chief Financial Officer Howard Smith and five others breached their fiduciary duty through "misappropriation of a special block of AIG shares worth approximately \$20 billion in 2005." The shares were held by Starr International Co. Inc., a company that had had close ties with AIG, owning a large block of shares for the purpose of protecting the insurer against hostile takeovers, and to fund compensation for current and future AIG employees. Starr, which is now controlled by Greenberg, is still a large AIG shareholder. This suit is separate from an earlier action in which AIG is effectively seeking to have all shares held by Starr International that were allocated for future compensation of AIG employees placed in a trust controlled by current AIG executives.

AIG contends in the New York litigation that the defendants had a fiduciary duty to preserve, protect and use the stock acquired by Starr International for the benefit of AIG. Allegedly, the defendants breached that duty by causing or participating in the removal of AIG managers from Starr's board and by the cancellation of the future deferred compensation for AIG, among other charges.

Greenberg left AIG in 2005, but he has retained control of Starr International, running the company as a private investment vehicle. According to *Reuters*, Starr's 9.7% stake in AIG makes it the insurer's largest shareholder. The complaint also names Edward Matthews, Ernest Stempel, L. Michael Murphy, John Roberts and Houghton Freeman, all of whom are either former officers of AIG companies or ex-directors, and are voting stockholders of Starr International. Interestingly, some are still honorary directors of AIG. The new lawsuit was filed by AIG after individual defendants refused to sign an agreement that would have effectively waived the three-year statute of limitation, which would have extended the time for filing suit.

Source: *Insurance Journal* and *Reuters*

HOME DEPOT SETTLES SHAREHOLDER SUITS

Home Depot has settled several lawsuits brought by shareholders. The company will adopt a sweeping array of corporate governance reforms to settle the combined shareholders' suits filed in Fulton County Superior Court in 2006, as well as three suits originally filed in U.S. District Court that were later added. The suits were filed in response to revelations that the company's board of directors had:

- for nearly 20 years backdated the stock options granted to executives, causing their value to be greater than it was when actually approved;
- fraudulently manipulated the company's "return to vendor" (RTV) program, under which suppliers are billed for supposedly damaged or returned merchandise; and

- provided hugely disproportionate payments and benefits to former board chairman and CEO Robert L. Nardelli, who was paid \$245 million over five years during which time the company's stock value plummeted 12%.

Nardelli resigned in January 2007, accompanied by a retirement package worth an estimated \$200 million. The suits also accused founding director Kenneth G. Langone of packing the board with corporate cronies, including Nardelli, who shared memberships on several corporate boards and provided other benefits to each other. As a result, the suits charged, the company falsified reports provided to federal regulators, and shareholders suffered multimillion-dollar losses. Shareholders also were upset when, at the 2006 shareholders' meeting, no board members attended and Nardelli—after skipping the usual speech—gave attendees a one-minute limit to ask questions. Apparently, eight shareholder resolutions were ignored and rejected. The settlement was approved and signed by Fulton County Superior Court Judge Craig Schwall on April 3rd. In addition to paying all legal fees and expenses, the company also agreed to 13 corporate governance changes. As a result, Home Depot will:

- Institute "multiple changes" to the board of directors;
- Ensure that two-thirds of board members are independent, and that five key committees, including the audit, nominating, corporate governance, leadership development and compensation committees, be composed only of independent members;
- Allow shareholder questions at meetings;
- Require that candidates for uncontested board seats receive a majority of votes cast;
- Impose safeguards on the removal procedures for directors;
- Institute measures to prohibit the abuse of backdating and RTV policies; and

- Allow large or group shareholders to nominate directors.

A settlement hearing to finalize the order will be scheduled within 60 days to allow any other documents or objections from Home Depot shareholders to be filed. The agreement includes a provision mandating that, in case the settlement deadline is not met or the plaintiffs lawyers fees are reduced or modified on appeal, the money will be refunded to the company.

Source: *Fulton County Daily Report*

A LARGE COURT VICTORY FOR AETNA

It appears that the Pennsylvania Superior Court has solidified a victory of more than \$200 million for Aetna by reversing a lower court judge's denial of its claim against its excess insurance providers. The appeals court sent the case back to the trial court to enter summary judgment. If that happens, it will result in an award of about \$200 million in damages for Aetna, with several million dollars in interest to be added. Aetna will also have the opportunity to amend its complaint to add a bad faith claim. According to the court's opinion, Aetna claimed its excess insurers, among them Lexington, National Union Fire Insurance Co., certain underwriters at Lloyd's of London and Executive Risk Specialty Insurance Co., breached their contracts by refusing to cover costs incurred from class action settlements with various groups of health care providers in 1999 and 2000. The opinion lists those costs as being \$24,648,541.59 in defense costs and \$4,228,515.44 in settlement administration expenses. In addition to those damages, Aetna sought to recover the approximately \$170 million it paid to settle the 2000 suit.

Source: *The Legal Intelligencer*

GENERAL MOTORS SETTLES CLASS ACTION LAWSUIT

A 49-state class action with a projected value of as much as \$165 million against General Motors has been settled. A state court judge granted pre-

liminary approval to the proposed settlement in what is referred to as “the auto-repair litigation” against General Motors. The nationwide settlement involved a group of consumer suits. It’s unclear how many GM car owners actually paid for repairs covered by the settlement. The per-person recovery will result in most people receiving about 50% of costs incurred for repairs. Most folks paid between \$600 and \$900 for their repairs.

Under the terms of the settlement, the class would be split into three groups based on the cars they drive, the type of engine and the kinds of repairs performed. Plaintiffs would collect \$50 to \$800 per repair, with speedier repairs generating larger reimbursements. The settlement does not cap the total amount GM would pay class members. Suits were filed in California and Missouri against GM about five years ago, claiming the auto manufacturer used an engine coolant in factories that created performance problems in more than 30 models of GM cars, including the Oldsmobile Cutlass and Chevy Impala. All of the cases targeted Dex-Cool, a coolant GM started using with the 1995 model year. The suits asserted claims for breach of warranty and violations of unfair business practices statutes. A hearing will be held on August 29th to determine whether the proposed settlement is fair, reasonable and adequate to the class and should be granted final approval.

Source: *The Recorder*

AUTOMAKERS BEAT BACK CLASS STATUS IN ANTITRUST CASE

General Motors Corp. and six other automakers were successful in reversing a ruling allowing as many as 13 million U.S. consumers to seek as much as \$3 billion on claims they were blocked from buying cars made in Canada. The 1st U.S. Circuit Court of Appeals in Boston reversed class certification in an antitrust lawsuit against the automakers including Ford Motor Co. and Honda Motor Co. The appeals court said a lower court erred when it said consumers could pursue as a

group claims that they should be compensated for overcharges that resulted when automakers restricted the availability of lower-priced Canadian-made cars in the U.S.

The appeals court said class status wasn’t warranted because prices paid by car buyers depend on negotiations with dealers and the exchange rate between the Canadian and U.S. dollars, which tipped in favor of the Canadian dollar since the lawsuit was filed in 2003. The court felt that alone eliminates any realistic current threat of injury. The court reversed class certification for consumers seeking an injunction to force carmakers to honor warranties on Canadian cars and sent a ruling establishing group claims for monetary damages back to the lower court for reconsideration.

The automakers said the amount of damages at stake in the case totaled \$3 billion for as many as 13 million consumers. The original lawsuits, filed in San Francisco and Chicago, claim car companies restrict competition by penalizing Canadian dealers who sell to American importers and by refusing to honor warranties on the vehicles. This was clearly a major win for the automakers.

Source: *Bloomberg*

XI. INSURANCE AND FINANCE UPDATE

SECURITIES LAWSUITS CONTINUING AGAINST REGIONS MORGAN KEEGAN

Our firm is representing a number of investors who have claims against Regions Morgan Keegan (RMK). These claims involve six bond funds that have lost almost 70% of their total value since the funds’ inception. Many of our clients were assured that these bond funds were safe, low-risk investments—comparable to money market accounts and/or CDs. Unfortunately, these funds were actually extremely high risk investments that were filled with mortgage back securities and considered by many as “junk.” Based on RMK’s advice,

many investors placed a large portion of their retirement savings in these accounts. In many cases, RMK brokers placed all of an investor’s life savings in these funds.

Some of the tougher tragedies we have seen in these cases are from individuals in their 70s and 80s who have lost most of the savings they worked all their lives to build. In some instances, these investors are facing the very real possibility that they may have to go back into the workforce to support themselves. Some individuals are simply not physically able to go back to work and are understandably worried about what will happen in their future.

Presently, we have several cases filed in arbitration and are continuing to investigate many more. If you or one of your clients has suffered losses in the RMK bond funds we will be glad to share the information we have learned. It is our hope that this litigation will be able to allow many of our clients, especially those of retirement age, to enjoy their retirement years instead of worrying about how to live through them. Roman Shaul is the contact lawyer on these cases for the firm. You can contact him at 800-898-2034 or by email at Roman.Shaul@beasleyallen.com.

ANNUITY FRAUD TARGETS SENIORS AND THEIR SAVINGS

As you may have heard, deferred annuity sales have reached an all time high in the United States. The majority of the purchasers of these financial instruments are retirees and the elderly. In fact, the average purchaser age of deferred annuities is over 60. Many unknowing retirees have invested their life savings, or a large portion thereof, in these financial instruments believing they are safe, secure and provide immediate easy access to the funds invested.

Many companies are finding themselves in litigation across the United States regarding the sale of deferred annuities to seniors. Recently, *Dateline NBC* ran a segment regarding the unscrupulous sales tactics of agents who represent large insurance companies such as Allianz. The segment featured investigative reporter Chris

Hansen, going undercover and performing a “sting operation” with the help of his “Aunt Alice” who posed as a senior interested in purchasing a deferred annuity. The gist of the television segment involved the company’s and agent’s reluctance to disclose the fact monies deposited in these investments are not liquid and in fact have extremely high and severe penalties for withdrawals during the early years of the annuity. Only under certain limited circumstances (such as major health problems) can a purchaser of a deferred annuity withdraw his or her entire investment without penalty. Otherwise, withdrawals in excess of 10% of the total value of the annuity incur substantial surrender charges (sometimes as high as 10% to 12%) for the first five to ten years.

Anyone considering the purchase of a deferred annuity should seek the advice of a professional investment advisor, as opposed to just an insurance agent, and furthermore have a qualified legal professional evaluate any such purchase prior to making a decision. Our firm is handling these cases and Jay Aughtman is the contact lawyer. If you want more information contact Jay at 800-898-2034 or email him at Jay.Aughtman@beasleyallen.com.

FLORIDA COURT SUSPENDS ALLSTATE IN THE SUNSHINE STATE

A Florida court has upheld the Florida Office of Insurance Regulation’s suspension of Allstate from writing insurance in the State of Florida. As previously reported, the Office had suspended Allstate weeks before for a refusal to produce the “McKinsey” documents during an investigation of the company. That investigation resulted in Allstate being cut off from a market comprising 17% of its national sales. The court, in its April 4th ruling, found Allstate guilty of arbitrary reductions of “bodily injury claim payments to its policyholders and beneficiaries by up to 20%.” It also determined that Allstate was engaged in ongoing criminal activity by failing to cooperate with the Office of Insurance Regulation’s investi-

gation of a crime, and that this constituted a danger to the public health, safety or welfare of citizens. After the court ruling, Allstate posted 150,000 documents related to “McKinsey” on its web site. This number of documents is substantially more than the number it had represented were all of the McKinsey documents. These representations had been made in several courts around the country. Several lawyers who have studied the matter say the documents are not as detailed as they should be. Lacking is information relating to how Allstate handles catastrophic claims. Allstate says catastrophes were not a focus of McKinsey’s work because the catastrophe team wasn’t founded until 1996.

There may be more documents due from Allstate, but there is one thing for certain. Allstate’s argument that the documents are confidential trade secrets and that it would be too burdensome to produce them in courts were thrown out the window the moment the company chose to post them on its Web site.

Source: Associated Press

LAWSUIT FILED AGAINST TITLE INSURERS

A lawsuit filed in a federal court in Washington State alleges that title insurance companies are colluding illegally to keep prices artificially high and are gouging consumers who buy and sell homes. A homeowner filed the lawsuit in U.S. District Court in Tacoma in March. It was alleged that the rates that homeowners “are charged are grossly out of proportion to what it costs to write title insurance.” The lawsuit seeks class-action status and could take in “hundreds of thousands, if not millions of consumers.”

Most folks really don’t understand how title insurance works. Quite often, it’s one of the larger costs involved in home transactions and is highly profitable for insurers. It protects against complications—such as forged signatures on title transfer documents and unpaid real estate taxes or other liens on the title—that already exist, but do not become known until after sales

close. Borrowers typically are required to buy a policy to protect their lenders, while sellers generally buy one for the buyer.

Title insurers eliminate most of their payout risk through public-record searches that are now easier and quicker to get done than ever. In reality, the risk is very small. For example, payouts from title insurers doing business in Washington equaled, on average, 4.7% of the total premiums they collected in 2006, according to the state Office of the Insurance Commissioner. That’s far less than the average payouts of 84% of premiums for accident and health insurers, and 57% for property and casualty insurers.

Title insurers don’t have to compete on price, because the people deciding which company to use typically are real estate agents, lenders and builders. The consumer paying for the policies has little—if any—choice in the matter. The lawsuit alleges that title insurers actually have agreed not to compete on price in many states, including Washington, and collectively set rates in some states, such as New York. Currently there are pending lawsuits in several states similar to the new one in Washington. I wouldn’t be surprised to see more lawsuits being filed.

Title insurers should be required to justify rates with actuarially sound data, and post rates and fees on their Web sites. Regulation over rates is a necessity. Under a new law in Washington, the Insurance Commissioner has significant new authority over their rates that better aligns with our authority over other lines of insurance. Rates in that state must now be justified in order to be approved by the Insurance Commissioner. The lawsuit also says title companies win business by setting up affiliates in which large real estate brokerages have an ownership stake and, therefore, get a share of the profits. The new lawsuit alleges that title insurers engaged in illegal anti-competitive practices that kept rates artificially high. The suit names as defendants:

- Fidelity National Inc. and subsidiaries
Fidelity National Title Insurance Co.,
Chicago Title Insurance Co. and

TICOR Title Insurance Co.

- First American Corp. and subsidiaries First American Title Insurance Co. and Pacific Northwest Title Insurance Co.
- LandAmerica Financial Group and subsidiaries Commonwealth Land Title Insurance Co., Lawyers Title Insurance Corp. and TransNation Title Insurance Co.
- Stewart Title Guarantee Co.

We will follow the course of this litigation closely and see what develops.

Source: *Seattle Post-Intelligencer*

LOUISIANA SUPREME COURT UPHOLDS KATRINA LEVEE EXCLUSIONS

Louisiana's Supreme Court has ruled out insurance companies paying billions of dollars to policyholders for damage caused by levee and floodwall failure in Hurricane Katrina. In the decision issued last month, state Supreme Court justices said the flood exclusion in a Lafayette Insurance Co. policy covering a New Orleans apartment building applied to damages even from a flood caused by breaks in poorly maintained levees. The court wrote in its decision:

Even if the exclusion only referred to natural, rather than man-made floods, the flood at issue was not caused by man. The flood was caused by Hurricane Katrina, not by man.

Last year the Fifth U.S. Circuit Court of Appeals reached a similar decision, saying flood exclusions, which are routinely written into commercial and private property insurance policies, are not eliminated if the flooding is due to negligence. The U.S. Army Corps of Engineers has been faulted for failing to properly maintain the levee system around low-lying New Orleans. Storm surge and high winds from Katrina breached the levees, leaving more than 80% of the city underwater for weeks. This ruling came as a surprise to many observers since the jury could reasonably have found that the damage was

caused by a man-made disaster. According to lawyers it's been the law in the state of Louisiana that water damage exclusions did not cover man-made disasters. In any event, this ruling must be considered a major set-back for policyholders and a significant victory for the insurance industry.

Source: *Reuters*

MARINE AWARDED \$3.5 MILLION IN DAMAGES FROM MILITARY INSURER

A Marine, who is on his third tour in Iraq, was awarded \$3.5 million in punitive damages last month in his lawsuit against USAA, a servicemembers' insurance company. The claim had been for water damage to his house. Capt. John Colombero already had won \$50,000 in damages for emotional distress in the first phase of the trial. His lawyers contended that he spent time between deployments arguing with his insurance company. USAA had denied a 2004 claim for \$84,744 in damage to the Marine's house. Jurors indicated on the verdict form that the punitive award was intended to punish USAA for malice, oppression and fraudulent conduct.

USAA, a private company based in San Antonio, Texas, provides insurance and financial services to 5.6 million servicemembers and their families. Capt. Colombero bought his three-bedroom house for \$352,000 in 2002 and rented out the spare bedrooms to make his payments. In 2004, after he returned from a tour in Baghdad, he decided to build an addition. A pipe burst during construction, damaging the foundation. Since he had been deployed to Iraq on March 20th, Capt. Colombero wasn't around to hear the jury's verdict.

Source: *Associated Press*

COUPLE AWARDED MORE THAN \$2 MILLION IN BAD FAITH CLAIM

A federal jury has awarded the mayor of a small North Dakota town more than \$2 million in a lawsuit over an insurance company's failure to pay a valid insurance claim after a fire. Timothy and Sylvia Moore sued Ameri-

can Family Insurance after a fire destroyed a vacant duplex the couple owned in Walsh County, North Dakota. The plaintiffs claimed the insurance company had wrongly blamed them for the fire. The amount of coverage under the insurance policy on the duplex was \$50,000. The jury awarded the plaintiff's \$1.15 million for bad faith on the part of the insurance company in failing to settle the claim as well as \$1.15 million in punitive damages and more than \$48,000 for breach of contract.

Timothy Moore is the mayor of Mountain, a town of about 130 people in Pembina County, North Dakota. Timothy Moore, a custom farmer, had planned to move the house near the Cavalier Air Force Station and rent it to people working at a radar base located in the area. The Moores say the fire was not intentionally set and contended that the insurance company acted in bad faith by failing to pay the claim. Interestingly, while Timothy Moore was never charged with arson, the insurance company accused him of arson and turned the case over to the state Bureau of Criminal Investigation. The Bureau, along with the fire marshal's office, investigated. It appears there was no evidence of arson and certainly none that implicated the plaintiffs.

Source: *Insurance Journal*

A BAD-FAITH VERDICT AGAINST FIREMAN'S FUND

A federal court jury in Montana awarded a woman \$5.3 million in damages last month in a bad-faith insurance claim case. It was the largest bad faith verdict in Montana history. The jury ruled unanimously against Fireman's Fund Insurance Co., deciding that the California-based company acted in bad faith and breach of contract in denying the woman's insurance claim. In January 2003, the plaintiff, a 32-year-old salmon ecologist, suffered permanent brain injuries in a head-on car collision. She was not at fault in the accident, and her damages exceeded the amount of the other driver's policy limit. The plaintiff, a doctoral student at the time of her accident, was covered

under her family's insurance plan for a total of \$1.5 million in underinsured motorist benefits and \$15,000 in medical pay. The insurance company refused to pay out her underinsured motorist coverage and delayed payment of her medical benefits until January 17, 2008. A check was cut by the company exactly five years from the date of the accident. It was actually on the same day as the final pretrial conference in the plaintiff's civil case.

Because jurors found the company guilty of actual malice, the verdict included \$3.5 million in punitive damages. The remaining \$1.8 million was awarded for compensatory damages, including medical bills, loss of past and future earning capacity, physical pain and suffering, mental and emotional injury and loss of established course of life. The jury also found the company guilty of violating Montana's Unfair Trade Practices Act, and awarded the \$35,000.

The plaintiff was turned over to a collection agency after Fireman's Insurance repeatedly refused to pay her medical expenses. The company's refusal to pay the medical bills delayed and interfered with her medical treatment, according to the lawsuit. The plaintiff has since earned her doctorate, and is now working at a Biological Station on Yellow Bay.

Evidence presented at trial showed that Fireman's Fund Insurance Co.'s net assets in 2004, the same year the plaintiff made the claim for her benefits, exceeded \$9.9 billion. The insurance company went for five years before it paid any of the plaintiff's medical expenses. The plaintiff still suffers from a short-term memory defect, which affects her performance at work, and is still undergoing treatment for her brain injury.

The suit accuses the company of misrepresenting the amount of coverage available to the plaintiff, and of ignoring her persistent claims for assistance throughout the years. In the four years after Fireman's Insurance received notice of the plaintiff's claim, the company obtained just one page of medical records to investigate and took

no recorded statement from the plaintiff or any other witnesses or health care providers, according to the lawsuit. The company did not request an independent medical examination, and refused to pay the ongoing medical expenses, even after receiving the collection notices that the plaintiff was getting. Meanwhile, the company's own claim file characterizes the plaintiff's case as having the "potential for high exposure" and says "the woman had a potentially serious head injury." James A. Manley of Polson, Montana, represented the plaintiff and did a very good job.

Source: *Missoulian*

XII. PREDATORY LENDING

JUDGE APPROVES PROBE OF COUNTRYWIDE

The Justice Department will be allowed to question Countrywide Financial Corp. executives under oath and subpoena company documents to determine whether the lender abused borrowers and the bankruptcy process. A federal judge ruled that the department's Office of the U.S. Trustee, which monitors bankruptcy proceedings, "has made a showing of a common thread of potential wrongdoing" by Countrywide in a sample of 293 cases. The nearly 300 cases filed in Pittsburgh include allegations that Countrywide sought improper fees or payments from homeowners and otherwise violated Bankruptcy Court orders and regulations.

Some borrowers have accused the company of threatening them with foreclosure even after they made payments under plans approved by the Bankruptcy Court to shield them from subsequent efforts to collect the debts. Countrywide has acknowledged errors in handling some debts, but has denied any systematic effort to thwart bankruptcy protections. The company had argued in court that the U.S. trustee's requests amounted to an illegal "fishing

expedition" outside the agency's scope. Fortunately, the judge didn't buy that argument and approved the probe!

Source: *New York Times*

XIII. PREMISES LIABILITY UPDATE

A NEW LEAD PAINT RULE FROM THE EPA

Contractors must soon take additional precautions to protect children from lead-based paint when renovating older buildings. A few weeks ago, the Environmental Protection Agency announced new work place standards for renovating old homes where children or pregnant women live, and in older buildings that house child-care centers or schools. The requirement will be for structures built before 1978. Beginning in 2010, contractors must train workers on dealing with lead paint, post warning signs, contain lead-contaminated dust, and keep people and pets away from work areas.

Many physicians and scientists have criticized the long-awaited rule as inadequate to protect children who live in the estimated 38 million homes that contain old lead paint. Each year, about 11 million renovations occur in U.S. homes built before 1978, when lead was banned from household paint. When walls and windowsills of those homes are sanded, demolished or drilled, lead dust can be unleashed. The rule will cover all pre-1978 houses, apartments, child-care facilities and schools occupied by children under 6 or pregnant women. Builders, painters, electricians and others will have to be trained and certified in lead abatement procedures. They will be prohibited from using sandblasters, torches or other power tools that stir up lead dust, and they must post warning signs, keep residents out of work areas and contain and clean up dust and debris.

Exposure to lead is especially dangerous to young children, because it can damage their developing brains, causing learning disabilities and behav-

ioral problems. The rule comes 16 years after Congress ordered the EPA to protect children from lead paint during home renovations. After the EPA proposed its rule in 2006, many physicians and other experts, including an EPA scientific advisory panel and the American Academy of Pediatricians, said it didn't go far enough. They said that contractors should be required to verify that no lead dust remained in the homes and that the requirements should apply to all pre-1978 homes, not just those with children under six.

The building industry claims the rule will drive up the cost of renovations and could force people to do the work themselves or use unsafe, unlicensed workers. I am told that the actual costs would not be that great. An EPA analysis estimated that the cost of home renovations nationwide would rise by \$500 million per year, but that the regulations would save as much as \$5 billion a year in children's health and education costs. Because lead has already been removed in many low-income housing projects through a federal program, much of the remaining threat lies in suburban homes that are being remodeled.

Source: *Los Angeles Times* and *Associated Press*

WRONGFUL DEATH LAWSUIT FILED AGAINST BANK OF AMERICA

The family of a U.S. Customs employee who was killed during a holdup at an ATM in Los Angeles has filed suit against the Bank of America. According to allegations in the lawsuit, filed in a California state court, there had been at least three holdups at the same ATM since last August. The 47-year-old was shot in the back and killed in March as he ran from attackers who tried to rob him at a Bank of America location. The plaintiff's lawyer, John Sweeney, contends that the bank had a duty to notify the public of the robberies and to take measures to protect customers. The suit also names a man and a woman who were arrested in connection with the killing, accusing them of assault and battery. It's contended that the Bank was negligent and thus responsible in part for the death.

Source: *Associated Press*

TEXTILE FIRM AND RAILROAD SETTLE TRAIN WRECK LAWSUIT

In last month's issue, we wrote about the lawsuit filed by Avondale Mills arising out of the toxic chemical spill in 2005. The parties have now settled the case after about four weeks of trial. Avondale Mills, Norfolk Southern and the mill's insurance company reached the settlement last month. The amount of the settlement is confidential. Avondale Mills sued Norfolk Southern, asking for \$420 million in damages. Avondale claimed equipment at the firm's Graniteville facilities was covered with corrosive chemicals and it would have cost more than the business was worth to clean the buildings and replace the machinery. Early on January 6, 2005, a Norfolk Southern train veered off the main track onto a spur, rear-ending a parked train whose crew had failed to switch the tracks back to the main rail. The wreck ruptured a car carrying chlorine and released a poisonous cloud over the mill town of Graniteville. Nine people died and 250 were injured. Some 5,400 people were evacuated.

Source: *Associated Press*

XIV. WORKPLACE HAZARDS

\$30.3 MILLION JURY VERDICT FOR MESOTHELIOMA VICTIMS

Employees who work around asbestos bring home the fibers on their clothes. This is what happened to 50-year-old Mark Buttitta. For years, his father brought home the deadly fibers on his clothes from working as a parts picker at GM warehouses. Mr. Buttitta handled the clutches and brakes that were made with asbestos, causing the fibers to attach to his work clothes. In addition to the years of his father bringing home the fibers on his clothes, Mark and his brother worked summers during their college years at the GM warehouse. The Buttittas would wear the same work clothes for

days at a time, which meant the cancer-causing fibers would accumulate and settle through the home. What is even worse is the fact that Mark would sit on his father's lap when his father got home from work, not knowing that the harmful fibers were on his dad's clothes.

Asbestos may not have an immediate effect on those exposed to it, but over time it can cause complications. This is what happened to Mark Buttitta who was a rising star in the advertising world. He had managed to acquire advertising clients such as Northwest and Continental Airlines, Coca-Cola, and various other large clients. But his life was cut short just days before his 50th birthday. Mark Buttitta had graduated from college, was married, and had three daughters. He was holding the position as vice president of MediaVest when in 2001 he received the diagnosis that said he had *Mesothelioma*. It was just a year later when he *died*. After Mark's death, his family had created the Mark Buttitta Memorial Foundation. The foundation is geared toward finding ways to prevent, treat, and cure Mesothelioma. Many of the victims are employed in construction businesses and automotive manufacturing companies, but Mark was neither of these. What his case shows is that someone doesn't necessarily have to work in an occupation that exposes them to asbestos that causes them to develop Mesothelioma. All it takes is repeated exposure unknowingly and death can occur.

As a result of Mark Buttitta's death, his wife and his three daughters will receive what is believed to be the largest verdict in a Mesothelioma lawsuit in New Jersey. The amount of the verdict is \$30.3 million. What his case is showing is that anyone can be exposed to harmful asbestos and develop Mesothelioma without ever knowing that the exposure occurred. Hopefully, this awareness will help save more lives. Our firm is also handling a number of Mesothelioma cases. Mike Andrews is the lead lawyer on these cases. You can contact him at 800-898-2034 or by email at Mike.Andrews@beasleyallen.com.

SETTLEMENT REACHED IN LAWSUIT OVER DEATH OF STORE CLERK

A lawsuit, filed over the abduction and slaying of a convenience store clerk, was settled recently. Interestingly, the settlement between the parties came just minutes before a jury was to award the victim's three children \$51 million in damages. The amount of the settlement and its terms are confidential. A state court jury had been deliberating into its second day when the family's lawsuit against New Mexico's largest chain of convenience stores, Allsup's Enterprises of Clovis, was settled. The trial focused on the inadequate security practices of Allsup's. A letter from the family to jurors said Allsup's has promised never to challenge convenience store safety regulations in New Mexico. The letter contained this statement:

This is something Allsup's was never willing to agree to until you—the jury—entered into deliberations following this two-week trial in which the facts of Allsup's operations became public.

The 26-year-old was working alone overnight when she vanished in January of 2002. Her body, with 57 stab wounds, was found later that day in a field. She had been raped and then brutally murdered. Jurors had decided to assess \$21.2 million in compensatory damages and \$30 in punitive damages against Allsup's. The jury was ready to deliver a verdict when the judge told them the case had been settled. Lawyers for the victim's family said Allsup's failure to protect clerks working the graveyard shift made the near-minimum-wage jobs the most dangerous in New Mexico. Efforts to improve safety for clerks escalated after the clerk's death. The state Environmental Health Board ordered convenience stores that were open between 11 p.m. and 7 a.m. to have two clerks on duty, station one guard with one clerk or put clerks in enclosures with bulletproof glass. The Allsup's store where the victim in this case was working had no security camera. The jury had been asked to award \$60 million in damages.

A 27-year-old man was convicted of two charges of first-degree murder and sentenced to life in prison last year for the killings of this victim and another woman, who disappeared from her job at a Hobbs department store. The second victim's body—her throat slashed and skull fractured—was found in May of 2003 in a caliche pit. Lawyers for Allsup's insurance carrier argued during the trial that security measures now required by the state do not deter crime and likely would not have prevented the death of the clerk in their store. They argued that Allsup's had a policy of keeping no more than \$50 in cash registers, maintaining adequate lighting at stores, giving clerks necklace alarms and training clerks to resist robbers at the time of the incident. Allegra Carpenter, a lawyer from Albuquerque, New Mexico, represented the children in the Allsup's case and did an outstanding job.

Source: Associated Press

FAMILIES OF SIX MINERS WHO WERE KILLED FILE SUIT

A lawsuit, filed by the families of six men killed in a Utah mine cave-in, alleges the collapse occurred because the mine's owners were harvesting coal unsafely. The suit, filed in Salt Lake City, contends that Murray Energy Corp. performed risky retreat mining last summer. As you may recall, six miners were killed in the August cave-in in central Utah. Their bodies haven't been recovered. Three men trying to reach them died ten days after the collapse in another cave-in. The lawsuit names Murray Energy and others affiliated with the mine, including the Intermountain Power Agency and the Los Angeles Department of Water and Power as defendants.

Source: Associated Press

NEW GOVERNMENT REPORT SAYS MINES LACK SAFETY EQUIPMENT

According to a new federal report, underground coal mines lack stockpiles of breathable air and communications gear for trapped workers. This

revelation comes nearly two years after Congress required the industry to install more safety equipment. The U.S. Government Accountability Office report blames the federal Mine Safety and Health Administration for failing to act faster. Among other things, the report says poor leadership by MSHA has caused mine operators to miss opportunities to install better communications equipment.

Sweeping coal mine safety legislation, adopted after the deaths of 12 men at West Virginia's Sago Mine and two other high-profile fatal accidents in 2006, mandated larger stockpiles of emergency air packs among other things. The MINER Act also gave MSHA until June 2009 to require wireless communications and tracking equipment underground. The Act was designed to better protect the 43,000 men and women working in the nation's 700 underground coal mines. Unfortunately, like most all regulatory agencies, MSHA does a rather poor job of protecting the people it should be protecting. It's high time for MSHA to do its job and make mines in this country safer for miners.

Source: Associated Press

OSHA CITES IMPERIAL SUGAR PLANT IN TEXAS

The Occupational Safety and Health Administration has cited Imperial Sugar Company for various violations at its plant in Texas. A total of \$36,000 in penalties was assessed. The alleged violations included the use of three filter-cartridge dust collectors that were not equipped with explosion protection systems and bags of sugar stored in an unstable manner. The proposed penalties ranged from \$4,500 to \$6,300.

Imperial Sugar, based in Sugar Land, Texas, is a major processor and refiner of sugar. The company said last month it plans to begin removing potentially combustible dust at its powdered sugar operation in Gramercy, Texas. The dust forced the plant to shut down that operation. As you will recall, a February 7th explosion at an Imperial refinery outside Savannah, Georgia, killed

13 people and it appears dust that ignited caused the blast. The disaster prompted OSHA to inspect hundreds of plants where combustible dust is a workplace hazard.

Source: *Houston Chronicle* and *Associated Press*

XEROX SETTLES LAWSUIT OVER RACE DISCRIMINATION

Xerox and representatives of current and former black sales representatives have settled a class action lawsuit accusing the office equipment manufacturer of race discrimination. The settlement has received preliminary approval from a U.S. District Judge in Brooklyn, New York. Xerox will pay \$12 million to 1,100 former and current employees. The company also agreed to establish a task force of Xerox employees to ensure that black sales representatives are compensated in a non-discriminatory manner by assessing how sales territories are assigned and other issues.

The lawsuit, filed in 2001 in federal court in Brooklyn, was brought on behalf of black sales representatives from New York, California, Georgia and Texas. The court approved class action status in March 2004. The workers said they were assigned to less profitable territories than white co-workers or were assigned to territories based on their race. They also contend they were passed over for more lucrative territories, promotions, and were denied commissions they had earned.

Source: *USA Today* and *Associated Press*

CITIGROUP TO SETTLE SMITH BARNEY BIAS LAWSUIT FOR \$33 MILLION

Citigroup Inc., the biggest U.S. bank by assets, has agreed to pay \$33 million to resolve claims by female brokers at a unit of Smith Barney that the company continued to discriminate after a 1997 sexual-harassment settlement. The proposed settlement calls for as many as 2,500 current and former Smith Barney female brokers nationwide to share in the settlement and procedures to increase opportunities for women. In 2005, four female brokers in California

sued in federal court alleging branch managers steered accounts to male brokers, making it harder for women to earn commissions, and retaliated when they complained.

The suit was filed eight years after Smith Barney settled claims that women in its Garden City, New York, branch were subject to crude talk and lewd antics by male employees who nicknamed their part of the workplace the "boom-boom room." However, the brokerage unit didn't live up to promises made in that settlement to end discrimination. The plaintiffs didn't claim harassment, which U.S. courts have ruled is a form of bias. The women sought back pay and other damages. Female brokers who worked at Smith Barney starting in 2003 are eligible for the settlement funds, which amount to \$33 million plus interest.

Smith Barney will revise the way it distributes accounts to give more weight to recent performance and ensure that walk-in clients and customers of retiring brokers are distributed fairly. The company and lawyers for the women will appoint an independent diversity monitor who will review reports of the company's progress and employee complaints, according to the agreement. The monitor will report to the company's chief executive officer of global wealth management. Smith Barney also agreed to post available branch management positions and provide all management personnel with diversity training. Branch manager compensation would be linked to increasing diversity, according to the agreement. The settlement is subject to court approval.

Source: *Bloomberg*

JUDGE APPROVES AGREEMENT IN WALGREENS BIAS CASES

A federal judge has given final approval to a \$24.4 million settlement over claims that the Walgreens drug-store chain discriminated against thousands of black employees nationwide. The settlement resolves two lawsuits filed in federal court in East St. Louis. The first was an EEOC suit filed last year after complaints from more than

20 current or former employees. The second suit was a class action filed in 2005 by 14 current and former black employees alleging "a pervasive policy of race discrimination" at Walgreen Co. In the suits, employees and former employees claimed that black employees were paid less than similarly situated white counterparts and that black applicants for management trainee positions were rejected because of their race. They also alleged that the company steered black managers to certain stores and denied them promotions.

As part of the consent decree, which has been given final approval by a federal judge, about 10,000 current and former black employees will share in the settlement funds. The named plaintiffs in the case will receive more than \$300,000 each. In the consent decree, Walgreen Co. says it will not discriminate against employees based on race and won't retaliate against anyone reporting discrimination. The agreement requires the company to hire outside consultants to review its employment and promotions practices. The company also agreed to examine compensation for disparities between similarly situated black and white employees, set up a procedure for employees to report race discrimination and provide nondiscrimination training. Walgreen Co., which is based in Deerfield, Illinois, operates more than 6,000 stores nationwide. The EEOC offices in St. Louis and Kansas City investigated the initial charges filed with the federal agency.

Source: *St Louis Post-Dispatch*

MCDONALD'S SETTLES SEXUAL-HARASSMENT LAWSUIT

Durango, a McDonald's franchise in Durango, Colorado, will pay \$505,000 to settle a sexual-harassment lawsuit brought by the federal Equal Employment Opportunity Commission on behalf of several teenagers who worked there. The settlement was approved by a U.S. District Court judge in Denver. According to the complaint, four teenagers were subjected to egregious sexual harassment at the

Durango McDonald's by their 24-year-old supervisor. The alleged harassment began in December 2003 and continued for several months.

Under terms of the settlement, the franchise will pay \$450,000 to two of the victims who were represented by a lawyer. An additional \$55,000 will be distributed to the two other victims represented by the EEOC. In addition to monetary relief, the franchise must provide sex-discrimination training that will be monitored for three years and post notices of non-discrimination in the workplace. The defendants were identified as Colorado Hamburger Co., Farmington Hamburger Co., and Jobec Inc., the latter of which does business as McDonald's in Durango. The owner of the local McDonald's franchise was required to write letters of apology to the victims.

Source: *Herald*

XV. TRANSPORTATION

ALABAMA DOT WORKS TO REDUCE DEADLY WRECKS IN WORK ZONES

It was good to see the Alabama Department of Transportation officials working to reduce fatalities in work zones areas. For DOT workers repairing highways at approximately 700 sites statewide, speeding remains the number one hazard. In 2006, 37 people were killed in work zone accidents in Alabama and more than 1,000 people died nationwide. Director Joe McInnes said the primary reasons for work zone related accidents are inattention, tailgating and speeding. Work zone awareness brochures and posters were distributed at Welcome Centers and highway rest areas across the state during National Work Zone Safety Week.

Alabama is among dozens of states which will double the fines if motorists are caught speeding in a work zone. The slogan for this year's campaign is "Slow for the Cone Zone." Our firm has handled a number of cases where both workers and motorists were killed or

badly injured in work zone crashes. Our experience in these type case is that the DOT's assessment as to what causes the vehicle crashes is correct. In addition, we have seen examples of where the contractors created hazards on occasion. The Alabama DOT is to be commended for taking steps to help reduce the number of work zone crashes.

Source: *Associated Press*

MEDICAL HELICOPTER CRASH CASE SETTLED

Three families will receive \$18.4 million to settle their lawsuits over a 2002 medical helicopter crash that killed three people aboard. Six companies that made and maintained the helicopter and its key components agreed to pay the families. As a part of the settlement, the three lawsuits filed by the families were dismissed. The helicopter's French manufacturer, Eurocopter S.A., also promised to require more frequent inspections of the part that was believed to have caused the crash. The LifeNet of the Heartland helicopter had just left a hospital on June 21, 2002, when the pilot reported trouble. The helicopter crashed at the Norfolk airport and the pilot, a nurse and a paramedic were killed.

The National Transportation Safety Board ruled in 2004 that a faulty tail rotor and an inexperienced pilot were the likely causes of the crash. Other factors included the binding of a mechanism controlling the tail rotor, gusty winds and the pilot's lack of experience with that type of helicopter, according to the agency. Eurocopter pledged to change the maintenance requirements for the tail rotor load compensator within 90 days. That mechanism, which helps control the tail rotor, will be inspected after every 100 hours of flight under the new requirements instead of after every 500 hours. Eurocopter also plans to redesign the tail units of all helicopters similar to the Eurocopter AS350B2 involved in the Norfolk crash to remove tail rotor load compensators.

The six companies involved in the settlement were American Eurocopter,

Eurocopter S.A, Duncan Aviation of Lincoln, CIT Leasing Corp., Societe D' Applications Des Machines Motrices and Dunlop Limited. Gary Robb of Kansas City, Mo. And Vince Powers, a Lincoln, Nebraska lawyer, represented the families and did a very good job.

Source: *Associated Press*

SCHOOL GUILTY IN ALCOHOL-RELATED CRASH AFTER DRINKING PARTY

A Miami-Dade jury ruled that the Archdiocese of Miami was liable for \$14 million in damages for the car wreck that left a high schooler dead and another paralyzed and brain damaged. The wreck occurred after a year-end party at the home of two students in 2001. Archbishop Coleman Carroll High School was found to be at fault for the accident. The Archdiocese of Miami, which owns the school, will appeal the decision.

The jury decided Archbishop Carroll was negligent because it did not notify authorities, even though school officials knew in advance of the underage drinking party. The wild party was held at a private home in 2001 on the last day of school. The student organizers of the drinking bash circulated invitations with a picture of Crown Royal whiskey and a call to "come end the school year the right away." Administrators found out about the party and the school principal even made some dumb remarks about the event over the public address system. However, the school officials never collected the invitations and failed to contact the police or any of the parents. This left the school partially responsible for the party's aftermath. The jury heard testimony that the principal even stopped by the party, witnessed students falling down drunk, but did not call authorities.

The wreck occurred after the two students left the party. Their vehicle, traveling at about 80 mph, slammed into a tree. The impact was so violent, it split the car in half. Toxicology tests showed the passenger had a blood alcohol level of .22. The driver, who

was ejected from the vehicle, had a blood alcohol level hours later of .096. The legal limit for operating a vehicle in Florida is .08. The total jury award was nearly \$56 million, although much of that may never be collected. In addition to the Archdiocese, the jury found a host of parties, including the student and his parents, at whose home the party was hosted, to be negligent. The jury ruled that the parents were 20% negligent. This was a very sad case and the conduct of the school officials was inexcusable.

Source: *Miami Herald*

U-HAUL MUST PAY \$84 MILLION TO INJURED MAN

A jury in Dallas, Texas, has returned an \$84 million verdict against U-Haul International Inc. The plaintiff, a 74-year-old man, who was injured when the truck he rented ran over him, filed suit. The plaintiff parked the truck on a "slight incline" and the parking brake failed. It was alleged and proved that U-Haul failed to maintain the truck, thereby causing the accident. In fact, evidence at trial indicated that truck's parking brake did not work at all. The Dallas jury found U-Haul guilty of negligence and awarded the plaintiff \$84.25 million, including \$63 million in punitive damages. U-Haul, a unit of Reno, Nevada-based Amerco, will appeal the verdict.

The plaintiff's pelvis was crushed in the 2006 accident, leaving him unable to walk and with no bowel control. It was alleged the rented U-Haul truck, which had 234,000 miles on it, was poorly maintained. It's been known that the company doesn't routinely service vehicles after being used by renters. A rented truck can be driven from Dallas to Michigan and then taken to a U-Haul center, but U-Haul won't do any maintenance on it. Six previous renters had similar problems with this specific truck that was the subject of this trial.

In February, U-Haul settled another lawsuit involving a defective parking brake on a truck that killed a customer in San Francisco. That customer was

killed at a U-Haul center in San Francisco in December 2006, when he was crushed between a post and a rental truck. He had returned the truck because the parking brake didn't work. A U-Haul employee was working on the brake when the truck suddenly began rolling forward. According to a police report, the man rushed to the cab, apparently trying to climb in to stop the truck, but was pinned against the post. His family filed a wrongful death claim. Terms of that settlement were confidential.

Source: *Bloomberg*

XVI. ARBITRATION UPDATE

THE FAIRNESS IN NURSING HOME ARBITRATION ACT

U.S. Senator Mel Martinez has introduced legislation to protect dispute resolution options for residents of nursing homes. The measure by the Florida Republican is in response to the increasing practice of nursing home facilities requiring patients to agree to arbitration as the sole vehicle for dispute resolution prior to admittance to a facility. When introducing the bill last month, Senator Martinez said:

When a family makes the difficult decision to help a loved one enter a nursing home, among the primary considerations is quality care. Forcing a family to choose between quality care and forgoing their rights within the judicial system is unfair and beyond the scope of the intent of arbitration laws. This effort restores the original intent and tells families that they don't have to sign away their rights in order to access quality care.

Joining with Senator Martinez in pushing this needed legislation was Senator Hub Kohl, a Democrat from Wisconsin, who observed:

Nursing home residents, one of our nation's most vulnerable populations, must not lose their right to hold nursing homes accountable in the event of abuse or neglect. This bipartisan legislation protects senior long-term care residents who unwittingly sign away their constitutional right to have their case heard by an impartial judge or jury. I am proud to work with Senator Martinez in introducing this bill, and urge my colleagues in the Senate to pass it without delay.

As we have repeatedly said, Congress enacted the Federal Arbitration Act in 1925 with the sole goal of allowing parties an alternative forum to efficiently resolve **business disputes**. Consumer transactions were clearly never intended to be included in the FAA. Over time, however, arbitration was expanded by the U.S. Supreme Court to include non-business disputes. Nobody would have ever dreamed a dispute involving a resident in a nursing home would fall under the FAA. But, nursing homes are now requiring patients to sign mandatory pre-dispute arbitration clauses upon admittance to their facility. Clearly, this trend is an unwarranted intrusion into a vulnerable population's right to access the civil justice system for redress of their potential claims.

The Fairness in Nursing Home Arbitration Act reflects the FAA's original intent by requiring that agreements to arbitrate nursing home disputes be made after the dispute has arisen. While the Act doesn't prohibit arbitration in nursing home disputes, it will prevent a nursing home corporation with greater bargaining power from forcing residents and their families into arbitration through a non-negotiable contract entered into prior to the dispute. It will ensure that arbitration is a voluntary and not a coerced forum to resolve disputes. While I would prefer to see arbitration banned by Congress in all consumer disputes, including those involving nursing homes, this legislation is a step in the right direction. Hopefully, it will pass.

Source: *Washington Post*

HIGH COURT RULES IN ARBITRATION CASE

The U.S. Supreme Court has refused to expand the role of the judiciary in reviewing arbitration awards under federal law. The 6-3 decision came in an environmental cleanup dispute. Arbitration is seen by some in the business community as too risky because the opportunities for court review under the Federal Arbitration Act are narrow. Writing for the majority, Justice David Souter said the law's essential virtue is in "resolving disputes straightaway." The Supreme Court, Justice Souter wrote, has "no business" expanding judicial review beyond what the law allows.

The decision came in a cleanup dispute between toymaker Mattel Inc. and the owner of a factory site in Oregon contaminated with an industrial solvent. An arbitrator ruled in favor of Mattel, which won the case at the Supreme Court. The justices did not rule on other possible avenues Hall Street and Mattel could take outside the Federal Arbitration Act. The case was sent back to the lower federal courts, where Hall Street may pursue the case.

The issue before the Supreme Court was whether Mattel and property owner Hall Street Associates L.L.C. could agree in advance to broad court review of an arbitration award to correct any errors of law. An arbitrator ruled that Mattel did not have to pay for environmental cleanup on Hall Street's property, even though the toymaker failed to test the well water. A federal judge subsequently rejected the arbitrator's legal reasoning. The 9th U.S. Circuit Court of Appeals in San Francisco sided with Mattel, saying the Federal Arbitration Act bars judicial review of arbitration awards in such circumstances.

The Hall Street-Mattel fight has bounced between arbitration and the courts for seven years, a fact that opponents of expanded court review pointed to as undermining the purpose of arbitration. Obviously, the American Arbitration Association likes the decision. The American Arbitration Association oversaw more than 137,000 cases in 2006, the large majority of them arbitrations. The association is on record as

opposing expanded judicial review. A group representing small businesses said the ruling likely will limit reliance on arbitration. Karen Harned, executive director of the National Federation of Independent Business Legal Foundation, observed:

Small business owners are probably going to be more likely to use arbitration if they know that in instances like this they can get judicial review.

In dissent, Justice John Paul Stevens said the majority's decision "conflicts with the primary purpose" of the Federal Arbitration Act because it "forbids enforcement of perfectly reasonable judicial review provisions."

Source: Associated Press

XVII. HEALTHCARE ISSUES

AWARENESS OF DRUG-INDUCED EYE TOXICITY CRUCIAL FOR PATIENTS AND PHYSICIANS

Public Citizen says that physicians and patients should be aware of the slew of drugs that can cause eye disease and be diligent in identifying potential adverse effects. A recent paper, published in Drug Safety, identifies 62 drugs that can cause adverse reactions to the eye. Public Citizen summarizes the paper's findings, highlights these reactions and describes how they relate to structures in the eye and certain eye conditions on its WorstPills.org Web site. The eye is composed of a plethora of different types of cells, and drugs can affect each type. The 62 drugs can cause a host of different eye diseases, including cataracts, glaucoma, eye surgery complications, eyelid and conjunctival diseases, optic nerve diseases and retinal abnormalities. Loss of color vision, blurred and impaired vision, decreased night vision, skin lesions and blindness are just some of the symptoms people who develop these diseases can experience.

Public Citizen points out that while people are aware of the undesirable effects drugs can have on organs in the body, they often don't consider the potential risks to their eyes. Dr. Sidney Wolfe, director of the Health Research Group at Public Citizen, observed:

The eye is a crucial organ, and it is important that physicians and patients understand the risks associated with certain drugs.

WorstPills.org includes the full list of implicated drugs cited in the Drug Safety article. Some examples include: chloroquine and hydroxychloroquine, used to treat rheumatoid arthritis, lupus, amoebae and malaria; the antibiotic linezolid; ethambutol, used to treat tuberculosis; corticosteroids; alpha-1 blockers, particularly tamsulosin; botulinum toxin (Botox); morphine administered intravenously or by mouth; and drugs in the anticholinergic and adrenergic categories. Just as patients check for drug-induced diseases in other parts of the body when starting new medications, they also should consider newly developed eye symptoms, according to Dr. Wolfe. Early detection and various eye examinations are crucial, since some conditions, such as retinal damage, are reversible only during the earliest stages of the disease.

Worst Pills, Best Pills is a monthly newsletter available in print and electronic formats through Public Citizen's subscription Web site, www.WorstPills.org. The site has other searchable information about the uses, risks and adverse effects associated with prescription medications, including all the information contained in Public Citizen's best-selling book, *Worst Pills, Best Pills*. WorstPills.org is an unbiased analysis of information from a variety of sources, including well-regarded medical journals and unpublished data obtained from the Food and Drug Administration, that allows Public Citizen to sound the alarm about potentially dangerous drugs long before they are banned by the federal government. For example, Public Citizen warned consumers about the dangers of Vioxx, ephedra, Baycol and Propulsid years before they were

pulled from the market. One has to wonder what the FDA was doing to protect the public during that time!

Source: Public Citizen

DRUG ERRORS IN HOSPITAL ARE A MAJOR PROBLEM

Medicine mix-ups, accidental overdoses and bad drug reactions harm roughly one out of 15 hospitalized children, according to the first scientific test of a new detection method. That number is far higher than earlier estimates. The data indicate that these kinds of errors and experiencing harm is much more common than people believe. The National Initiative for Children's Healthcare Quality helped develop the detection tool used in the study, which can be found in the April issue of the journal *Pediatrics*. All parents should read this article if possible.

Source: *Associated Press*

NEARLY 12 ALABAMIANS DIE WEEKLY DUE TO LACK OF INSURANCE

Families USA, a non-profit consumer health-care advocacy group, works hard on health-care issues in Congress. The group, which has been a strong advocate for universal healthcare and other major reforms, recently released the results of a study of healthcare issues. Some of the findings from the study, "Dying for Coverage," are:

- In 2006, there were nearly 2,392,000 people between the ages of 25 and 64 living in Alabama. Of those, 20.1% were uninsured.
- Uninsured Alabamians are sicker and die sooner than their insured counterparts.
- Families USA estimates that nearly 12 working-age Alabamians die each week due to lack of health insurance (approximately 600 people in 2006).
- Between 2000 and 2006, the estimated number of adults between the ages of 25 and 64 in Alabama who died because they did not have

health insurance was nearly 3,400.

There is currently a national crisis over the number of people with no health insurance. Those uninsured persons number about 47 million at present. This is a national crisis that affects all states. The report used national data from the Institute of Medicine and The Urban Institute to compile the state-by-state results. Ron Pollack, executive director of the Families USA, observed:

Our report highlights how our inadequate system of health coverage condemns a great number of people to an early death simply because they don't have the same access to health care as their insured neighbors. A lack of health coverage is a matter of life and death for many people.

While the study didn't rank states it did make a report on the situation in the individual states. The study found that nearly 3,400 working adults died in Alabama between 2000 and 2006 because of their uninsured status. It also found that residents were sicker and died sooner than their insured counterparts. The group's study only focused on people dying, but there are a host of other medical problems short of death that can crop up. A person's health can be "significantly impaired as a result of not getting timely care," according to Pollack.

Ron Gilbert, policy director for Alabama Arise, believes studies like this one are important because they bring a more local and personal perspective to a broad, national crisis. Ron says ARISE, the Montgomery-based advocacy group for the poor, supports raising the state's poverty threshold. He says proposals like Gov. Bob Riley's that would give tax incentives to small businesses to provide health care to employees are good ones. It will be interesting to see if Gov. Riley and the Legislative leadership will do anything with the information supplied by the report.

Source: *Associated Press*

CONSUMERS URGED NOT TO USE CERTAIN FLAVORS OF TOTAL BODY FORMULA

The Alabama Department of Public Health has been informed of an advisory from the U.S. Food and Drug Administration alerting consumers not to purchase or consume Total Body Formula in the flavors of Tropical Orange and Peach Nectar, or Total Body Mega Formula in the Orange/Tangerine flavor. The liquid dietary supplement products may cause severe adverse reactions, including significant hair loss, muscle cramps, diarrhea, joint pain and fatigue. Although the product has been distributed in Alabama, the exact distribution within the state is not yet known.

According to the FDA advisory, the Total Body Formula products are sold in eight-ounce and 32-ounce plastic bottles. The Total Body Mega Formula is sold in 32-ounce plastic bottles. Both products are distributed by Total Body Essential Nutrition of Atlanta. The company is the sole distributor of the products and has voluntarily recalled Total Body Formula in the flavors of Tropical Orange and Peach Nectar and Total Body Mega Formula in Orange/Tangerine flavor.

The Florida Department of Health recently provided reports to the FDA on 23 individuals who experienced serious reactions to these products seven to ten days after ingestion. The FDA subsequently learned and is investigating a report that some individuals in Tennessee using the same products have experienced similar reactions. FDA laboratories are analyzing samples of the products to identify the cause of the reactions, including the possibility that the products contain excessive amounts of selenium, which is known to cause symptoms such as those described in the adverse events reported to the agency. Selenium, a trace mineral, is needed only in small amounts for good health.

In addition to Alabama, the products have been distributed in California, Florida, Georgia, Kentucky, Louisiana, Michigan, Missouri, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Texas and Virginia. The FDA is

advising consumers in all states to avoid using the products immediately and to discard the products by placing them in a trash receptacle outside of the home. Consumers who have been taking the products and have experienced adverse reactions should consult their health care professional. Consumers and health care professionals can also report adverse events to the FDA's MedWatch program at 800-FDA-1088 or online at www.fda.gov/med-watch/report.htm.

Source: *Associated Press*

REPORT LINKS PLASTICS CHEMICAL BPA TO HEALTH PROBLEMS

A draft report from the National Toxicology Program has concluded that the plastics chemical Bisphenol A (known as BPA) may be linked to a number of health and developmental problems, including breast cancer and early puberty. In January, we reported that the House Energy and Commerce Committee expressed concerns because BPA is among chemicals used in plastic baby bottles as well as the plastic lining of cans of infant formula. The committee, as well as health advocacy groups such as the Environmental Working Group, have also complained that chemical-industry contractors have misrepresented BPA's potential hazards.

Last month's report from the program, part of the National Institutes of Health, contradicts the results of some industry-funded studies that have minimized concerns about the effects of small amounts of BPA. The new report said the chemical, even in small quantities, may be linked to the problems. Earlier this year, the House committee, led by Rep. John Dingell contacted several baby-formula makers, asking them whether and how much BPA could be found in their products. Some companies responded saying that they tested for the chemical and that their products are safe. The FDA responded to the House committee's concerns by saying that BPA in small amounts doesn't pose a health risk. Now the agency has come under fire from Rep. Dingell and the House com-

mittee. The new report is likely to prompt more action by the committee concerning the FDA and the chemical industry's more positive reports on the chemical's safety. As a matter of interest, Nalgene water bottles made with BPA will be pulled from stores by Nalge Internal, a division of Therma Fisher Scientific, Inc.

Source: *Wall Street Journal*

XVIII. ENVIRONMENTAL CONCERNS

AN UPDATE ON TOXIC TORTS BY THE FIRM

Since we included a review of the current activities of the Mass Torts Section in the last issue, we were asked to do the same thing this month for the Toxic Torts Section. The lawyers and staff personnel in the Section have been very busy and are working on a number of interesting cases. The following report was supplied by Rhon Jones who heads up the Section. Hopefully our readers will find the things the Section's lawyers and staff personnel are doing to be helpful as well as informative.

A CLASS ACTION LAWSUIT AGAINST DUPONT

Our firm is working with several other law firms on a class action lawsuit filed in the U.S. District Court of New Jersey against DuPont. We are being assisted locally in that case by the Lieberman & Blecher law firm. The suit alleges that perfluorinated chemicals (PFCs) discharged by the DuPont Chambers Works facility in Salem County, New Jersey have contaminated private and public water supplies in several Salem County townships. The proposed class includes the public water supply customers and private well owners whose drinking water has been contaminated with these

harmful chemicals. Among other things, the plaintiffs are seeking relief for the proposed class in the form of medical monitoring and corrective measures to remove the PFCs currently in their drinking water. The plaintiffs' claims are almost identical to the claims asserted against DuPont in a West Virginia Circuit Court case by a class of individuals whose drinking water supplies were contaminated by PFCs discharged from the DuPont Washington Works facility in Parkersburg, West Virginia. A little more than a year ago, DuPont agreed to settle that class action case for about \$343 Million.

In the near future, the U.S. District Court of New Jersey will determine whether our clients' case should proceed to trial as a class action. Given the previous class certification decision and settlement of a nearly identical case against DuPont in West Virginia, we are hopeful that the New Jersey court will also see fit to certify our clients' case as a class action. David Byrne from our firm is the lead lawyer for the plaintiffs in this interesting case.

AN UPDATE ON THE CONTINENTAL CARBON CASE

Over the past six years, our firm has represented the City of Columbus, Georgia, Columbus boat dealer John Tharpe, and Columbus homeowner Owen Ditchfield in a U.S. District Court case against Continental Carbon Company and its corporate parent company, China Synthetic Rubber Corp. The claims against Continental Carbon involve air emissions of "carbon black" from its Phenix City, Alabama plant that have seriously damaged our clients' property and exposed them to potentially unsafe levels of this substance. In August of 2004, a federal jury heard the evidence against Continental Carbon and CSRC and awarded our clients a

\$20.7 million dollar verdict. The verdict was subsequently upheld by U.S. District Judge Mark Fuller.

Following the trial court's decision, the Defendants appealed to the Eleventh Circuit Court of Appeals. On March 21, 2007, the Court of Appeals affirmed the District Court's decision in its entirety and upheld the jury's award of both compensatory and punitive damages in a very strong opinion. Soon after, Continental Carbon and CSRC filed a petition for writ of certiorari with the U.S. Supreme Court. In its petition, the Defendants asked the Court to hear its appeal and reduce the jury's \$17.5 Million punitive damage award. In our clients' response to the Defendants' petition we argued that the jury's verdict was properly upheld by both the District Court and the Court of Appeals and that no further appeals should be considered by the U.S. Supreme Court. We are hopeful that the Court will deny Continental Carbon's petition in the very near future.

FLY ASH FROM INTERNATIONAL PAPER CREATES PROBLEMS

Our firm is pursuing a class action for residents near an International Paper facility near Pensacola, Florida. We are working with the firm of Levin Papantonio on this case. We believe that the International Paper facility has historically had fly ash leave the mill and blow over on to surrounding properties. We intend to prove that over time harmful substances such as arsenic have been deposited on these properties. This type of deposit will diminish the value of the homes in the area and is certainly a nuisance. We are continuing with discovery and hope to submit to the court our class action certification motion late this summer.

We have had an opportunity to meet with many of the residents in this area and they would like to see

the amount of fly ash leaving the mill drastically reduced or eliminated. Many of our clients have lived near the mill for years and while they appreciate the positive impact businesses such as this one have on the community, they do not want to be subjected to exposure of substances like arsenic in their soil or dust in their homes. It has been a pleasure for members of our firm to get to know residents near the mill and to in some way attempt to help them with this problem. These are really good people who just want a cleaner, better environment to live in. Rhon Jones and Mary Pat Crook are the lawyers handling this case for our firm.

OCCIDENTAL CHEMICAL MERCURY CONTAMINATION

We are continuing to pursue claims for almost 300 property owners in Federal Court in Muscle Shoals, AL for contamination of their property from a nearby chlor-alkali facility run by Occidental Chemical. This is not a class action, but rather individual claims for each property owner and our lawyers and staff have done an admirable job working with these clients. The clients have also been most cooperative in helping our firm bring these claims and that makes our job much easier.

We believe that a significant amount of mercury has been released from this plant over the years and has been deposited in substantial amounts in roughly a three mile area around the plant. This particular facility is a major source of mercury both in the Southeast and in fact the nation. Occidental uses mercury cells to produce chlorine at this facility. It is quite frankly a very outdated way to produce chlorine and we have learned that Occidental is going to shut down the portion of this facility that uses mercury to

produce chlorine. Regardless of how the legal claims come out, the closing of this part of the plant is good news for all who live in the area. A major source of mercury releases will be significantly reduced.

As you may know, continued exposure to mercury can be harmful. While these claims involve trespass and nuisance to the properties, the less mercury these residents are exposed to the better. Alyce Robertson, Rhon Jones and Mark Englehart are handling these claims for our firm.

RENEWABLE ENVIRONMENTAL SOLUTIONS UPDATE

We are currently working with The Belt Law Firm on a class action lawsuit against Renewable Environmental Solutions (RES), a rendering plant located in Carthage, Missouri, which began operations in 2002. Our firm is representing Carthage area residents who have experienced noxious odors emanating from the RES facility. Specifically, the RES facility converts turkey waste generated by a nearby turkey processing plant into reusable oil. The suit alleges that the processes used by RES release putrid odors into the community on a regular basis. In fact, the odors can reach such a degree that Carthage residents are forced to shut their windows and remain inside to obtain relief. Although creating renewable fuel sources is an admirable endeavor, we believe it should not be done at the expense of surrounding community members' right to use and enjoy their property.

RES' odor releases have resulted in the diminution in value of the class members' properties. Additionally, the class members have lost the ability to use and enjoy their property as they see fit. Our goal in this lawsuit is to terminate the continuing nuisance caused by RES'

odor and obtain compensation to recover the diminished value of the class members' property. Within the next nine months, the Circuit Court of Jasper County will determine whether the case can proceed as a class action. Rhon Jones and Mary Pat Crook are handling these claims for the firm.

LESAFFRE YEAST CORPORATION UPDATE

Our firm is currently working on a most interesting case against Lesaffre Yeast Corporation, a firm that manufactures yeast in Headland, Alabama. We are representing property owners located in the area surrounding the Lesaffre facility. The suit alleges that Lesaffre releases noxious odors as a result of the yeast manufacturing process. Regularly, the foul odor can reach such a degree that nearby residents are forced to stay indoors to obtain relief. As a result of the odor, surrounding property owners are unable to enjoy ordinary outdoor activities such as gardening or relaxing in the yard.

Lesaffre's continuing odor nuisance has diminished the value of the neighboring landowners' property. In addition, the nearby residents can no longer use and enjoy their property as they would like. Our first objective in this litigation is to terminate the odor nuisance from which surrounding landowners have suffered for years. Finally, it is our goal to recover the diminished value of the residents' property as well as compensate the Plaintiffs for their loss of use and enjoyment of their property. Rhon Jones and Mary Pat Crook are handling these claims for the firm.

EFFORT TO LIMIT GREENHOUSE EMISSIONS

Eighteen states, led by Massachusetts, filed a petition in federal court last month to pressure the US Environmen-

tal Protection Agency to regulate greenhouse gas emissions from cars and trucks—a move that could lead the automobile industry to produce cleaner-burning cars. The filing came on the first anniversary of a landmark U.S. Supreme Court ruling that such greenhouse gases are pollutants, and was designed to highlight the lack of progress since then. It also came in the face of suggestions that the White House is stalling approval of a document that would declare these emissions are harmful to public health. Attorney General Martha Coakley of Massachusetts, which is leading the petition, said in a statement:

Once again the EPA has forced our hand, which has resulted in our taking this extraordinary measure to fight the dangers of climate change. The EPA's failure to act in the face of these incontestable dangers is a shameful dereliction of duty.

The justices last year ordered the EPA to formally declare whether carbon dioxide and other global warming gases from motor vehicles could harm human health, and if so, to regulate them under the Clean Air Act. Specifically, the recently filed petition asks the U.S. Court of Appeals in Washington to order the EPA to make that determination within 60 days. If the states are successful and the agency rules that the gases can harm human health, it could lead to requirements that vehicles emit fewer greenhouse gases. This could be accomplished by requiring new cars to get better gas mileage or encouraging consumers to buy smaller vehicles or hybrid cars.

The states want the federal government to act before President Bush leaves office. Scientific evidence is growing that the manmade release of heat-trapping gases from power plants, vehicles, and factories will lead to public health problems, such as more common heat waves and increased plant pollens that can aggravate allergies and asthma, yet the Bush Administration has repeatedly failed to regulate the gases. States and environmental organizations want greenhouse gas

emission limits for power plants and factories in addition to vehicles.

Source: *Boston Globe*

PG&E TO PAY \$20 MILLION IN TOXIC SUIT

While most of our readers will remember the movie *Erin Brockovich*, I doubt that all will recall the actual lawsuit that was the basis for the movie. Before that movie, most folks weren't aware of the magnitude of the problem relating to toxic torts. Now, Pacific Gas & Electric Co. will pay \$20 million to settle the last in a series of lawsuits that claimed it was responsible for poisoning water in the Mojave Desert town of Hinkley, California. The agreement involved claims that 104 people were exposed to water that contained chromium 6, a potential carcinogen. The settlement was the latest in a series of suits involving PG&E contamination that sickened hundreds of people in Kings, Riverside and San Bernardino counties from the 1950s through the mid-1980s.

The 2000 movie *Erin Brockovich* was based on the 1996 case that ended with a \$333 million settlement on behalf of more than 600 Hinkley residents. Two years ago, PG&E agreed to pay \$295 million to settle other lawsuits involving about 1,100 people. The final lawsuit was filed about seven years ago. As it turned out the people who lived by the PG&E plant weren't the only ones affected. The settlement ends the last remaining lawsuit against the company over chromium 6 pollution in the region.

Source: *Associated Press*

CITIES TURN LIGHTS OFF FOR EARTH HOUR

Twenty-four major cities worldwide, plus 300 smaller cities, turned off their lights for Earth Hour on March 29, 2008, at 8:00 p.m. U.S. cities participating in this event included Atlanta, Chicago, Phoenix, and San Francisco. Cities worldwide, such as Bangkok, Budapest, and London also joined in this effort. Sydney, Australia, the first city to recognize Earth Hour in March

of 2007, also participated as the city turned off lights at all major landmarks and homes and businesses turned off their lights.

Earth Hour is organized by the World Wildlife Organization and is intended to bring awareness to the need to take action against global warming. Participants are asked to turn off all nonessential lights for the designated hour. The next Earth Hour is planned for March 28, 2009.

GROCERY STORE CHAINS WARN CONSUMERS OF MERCURY LEVELS IN FISH

Approximately 28 grocery store chains have begun posting signs about mercury levels in seafood. They have taken this action in response to increasing reports regarding the high levels of mercury in certain fish. A study released by Oceana in January indicates that mercury levels are higher than expected in fresh tuna steaks and swordfish, and in fact, are up to two times greater than the previously estimated level. The amount of mercury in sushi tuna is even higher than that of tuna steaks.

In 2004, the FDA, with the help of the EPA, issued a report warning women who may become pregnant, pregnant women, nursing mothers, and young children to avoid certain fish and to limit other types of fish and shellfish. Fish to be avoided because of high mercury content include shark, swordfish, king mackerel, and tilefish. Fish and shellfish that are lower in mercury may be eaten two times per week. These include shrimp, canned light tuna, salmon, pollock, and catfish.

Based on Oceana's latest study, it recommends that children and pregnant/nursing women limit their intake of tuna and swordfish and consider alternatives such as tilapia and sushi mackerel. The grocery store chains that have agreed to post warnings regarding mercury content in fish should be applauded for their commitment to the safety of their customers. Some of these stores include Kroger, Safeway, Harris Teeter, and Whole Foods. Hopefully, other grocery chains will join in these efforts.

XIX. THE CONSUMER CORNER

TEXAS SETTLES WITH PHARMACY COMPANY OVER IDENTITY THEFT CHARGES

Texas Attorney General Greg Abbott has reached an agreement with CVS Pharmacy Inc. that resolves the state's April 2007 enforcement action against the nation's largest retail pharmacy. CVS was charged with violating state laws that govern the disposal of customer records containing sensitive personal information. Under an agreed final judgment obtained by the attorney general, CVS will overhaul its information security program. The program must be fully documented in writing and contain administrative, technical and physical safeguards designed to protect the personal information of CVS customers. CVS also will pay \$315,000 to the State of Texas, which will be appropriated for the investigation and prosecution of other identity theft cases, pursuant to the Identity Theft Enforcement and Protection Act.

Under the agreement with the state, CVS must implement a new training program to inform its Texas employees about the company's enhanced information security procedures. The employee training program must provide employees with a review of CVS' privacy procedures and a review of state laws governing the disposal of customer records. The training program also must explain identity theft, its costs to individual consumers and businesses, and the importance of abiding by the company's disposal program. The Office of the Attorney General took legal action against the defendant after hundreds of documents containing customers' personal information were unlawfully dumped behind a CVS store in Liberty, Texas. The investigation subsequently revealed numerous credit card receipts containing customers' complete credit card numbers and expiration dates as well as a handful of prescription sleeves that included

dates of birth, type of medicine prescribed, insurance company, and prescribing physician. The AG's office warned that although the investigation revealed no confirmed incidents of personal information being misused, consumers who interacted with CVS' Liberty location should carefully monitor bank, credit card and any similar financial statements for evidence of suspicious activity.

Source: Insurance Journal

USDA FINDS VIOLATIONS IN U.S. SLAUGHTERHOUSES

A federal audit of 18 beef slaughterhouses following the nation's largest beef recall has found humane handling violations in three of them. One plant was temporarily suspended. The audit by the Department of Agriculture's Food Safety and Inspection Service found that one plant was insufficiently stunning animals, which failed to make them insensible to pain before slaughter. It's reported that plant has taken corrective actions and its suspension was lifted. The audit results were provided to Wisconsin Democrat Herb Kohl, the chairman of the Senate Appropriations agriculture subcommittee. Congress should make sure that the Department of Agriculture does its job and that it protects consumers from beef that is unsafe for consumption.

Source: Associated Press

FOOD COMPANY LINKED TO PET DEATHS AGREES TO SETTLEMENT

A pet food maker whose contaminated product was said to have caused the deaths of thousands of dogs and cats in North America has agreed to settle lawsuits with pet owners in the United States and Canada. Streetsville, Ontario-based Menu Foods Income Fund announced the tentative settlements last month. The amount of the settlement has not been disclosed. But Menu did say that it expects its total costs associated with the massive recall of its products last year to be about \$53.8 million. The company's pet foods are produced in bulk and

sold as store brands.

In March 2007, Menu recalled tens of millions of containers of pet food when the New York State Food Laboratory discovered that some contained aminopterin, a chemical that has been used to induce abortions, treat cancer and kill rats. The U.S. Food and Drug Administration later rejected that finding but found melamine, a chemical used to make plastics, in samples of Menu Foods' products. The melamine was traced to contaminated wheat gluten imported from China. The discoveries solved the mystery of why so many seemingly healthy pets had been dying in the previous months.

In the United States, dozens of cases against Menu and many of the companies that own the private labels were consolidated in a federal court in Camden, New Jersey. Menu had to file the terms of the settlement in Camden by May 1st. U.S. District Judge Noel L. Hillman set a May 14th hearing to consider the agreement. The company said it expects court approval. Sherrie R. Savett, a lead lawyer for the pet owners, did a very good job.

Source: *Associated Press*

COMMISSIONER PARKER UNVEILS PSC'S NEW CONSUMER EDUCATION PROJECT

Susan Parker is doing a great job on the Public Service Commission and that's good news for Alabama consumers. Last month, Susan unveiled the Commission's new Consumer Education Initiative to help conserve energy. Some of the recommendations for consumers are:

- Replace old light bulbs with new compact fluorescent bulbs.
- Install low flow shower heads and sink aerators.
- Turn off lights, computers and other electronics when not in use.
- Put plastic on windows.
- Keep the inside of your microwave clean so it will cook food more efficiently.
- Use lids when cooking because they

help the food cook more quickly by keeping the steam in the pot or pan.

- Only use the dishwasher to wash full loads.
- Clean the lint filter on your clothes dryer after every load.
- Install a programmable thermostat.
- Let hot food cool before putting it in the refrigerator.

All of us have a responsibility to do our part to conserve energy. These recommendations are all easy to follow and should be made a part of our daily activities. Thanks to Susan for making them available to Alabama citizens.

Source: *Associated Press*

MATERNITYCARD PROVIDER SUED BY STATE OF TEXAS

The Texas Attorney General's office has filed a lawsuit accusing an Austin company of selling fraudulent discount health card plans to pregnant women. The lawsuit claims that Austin-based AHCO Direct, also known as Affordable HealthCare Options, sold fake discount cards to uninsured pregnant women that promised to cover up to 60% of maternity-related costs. They are accused of multiple violations of the Texas Deceptive Trade Practices Act. The cards were marketed to uninsured pregnant women via Google ads. The company's Web site states that a large number of health care providers accept their MaternityCard, which it said would lower the cost of doctors' visits, sonograms, prescriptions and other prenatal care. The plan cost \$199 to enroll and \$99 a month. But MaternityCard users who visited the doctors on the company's preferred provider list were told the card wouldn't be accepted. When customers complained and tried to cancel the card, they faced a \$250 cancellation fee. Texas law prohibits vendors from baiting consumers with promises and failing to deliver on their guarantee, according to Attorney General Abbott.

Source: *American-Statesman*

PUBLIC JUSTICE FILES LAWSUITS OVER CSI TOYS CONTAINING ASBESTOS

Public Justice has filed state and federal lawsuits to force CBS Broadcasting, Inc. and Planet Toys, Inc. to protect children and their families from further exposure to asbestos contained in toy science kits made by Planet Toys and licensed by CBS. The toy kits are based on the popular "CSI" television drama series, and tests of the kits' fingerprinting powder found tremolite, one of the most deadly forms of asbestos.

Public Justice's federal complaint, filed in U.S. District Court in Los Angeles, alleges that CBS and Planet Toys were negligent in their quality control measures and that they made consumers believe the toys were appropriate playthings for children when, in fact, the toys contained a hazardous and potentially lethal carcinogen. Because the toys were sold nationwide, the lawsuit is brought on behalf of a nationwide class of consumers who purchased or acquired the toys.

Among other things, the class action asks that the defendants provide refunds to consumers, pay for asbestos testing of toys that have been opened, and pay for appropriate medical treatment for consumers who have been exposed to asbestos. A second suit was filed in California state court, citing violations of a state law known as "Proposition 65," which requires businesses to give a "clear and reasonable warning" to California consumers if a product contains a chemical known to cause cancer or birth defects, such as asbestos.

The Proposition 65 complaint was filed, in part, on behalf of the California-based Asbestos Disease Awareness Organization (ADAO), which first publicly reported the presence of asbestos in the CSI: Crime Scene Investigation™ Fingerprint Examination Kit last November. The discovery was the result of independent laboratory tests on an array of consumer goods and toys, including the popular fingerprinting kit. Further investigation found that the fingerprinting powder containing asbestos was also in other "CSI" toy

kits—the CSI: Crime Scene Investigation™ Field Kit and the CSI: Crime Scene Investigation™ Forensic Lab Kit. Both lawsuits name CBS, Planet Toys, and major retailers of the toy, some of whom continue to sell the kits. The Proposition 65 lawsuit seeks civil penalties for violations of the law, in addition to injunctive relief.

The dangers of asbestos exposure have been well documented by scientists, doctors, and environmentalists since the 1970s. There is no known safe level of exposure. If inhaled, microscopic asbestos particles can penetrate lung tissue and stay there permanently, causing serious, even deadly, respiratory illnesses or cancer that might not manifest until decades after initial exposure. Even small quantities of asbestos are hazardous when inhaled. Since the kits contain powder, it makes the presence of asbestos more hazardous.

Source: Public Citizen

XX. RECALLS UPDATE

TOYOTA AND GM RECALL 662,000 CARS IN U.S.

Toyota Motor Corp and General Motors Corp are recalling more than 662,000 vehicles sold in the United States due to defects in power windows. Toyota will recall 539,500 Corolla and Matrix vehicles for the 2003 and 2004 model years. GM will recall 122,598 Pontiac Vibe hatchbacks, which share the same platform with Toyota's Matrix and are built by GM in a joint venture with the Japanese automaker. On vehicles equipped with power windows, the driver and front passenger glass bolts may loosen and cause the door glass to separate from the window regulator, according to Toyota. Vehicles equipped with manual windows are not subject to the recall. Owners should contact their local Toyota dealer for inspection and repairs. Replacement of the driver and front passenger door glass bolts will be

done at no charge. The vehicles share a common platform and are built in a GM-Toyota joint venture in Fremont, California. GM says it received 107 complaints of glass breaking and 11 reports of minor injuries. According to GM and NHSTA there have been no crashes reported. The GM recall involves 2003-2004 model year Vibe vehicles with power windows.

CHRYSLER IS RECALLING 212,000 SEBRINGS AND AVENGERS

Chrysler LLC is recalling 212,347 Chrysler Sebring and Dodge Avenger passenger cars worldwide to fix an electrical problem that could lead to engine stalling and other issues. The National Highway Traffic Safety Administration said in a posting on its Web site the recall involves 2007-2008 Sebring and Avenger vehicles with standard tire pressure monitoring systems. According to NHTSA, unused electrical connectors for the monitoring system could become corroded and short circuit, leading to problems starting the engine, a dead battery, an inoperative cruise control or engine stalling. A Chrysler spokesman said while there have been no accidents or injuries reported, Chrysler has received nine reports of engine stalling. About 180,000 of the recalled vehicles are in the United States. Nearly 15,000 are in Canada, more than 12,000 are in Mexico and the rest are in European markets. The recall is expected to begin in mid-April. Dealers will seal the wires for the tire pressure monitoring system at no cost to consumers. Owners can contact Chrysler at (800) 853-1403.

HYUNDAI RECALLING SOME SONATA CARS

Hyundai Motor Co. is recalling 393,714 Sonata passenger cars in the United States to fix a problem with the air bag system in the front passenger seat. The automaker said the recall affects 2006-2008 Sonata vehicles equipped with an advanced air bag system. The system disables the front passenger seat's front air bag when it detects the presence of a child restraint

system or a small child in the seat. The right front air bag is disabled to prevent injuries to a child that could result from the air bag inflating during a crash. According to Hyundai it received some complaints that the system was misclassifying a small adult as a child and shutting off the passenger air bag. The automaker said the misclassification would prevent the air bag from inflating in a crash, potentially leading to an injury to the passenger. The company says it is not aware of any injuries. The recall is being conducted to "ensure the safety of our customers," according to Hyundai. Dealers will evaluate the air bag system and make any necessary repairs. The recall is expected to begin later this month. For more information, owners can contact Hyundai at (800) 633-5151.

HONDA RECALLS ACCORD SEDANS OVER WINDSHIELD WIPER MOTOR

Honda Motor Co. is recalling 353,000 Accord sedans over possible corrosion in the windshield wiper motor. According to Honda, the recall involves Accords from the 2003 model year. The automaker says water could enter an area near the windshield wiper motor and cause corrosion, which could cause the electrical circuit breaker inside the motor area to fail. That could prevent the motor from working, potentially leading to a crash. No injuries or crashes have been attributed to the wiper problem. Dealers will inspect the windshield wiper motor and install a cover over the motor if no signs of corrosion are present. If there is corrosion, they will replace the motor. Owners may contact Honda at (800) 999-1009.

A SECOND RECALL OF COOPER TIRES IN EIGHT MONTHS

Cooper Tire & Rubber Co., which is in the midst of a plan to build and sell more high-end products, is having to replace tires for the second time in eight months. The company is voluntarily recalling 48,037 tires because of sidewall separation. The recall, which

started March 14th, covers more than 20 different Cooper Tire brands including Cooper Discoverer, Wildcat and Wild Country. The recall tarnishes Cooper's image at a time when Chief Executive Roy Armes is trying to reposition Cooper as a maker of high-end tires usually purchased by sport-utility vehicle and luxury car owners. As you may recall, the company recalled 91,000 tires in July and a total of 296,500 in 2006.

Cooper swung to an annual profit of \$119.5 million in 2007. The company has said it will follow quality programs to increase revenue and operational improvement in North America. The recalled tires were built at the company's Albany, Georgia, plant. Cooper, in its filing with NHTSA, said it will pay its dealers the \$ 17.50 per tire cost for mounting and balancing. That charge alone would generate \$840,000 in expenses. However, the safety issue is the thing that is of concern to consumers.

Source: CNN

RECALL OF GAS WATER HEATERS ANNOUNCED

A.O. Smith Water Products Co. has recalled gas water heaters because of possible fire and carbon monoxide hazards. The U.S. Consumer Product Safety Commission said consumers should stop using the water heaters immediately. No incidents or injuries have been reported. The recall affects about 1,500 units of 75-gallon natural and propane gas water heaters sold by independent contractors and plumbers nationwide from November 2007 through January 2008. The commission said the water heater's flue gas temperatures can exceed safe limits and produce excessive temperatures in the venting unit, posing a fire hazard. The exhaust can leak into the surrounding room. Consumers can get details from A.O. Smith at 1-866-880-4661 or www.hotwater.com. A.O. Smith bought Ashland City-based State Industries in 2001.

DOLLAR TREE RECALLS 300,000 TOYS DUE TO CHOKING RISK

Dollar Tree Stores has recalled about 300,000 stuffed animals because they contain small parts that could be a choking hazard for young children. The recalled Cuddly Cousins Plush Insect Toys include a lady bug, bumblebee, caterpillar, snail and two butterflies, the safety agency said in a statement. They were sold for \$1 each from March through December, 2007. The U.S. Consumer Product Safety Commission says the Chinese-made toys should be taken away from children and returned to the store for a refund.

ACTIVITY CENTERS RECALLED

About 16,400 Imaginarium multi-sided activity centers and Jungle activity centers, made in China and imported by Toys "R" Us Inc., have been recalled because small parts on the toys can detach, posing a choking hazard to young children. The company has received 12 reports of small parts detaching from the activity centers. Thus far, the company says no injuries have been reported. The multisided activity center, with the item No. 69042, has moveable block letters, a clock face, sliding shapes and gears. The Jungle activity center, with the item No. 69083, has peg jumping monkeys, sliding fish, abacus beads and bead mazes. The activity centers, made by Taizhou Orient Toys Company Ltd. and Shanghai Cosmos Gift Industry Company Ltd., were sold at Toys "R" Us stores nationwide and through its Web site from August 2007 through February of this year. Details: by phone at 800-869-7787; by Web at <http://www.toysrus.com> or <http://www.cpsc.gov>.

XXI. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

BRUCE HUGGINS

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

Bruce recently celebrated 20 years with the firm, having come on board in April of 1988 from the Montgomery County Sheriff's Office. During his tenure with the Sheriff's office Bruce won numerous awards, including Officer of the Year. He was the first member of the Sheriff's Office to attend and graduate from the prestigious FBI National Academy in Quantico, Virginia. Bruce and his wife of 32 years, Cindy, have two children. Daughter, Amanda, followed in her mother's footsteps and became a registered nurse. She is presently working in ICU at Baptist East in Montgomery. Daniel recently graduated from Birmingham-Southern and is working for a software development company in Birmingham where he currently resides. Bruce is an excellent employee and sets the right example for all who work with him. He is totally dedicated to the welfare of the clients we represent. We are truly blessed to have a man like Bruce with the firm.

RICKY MOORE

Ricky Moore, who has been an investigator with our firm since 1995, stays very busy. He currently works in our Personal Injury/Products Liability Division. Before coming to work with us, Ricky was with the Montgomery Police Department from 1978 until he retired after twenty years of service. During

his time with the MPD, Ricky worked for nineteen years in the Detective Division. Ricky comes from a family with a strong background in law enforcement. After retiring from the MPD, Ricky's father became the Chief of Police in Roanoke, Alabama. He later served as Sheriff of Randolph County.

Ricky and his wife, Kathleen, have three children, Melissa, Will, and Molly. Melissa is married and resides in Richmond, Virginia. Will is graduating from Prattville Christian Academy this year and will attend AUM. Molly will be a 10th grader at Prattville Christian Academy. Kathy is retiring as a school teacher in Elmore County, but will begin teaching at Prattville Christian Academy this fall. Ricky and his family are active members of Coosada Baptist Church. When he is away from his work, Ricky enjoys hunting, fishing, and playing bluegrass music on his banjo. Ricky is an exceptionally good employee and we are most fortunate to have him with the firm.

SANDRA WALTERS

Sandra Walters, who has been with the firm for sixteen years, is the Section Head Administrator of our Toxic Torts Section. In this position, she assists Rhon Jones with the day-to-day activities of managing that section. Sandra enjoys being able to work on toxic tort cases. She works hard and has the ability to help coordinate the efforts of all personnel in the Section.

Sandra is married to Johnny Walters and is the mother of three children: Melanie Sullins, a Registered Nurse who works in a critical care unit at a local hospital; Holly Stroh, who has been with our firm for over seven years and works in our Fraud Section; and 17-year-old Hunter Walters, who has recently taken up the sport of drag racing. Sandra is also the proud grandmother of Taylor and Drew Stroh, who attend Montgomery Catholic Preparatory School. In her spare time, Sandra enjoys spending time with her family and her two English Bulldogs, and collecting and restoring primitive antiques. Sandra, a very good employee who does outstanding work, is a definite asset to the firm. We are blessed to have her with us.

SANDY JACOBS

Sandy Jacobs, who has been with the firm for over four years, works in the Mass Torts Section and is heavily involved with the Vioxx Litigation. Currently, Sandy is a member of the LMI Team where she is responsible for downloading medical records from LMI on our Vioxx clients. Prior to taking on that responsibility, Sandy handled client phone calls relating to Vioxx. She helped our clients fill out the appropriate documents that had to be supplied to us. Sandy has played an important role in the Vioxx litigation. In addition, she has performed other duties for the Mass Torts lawyers.

Sandy previously worked as a clerical assistant in the Toxic Torts section before moving to work on *The Jere Beasley Report*. Her next move was to the Mass Torts Section. Sandy was born in Enterprise and attended Zion Chapel High School, which for the uninitiated is located in Jack, Alabama. Of course, Jack is between Troy and Elba. After graduation, she attended Troy University and later transferred to Enterprise State Junior College to pursue a paralegal degree. Sandy currently has her studies on hold, but has hopes of finishing her paralegal degree in the very near future. Sandy spends a lot of time trail-riding her quarter horse and 4-wheeling on the weekends. She has been a very good employee and has worked very hard. We are fortunate to have Sandy with the firm.

KATHY FARMER

Kathy Farmer started with the firm as a temporary employee back in 2006 to work with Ben Locklar on Vioxx cases and came back as a temp in September, 2007. She then worked with Ted Meadows on the new pain pump cases. Kathy was hired this past February as a full-time Legal Assistant for Ted Meadows in the Mass Torts Section and now works on the pain pump cases, managing the day-to-day operation of screening cases, and then following the progress of those cases that are filed in court.

Kathy is originally from a small town in the Appalachian mountains of Southeastern Kentucky, where her parents

continue to live. Her mother is the Bookmobile librarian in her home county and her father is a retired consultant geologist who specialized in oil. She has three brothers, all of whom are engineers and who live in Western Kentucky. Kathy's husband, Robb Farmer, was a practicing lawyer in Lexington, Kentucky, when they married five years ago. He is now a law school law librarian at Jones School of Law, which is what brought the couple to Montgomery. They had been living in Phoenix, Arizona prior to coming to Montgomery, and Kathy says "it's so good to be back in the land of grits and sweet tea!"

Kathy graduated with a double-major B.S. in Computer Information Systems and English from Cumberland College, a small, Southern Baptist college, in Williamsburg, Kentucky. It is now a larger university known as the University of the Cumberlands. Kathy had originally planned to be a computer programmer upon graduation but was later offered a job as legal secretary and that began what she describes as her "love of the law." Kathy is currently taking evening classes at Jones School of Law as her schedule will permit. She also loves to read and travel. Kathy is a very good employee—who enjoys her work—and we are fortunate to have her with us.

XXII. SPECIAL RECOGNITIONS

JAY WOLF LEADS MISSION TRIP TO INDIA

Pastor Jay Wolf led a mission trip to India last month. Andy Birchfield from our firm was among the group from First Baptist Church that made the trip. On April 1st, the team of seven men from Montgomery traveled 8,000 miles to India to share the good news of salvation through Jesus Christ in a region where less than 1% of the population professes to be Christians. Andy says this trip proved to be one of the most extraordinary experiences of his life.

Upon their arrival in Delhi, the team was met by Pastor Nazir Masih. As a young man growing up in a Sikh family in the Punjab province of Northwest India, Nazir was exposed to the Gospel through a tract left by a visiting missionary. Nazir accepted God's free gift of salvation through the death of Jesus and committed his life in service to the Lord. In 1978, he started the First Baptist Church of Chandigarh. Since then Nazir has planted 370 churches with an aggregate membership of 80,000 people. In addition, he started a private school that now has 1300 students. It is Nazir's vision that through this Christian school, which emphasizes not only discipleship and Biblical education but academic excellence, a new generation of Christian leaders will be equipped to be used by the Lord to usher in a spiritual awakening which will transform the country of India, the second most populous country in the world.

Nazir continues to support and mentor the pastors of the 370 churches he planted. During this 12-day visit, Andy says they offered encouragement, support and instruction to many of the pastors of these growing churches. The team visited the villages of these local churches, shared their testimony and proclaimed to them that God loves them and powerfully demonstrated His love on the Cross. As Americans walking through the village, the team drew immediate attention. In many places visited by the team Westerners are rarely seen. Their status as Americans prompted crowds to gather, and as a result, multitudes heard the Gospel proclaimed. On one evening as the group shared with the people of a village, they witnessed about 100 people step out of darkness into light, and out of death into eternal life. Throughout their visit the team witnessed the power of the gospel to transform lives. What a remarkable experience!

Andy says that India is a country of stark contrasts. He says wealth is juxtaposed with abject poverty. The team observed roads congested with automobiles, motorcycles carrying a family of five, big trucks, buses, rickshaws, ox

carts and herds of water buffalo. But, according to Andy, most poignant was the contrast of hopelessness and despair of those trapped in the empty religions of the region compared to the hope and joy of those who are experiencing an intimate, personal relationship with our Creator through His son Jesus. Andy made this observation:

During this amazing adventure with the Lord, I was reminded as never before that this world is not our home if we have placed our trust in Christ and that we can experience joy and contentment no matter what circumstance we may find ourselves in. It was a humbling reminder of how utterly blessed we are here in America, and I was challenged yet again to use the benefits and opportunities the Lord provides for His glory.

WEATHER RADIOS HELP CITIZENS PREPARE FOR INCLEMENT WEATHER

For the second year in a row, the Alabama Association for Justice and the Alabama Civil Justice Foundation have joined forces to help citizens become better prepared for bad weather by raising money for weather radios. Bob Prince, ALAJ president, explains the good that has resulted from the program:

This program has helped put more than 400 much-needed weather radios in homes across Alabama. When you factor in the benefits from just one more home having a weather radio the true magnitude of this program is immense. All across Alabama people need weather radios, especially in areas without warning sirens. Weather radios are crucial to people's preparation for bad weather, and our members are committed to helping provide them and in the process hopefully save lives.

Between 2007 and 2008, nearly \$10,000 was raised to purchase and distribute more than 400 weather radios

to residents in Coffee, Wilcox, Jackson and Autauga counties. These areas of the state were hit hard by tornadoes in 2007 and 2008, where millions of dollars worth of property was destroyed and several people lost their lives. Residents in rural areas in these counties are especially susceptible to the danger of tornadoes, largely because early warning weather sirens prevalent in urban areas are sparsely placed in the rural landscape if they are present at all. The lack of early warning sirens, coupled with a high number of mobile homes, makes the need for weather radios in these areas apparent. In order to help residents in the affected counties prepare for future bad weather, the members of ALAJ and ACJF committed to raise money for weather radios. Emergency management officials and meteorologists agree that weather radios not only help citizens prepare for inclement weather, they can also help save lives in the process.

Source: ALAJ

MONTGOMERY POLLING FIRM SETS UP SATELLITE IN OUR NATION'S CAPITAL

John Anzalone is a very busy man these days. His firm, Anzalone Liszt Research, a Democratic polling firm based in Montgomery, has political candidates all across the country. The firm is now expanding its operations to Washington, DC. John says his firm really needs a "presence up there." A senior associate at the firm is now based in Washington. Anzalone Liszt does survey work for Rep. Artur Davis and is involved in the campaign of Montgomery Mayor Bobby Bright, who is running for Congress in the 2nd District. The *Washington Post* recently called the firm "the best pollster you've never heard of," but also one of the "hottest" after helping four Democrats unseat GOP members of Congress in the 2006 elections. I have known John for a number of years and consider him to be a very good friend. I'm most pleased to see his firm doing well.

JERRY INGRAM'S FIRM HAS BEEN VERY BUSY

Another local firm has also been very busy. Dr. Jerry Ingram, whose firm is Southeast Research, has over 30 years of public opinion research experience. While he is primarily known for using his polling data to predict the outcome of elections, Dr. Ingram also has extensive experience using public opinion research in the business and legal arenas. He has given expert testimony in state and federal courts involving issues pertaining to disputed elections, changes of venue, economic damages, and the credibility of trial evidence generated from public opinion research. His research and associated testimony have withstood legal scrutiny all the way to the U.S. Supreme Court. Dr. Ingram has assisted lawyers—both for plaintiffs and defendants—with jury selection and trial preparations using focus groups and mock trials. He has also worked with a great number of businesses in their marketing and organizational pursuits.

Dr. Ingram, a Professor Emeritus at Auburn University Montgomery, is currently a member of the American Association of Public Opinion Researchers and is certified at the Expert Level with the Marketing Research Association. I have found Jerry Ingram to be one of the most accurate pollsters in the country when it comes to political races. He has been right on target in every race that his firm has polled and that's quite an accomplishment.

XXIII. SOME CLOSING OBSERVATIONS

My friend Wanda Devereaux, who is a very good Montgomery lawyer and an even better person, recently sent out a timely message to a number of her friends. Even though Wanda intended it for women only, a copy of the message was delivered to me. After reading it, I asked Wanda's permission to include her message in this issue and she agreed.

During my (way too early) morning prayers, it occurred to me how much I hate Mondays. Don't you? Anyway, it inspired me to send a Monday morning prayer to all my Daughters of the King Sisters online and I thought I would share one with you. It can't hurt, even if you don't believe, and it just might make your Monday go better. Anyway, I love you all—Monday or no! Maybe just getting out of the hospital—again—has inspired me. The entire EMT, ambulance, ER, 5N staff know me and Jerry by name and sight. This one was so close it even makes being around for Mondays look good!

Almighty God, what better day to re-devote our lives to Thee, following thy precious Sunday, beginning the week of toil—and heavy burdens for some—than Monday? Give us grace and confidence to start this new week with vigor, confidence, dedication and—most of all—abiding love for Thee. So draw our hearts to Thee, so guide our minds, so fill our imaginations, so control our wills, that we may be wholly thine, utterly dedicated unto Thee; and then use us, we pray Thee, as thou wilt, and always to Thy glory and the welfare of Thy people; through our Lord and Savior Jesus Christ, without whom we are naught. Amen.

I pray this prayer for each of you, whatever your beliefs. God has an enormous capacity for love for all of us, regardless of our beliefs. I also pray that this prayer brings you blessings and a productive Monday and week.

Wanda's prayer is certainly appropriate for all of us as we start a work week. I appreciate very much her allowing me to include it for our readers—men and women alike!

FAVORITE BIBLE VERSES

Shane Seaborn is a partner in the law firm of Penn and Seaborn with offices in Clayton and Union Springs. Shane and his wife Anna are the proud parents of a new baby, Sophia, who was born a few weeks ago. Shane furnished two of his favorite Bible verses to be included in this issue.

*I can do all things through Christ who strengthens me.
Philippians 4:13*

*If you wait for perfect conditions, you will never get anything done.
Ecclesiastes 11:4*

Lee Baugh, who is the executive director of The Step Foundation, also supplied two of his favorite verses. Lee has done a very good job of helping spread the Gospel through his ministry in Montgomery. He carries on a tradition started by the late Joe Phelps, who was a Montgomery County Circuit Court Judge, and a very good friend. Some of Lee's favorite verses are from Jeremiah:

*[F]or I know the plans I have for you", declares the Lord, "plans to prosper you and not to harm you, plans to give you hope and a future. Then you will call upon me and come and pray to me, and I will listen to you. You will seek me and find me when you seek me with all your heart. I will be found by you," declares the Lord,
Jeremiah 29:11-14*

*"Ab, Sovereign Lord, you have made the heavens and the earth by your great power and outstretched arm. Nothing is too hard for you."
Jeremiah 32:17*

It's good to have folks like Shane and Lee, who are willing to share their faith on a daily basis, taking time to share Bible verses with others. Hopefully, this will inspire each of us to share our favorite verses with others. It's a great way of helping to spread the good news!

XXIV. SOME PARTING WORDS

We have been studying the Book of Daniel in our Sunday School Class at St. James United Methodist Church over the past few weeks. During that study, I have learned that Daniel understood a disciplined spiritual life was necessary if he was to live as a faithful believer in God. That was true for Daniel in his day and it's also very much true for us

today. We must live as faithful disciples of Jesus Christ. The study of Daniel proves without a doubt that the basic spiritual discipline is that of prayer. Everything else flows out of this bedrock relationship with God through his Son, Jesus.

We learn from studying Daniel's life that it was actually his prayer life that got him in deep trouble and eventually resulted in his being thrown to the lions. The fact that Daniel continued to pray to his God—in spite of being warned not to do it—was what put his life in danger. As was pointed out by a

good friend of mine, it's our lack of prayer that gets us in trouble in today's world. Of course, Daniel was saved from a certain death because of his faith and obedience to God. I recommend the 6th Chapter of Daniel to get "the rest of the story" to borrow a phrase from Paul Harvey. The entire Book of Daniel is one that should inspire each of us to be faithful and obedient to God. It also lets us know that prayer is critically important and how it will sustain us in good times and bad.

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