



THE  
**JERE BEASLEY REPORT**

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# Beasley Allen

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# I. CAPITOL OBSERVATIONS

## JOHN KENNEDY WAS AN INSTRUMENT OF CHANGE

The problems facing America in 1960 were significantly different than those now facing our country in 2008. John Kennedy was the Democratic nominee in 1960 and faced Richard Nixon, who may have been the most insecure man ever to have gained national prominence, in the general election. Our country's enemies at that time were quite different than those we face today and Russia was the country posing the greatest threat to our national security. The fears of communism and nuclear war were discussed on a daily basis in some form or other by the politicians of that day. Our country was in need of a real leader in 1960—one who could take the United States to greater respect on the international stage and who could at the same time bring about needed change at home. The differences in Kennedy and Nixon were most significant—Kennedy offered “hope for the future” and Nixon projected “gloom and despair.” The American people would have a clear choice on Election Day that year, but there was one major problem for the Democratic ticket. John Kennedy had to overcome the fact that he was Catholic. Many people were concerned over the perceived influence the Pope might have over affairs of government if the Senator from Massachusetts was elected president. Fortunately, the voters were smart enough to make the right choice in 1960 and our country was better for it. John Kennedy accepted his party's nomination in 1960 with these words:

*Give me your help—your hand—your voice—your vote! Recall with me the words of Isaiah: “They that wait upon the Lord shall renew their strength; they shall mount up with wings as Eagles; they shall run and not be weary.”*

The man who would be the standard-bearer for the Democratic Party and the spokesman for ordinary citizens in the months to follow then concluded his remarks by saying:

*As we face the coming challenge, we too shall wait upon the Lord, and ask that He renew our strength. Then shall we be equal to the test. Then shall we not be weary. And then we shall prevail.*

There are lots of parallels between the times of John Kennedy and the current times we as Americans face. The Republican President, who was completing his term, would leave an unsettled world on the international stage and numerous problems at home. President Eisenhower attempted to pass the mantel to his Vice-President, and we know how that turned out. Now in 2008, an unpopular president with approval ratings of only 27%—the lowest in history—is attempting to have as his successor Senator John McCain, a man who is taking on all of the problems that the Bush-Cheney-Rove Administration has created. Frankly, the American people don't want four more years of Bush rule. The type leadership our country has experienced during the Bush years should be a virtual guarantee that the voters will elect a Democratic president. It's my belief that the only way for Senator McCain to be elected is for the Democratic Party to really mess up! I would encourage the Democratic nominee and the folks running his campaign to consider the source of John Kennedy's inspiration before beginning the journey toward November.

### **NO REAL CONSERVATIVE COULD SUPPORT FEDERAL PREEMPTION**

No person who claims to be a true-blue conservative could possibly be in favor of federal preemption. Most of those who profess to support such an anti-states' rights principle either know little about preemption or have a special interest agenda that controls their thinking. The concept of federal

preemption being pushed by the Bush Administration in its last days runs counter to the principles of “states' rights,” “federalism,” and “small government,” which are supposed to be the cornerstones of modern conservatism. In the model that the Bush Administration is pushing, total control over consumers' rights is located in one federal agency. That agency, with the stroke of a pen, can literally destroy the states' judicial systems and in the process do great damage to the Constitution. I have yet to hear any of my friends who profess to be conservatives explain to

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me how they can possibly justify federal preemption. In fact, few of them even have a clue when the subject comes up. It soon becomes very clear that they don't know what preemption really is. Nor do they understand how it would affect them.

#### **THE EXXON BILL DIES IN THE ALABAMA LEGISLATURE**

I was shocked to learn that the legislation referred to as the "Exxon bill" died in the Alabama Legislature without making it out of the House of Representatives. The measure supported by Governor Bob Riley, Lt. Governor Jim Folsom, Rep. John Knight and others would have raised about \$40 million for the state General Fund budget at a time when funding is badly needed. For some unexplained reason, the bill was never even put on special order even though it was on the House calendar for days. ExxonMobil opposed the legislation and I guess that tells the story of why this badly needed bill was never put up for a vote by the House leadership.

The bill, sponsored by Rep. Knight, was never given a chance of passage and that's a shame. Exxon's lobbying efforts won this battle, but the powerful oil giant may not have won the war. Hopefully, Governor Riley will give the members of the Legislature another shot at passing this crucial legislation in a special session. It doesn't make sense to let the Exxons of the world take our natural resources and not pay a fair price to the state for them.

#### **GOODYEAR TIRE CASE SETTLED**

Our firm settled a lawsuit last month that had been filed against Goodyear Tire & Rubber Company and Monaco Coach Corporation. In this case, we represented Shirley Woods, Jon Woods and Stacey Woods, as well as the Estate of Billy Woods, deceased. The Woods family was returning to Alabama from a vacation at Disney World on I-75 in Georgia when the left front tire on their 2001 Monaco Diplomat LE

detreaded. As a result, the RV left the roadway, crossed over the median and two lanes of on-coming traffic before slamming into an embankment in a rest area. Billy Woods, who was driving, was paralyzed in the accident. His wife Shirley, who was in the front passenger's seat, suffered a severe back injury. Their daughter-in-law Stacey also suffered a severe back injury, and their son Jon suffered a severe hip injury. Miraculously, Jon and Stacy's two small children weren't injured at all.

The evidence was clear that Billy Woods, a retired aircraft mechanic, performed regular maintenance on the RV and its tires. In addition, at the time of the accident Mr. Woods was driving well within the posted speed limit and was operating his vehicle properly in every respect. The evidence was that once the Goodyear tire failed, Mr. Woods did everything possible to control the vehicle but was unable to do so.

Through intense discovery, we learned just how dangerous Goodyear's G159 275/70R22.5 is when used on the big Class A RVs. When Goodyear first marketed the 275/70R22.5 for North America in 1996, the tire manufacturer did not have a tire designed for RVs. Instead, it sold the 275/70R22.5 to RV companies even though the tire was designed for a completely different use. The 275/70R22.5 was designed for metro and urban pickup and delivery trucks, such as those used by UPS. Those vehicles are used in urban settings and not for extended trips at highway speeds for several hours. The design features that made the 275/70R22.5 appropriate for metro-delivery trucks made it dangerous and prone to fail when used on Class A RVs driven at highway speeds. The tire's thick tread and wide belt package caused it to operate at too high a temperature at continuous highway speeds and eventually the tire would fail. It was well known to Goodyear and all tire manufacturers that heat is the number one enemy for tires.

Through discovery, we learned that Goodyear's own internal documents showed that it was well aware that the 275/70R22.5 could fail when operated

at highway speeds on vehicles such as RVs. While I cannot discuss the documents' contents in detail in this report because of Goodyear's Confidentiality Order, I can say that by 1998, Goodyear began documenting failures and tread separations with the 275/70R22.5 when used on Class A RVs. At least by 1999, Goodyear knew this tire was not safe for use on Class A RVs. It is significant that the 275/70R22.5 failures were occurring primarily on Class A RVs and not with other applications such as the use on UPS delivery trucks. In 1999, Fleetwood, one of the largest RV makers, instituted a recall that mandated replacing the 275/70R22.5 with larger tires designed for highway use. Fleetwood replaced the 275/70R22.5 on its RVs to provide its users with a safer tire.

Despite Goodyear's knowledge concerning the safety issues with the 275/70R22.5, it continued to sell the 275/70R22.5 to other RV manufacturers such as Monaco. The Woods' RV was made by Monaco in 2001 and the very same tire that Fleetwood replaced on its RVs in 1999 was utilized on these Monaco RVs as original equipment.

Not surprisingly, Goodyear continued to receive reports of failures with the 275/70R22.5 when used on the big RVs. These failures led Goodyear and Monaco to issue a Product Changeover Program—or a silent recall—in 2002 removing the 275/70R22.5 from Monaco's Class A Windsor. Tragically, neither Monaco nor Goodyear mandated replacing the 275/70R22.5 on all Monaco RVs. Our clients' RV, which by Monaco's own admission was essentially the same size and weight as the Windsor, did not have the 275/70R22.5 replaced. It still had the undersized tires and the Woods family never knew that the tires were defective. The Goodyear tire failed and caused the Woods' wreck over a year after Goodyear and Monaco had replaced the 275/70R22.5 tires on the Windsor RVs. From its outward appearance, the Goodyear tire looked to be in good shape at the time of the detread. The tire on the Woods' RV that failed had less than 20,000 miles on it, had most

of its original tread and was properly inflated.

This case points out graphically how defective products can cause serious injuries to people without any warning. The results of defects, such as the tire detread, are neither discoverable nor observable to the average person. The tragedy is that an accident like this one involving the Woods family can happen to anybody because of the defect. In fact, through the handling of the Woods case, we learned that over 25 lawsuits had been filed against Goodyear for injuries and deaths due to failures of 275/70R22.5 tires on RVs. At one time last year, there were at least seven cases pending against Goodyear because of failures with 275/70R22.5 on RVs. Including our case, Goodyear has settled three of the cases within the past few months. Nonetheless, Goodyear has yet to take responsibility for selling the 275/70R22.5, which was undersized and inadequate as an RV tire. A good number of these tires are still being used on RVs today. The question is not if another 275/70R22.5 will fail and cause an RV wreck, but when it will happen. Goodyear needs to take the proper steps to replace these tires on all RVs. Rick Morrison was the lead lawyer on the Woods case and did an outstanding job on discovery and trial preparation. Cole Portis and I also worked on this case. The settlement is confidential at the request of the defendants. It was good to represent a good family in this tragic case and be able to help them.

## II. POLITICAL OBSERVATIONS

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### ***THE MCCAIN CAMPAIGN HAS SOME EXPLAINING TO DO***

While John McCain says he's a defender of democracy, it appears some of the folks running his campaign may have been playing for the other team.

Two of McCain's senior campaign staff were forced to resign last month after revelations that their lobbying firm had been paid hundreds of thousands of dollars to represent Burma's brutal military dictatorship. And it gets worse—turns out this sort of thing goes all the way to the top. It has been reported that Charlie Black, McCain's campaign chairman, ran a lobbying firm that has represented some pretty bad actors on the international stage. Also, I am told that Charlie Black has represented war profiteer Blackwater and some others with financial ties to the war in Iraq. Clearly, those sorts of ties make you wonder about the key folks surrounding the Arizona Senator.

Last month, we wrote about all of the lobbyists who are actually running the McCain campaign. Including Charlie Black, there were 112 lobbyists running the campaign, but their number is getting smaller. The bottom line is simply that John McCain's inner circle is filled with lobbyists who have worked for forces the GOP standard bearer now claims to be against. Having folks who have ties to the powerful special interests running the show is bad enough, but when many of them have worked for foreign interests like those described above, there is real reason for concern.

### ***MCCAIN'S NATIONAL FINANCE CO-CHAIR RESIGNS***

In the May issue, we wrote about all of the lobbyists running the McCain campaign and we have updated the story for this month. McCain's national finance co-chairman has now stepped down, which will be hard to explain. Former Texas Rep. Thomas G. Loeffler, one of McCain's key fundraisers, resigned in the wake of a "new McCain policy" on conflicts of interest that requires campaign volunteers to disclose their lobbying connections. Loeffler, who runs The Loeffler Group, a lobbying shop, is the highest profile departure from McCain's inner circle. Maybe the Senator should check a little more closely before he brings in folks

to run his show. For example, Loeffler's firm has lobbied for other foreign interests and foreign governments. His firm was paid \$15 million by Saudi Arabia. It was reported in a Newsweek article that Loeffler listed meeting McCain along with the Saudi ambassador to "discuss US-Kingdom of Saudi Arabia relations," even though Loeffler had told a reporter earlier that he had not discussed his clients with McCain.

Senator McCain's new policy prohibits any staffer on the campaign from being a registered lobbyist or foreign agent. Part-time volunteers for the campaigns must disclose whether they are registered lobbyists or lobbying on behalf of foreign entities. This is sort of like "shutting the barn door after the horses get out!"

Source: *Associated Press* and *Newsweek*

### ***ALL OF THE PRESIDENTS HAD A CHANCE***

Each of our Presidents—starting with Richard Nixon—claimed to have a plan to make the United States energy independent. In 1974, President Nixon made a solemn pledge to the American people that he was laying the foundation for our future capacity to meet our country's energy needs from our own resources. Each President to follow, Nixon through George W. Bush, made promises that for whatever reason were not kept. The current occupant of the White House had this to say:

*We have got to do something about our dependence on oil—for two reasons: it provides an economic and national security risk ... and ... makes it harder to be wise stewards of the environment.*

Considering the control that the powerful oil and gas industry has had over President Bush, and with their chief lobbyist serving as Vice President, it's not surprising that Bush would make such a shallow and rather elementary statement concerning a most serious topic. His Administration has done virtually nothing to come up with a real plan to address our nation's dependence on foreign oil. All the

United States has to show for the lack of action is \$4-a-gallon gas and a public that is mad as all get out over the plight. The next President had better be dead serious about ending our dependence on foreign oil. We had better get serious and fast. The prospects of John McCain being the instrument of change in this critically important area of concern are slim to none. All he can offer is little more than four more years of Bush-Cheney-Rove rule. The ball will soon be in the Democrats' court and there is one thing for certain—they can't afford to drop the ball. In my opinion, the American people won't allow that to happen. It's time for political speeches to end and real action to begin and that's the hard, fast truth!

#### ***WATCH OUT FOR FREEDOM'S WATCH***

The Republican National Committee has learned well from Karl Rove and his brand of politics. As you may know, Rove started using "shadow groups" in Texas several years ago and he brought his bag of tricks onto the national stage in 2000 and further refined his handiwork in 2004. We all recall the attacks on John McCain by Rove and his group of thugs in 2000 and the vicious attacks on John Kerry in 2004. I am convinced the so-called "Swift Boat" attacks on Kerry were largely responsible for providing a second term for President Bush.

Now we see another of the right-wing shadow groups, Freedom's Watch, coming on to the scene in a warm-up for the Obama-McCain race. This group has already been on the attack using a bag of Rove-style tactics. Freedom's Watch, a \$250 Million group headed by Ari Fleischer, was heavily involved in a smear campaign in Louisiana against the Democratic candidate in the special election to fill a Congressional seat. The tactics were rejected by the voters and the Democrat, Don Cazayoux, won the race handily. While the Louisiana win has been called a major upset by some of the political experts, I really think it was a rejection of the Rove-style politics. In any event, it's a

good sign for November. Interestingly, the ads run by the NRCC and Freedom's Watch were virtually identical. The smear campaigns were heavily financed and were typical Rove.

I am not sure if Freedom's Watch was involved in the special congressional election in Mississippi—where another major Democratic victory occurred in a Republican district—but I wouldn't be surprised if it was. The Republican campaign in Mississippi involved some of the same smear tactics that had been used unsuccessfully in Louisiana. I doubt that this was just a coincidence.

In case you have forgotten who Fleischer is, he served as press secretary for President Bush and has been heavily involved on the national scene since leaving the Bush Administration. Freedom's Watch is being run by Carl Forti a long-time Republican Party operative who is very well-versed in the business of political dirty tricks. The NRCC has to know that the American people are fed up with the Bush Administration and are demanding change. A wave of momentum is building and Rove and his gang will do anything to stop it. My advice to folks is to be a little suspicious of any group that adopts a name that sounds "patriotic," but in reality plays the political game in an underhanded manner. Freedom's Watch is one such group and it should be exposed for what it really is!

#### ***THE TIDE IS TURNING NATIONWIDE***

The Mississippi congressional race deserves another look. Travis Childers, the Democratic candidate there, won a stunning victory. This was the third straight win in a so-called Republican district, and it was most impressive. There is no way for the GOP to spin this loss into anything other than a total rejection of the Bush-Cheney-Rove Administration. The Republicans brought the big guns, including Vice-President Dick Cheney and their shadow groups, into the Magnolia State. The results there speak for themselves. Even Cheney, with all of his Halliburton-backed Big Oil money, is no

match for the nationwide grassroots movement for change that is sweeping the nation.

The Mississippi victory followed the big win in the race mentioned above for Louisiana's Sixth District, a seat that the Republicans have held for the past three decades. There had been an earlier race in Illinois' Fourteenth District for the seat held by the former Republican House Speaker Dennis Hastert for more than 20 years. It was won by Democratic Congressman Bill Foster. I believe the tide has turned and that there will be a clean sweep in the Fall for Democrats.

### **III. LEGISLATIVE HAPPENINGS**

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#### ***A SPECIAL SESSION WILL BE REQUIRED***

This issue was being sent to the printer just as news was spreading around the state that a special session would be needed. The Senate failed to pass the education budget, which really doesn't come as a big surprise. The budget that was being filibustered was a bad one for a number of reasons. A special session will allow for a better budget and also passage of some tax reform measures that are badly needed.

#### ***ALABAMA DEMOCRATS WANT TO HOLD EXXONMOBIL ACCOUNTABLE***

During the regular session, Alabama Democratic Party Chair Joe Turnham called on Democrats and Republicans alike to support the bill sponsored by Democrat John Knight that would tax oil and gas based upon gross value at the point of production. Joe believes companies like ExxonMobil need to pay their fair share of taxes just like Alabama consumers have been doing for years. With record profits being reported by the giant oil companies and with Alabama citizens, truckers and small business owners being hammered by record gas prices at the

pump, the Knight bill made sense because it simply required corporate responsibility.

Joe was correct in saying that revenue from big oil and gas interests should be used to fund programs such as children's health care, Medicaid programs, veterans' care, roads and bridges, and corrections. Joe referred in his media statement to the Supreme Court's overturning two different jury awards against ExxonMobil and to the company's subsequent attempts to receive tax refunds from Alabama citizens. Joe saluted Rep. Knight for attempting to rectify what he described as an "awful situation" and for trying to restore accountability of big oil to Alabama taxpayers. It appears that the Democratic leadership in the House could have pushed this legislation through, but they let the Republicans outsmart them. Hopefully, they will get a chance to make amends and soon.

Source: Alabama Democratic Party

#### **GOVERNOR RILEY SIGNS A MOST IMPORTANT BILL**

Governor Bob Riley signed into law a bill that will send many troubled teens to community programs instead of locking them up in detention centers where they often learn bad habits that get them into worse trouble. The new law stops juvenile judges from sending children who have committed non-violent offenses to the Department of Youth Services. Last year 77% of DYS admissions were low-risk juveniles with non-violent offenses like running away and being truant from school, according to the Alabama Youth Justice Coalition. Children are being incarcerated who have never before committed a crime. Many of the first offenses are drug-related and don't involve any violent act. Time in DYS gives these young offenders the wrong kind of training. Keeping them out of the system makes good sense. We don't need that kind of training for our young people who have made a mistake.

The law also consolidates the state's

juvenile laws by putting them into an organized code. Chief Justice Sue Bell Cobb, who has worked on the bill for the last four years, believes it also ensures compliance with all federal regulations for government funding for abused and other at-risk children. Concerning the importance of this bill, the Chief Justice observed:

*It had to be done. This is the most important piece of legislation that has passed during my professional career impacting the lives of children.*

Only a handful of counties currently have the community programs in place for judges to use as an alternative to DYS. Under the new law, counties have 18 months to develop the programs, after which judges will be prohibited from locking up non-violent offenders. The change is expected to save the state millions each year by moving youngsters from expensive institutional beds into nonresidential treatment programs that are usually cheaper.

A percentage of the money that would have been spent to institutionalize the teens will instead go toward their treatment in the community-based programs. A child's average DYS stay in 2007 was 144 days, with the state paying a daily average of \$134 per child. Governor Riley, who gave his full support to the bill, believes it will help make a safer Alabama. Judicial officials and juvenile advocates will be getting together in the fall to discuss different strategies for the programs. Senator Myron Penn was instrumental in guiding the bill through the State Senate. The real credit for making the bill-signing a reality, however, goes to Chief Justice Cobb and the groups that have worked tirelessly to pass this legislation.

Source: Associated Press

#### **AUTOMOBILE LIABILITY INSURANCE MINIMUMS RAISED**

The Alabama Legislature passed a bill to raise the minimum amount of auto-

mobile liability insurance that motorists must purchase. The current limits under Alabama's mandatory insurance law are \$20,000 for a single injury or death, \$40,000 for multiple injuries or deaths, and \$10,000 for property damage. The House gave final approval to the bill raising the mandatory minimum limits to \$25,000, \$50,000 and \$25,000. The bill, sponsored by Senator Roger Bedford, passed the Senate without a dissenting vote in February. It was sent to Governor Bob Riley, who must sign it in order for the bill to become law. The limits haven't been changed since 1983 and an increase was long overdue. Unfortunately, the limits are still very low, even with these changes.

The new bill, if signed, will take effect in three months for new policies and six months for renewals. I will be surprised if the Governor doesn't sign the bill into law. The new minimums bring Alabama in line with the insurance requirements in Arkansas, Georgia, Mississippi, South Carolina and Texas. Tennessee, Virginia and Kentucky have the same limits for injuries and deaths but smaller amounts for property damage. Florida and Louisiana have lower amounts across the board. North Carolina's minimums are higher for injuries and deaths than the new amount in Alabama, according to the Insurance Information Institute. Rep. Marc Keahey, who guided the bill through the House, told Phil Rawls with the Associated Press that the higher liability requirements would affect less than 10% of Alabama's motorists and cause them to pay only \$20 to \$30 more per year.

Interestingly, the bill also raises the minimum amount of uninsured motorist coverage to match the liability coverage. There is another matter to consider relating to this coverage. I would recommend that people who really want to get protection for themselves and their families should increase the uninsured motorist coverage under their own policy to the largest amount that their liability insurance company will write. That

amount can be at least \$300,000. They can get an umbrella policy, also, that affords as much as a million dollars in additional uninsured motorist coverage. As you know, uninsured motorist coverage is optional in Alabama. It kicks in when the driver at fault in an accident has no insurance or too little insurance to cover all the damage. If a motor vehicle accident occurs where the person at fault has liability insurance, but the coverage is inadequate, that is when the amount of underinsured motorist coverage is important. Higher uninsured motorist coverage is needed and would be available under your policy when you are in a motor vehicle accident involving serious injuries and possibly death for persons in your vehicle. If the other party (wrongdoer) has only the minimum liability insurance coverage, or inadequate coverage in any amount, your underinsurance coverage will kick in.

As a matter of interest, a study released last year by the nonprofit Insurance Research Council showed that 25% of Alabama drivers lacked insurance between 1999 and 2004. That tied Alabama with California for the second-highest percentage of uninsured drivers. Mississippi was first. Of those who have liability insurance the available limits are often inadequate to cover the claims that can be involved in a serious motor vehicle accident.

Source: Associated Press

#### **RATING THE REGULAR SESSION**

I had intended to rate the performance of the Legislature in this issue, but that will have to wait until next month. The failures to deal with tax reform measures—including the “Exxon bill” and the bill taking the sales tax off groceries—will go down in the negative grouping, but fortunately the legislators will get a second chance to cure those failures.

## **IV. COURT WATCH**

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### **WHEN DENNIS QUAID SPEAKS—CONGRESS WILL LISTEN—AND THAT’S GOOD**

One of my favorite actors, Dennis Quaid, made a noteworthy appearance before a Congressional Committee last month. With his newborn twins steadily recovering from a grave medical error that nearly cost them their lives, Quaid assured lawmakers that his fight wasn’t over. Quaid was among several people telling the House Oversight & Government Reform panel that, just because the FDA approves a drug, it doesn’t mean it is safe. The actor is arguing for the right to sue the drug maker of the blood-thinner heparin after his twins almost died from an overdose shortly after their birth. As has been reported in November 2007, the Quaid’s twins were given doses of the blood thinner Heparin that were 1,000 times larger than the doses they should have received. They later learned that the labels of the dramatically different doses looked strikingly similar.

The Quaid’s are suing Heparin maker Baxter Healthcare Corporation for not pulling the labels from the shelves while it was fixing the problem. The company warned hospitals and submitted label changes to the FDA, but did not recall the bottles still on the market. Baxter wants the lawsuit dismissed on the grounds of “federal preemption,” which, if allowed, would bar state lawsuits over drugs that have FDA approval. Quaid told lawmakers in his testimony:

*The overdosing of our twins was a chain of events of human error. And the first link in that chain was Baxter. Baxter’s negligence, the cause of that, was an accident waiting to happen. Like many Americans, I have always believed that a big problem in this country has been frivolous lawsuits. But now I know that the courts are often the only path that families have that are harmed by drug companies’ negligence.*

According to Healthgrades, an independent health care ratings company, 247,662 patients studied between 2003 and 2005 died from potentially preventable problems. The Institute of Medicine estimates that 1.5 million patients every year suffer from mistakes with medications. People can sue for damages under state law if they’re harmed by drugs and medical products, but the Bush Administration is trying to sell a bill of goods to the courts saying that states have no right to fault a company for selling a product that has been reviewed and approved by the federal government. A panel of medical experts testifying alongside Quaid agreed that a policy of federal preemption would harm drug safety. Dr. Aaron S. Kesselheim, an internal medicine physician at Brigham & Women’s Hospital in Boston and an instructor at Harvard Medical School, observed:

*Preempting, or blocking such lawsuits, in my view, would do great harm to the public health. Some drug and device companies have bidden and manipulated important safety data.*

Committee chairman Henry Waxman (D-CA), who has been a real champion of consumer rights and a critic of both the drug industry and the FDA, added:

*Some have failed to report serious adverse events. And some have failed to disclose even known defects. If manufacturers face no liability, all the financial incentives will point them in the wrong direction and these abusive practices will multiply. This is exactly the wrong time for the FDA to be saying, “Trust us.”*

New England Journal of Medicine Editor Gregory Curfman cited the case of Vioxx, the infamous drug approved by the FDA in 1998, even though it could cause heart attack, stroke or cardiovascular problems, as a prime example of why the court system is important. In 2002, the Vioxx label was revised to reflect those risks and in

2004, it was pulled from the market. Dr. Curfman told the committee that “pre-emption of common-law tort actions against drug and medical device companies is ill-advised and will result in less safe medical products for the American people.” Vioxx is a classic example of how the partnership-type relationship between the drug industry and the FDA results in bad things happening to consumers.

Dr. Curfman also testified that the drugs Avandia, approved by the FDA in 1999 for treating Type 2 diabetes, and Trasyolol, approved in 1993 to control bleeding during heart surgery, also show how researchers sometimes find out after the fact what’s wrong with the drugs. Avandia remains on the market—with altered warning labels—since researchers found in 2007 that it is associated with an increased risk of cardiovascular events.

In 2006, the FDA re-examined Trasyolol after a study in the *New England Journal of Medicine* suggested it was associated with an increase in heart attack, stroke, kidney failure and death. Dr. Curfman also said that *The New England Journal of Medicine’s* Web site was publishing a large clinical trial showing that Trasyolol results in higher mortality in patients undergoing high-risk heart surgery. He pointed out that “it’s essential that a drug’s safety continue to be carefully monitored during the post-marketing period, because we know that serious safety issues may come to light only after a drug has entered the market.”

In the case of Heparin, Baxter made efforts to change the drug’s labels after three infants at a hospital in Indianapolis died in September 2006 of the same mix-up that the Quaid’s experienced. But Baxter’s efforts to warn hospitals and submit label changes to the FDA progressed slowly. Meantime, Baxter didn’t recall the bottles still on the market with the old labels. Maybe the courageous acts by the Quaid’s in filing suit and then going public with their case will alert the public to what federal preemption is all about and how it hurts people.

Source: ABC News

### **U.S. CHAMBER LEGAL SURVEY IS A FRAUD ON THE PUBLIC**

The U.S. Chamber of Commerce survey, which ranked the best and worst legal systems in the country, is pretty much a fraud on the public. The so-called “study” is based on a survey of corporate defense lawyers from large corporations who are paid to avoid accountability for the misconduct and negligence of their corporate clients. Since this survey was limited to lawyers who are paid by corporate bosses, no reasonable person would consider it to be a fair and objective study. It would be sort of like doing a study on the courts and only surveying victims’ lawyers for their opinions. It should be noted that the Chamber’s Institute for Legal Reform, which is its tort reformer arm, currently has seven board members who represent the insurance industry. It’s a mystery why the media would report this survey as being valid considering how the study was conducted.

### **BUSH ADMINISTRATION RULES ATTEMPT TO LIMIT LAWSUITS**

As we have written in prior issues, the Bush Administration is trying its best to make it more difficult—if not virtually impossible—for consumers to sue large corporations over faulty products. In effect, they are rewriting the bureaucratic rulebook. A recent Associated Press story revealed that lawsuit limits have been included in 51 rules proposed or adopted since 2005 by federal agency bureaucrats. The regulatory agencies govern just about everything Americans use: drugs, cars, railroads, medical devices and food. During the Bush years, consumer advocates have fought hard to preserve the right to trial by jury guaranteed to all citizens by the U.S. Constitution. The agencies’ use of the government’s rule-making authority represents the Administration’s last stand in a long-standing drive to shield companies from lawsuits and give them total immunity from being held accountable for their wrongdoing.

President Bush has tried a back-door approach and it almost worked because the public was being kept largely in the dark. If the rulemaking at the various agencies had been a centralized effort in the White House or the Justice Department, “it would have failed because immediately everybody would have mobilized resistance,” according to Michael Greve of the American Enterprise Institute, a conservative Washington think tank. Limits on lawsuits have been ordered or proposed for drug labeling and packaging and for rules ranging from mattress flammability standards to school bus passenger seating to dietary sweeteners and roof-crush requirements in motor vehicle rollovers. The regulations came from the following agencies:

- 41 came from the Food and Drug Administration; and
- 10 from the National Highway Traffic Safety Administration.

Ten of 15 federal traffic safety regulations from last year have been finalized by NHTSA and are now in force or soon will be, a development that has gotten minimal public attention. As we have reported, underlying this bureaucratic version of lawsuit reform is the concept of federal preemption. Once people learn what this is all about they are totally against it. However, because of the stealth manner in which the project was planned and carried out, few people even know what federal preemption is all about. Rooted in the Supremacy Clause of the Constitution, federal preemption refers to circumstances in which federal law and regulation trump state law, in this instance state laws that govern when one person may be held liable for another’s injury or death. There is no way that the Supremacy Clause can be used to justify federal preemption in the context described above.

Companies can’t be allowed to use broad preemption language in regulatory preambles to get cases thrown out of court. The preambles are the agencies’ interpretation of whether the federal regulatory law permits preemp-

tion of lawsuits. An expansive interpretation of preemption leaves little room for consumers to sue, and that's why all consumer groups are against it. In fact, all public opinion surveys that I am aware of reveal that once folks realize how federal preemption works and how it affects them, they are totally against it.

The Bush Administration is engaged in a brazen end run around Congress, the Constitution and the states in an effort to let corporations that commit wrongful acts off the hook and, as a result, knowingly put consumers at risk. Joan Claybrook, former head of NHTSA, says her former agency is using regulatory preambles in a campaign against lawsuits. Joan says that what the companies want is "complete immunity and the regulators in the Bush Administration are helping them." As you know, Joan is now head of the consumer advocacy group Public Citizen and fights daily for consumers. We all have a moral obligation to join this battle so that the American people can be protected from unsafe and dangerous products and drugs.

Source: Associated Press

### **THE TAIL SHOULD NEVER BE ALLOWED TO WAG THE DOG**

During 2005, 43,200 Americans were killed in motor vehicle crashes on highways in this country. While less than 5% of those crashes were rollovers, fully 25% of the fatalities—10,816 in 2005—were from rollovers. The vast majority of rollover fatalities and injuries are the result of the roofs crushing down on the passengers—or when the roof crush shatters the side window glass, allowing deadly ejections to occur—and that is a matter of record. In addition to the almost 11,000 fatalities a year from roof crush accidents, in 2005 the total number of quadriplegics in motor vehicle collisions totaled 5,608 according to the National Spinal Cord Injury Statistical Center, which is located in Birmingham, Alabama. A significant number of those are due to roof crush in rollovers.

As pointed out above in the discussion on preemption, the automobile industry is using a federal regulatory agency to eliminate the rights of injured car crash victims to seek justice and compensation for their preventable injuries. It's abundantly clear that the proposed roof crush standard is dangerously weak and lags behind existing, practical technology. If NHTSA allows the automakers and their powerful lobby to control this issue, the motoring public will continue to be put at great risk in rollover accidents. Some automakers—Volvo, Saab, and Subaru, for example—produce models that offer greater protection in roof crush rollovers than the protection offered by this long-overdue anemic standard that NHTSA is about to issue.

The federal government, at the very least, should mandate the best practice in the industry. NHTSA was created in the 1960s to establish technology forcing life-saving safety standards for motor vehicles. The agency has now become little more than an extension of the motor vehicle manufacturers. As a result, when it comes to regulation at NHTSA, it's a classic example of the "tail wagging the dog." Only citizen pressure can turn this agency around and set it on its original statutory mission. But Congress must be involved to make this happen. Congress can make NHTSA do right, but that will happen only if public opinion and the resulting pressure forces its members to get involved.

### **A TORT REFORMER SETTLES HIS LAWSUIT**

In his public life, Robert H. Bork has never been a friend of consumers, especially not those who are victims of corporate abuse or wrongdoing. As most of you will know, the one-time U.S. Supreme Court nominee has been a strong proponent of tort reform over the years. You might be interested to know that Judge Bork has now settled his million dollar lawsuit against the Yale Club. As you may recall from previous reports, while at the club, Judge Bork fell stepping onto a platform to

speak. Terms of his settlement are confidential. Judge Bork filed suit in a Manhattan federal court last year, claiming that he injured himself so badly at the June 2006 event, which was being sponsored by *New Criterion* magazine. The judge faulted the club for not having stairs or a handrail leading up to the platform. In his lawsuit, Judge Bork said he suffered "excruciating pain" after he fell backward as he tried to mount the dais, striking his left leg on the side of the dais and his head on the heat register. He underwent surgery and physical therapy and was left with a limp and a cane.

Lawyers for the Yale Club blamed Judge Bork, saying any injuries he sustained were at least partially his fault because he failed to recognizing potential risks, which the club said were "open, obvious and apparent." Judge Bork served as a solicitor general and acting attorney general in the 1970s. As solicitor general in 1973, he fired Watergate special prosecutor Archibald Cox on orders of then-President Nixon. From 1982 to 1988, he was a federal appeals judge in Washington. In 1987, the Senate failed to confirm his nomination to the Supreme Court.

I am always amazed at how folks who don't believe that ordinary citizens should have the right to file a lawsuit when they are hurt or damaged by the wrongful act or omission of a large corporation, are the very first in line to go to court when they themselves become victims. That sort of thing seems hypocritical to say the least. In any event, I am glad that Judge Bork settled his claim. Some might say the liability in his case looked pretty weak. However, I won't go so far as to say that the judge filed a frivolous lawsuit. But, I have to wonder if his views on tort reform as it applies to "the masses" have changed.

Source: Associated Press

### **FEDERAL APPEALS COURT RULES AGAINST PEANUT FARMERS**

My Daddy, who was a farmer, as had been his daddy and grandfather, used to

tell me that regardless of what happens the farmers in this country will always get the “short-end of the stick.” I didn’t realize at the time how true his assessment really was. Recently, a federal appeals court in Richmond, Virginia, threw out a nearly \$30 million judgment for peanut farmers in seven states who sued the government in a dispute over crop insurance payments. A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit agreed with federal officials who had cut the payments by nearly half. The farmers will appeal the ruling. The lawsuit involves about 3,870 farmers in Alabama, Virginia, North Carolina, South Carolina, Texas, Georgia, and Florida. They claimed the federal crop insurance program should have paid them 31 cents a pound for peanut crops lost in the 2002 drought. The appeals court said that under the 2002 Farm Bill that eliminated the peanut quota system, the farmers were entitled to only 17.75 cents a pound. Hopefully this decision will be reversed. The American farmers deserve a break!

Source: *Associated Press*

#### **\$400 BILLION APARTHEID DAMAGE CLAIMS AGAINST COMPANIES TO PROCEED**

The U.S. Supreme Court has affirmed a ruling that apartheid victims who seek damages exceeding \$400 billion from more than 50 major corporations can go forward with their lawsuits. Four justices recused themselves from the case and as a result the court lacked a quorum. The high court issued a brief order last month simply affirming a ruling by a federal appeals court in New York. That court had reinstated the lawsuits by the plaintiffs, who claim the companies violated international law by assisting the apartheid system in South Africa.

Interestingly, Chief Justice John Roberts and Justices Anthony Kennedy, Stephen Breyer and Samuel Alito didn’t take part in the case, apparently because they own stock in some of the companies. Because they did not participate, the Supreme Court said it lacked

a quorum, which requires at least six of its nine members. While the affirming of the lower-court ruling allows the lawsuits to proceed, it doesn’t represent a decision by the justices on the merits of the dispute. The corporations named in the lawsuits included oil companies such as BP PLC and ExxonMobil Corp., banks such as Citigroup, Deutsche Bank AG and UBS AG, as well as other multinationals like IBM, General Motors Corp. and Ford Motor Co.

The suits accuse the companies of “aiding and abetting” violations of international law committed by South Africa’s apartheid-era government. Those suing the companies include torture victims and representatives of people who were murdered. The suits name more than 50 companies, some of whom weren’t involved in the Supreme Court appeal. The South African government has called for rejection of the lawsuits. The cases invoke the U.S. Alien Tort Statute, a two-century-old law that lets federal courts hear suits by non-citizens claiming violations of international law.

The U.S. and foreign corporations had appealed to the Supreme Court. The Bush Administration and some business groups supported the appeal. The lawsuits, filed in 2002 by three separate groups of plaintiffs, were brought on behalf of all persons living in South Africa between 1948 and 1994 who were apartheid victims. One set of plaintiffs, a South African human rights organization called the Khulumani Support Group, said it had 32,700 members who are survivors of apartheid violence. Apartheid ended in 1994 when South Africa held its first all-race elections, bringing Nelson Mandela and the African National Congress to power. A federal judge initially dismissed the lawsuits on the grounds that the court did not have jurisdiction over the cases. But the appeals court ruled the lawsuits brought under the Alien Tort Claims Act could go forward. It will be interesting to see how these lawsuits wind up—considering the power and political influence of some of the defendants.

Source: *Insurance Journal*

#### **STATE TROOPERS IN ALABAMA ARE IMMUNE FROM SUIT**

In a recent case, the Alabama Supreme Court ruled that three state troopers are immune from a wrongful death suit involving an Escambia County man who shot at officers and then was killed by a trooper. The lawsuit sought damages over the shooting death. In a 5-0 decision, the Supreme Court said the three troopers sued by Burl Thompson are covered by the state government’s immunity from lawsuit. The justices said the decedent was suffering from mental illness and became angry about cars that he believed were speeding past his home in a rural area of Escambia County.

Escambia County officers went to the scene but couldn’t get the man to leave his house or speak with them. The sheriff’s department called in a State Trooper tactical unit, which also had no success in getting him to surrender. State Troopers fired tear gas into the home. The man came out with his shotgun, firing at officers. He reloaded his shotgun and kept firing, wounding one in the ankle before one of the troopers fatally shot him in the chest. The plaintiff argued on appeal that the troopers shouldn’t have immunity as agents of the state because they had not followed the Alabama Department of Public Safety’s manual for handling such situations. The plaintiff contended that the troopers didn’t have enough negotiators present and used tactics that agitated the situation.

The Supreme Court said the Department of Public Safety’s manual provides guidelines for handling situations, but it does not set binding rules that troopers must follow. If the court had found the manual to be binding on the troopers, the plaintiff could have tried to recover monetary damages from them at trial. In my opinion, the court made the right decision on the immunity issue in this context. We don’t need to further tie the hands of law enforcement officers who put their lives on the line daily. I believe the Supreme Court justices did the right thing!

Source: *Associated Press*

## V. THE NATIONAL SCENE

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### **FEDERAL REGULATORS MUST CONTROL THE OIL INDUSTRY**

There have been reports relating to high gas prices and the possibility of market manipulation by the oil companies. Federal regulators must expand their oversight of oil companies and energy markets. The Federal Trade Commission should take a close look at the oil industry and take whatever steps are necessary to make sure market manipulation hasn't happened. If it has happened, the FTC should put a stop to it. Acting under authority granted in a 2007 energy law, the FTC's powers may be great enough to reach into the oil-trading markets, competing with the Commodity Futures Trading Commission (CFTC), the traditional overseer of energy-trading markets. Capital insiders believe that the FTC has the power to take the steps necessary to create major transparency in these markets. However, full cooperation between the FTC and the CFTC would avoid turf battles and would also allow the focus on the problems at hand. I have always believed that the oil companies manipulated the market, but as a private individual I could do little about it. However, the federal government can and should!

Source: *Wall Street Journal*

### **EXXON'S VALDEZ VICTIMS TAKE ANOTHER HIT**

The plaintiffs in the civil lawsuit against ExxonMobil over the 1989 Exxon Valdez oil spill have suffered a setback. Congress has refused an amendment that would have given Alaskans a tax break on any awards received from the Exxon Valdez lawsuit. The amendment, sponsored by Senator Lisa Murkowski, was attached to a farm bill and passed by the Senate, but the House version didn't contain the tax provision. When both chambers

began negotiating a final version of the farm bill, the tax amendment was quietly dropped. Hopefully, Senator Murkowski will find another bill to be used as a vehicle for the tax proposal. The U.S. Supreme Court is expected to deliver its decision on the lawsuit against Exxon sometime this month. I have hopes that the court will do the right thing and uphold the Valdez verdict in its entirety.

Source: *Associated Press*

### **EXXON DEMANDS \$800 MILLION FROM ALASKA**

While coverage of the Valdez case is getting all of the media attention, ExxonMobil Corp. has been pretty active on another front in Alaska. The oil giant wants Alaska to pay \$800 million in damages, claiming the state breached an agreement when it revoked gas and oil leases on a North Slope oil field. The Irving, Texas-based company also filed a separate request for reconsideration of a gas field development proposal that was rejected by the state Resources Commissioner in April. Both filings were submitted to the Alaska Department of Natural Resources by ExxonMobil on behalf of itself and its lease partners over the revocation of Point Thomson oil and gas leases. Development of the field is considered vital to a successful natural gas pipeline project under consideration by the state. Point Thomson holds nearly one-fourth of Alaska's 35 trillion cubic feet of natural gas reserves.

The players in this latest big-oil attack with their respective interests in the field are ExxonMobil (36%); BP PLC (32%); Chevron Corp. (25%); and ConocoPhillips (5%). A few minority owners hold the rest of the interests. Exxon initially said its claim for damages was submitted as a "precautionary matter." About four hours later, however, the department received the request to reconsider its decision to reject the plan. I'm not sure you could call this a threat, but it sure smells like one to me. Having dealt with ExxonMobil, I can tell you that sort of thing fits their

methods of operation.

ExxonMobil, BP PLC and Chevron purchased leases 31 years ago allowing them to drill at Point Thomson. Interestingly, they haven't produced any oil or gas from the tracts. The lack of activity prompted the state to try to reclaim the leases in late 2006 and give other companies the opportunity to move forward with development at Point Thomson. But a Superior Court judge in December ordered state officials to weigh other options before stripping the leases. Two months later, Exxon submitted its 23<sup>rd</sup> development plan. The proposal involved a \$1.2 billion gas recycling and condensate production project to be developed over six years. The company claimed it had already secured a drilling rig and planned to begin development this year. The Department of Natural Resources ruled the plan's technical aspects represented a reasonable first step toward development, but lacked a commitment from the companies to ramp up production. It will be most interesting to see how this battle between Alaska and the oil giants pans out.

Source: *Associated Press*

### **WIND POWER COULD SUPPLY 20% OF OUR NATION'S ENERGY**

The federal Energy Department released a detailed analysis last month that concludes that wind power can provide up to 20% of the nation's energy in the next 25 years. Federal officials and industry leaders say moving to wind power is necessary to help wean the country off foreign oil and to improve air quality. But doing so will require at least a threefold increase in the number of wind turbines, as well as a significant expansion of power transmission lines to carry the electricity from the wind farms to the large population centers that need it. While it's good to know that the federal government has finally recognized the potential of wind energy, the government isn't moving fast enough.

A friend of mine, Cecil Spear, who is a key player with Trinity Industries, tells

me his corporation is a leading proponent of wind-supplied energy. Trinity, which manufactures and sells the steel towers that are a part of the system, has been pushing wind power for the past several years. The analysis, by the U.S. Energy Department, after looking into the country's technological and manufacturing capacity, determined that wind power can supply 20% of the country's electricity by 2030. Wind is a renewable energy source, and the more it's utilized the less the country must rely on foreign oil.

Randall Swisher, executive director of the American Wind Energy Association, says that 35% of all new electric generating capacity in the country last year was wind power. I have to wonder if the Bush Administration knows this or if they really care. The full report will be available soon at [www.20percentwind.org](http://www.20percentwind.org). Hopefully, the next President will fully support this needed energy source.

Source: *Star-Telegram*

### **MASSIVE FRAUD INVOLVING IRAQ CONTRACTS**

An audit has revealed that the U.S. has spent millions of dollars in lucrative Iraq reconstruction contracts that were never finished because of excessive delays, poor performance or other factors, including failed projects that are being falsely described by the U.S. government as complete. The audit by Stuart Bowen Jr., the special inspector general for Iraq reconstruction, provided the latest snapshot of an uneven reconstruction effort that has cost U.S. taxpayers more than \$100 billion. It also comes as several lawmakers have said they want the Iraqis to pick up more of the cost of reconstruction.

The special IG's review of 47,321 reconstruction projects worth billions of dollars found that at least 855 contracts were terminated by U.S. officials before their completion, primarily because of unforeseen factors such as violence and excessive costs. However, about 112 of those contracts were ended specifically because of the contractors' actual or anticipated poor

performance. The audit also said many reconstruction projects were being described as complete or otherwise successful when they were not. That's totally unacceptable and can't be tolerated.

In one case, the U.S. Agency for International Development contracted with Bechtel Corp. in 2004 to construct a \$50 million children's hospital in Basra. That project was changed in 2006 because of tremendous delays. Rather than terminate the project, U.S. officials modified the contract to change the scope of the work. As a result, a U.S. database of Iraq reconstruction contracts shows the project as complete "when in fact the hospital was only 35% complete when work was stopped." Investigators described the practice of "descoping" as being quite frequent. "Descoping is an appropriate process but does mask problem projects to the extent they occur," according to the audit.

The audit comes amid renewed focus in recent months on potential abuse in contracting government-wide, such as Iraq reconstruction. Last year, congressional investigators said as much as \$10 billion in charges by U.S. contractors for Iraq reconstruction—or one in six dollars—were questionable or unsupported, and warned that significantly more taxpayer money was at risk.

Senator Ben Nelson (D-NE), has been working with Senators Evan Bayh (D-IN), and Susan Collins (R-ME) on legislation that would restrict future reconstruction dollars to loans instead of grants. The legislation would require that Baghdad pay for fuel used by American troops and take over U.S. payments to predominantly Sunni fighters in the Awakening movement. Danielle Brian, executive director of the watchdog group Project on Government Oversight, said the latest audit report points to significant U.S. taxpayer waste in current reconstruction efforts. In this regard, Ms. Brian observed:

*The report paints a depressing picture of money being poured into failed Iraq reconstruction projects—contractors are killed,*

*projects are blown up just before being completed, or the contractor just stops doing the work.*

It certainly does appear that massive frauds have taken place relating to government contracts in Iraq. The Bush Administration has pushed billions of dollars to private contractors in Iraq and the American taxpayers have footed the bill. I doubt that we will ever determine the full extent of the fraud nor the real cost to taxpayers. This Administration should have lots of answering to do when you consider who some of the private contractors are.

Source: *Associated Press*

### **EPA SCIENTISTS SHOULD NEVER BE SUBJECTED TO POLITICAL PRESSURES**

A recent survey of scientists at the Environmental Protection Agency showed that hundreds of scientists are complaining about outside political interference and pressure from superiors who want to skew their scientific research. More than half of the scientists at the EPA who responded to the survey revealed they have experienced political interference in their work. The survey, by the Union of Concerned Scientists, shows "an agency under siege from political pressures." The report was sent to EPA Administrator Steve Johnson. It's widely known that the Bush Administration has played fast and loose with the truth when it comes to issues involving the scientific community. Putting political pressure on scientists who have the responsibility of protecting the public on health and safety issues can't be tolerated. The highest number of complaints came from scientists who are directly involved in writing regulations and those who conduct risk assessments on substances that may pose health risks to humans.

During much of the Bush Administration, there have been reports of the White House watering down documents regarding climate change, industry language inserted into EPA power-plant regulations and scientific advisory panels' conclusions about

toxic chemicals going unheeded. Francesca Grifo, director of the scientific integrity program for the Washington-based nonprofit group, said the survey documents the widespread nature of the problem at EPA. She acknowledged that scientists who are frustrated and upset might have been more likely than those who are satisfied to respond to her organization's survey, but added: "Nearly 900 EPA scientists reported political interference in their scientific work. That's 900 too many." I agree with that assessment and believe strongly that political influence and pressure should have no place at the EPA.

The survey respondents were split over the effect of political interference on regulations. According to the report, 48% believed that EPA's actions are "frequently or always" consistent with scientific findings, while 47% believed that agency policy "occasionally, seldom or never" made use of its scientific judgments. In optional essays, scientists repeatedly singled out the Office of Management and Budget (OMB) at the White House, accusing officials there of inserting themselves into decision-making at early stages in a way that shaped the outcome of their inquiries. The Bush Administration has used OMB to get its way in the regulatory affairs of a number of federal regulatory agencies, including the EPA. That sort of thing must be dealt with and curtailed during the next Administration.

EPA spokesman Jonathan Shradar attributed some of the discontent voiced by the survey respondents to the "passion" that scientists have toward their work. However, U.S. Rep. Henry Waxman, in a letter sent to EPA Administrator Stephen Johnson, called the results disturbing and said they "suggest a pattern of ignoring and manipulating science." Rep. Waxman also said that he planned to pursue the matter further in hearings by the House Oversight and Government Reform Committee.

Source: Los Angeles Times

### ***THE SALE OF ADULT VIDEO GAMES TO CHILDREN WITHOUT PARENTAL APPROVAL SHOULD BE BANNED***

A most important bill, the bipartisan Video Games Rating Enforcement Act, has been introduced by two members of Congress, Jim Matheson and Lee Terry. This bill, if passed, would require retailers to check identification in order to keep adult-rated video games from being sold to children. The introduction of this legislation in the House of Representatives came on the heels of the release of the latest version of the ultra-violent M-rated video game *Grand Theft Auto IV: Liberty City*. Despite the fact that this video game allows players to shoot police officers and innocent bystanders, have sex with prostitutes, and receive lap dances from strippers, nothing in the law currently prevents retailers from selling this video game to children of any age. In my opinion, that sort of thing can't be tolerated. It makes me wonder how our country could ever get to the state where parents of children of tender age even have to worry about such things.

A 2005 Federal Trade Commission study found that 42% of unaccompanied 13-16 year-olds were able to purchase "M" (Mature) rated games from retailers, even though the M-rating suggests the game is inappropriate for children under the age of 17. While parents are the first and best line of defense when it comes to protecting their children from inappropriate media content, they can't fight a multi-million dollar industry alone. That is especially true when the marketing machines behind games like GTA IV go out of their way to create "buzz" around new releases and retailers do little or nothing to keep these games out of the hands of children. As you may know, the new Grand Theft version is breaking sales records and that's bad news.

The proposed legislation codifies the video game industry's own voluntary policies and will ensure better enforcement by requiring all retailers to check IDs from any child trying to buy or rent Mature (M)-rated or Adult-Only (AO) rated games. It does not limit adults'

access to any games they want to buy for themselves or for their children—it merely helps ensure that children can only access "age appropriate" video games unless they are accompanied by an adult. You can help on this important issue by urging your representatives in Congress to support the Video Game Ratings Enforcement Act.

Source: Parents Television Council

### ***MILITARY BARRACKS SHOULD BE FIT FOR SOLDIERS TO LIVE IN***

It's been reported that some of the military barracks in the United States housing American soldiers are not fit to live in. That is a sad state of affairs and can't be tolerated. USA Today carried a story on this situation last month. It was reported that there is a long list of Army bases where barracks will undergo repairs. After a worldwide review of barracks, the Army will spend \$248 million to address mold, plumbing and temperature-control problems at eight bases. Those bases are: Aberdeen Proving Ground, Maryland; Fort Bragg, North Carolina; Fort Gordon, Georgia; Fort Lewis, Washington; Fort Polk, Louisiana; Fort Stewart, Georgia; Tripler Army Medical Center, Hawaii and West Point, New York.

American soldiers shouldn't have to live in barracks that are unsafe or cause health problems. Soldiers returning from Iraq and Afghanistan can find themselves living in less-than-ideal conditions as base commanders work to keep up with repairs to sometimes-century-old buildings. Even though barracks may be habitable, many of them in the nation require constant attention and can overwhelm limited maintenance budgets, according to military officials at the bases.

The condition of Army barracks made national headlines when the father of Sgt. Jeff Frawley, a soldier in the 82<sup>nd</sup> Airborne Division, posted a video of his son's barracks at Fort Bragg, North Carolina, on the Internet. The video was created by Ed Frawley and showed rusty stairways, peeling paint, broken toilet seats, a flooded

bathroom and mold found all around the barracks. This prompted the Army to perform a review of its entire barracks around the world. That review culminated when the Army announced it would spend \$248 million this year on eight bases in the United States that have serious problems with mold, plumbing and temperature control. We have simply not tended to business as it relates to providing adequate housing for our troops and that's inexcusable. Problems are to be expected when 79% of U.S. barracks worldwide are more than 30 years old. Maybe some of the U.S. tax dollars being paid to private contractors to rebuild Iraq could be used to help our military at home.

Source: *USA Today*

## VI. THE CORPORATE WORLD

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### **TYCO INTERNATIONAL SETTLES SECURITIES FRAUD LITIGATION**

Tyco International Ltd. has agreed to pay the state of New Jersey \$73 million to resolve state charges of securities fraud. Under the settlement agreement, Tyco will pay \$73.3 million to New Jersey's Division of Investment. The state alleged in a 2002 lawsuit that its pension fund suffered major losses due to fraud, including insider trading at Tyco, accounting improprieties, and former Tyco executives not disclosing millions of dollars in personal loans they got from the company. Tyco was a classic example of a corporation whose bosses let greed lead to corruption and then to serious problems for the company and its bosses.

Source: *Insurance Journal*

### **STATE STREET SUBPRIME DAMAGES MAY SURPASS RESERVE**

State Street Corp., the largest money manager for institutions, may have to pay more than the \$625 million it set

aside as a reserve for damages from lawsuits over losses from subprime-mortgage investments made for pension funds. Prudential Financial Inc., the second-largest U.S. life insurer, is suing the Boston-based company on behalf of more than 200 retirement plans. It's being alleged that State Street inappropriately invested Prudential's money in risky securities. Three other companies have filed similar actions. State Street reported in regulatory filings that the value of assets "adversely affected" by the collapse in subprime mortgages fell from \$13.9 billion on June 30<sup>th</sup> to \$6.1 billion at the end of 2007, a drop of \$7.8 billion. It's been reported that the actual damages in this case may well be greatly in excess of \$625 million. Fund managers who are hurt by the drop have an obligation to file suit as the existing plaintiffs have done. If plans were misled into purchasing something they were not authorized to purchase, they have an obligation to sue in order to recover the losses. Since they were misled into making bad investments, the plan managers should be attempting to make the plans whole. The companies involved in this latest suit are Unisystems; Nashua Corp., a maker of print-imaging products in Nashua, New Hampshire; and Merrimack Mutual Fire Insurance Co., based in Andover, Massachusetts.

The New York suits were filed under the federal Employee Retirement Income Security Act (ERISA). Plaintiffs allege that State Street breached its fiduciary duty by investing pensioners' money in high-risk securities instead of the conservative funds promised. Normally, that kind of accusation is a little easier to prove than fraud, a claim non-pension plaintiffs would have to make. In the securities fraud context, the plaintiff has to prove a fraudulent intent. In this case, however, all you must prove is that the investment is "imprudent." State Street was also sued over pension-fund losses by the Houston police officers' pension system, the Memorial Hermann Healthcare System in Houston and the Welborn Baptist Foundation in Evansville, Indiana. However, those cases don't

include ERISA claims. The cases are combined in the U.S. District Court, Southern District of New York (Manhattan).

Source: *Bloomberg*

### **LOCKHEED MARTIN UNIT TO PAY \$10.5 MILLION TO SETTLE FALSE CLAIMS ACT CASE**

Lockheed Martin Space Systems, a Denver-based unit of Lockheed Martin Corporation, will pay \$10.5 million to settle allegations that it submitted invoices for payment it was not entitled to receive on a multi-billion dollar contract connected to the Titan IV space launch vehicle program. After an October 2004 audit by the Defense Contract Audit Agency into the contract to provide launch vehicles and services for the Titan IV program, Lockheed conducted an internal audit and discovered that it should not have requested certain interim payments—known as progress payments—from the federal government. After Lockheed disclosed its findings to the government, an investigation determined that Lockheed was not entitled to millions of dollars of progress payments it received prematurely on the contract. The settlement figure represents approximately double the amount of interest Lockheed would have received by holding the premature payments. It's reported that Lockheed obtained the excessive progress payments by manipulating its billings on the complicated contract in two ways.

- First, Lockheed changed its methodology for calculating its cost of items delivered on progress payment requests without notifying the government. Consequently, from October 1998 to December 2001, Lockheed received more progress payments than it was entitled to receive.
- Second, in August 2000, Lockheed presented an invoice to the government that improperly claimed the government owed it millions of dollars in extra progress payments due to the lowering of the contract's

liquidation rate, which determined how much money the government would not have to pay to Lockheed upon delivery of an item in order to repay the previously paid progress payments.

The vast amount of fraud occurring in government contracts should be disturbing to all taxpayers. Unfortunately, when the fraud occurs it usually involves huge sums of money and that money comes directly or indirectly from U.S. taxpayers. I have often said—and I firmly believe—that repeat offenders who commit fraud in government contracts should be banned from all government programs for a specified time. After a second offense—the ban should be permanent.

Source: *Corporate Crime Reporter*

### **FBI RAIDS OFFICE OF SPECIAL COUNSEL**

The FBI is currently investigating Scott Bloch, the head of the federal agency that's investigating Karl Rove's White House political operations. Mr. Bloch runs the Office of Special Counsel, an agency charged with protecting government whistleblowers and enforcing a ban on federal employees engaging in partisan political activity. Mr. Bloch's agency is looking into whether Rove and other White House officials used government agencies to help re-elect Republicans in 2006. The investigation of this government watchdog has raised suspicions by players from both political parties.

However, on May 6, 2008, FBI agents raided and temporarily shut down the Office of Special Counsel. The raid on the downtown Washington headquarters of the agency, the Office of Special Counsel, and another at the Blochs' home, followed accusations that Mr. Bloch erased all the files on his office personal computer that might demonstrate wrongdoing. Investigators claim Bloch had his computer's hard disk completely cleansed using a "seven-level" wipe: a thorough scrubbing that conforms to Defense Department data-security standards. The process makes it nearly impossible for forensics

experts to restore the data later. Bloch claimed he hired the service to eliminate a virus from his computer, but interestingly, I understand the receipt doesn't mention a computer virus. Bloch also directed Geeks on Call to erase laptop computers that had been used by his two top political deputies, who had recently left the agency.

Mr. Bloch had been a loyal member of the Bush Administration when the President named him to head the Office of Special Counsel in 2003. In addition to investigating Karl Rove's politically motivated activities, the Bush loyalist has been involved in several highly-publicized investigations of other government agencies, including a look into the role of White House officials in the firing of several United States attorneys in 2006 for what certainly appeared to be political reasons.

Source: *Associated Press*

### **GREENBERG CHARITY SUES AIG OVER CREDIT LOSSES**

A charity headed by the former chief executive of American International Group Inc. has filed a civil lawsuit against AIG, claiming that his replacement as head of the giant insurer committed misrepresentations and omissions in downplaying what would become multibillion losses in AIG's portfolio of credit default swaps. The suit, filed on May 7<sup>th</sup> in New York Supreme Court in Manhattan by the Starr Foundation, chaired by Hank Greenberg, alleges that Martin Sullivan, who became chief executive when Greenberg was forced out of AIG in 2005, and Steven Bensinger, its then-chief financial officer, misled investors about the status of the portfolio dating back to the summer of 2007. The suit alleges that AIG and its two officers "fraudulently reassured" the investors in 2007 "that the risk of loss from its credit default swap portfolio was remote."

Starr Foundation alleges that these assurances "caused the Foundation to retain stock in AIG, which it would have otherwise sold." AIG now admits its credit default swap portfolio lost

\$11.5 billion in value during 2007, which is billions more than AIG has previously acknowledged. The Foundation, which owns 15.5 million shares of AIG stock, seeks damages of at least \$300 million as a result of the alleged fraud. The suit was filed the day before AIG issued its earnings report for the first quarter of 2008, posting a \$7.8 billion loss driven in part by a \$9.1 billion charge against its credit derivatives portfolio. This appears to be another occasion where "big folks" who don't believe "little folks" should have access to the courts, use the judicial system when it suits them.

Source: *Tradingmarkets.com*

### **BIOVAIL AGREES TO PAY \$24.6 MILLION TO SETTLE PROBE OF DOCTOR PAYMENTS**

A Biovail Corp. unit agreed to plead guilty and pay the Department of Justice \$24.6 million to settle charges that it paid doctors to promote its products. This settlement is the latest one for Biovail. The company in December settled a shareholder lawsuit accusing it of fraud for \$138 million. The agreement with the DOJ represents the fourth such action to be resolved in the past six months.

Bill Wells was named chief executive effective May 1<sup>st</sup>, replacing Douglas Squires who retained his position as chairman. Mr. Wells came into the role, pledging to clear up regulatory probes and lower costs. In February, Biovail disclosed that it was the target of a federal grand-jury investigation in connection with activities surrounding the 2003 commercial launch of Cardizem LA, a heart medication. The probe began after reports in *The Wall Street Journal* and *Barron's* revealed Biovail was paying doctors up to \$1,000 each to write prescriptions for Cardizem LA and to write reports on the drug. Biovail received subpoenas in July 2003 and October 2007 and according to media reports has been cooperating "fully" throughout the process.

Source: *Wall Street Journal*

## **MERCK AGREES TO \$58 MILLION SETTLEMENT OVER VIOXX AD CLAIMS**

Merck & Co. will pay \$58 million as part of a multi-state settlement concerning advertising of the painkiller Vioxx, which was taken off the market in 2004 after research showed it doubled the risk of heart attacks and strokes. The settlement addresses allegations that Merck's advertising deceptively downplayed the health risks of Vioxx. The settlement ends investigations by 29 states and the District of Columbia into Merck's advertising practices involving Vioxx. The settlement also calls for Merck to submit all new TV commercials for its drugs to the FDA for review. This settlement won't affect our settlement with Merck, but it will help consumers in the future. Merck and other companies must now be honest in their drug ads on television—that is, if Congress allows such unnecessary television ads to continue.

Source: Associated Press

## **VII. CAMPAIGN FINANCE REFORM**

### **A VERY BRIEF REPORT THAT HAS LITTLE TO OFFER**

I had hoped to be able to write this month that great accomplishments had taken place on both the national and state levels relating to campaign finance reform. I guess maybe my optimism was based more on hope than expectation. As a result, my report on this subject will be brief—nothing of consequence happened—and that's most unfortunate. I wonder how many of our readers are really surprised.

## **VIII. CONGRESSIONAL UPDATE**

### **WE SHOULD BLOW THE WHISTLE ON FRAUD AND WRONGDOING**

Most government employees are ordinary people who go to work day in and day out and do a good job. Few—if any—set out to be heroes. But some—when confronted with waste, fraud, recklessness about safety, or other abuses—make the extraordinary decision to risk their livelihoods to protect the public. While the federal government is supposed to serve the best interest of the public, this is not always the case. Too often, corners are cut or resources are wasted—or worse, government agencies are co-opted for political fights or private interests. When scientific research is altered or suppressed, when government contractors waste millions of taxpayer dollars, or when national security documents are falsified, the innocent government employees who witness these acts should be free to blow the whistle on others without fear of retribution. Unfortunately, whistleblowers all too often become victims. Retaliation by powerful political figures and lobbyists is a frequent occurrence.

Retaliation against those who speak up against such abuses must stop. The unmistakable, chilling message that reprisals against whistleblowers send to all employees—that they should “keep quiet, or else”—can't be tolerated. Last year, strong whistleblower protection bills were passed in both houses of Congress. Now it's time for Congress to finish the job by passing a final bill. It can and should be done without delay. We should demand better protection for all of the brave individuals who risk so much in serving the public good. We can show our support for honesty and accountability by letting members of Congress know that whistleblowers must be protected.

Source: Public Citizen

## **BAXTER SPENT \$730,000 LOBBYING GOVERNMENT IN THREE MONTHS**

The drug and medical device maker, Baxter Healthcare Corp., spent \$730,000 lobbying the federal government on health care issues during the first quarter of this year. The company says it lobbied on funding for the Food and Drug Administration, which as we all know reviews the safety and effectiveness of all U.S. pharmaceuticals. Baxter markets the blood thinner heparin which we have written about frequently. In this issue, more of the problems relating to heparin were discussed. Baxter disclosed its lobbying spending in a form filed with the Senate's Office of Public Records on April 18<sup>th</sup>. All of the special interests have lobbyists who enjoy tremendous power and influence in Washington. Collectively, they spend millions of dollars in order to maintain their power and control. Unfortunately, ordinary citizens don't have the capacity to hire lobbyists to protect their interests. That's why groups like Public Citizen must be supported by all Americans who want to have some say so over what happens in our nation's capital.

Source: Associated Press

## **IX. PRODUCT LIABILITY UPDATE**

### **VOLVO INJURY PROOF CAR**

For many years, Volvo has been considered one of the safest brands of automobiles on American highways. In my opinion, Volvo's reputation is well deserved. For example, Volvo invented three point safety belts. Additionally, it was the first manufacturer to implement crumple zones, side impact airbags and rear-facing child seats. Because safety of a particular automobile is one of the most important factors someone considers when purchasing a vehicle, companies like Volvo, Lexus and Mercedes Benz are allocating more of their resources to ensure

that their automobiles are on the leading edge of automobile safety. However, far too many automobile manufacturers continue to design their cars to meet the minimum requirements that were created by the government in conjunction with automobile manufacturers.

Volvo is a noteworthy exception. Recently, Volvo dedicated itself to meet a very worthy goal of designing an injury proof car by 2020. Volvo's intent is to use radar, sonar, and other advanced technology to prevent and mitigate crashes. One idea being explored is that immediately prior to and during a crash the car would steer and brake on its own. In Volvo's opinion, reducing speed by 10 mph during a crash would cut the death rate in half. We applaud Volvo's ingenuity and innovation. Maybe one day this same spirit of safety will migrate to the owner of Volvo, Ford Motor Co., which typically strives to meet only minimal safety standards.

#### **AGED TIRES CREATE HAZARDS**

The U.S. tire industry is refusing to give American motorists the same warnings given to car owners in Europe and Asia about the possible dangers of tires six years old or older. More than 100 deaths in the United States have been attributed to aged tires which dried out and lost their treads, even though the tires appeared to be safe. With no warning from the industry or the federal government, safety experts say the only way for consumers to protect themselves is to learn how to read the cryptic code embedded on a tire's sidewall which reveals the year and week a tire was manufactured. The code is at the end of a set of letters and numbers on the tire. Until recently, the code was on the inward side of the tire requiring motorists to climb under the car to read the number. For example, the number 418 indicates the tire was manufactured in the 41<sup>st</sup> week of 1998 and is ten years old. A tire older than six years old, even if it's never been driven

a mile, can be very dangerous. You don't know what's going on inside. That's what makes it so dangerous.

Members of the British Rubber Manufacturers Association, which include Goodyear, Firestone and Michelin, warned in 2001 that "unused tires" should not be put into service if they are over six years old. Interestingly, the U.S. Tire Industry Association, representing many of the same companies, says it has no plans to issue a similar warning. In fact, the Association says there is no scientific information that can point to when a tire should be removed because of age. Safety experts contend there is extensive research showing tires begin to deteriorate in "critical" ways even if they remain unused or unsold in store inventories. A tire can remain in a store's inventory for eight to ten years—look good—and be very dangerous.

In most cases, a visual inspection or check of tread depth will not reveal the problem. The Ford Motor Company has urged the federal government to adopt a six-year expiration date, citing "comprehensive research" and "defendable data driven by analysis." Ford, BMW, Chrysler, Toyota and VW/Audi now carry warnings about aged tires in manuals given to car owners. Even some tire companies have begun to issue warnings. Bridgestone/Firestone, Michelin and Continental now recommend that tires older than ten years should not be used, even if they appear safe by visual inspection. Our firm has handled a number of cases where "bad tires" caused injury or death. Based on our experience, I can tell you "aged tires" are a real hazard.

Source: ABC News

#### **JURY AWARDS \$24.2 MILLION IN ASBESTOS LAWSUIT**

A Florida jury has awarded \$24.2 million in an asbestos lawsuit against Honeywell International, the parent of brake maker Bendix. Stephen E. Guildler learned to repair tractors and other farm equipment as a teenager working on the family farm. He went on to

become a highly successful head and neck surgeon. Dr. Guildler was diagnosed last year with a rare, fatal type of cancer—which he blames on exposure in the 1970s and early 1980s to brake pads made with asbestos. The Miami-Dade County jury found Honeywell negligent for selling asbestos brakes and awarded damages to Dr. Guildler. This was the largest compensatory damages verdict thus far involving a single defendant in a Florida asbestos case. The doctor's oncologist testified during the two-week trial that his patient has a less than 10% chance of surviving beyond the fall of next year. Dr. Guildler was diagnosed with peritoneal mesothelioma, a cancer that affects the abdominal lining. Last November, two months after the diagnosis, Dr. Guildler closed his medical practice. Since that time, the cancer has spread throughout his body.

Honeywell obtained Bendix as a result of a 1999 merger with Allied-Signal, which had merged with Bendix in 1982. Honeywell no longer makes products containing asbestos. Nine other defendants named in the lawsuit, including Deere & Co. and General Motors, reached confidential settlements before the case went to trial. Caterpillar and Ford Motor Co. were dismissed as defendants from the case. David A. Jagolinzer, of the Ferraro Law Firm in Miami, represented the plaintiffs in this case and did an outstanding job.

Source: Miami Herald

#### **CHILD RESTRAINT USE IN 2007 INCREASED**

The National Highway Traffic Safety Administration recently released overall results for child restraint use in the year 2007. The results show some promising advancements in a critical area of child protection. The study indicates that restraint for all children (birth to age 7) increased to 89% in 2007. The information contained in the survey came from the National Occupant Protection Use Survey (NOPUS) which collects data on child restraint use throughout the United States. The NOPUS survey is conducted annually by the National

Center for Statistics and Analysis. Significant findings for 2007 include:

- Restraint use for children driven by a belted driver continued to be higher than for those driven by an unbelted driver.
- Restraint use by children driven by a belted driver was over 90%.
- The majority of children continue to ride in the rear seat of vehicles which is the safest place for children age 12 and under.

The survey also analyzes child restraint use by region of the country. For the second year in a row, the South had the lowest regional child restraint usage rates. Only 85% of children in the South were found to have been wearing appropriate child restraints. We really must do a better job to make sure that children are properly restrained. In Alabama, the law provides the following:

- Children younger than 1 or less than 20 lbs. must be in a rear-facing infant seat;
- Children age 1 through 4 or 20-40 lbs. must be in a forward-facing child safety seat;
- Children age 5 but not yet 6 must be in a booster seat; and
- Children age 6 through 14 may use an adult safety belt.

The manufacturers of child restraint devices must design the restraints in a safe manner. We have seen a number of child restraints that were improperly designed and which created a hazard for children. To view more helpful information on proper child restraint usage, you can visit the NHTSA website ([www.nhtsa.gov](http://www.nhtsa.gov)).

Source: NHTSA

### **RHINO ACCIDENTS ARE STILL HAPPENING**

As we have written in a previous issue, one of the most dangerous ATVs on the market is the Yamaha Rhino. Since the Yamaha Rhino All Terrain

Vehicle was introduced to the market in the United States in 2003, as reported, it has caused a large number of devastating rollover accidents leaving adults and a number of children seriously injured, permanently maimed and in some instances dead. The popularity of ATV's has greatly increased the number of accidents occurring. The defective Yamaha Rhino ATV makes the overall ATV picture much worse. As we have reported, these design defects include:

- High center of gravity
- Small wheels
- Narrow wheelbase / frame

When these design defects are coupled with a powerful engine, fast acceleration and quick turning radius, the Rhino can become very unstable, even at slow speeds. In addition to the aforementioned design defects, the Yamaha Rhino provides inadequate protection for drivers' and passengers' limbs in the event of an accident. The original design was manufactured without doors of any kind. The design resulted in arms, legs, and bodies being crushed when the defectively designed ATV rolled over. Consumers need to be very concerned if they have purchased a Rhino, especially if children ride in it. We are looking at potential claims relating to Rhino crashes and roll-overs. If you have any questions concerning the Rhino problems, feel free to call Mike Andrews, Cole Portis or Dana Taunton at 800-898-2034 or 334-269-2343. They will be glad to assist you.

### **ARTIFICIAL TURF CAN POSE A HEALTH HAZARD**

Since the 1960s, artificial turf has been installed on sporting events fields across the nation. It was sold as a more durable and cost-effective alternative to grass. Early synthetic surfaces—such as the short-bladed AstroTurf—have given way in recent years to longer-bladed versions designed to be softer and help prevent injuries. In a recently article, USA Today reports that there are

increasing concerns that some synthetic fields—particularly fraying AstroTurf surfaces that have been in place for years—are contaminated with lead and could pose a health hazard to children, athletes and others who use them. The threat of lead contamination in old turf has caused concern over the use of newer types of artificial turf.

These new surfaces often include bits of recycled tires—known as “crumb rubber”—among the turf blades to provide a cushioned surface. These surfaces have been installed at thousands of schools, public parks and indoor sports facilities across the country, and more installations are scheduled. The questions about both types of artificial turf have created ripples nationwide, prompting a federal investigation of artificial surfaces and raising anxiety among health specialists and elected officials, some of whom want to ban new installations until government agencies study the potential health risks and environmental hazards.

The EPA, along with the U.S. Consumer Product Safety Commission, has launched an investigation of artificial turf fields. The national investigation by the CPSC and the EPA will focus on all kinds of turf. The agency is collecting turf samples and expects to issue a report by early summer. The focus is on the risk to exposure from lead. There are 3,500 full-size, artificial fields in the USA, according to Rick Doyle, president of the Synthetic Turf Council, a trade group. Such turf accounts for 900 to 1,000 installations a year but does not include smaller surfaces such as practice fields and playgrounds. It will be interesting to see what the report concludes concerning this potential safety and health hazard.

Source: USA Today

## X. MASS TORTS UPDATE

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### **FORMER BRISTOL-MYERS SQUIBB VICE-PRESIDENT CHARGED WITH LYING ABOUT PLAVIX**

Andrew Bodnar, a former senior vice-president of Bristol-Myers Squibb, has been indicted for his role in lying to the federal government about a patent deal involving the popular blood-thinning drug, Plavix, used by heart attack and stroke survivors and other patients. On June 11, 2007, Bristol-Myers Squibb agreed to plead guilty and pay a \$1 million criminal fine for misleading the government about a Plavix patent deal. Plavix, a patented pharmaceutical, is the most widely prescribed blood-thinning drug in the world. Approximately 48 million Americans take Plavix daily to prevent potentially fatal blood clots. The drug was approved for sale in the United States in November 1997. Bristol-Myers Squibb and another company, Apotex Inc., were engaged in litigation over the validity of the patent for Plavix and were negotiating a settlement of that litigation.

At the time, Bristol-Myers Squibb was subject to a separate consent decree, for unrelated conduct, with the Federal Trade Commission that required Bristol-Myers Squibb to submit any proposed patent settlements for review and advisory approval by the FTC. The Commission warned Bristol-Myers Squibb that if it agreed with Apotex not to launch BMS's own generic version of Plavix—meaning that BMS would not compete against Apotex for generic sales—then the FTC would not approve a settlement of the Plavix litigation. Federal officials alleged that at a meeting in 2006, Dr. Bodnar, on behalf of BMS, made representations to Apotex to reassure it that BMS would not launch a generic version of Plavix if Apotex agreed to a settlement which would prevent Apotex from launching its Plavix generic until 2011.

Federal officials alleged that Dr. Bodnar knowingly and willfully made a

false statement to the FTC about the existence of his representations to Apotex. Antitrust Division chief Thomas O. Barnett made this observation relating to this sort of conduct:

*Lying to the federal government is a serious felony that obstructs the law enforcement process. The Department of Justice will vigorously prosecute such illegal activity.*

Dr. Bodnar is charged with a violation of the Federal False Statements Act. If convicted, he could face a maximum sentence of five years of imprisonment and a fine of \$250,000. The fine may be increased to twice the gain from the offense or twice the loss incurred by the victims of the crime. While this individual faces jail time, the corporate culture that allows and actually encourages this sort of thing should be on trial.

Source: *Insurance Journal*

### **STUDY FINDS NEW BLOOD SUBSTITUTES INCREASE RISK OF DEATH**

While the idea of a blood substitute that doesn't need refrigeration or cross-matching and has a long shelf-life would be an exciting scientific advance, a new study which was released online by the *Journal of the American Medical Association (JAMA)* found that these products significantly increase the risk of heart attacks and death. The authors from the National Institutes of Health and Public Citizen also raise serious questions about the role of the Food and Drug Administration in continuing to allow human trials of these products, despite evidence from past clinical trials that found patients given these hemoglobin-based blood substitutes face a 30% greater risk of death and a 171% increased risk of heart attack than those treated conventionally. The authors presented their findings this spring at an FDA public workshop on the "Safety of Hemoglobin-based Oxygen Carriers." Currently, such blood substitutes are not approved for use in the United States, although at least one product is approved for use outside the

country and new clinical trials are being conducted worldwide.

In the *JAMA* article analysis, the authors identified 16 different trials of five different blood substitutes. The studies were combined by the authors using a statistical technique called meta-analysis. Of those trials, 13 were published in medical literature, sometimes years after they were completed, while others were never published at all. In some cases, the only information available came from company news releases. One serious problem the authors encountered is that the FDA does not make much of the research into these blood substitutes available for review even though companies are required by law to report such data to the agency. The authors wrote:

*When 'secret science' is allowed, scientists are unable to build on the successes or failures of other researchers testing similar products, and patients can be repeatedly exposed to increased risks unnecessarily.*

Studies available to the FDA, but not always to the scientific community at large, would have made it clear by 2000 that these hemoglobin-based blood substitutes posed a significant risk to patients. By that point there was already a 27% greater risk of death and a 177% greater risk of heart attacks based on trials of four products. The report concluded that if the FDA had placed a moratorium on trials at that point, "product-related deaths and [heart attacks] in subsequent trials most likely would have been prevented." The authors recommend that the FDA require new and existing blood substitutes to be tested in animals before any further human trials are allowed. They also have called on Congress to change FDA policy or amend the Freedom of Information Act to make it easier for independent researchers to review information and studies submitted to the FDA during the product development process. The authors of the article, titled "Cell-Free Hemoglobin-Based Blood Substitutes and Risk of Myocardial Infarction and

Death,” are Dr. Peter Lurie and Dr. Sidney Wolfe from the Health Research Group at Public Citizen, and Dr. Charles Natanson, Steve Kern, and the late Steven Banks, Ph.D, from the National Institutes of Health.

Source: Public Citizen

### **ORTHO-EVRA PATCH EXPOSES WOMEN TO DANGEROUS ESTROGEN LEVELS AND RISK OF BLOOD CLOTS**

As has been widely reported, the contraceptive patch Ortho-Evra exposes women to dangerous levels of the hormone estrogen, posing a possible two-fold increase in the risk of blood clots. Public Citizen has told the Food and Drug Administration in a petition filed last month that Ortho-Evra should be removed from the market within six months. Ongoing litigation has recently released unpublished studies that confirm the increased estrogen content of the patch. Evidence compiled by Public Citizen’s Health Research Group reveals that, compared to standard oral contraceptives, Ortho-Evra exposes women to:

- More estrogen and a greater range of estrogen levels;
- A possible two-fold increase in the risk of blood clots;
- Increased painful side effects such as breast discomfort, severe menstrual pain, nausea and vomiting;
- An increased likelihood of discontinued contraceptive use; and
- No improvement in contraceptive outcomes.

Because the patch is still superior to no contraception at all, withdrawal of any contraceptive from the market carries the risk that some users will not immediately replace their contraception with a method that is as effective as the banned product. Public Citizen is requesting a six-month transition period in which Ortho-Evra will be available for refill prescriptions to allow women time to meet with their healthcare provider and seek a safer,

alternative contraceptive method. Ortho-Evra patches are designed to be worn on the skin for seven consecutive days before removal. Three consecutive patches are worn followed by a patch-free week. When Johnson & Johnson received FDA approval in November 2001 for marketing the patch, the company claimed that its product would have two key advantages over existing oral contraceptives:

- A constant delivery of hormones instead of the ups and downs associated with pill use, and
- Improvements in compliance compared to the daily dosing regimen of oral contraceptives.

However, evidence soon emerged that these theoretical benefits are outweighed by side effects from receiving high and variable levels of hormone exposure. A post-market study was the basis for a 2005 label change explaining that overall exposure to estrogen from the Ortho-Evra patch was 55 to 60% higher from the patch than a standard, 35 microgram (mcg) estrogen oral contraceptive. Comparison studies have also shown that the amount of absorbed estrogen varied 1.2 to 3.5 times as much for women who used the patch as for women who used oral contraceptives. Dr. Sidney Wolfe, director of the Health Research Group at Public Citizen, says:

- Had Ortho-Evra been designed as a pill, it is unlikely to have been approved because of its increased estrogen content.

In 1988, the FDA requested the withdrawal of all oral contraceptives with estrogen levels greater than 50 mcg because of the risk of blood clots and lack of additional contraceptive efficacy. The estrogen levels of the Ortho-Evra patch are equivalent, on average, to a 56 mcg pill. The Ortho-Evra label was changed again in 2006 and 2008 to include findings from studies that revealed an up to two-fold increase in the risk of blood clots in women using the patch compared to standard oral contraceptives. Further, side effects

(such as breast discomfort, painful periods, nausea and vomiting) and discontinuation (stopping the contraceptive entirely) due to side effects were more common among women who used the patch than among those who used pills.

Finally, Johnson & Johnson advertises that women who use the patch are more likely to use it correctly than women who use pills. Yet, according to Public Citizen’s research, there are no measurable differences in pregnancy outcomes. In other words, the patch does not provide any additional benefit that would outweigh the risks of high estrogen. Although demand for the patch has dropped dramatically in the past several years, from more than 9.9 million filled prescriptions in 2004 to 2.7 million filled prescriptions in 2007 (a decline of 73%), Ortho-Evra remains among the top 200 brand-name drugs by sales and prescriptions in the United States and is thus still a danger to large numbers of women in this country. Dr. Wolfe observed concerning this risk:

- Women deserve a level of risk at least comparable to or less than the pill for their hormonal contraceptive. The absence of any evidence of a unique benefit combined with the considerable safety problems of high-dose, variable estrogen exposure in Ortho-Evra tips the balance of risks and benefits against its availability as a contraceptive.

Our firm is handling a number of cases involving the Ortho-Evra patch. If you need any additional information relating to this matter, feel free to contact Chad Cook at 800-898-2034. You can also email him at [chad.cook@beasleyallen.com](mailto:chad.cook@beasleyallen.com).

Source: Public Citizen

### **HEPARIN LAWSUIT FILED IN BOSTON**

A wrongful death lawsuit has been filed in federal district court in Boston against the health-care company Covidien Inc., alleging that it supplied tainted doses of the blood thinner heparin to a Missouri retiree who died

as a result of allergic reactions to the drug. Plaintiffs allege that the company waited weeks to recall the tainted heparin after other suppliers had conducted their own recalls. Recalled heparin is still in circulation, and there may be more deaths around the country linked to it. It is alleged in the lawsuit that the 67-year-old man died from allergic reactions to tainted heparin on the same day the company announced its recall, March 28<sup>th</sup>.

Over a period of several months, the Missouri victim suffered nausea, vomiting, excessive sweating, and low blood pressure as a consequence of the drug. As reported, health authorities began to focus on heparin late last year, when reports emerged in Missouri of extreme allergic reactions among a handful of adult and pediatric dialysis patients. A nationwide alert eventually uncovered hundreds of other cases, which led to an investigation by the Food and Drug Administration. As reported, the FDA traced the problem to tainted batches of heparin's active ingredient, produced at a plant operated by Scientific Protein Laboratories L.L.C. in China.

Much of the focus thus far has been on Baxter International Inc., which supplies about half the heparin used in the United States through its Cherry Hill plant. Scientific Protein Laboratories supplied the active ingredient for both Baxter and Covidien. The FDA concluded that heparin had been contaminated with an over-the-counter dietary supplement and that scores of patients in the United States had died. The victim in the Boston case, the father of 11 children, never received a recall notice or any warning about the drug's potential danger. It should be noted that even after federal health officials began issuing general warnings in January and other suppliers of heparin began recalling their supplies around the same time, Scientific Protein Laboratories failed to promptly recall the dangerous drug, even though it had to know of the safety and health hazard it created.

Source: *Philadelphia Inquirer*

### **CANCER CLAIM AGAINST POULTRY FIRMS CAN PROCEED**

In a recent decision, the Arkansas Supreme Court has ruled that a lawsuit against Arkansas poultry producers can proceed. This lawsuit was dismissed two years ago by a lower court. The suit seeks to hold the defendants responsible for a man's leukemia. The Supreme Court overturned the lower-court ruling and found that Michael Green and his parents had presented sufficient evidence to pursue their case against Tyson Foods, George's Farms, Peterson Farms, and Simmons Foods. The plaintiffs in the Green case claim Michael Green was exposed to arsenic when he was a boy. They claim that chicken feed containing arsenic passed through the birds, and degraded into a harmful form of arsenic in poultry litter. Farmers spread the litter on fields as fertilizer, and wind then carried the dust into homes and schools. Michael Green was diagnosed with a rare form of leukemia when he was a boy, while attending a school about a block from his home. It will be interesting to see how this case develops.

Source: *Todays THV*

### **FDA IS CRITICAL OF MERCK'S VACCINE PLANT**

We have learned that the drugs sold in the United States are oftentimes composed of byproducts that come from other countries. Unfortunately, we have also learned that there is very little oversight of the safety and efficacy of those byproducts. The recent scare relating to heparin is an indication of how poor the oversight actually is. Issues regarding the safety and cleanliness of our pharmaceuticals, unfortunately, are not limited to the byproducts coming from other countries.

The Food and Drug Administration recently sent a warning letter to Richard Clark, Merck's chief executive officer, addressing sterility problems at Merck's vaccine plant in West Point, Pennsylvania. The plant manufactures a number of children's vaccines and a small number of adult vaccines.

Because of sterility problems, the plant was forced to recall two vaccines in December 2007. Apparently, the sterility issue has not been resolved and that's difficult to comprehend. One would think that the FDA would have followed up to make sure the problems were corrected.

The FDA cautioned Merck about a number of procedural violations and went further to state that Merck's responses to the agency's inspections and concerns were "inadequate to address the serious deviations" raised by its inspectors. The FDA has stated that it does not believe the sterility issues will affect the safety of the vaccines. Hopefully, that will prove to be an accurate assessment of what could be a most serious situation.

Source: *New York Times*

### **RECALL OF HEART FAILURE MEDICATION DIGITEK**

On April 25, 2008, Actavis Totowa LLC, issued a Class I recall of Digitek® (digoxin), which is a medication used to treat congestive heart failure, abnormal heart rhythms and other heart conditions. Digitek is manufactured by Actavis and was distributed by Mylan Pharmaceuticals Inc., and by UDL Laboratories, Inc.

Digitek was recalled due to the possibility that tablets were doubled in thickness and could contain twice the appropriate level of the active ingredient. According to a new release from Digitek's manufacturer, digitalis toxicity "can cause nausea, vomiting, dizziness, low blood pressure, cardiac instability, and bradycardia." There have also been reports of digitalis toxicity leading to death. Our firm is currently investigating claims relating to Digitek. Chad Cook, one of the lawyers in our Mass Torts Section is handling those claims.

### **STUDY LIKELY SPELLS END FOR ANTI-BLEEDING DRUG**

It's now almost certain that Trasylol, an anti-bleeding drug, will stay off the market. A rigorous study found that

patients receiving the medication during heart surgery were much more likely to die than patients given other drugs. At press time, Bayer AG, the maker of Trasyolol, was still deciding what to do and was awaiting details from the Canadian study. There have already been a number of lawsuits filed claiming Trasyolol led to excess deaths and that Bayer hid evidence of harm.

Experts in Canada and the United States say the study appears to seal the drug's fate, given that several prior studies linked Trasyolol to an elevated risk of death after surgery. There were other studies that didn't find a higher risk, but those had many weaknesses. The latest study was the first head-to-head comparison of Trasyolol, also known as aprotinin, and two other drugs that surgeons use to prevent massive blood loss during heart surgery. The findings were released last month by the *New England Journal of Medicine*. Drs. Wayne A. Ray and C. Michael Stein of Vanderbilt University School of Medicine wrote an editorial accompanying the study. In that editorial, they stated: "In all likelihood, this is the end of the aprotinin story."

Trasyolol was approved in 1993, but questions about its safety didn't surface until 2006, when one large study linked it to increased risk of death, heart attack, stroke and kidney failure. The Canadian study, paid for by the government, included more than 2,300 patients who were at high risk of bleeding or had multiple health problems. They were chosen randomly to receive Trasyolol or two other anti-bleeding drugs during heart surgery. The study was stopped early last October when preliminary results showed a higher rate of death in the Trasyolol group. Bayer temporarily pulled the drug off the market two weeks later.

An analysis of the data showed Trasyolol increased chances of death by 54%, compared to two other much-cheaper drugs. Six percent of the Trasyolol patients died within 30 days of surgery, compared with 4% who got either Amicar or Cyklokapron, despite a slightly lower percentage of the Trasyolol patients suffering from massive

bleeding or needing transfusions. The researchers found those who died in the Trasyolol group had a much higher proportion of heart complications after surgery, including heart attacks. So far, according to Bayer, more than 80 Trasyolol lawsuits have been filed. About 200,000 patients worldwide received Trasyolol in 2006, the peak year for sales. One has to wonder why the U.S. Food and Drug Administration hasn't already taken action. Well, on second thought, maybe we don't have to wonder considering the power and influence of the drug industry and the apparent weakness of the FDA. The agency may even continue allowing the drug to be used in research studies, according to reports.

Source: *Associated Press*

#### **JUSTICE DEPARTMENT AND CONGRESS INVESTIGATE VYTORIN MAKER**

The Department of Justice has joined federal lawmakers in seeking information about why it took drug makers so long to report the negative results of a study of the cholesterol drug Vytorin. Executives from Merck and Schering Plough, who make and market the drug in a joint venture, testified before House lawmakers at a congressional hearing last month. The drug companies were defending their decision to continue to promote the drug in ads after a study revealed that it was no more effective than the lower-cost generic Zocor. Three television ads were discontinued after being criticized by some lawmakers as potentially misleading consumers. The study was completed in 2006, but the companies didn't release the results until this past January. Rep. Bart Stupa (D-MI), who chairs the House Energy and Commerce Committee's oversight subcommittee, is considering new restrictions to "protect American consumers from manipulative commercials." I commend him for his concern and for his willingness to protect the public.

The Justice Department is also looking into the matter and has requested interviews and documents

on Vytorin from the companies. Merck and Schering halted television marketing for Vytorin after releasing the study results in January, but Rep. Stupak believes their action came too late. I agree with the Michigan lawmaker when he says "many consumers may not have taken Vytorin had they been aware of the study results." It's obvious that television ads for a number of drugs mislead the public. While in my opinion there can be no way to justify any television ads for pharmaceutical products, certainly misleading ads can't be tolerated. I don't believe the doctors who prescribe drugs and the pharmacists who fill the prescriptions favor television ads for drugs. Hopefully, this issue will eventually be handled by Congress. If so, the public will be protected as a result.

Source: *LawyersWeekly*

#### **APPEALS COURT IN TEXAS OVERTURNS VIOXX VERDICT**

A Texas appeals court has overturned the multimillion-dollar verdict against Merck & Co. in a Vioxx case. In April 2006, a jury in Rio Grande City, Texas, awarded \$32 million to the widow of 71-year-old Leonel Garza, a short-term Vioxx user, who died of a heart attack in 2001. That award—\$7 million for compensatory damages and \$25 million for punitive damages—was reduced to about \$7.75 million under Texas law limiting damages. A three-judge panel of the Texas Court of Appeals for the Fourth Circuit overturned the verdict, ruling in favor of Merck.

The judges wrote that Garza's family did not prove that his brief use of Vioxx caused two blood clots that the family contended triggered the man's heart attack. The judges also concluded the family did not provide sufficient evidence to rule out his long-standing heart disease as the cause of his fatal heart attack. Mr. Garza had a prior heart attack and heart bypass surgery, smoked for nearly 30 years and died of the second heart attack after taking Vioxx for less than a month.

Source: *Associated Press*

## XI. BUSINESS LITIGATION

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### **WACHOVIA'S AUCTION RATE SECURITIES PROBED**

Wachovia's WB brokerage arm has received "inquiries and subpoenas" from federal and state regulators over information regarding auction rate securities. The Charlotte, N.C.-based bank has revealed in its quarterly filing with the Securities and Exchange Commission that the agency and several states have requested information concerning the underwriting, sale and subsequent auctions of municipal auction rate securities and auction rate preferred securities. The auction rate security market, through which interest rates on the securities are reset at regular auctions, has been under fire since February. That's when auctions began failing, leading to a lack of liquidity for the securities.

Swiss bank UBS last month returned \$35 million to Massachusetts cities and other municipalities that bought auction-rate securities they could not unload. Massachusetts' Attorney General earlier this year began investigating whether the bank misled the municipalities about whether the securities were permissible investments for them under state law. Massachusetts also was looking into Merrill LynchMER and Bank of AmericaBAC as part of its probe.

Separately, Wachovia has been named in a civil suit, filed on March 19<sup>th</sup> in the U.S. District Court for the Southern District of New York. The suit "seeks class action status for customers who purchased and continue to hold auction rate securities based upon alleged misrepresentations made with respect to the quality, risk and characteristics of auction rate securities."

Source: *Thestreet.com*

### **NEW YORK COURT UPHOLDS FRAUD CLAIMS AGAINST LEASING COMPANY OFFICERS**

New York's highest court has refused to dismiss fraud claims against officers of NSL, an equipment-leasing company, accused of hiding overcharges in NSL's contracts with small businesses nationwide. The case is headed back to trial court in Manhattan, which will first decide whether to certify it as a class-action suit with up to 700,000 victims. It's reported that overcharges by Northern Leasing Systems of a few dollars monthly for insurance waivers on office equipment could total \$180 million over the past ten years. The leasing company denied it told independent sales outlets to hide the contracts' fine print or to refuse to give copies to customers.

In its ruling, the Court of Appeals majority said it's reasonable to infer NLS officers would have been involved if there was a national scheme to mislead customers about contract terms. Plaintiffs in the appeal were from New York, Missouri, Texas and Washington State. New York-based NLS leases credit card processing and other office equipment. At issue is whether NLS's four-page contracts were designed to appear, or were presented, as one-page contracts, signed at the bottom of the first page, with a notice in small print of more pages where the language about insurance waivers and other terms appeared.

Source: *Insurance Journal*

### **CITIGROUP \$1.66 BILLION ENRON SETTLEMENT IS APPROVED**

A bankruptcy court has approved Citigroup's \$1.66 billion settlement with creditors of Enron, the bankrupt energy trader. The court approval was expected after Citigroup agreed to settle the case at the end of March. Citigroup was the last remaining defendant in what was known as the "Mega Claims" lawsuit. This was a bankruptcy suit filed in 2003 against 11 banks and brokerages. The Enron Creditors Recovery Corp. alleged in the suit that, with the help of banks like Citigroup, Enron kept creditors in

the dark about the company's financial troubles by using shady and highly questionable accounting. The damage done by Enron's leadership team hurt a tremendous number of people in this country. Even with all the hurt and damage caused by a band of greedy men at Enron, there was still some good that came out of the Enron debacle. The exposure of Enron caused the government and others to look into what others in Corporate America were doing. When they did, a great deal of fraud and corruption was found. It also forced Congress to take action designed to avoid more Enrons in the future.

Source: *Associated Press*

## XII. INSURANCE AND FINANCE UPDATE

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### **LIFE INSURANCE COMPANIES MAY BE IN SERIOUS TROUBLE**

Florida's insurance commissioner is demanding that two life insurance companies explain why they should be allowed to keep their certificates to do business in Florida. The move comes after the companies were accused of unfair and deceptive practices to solicit business from military personnel. The two companies in question are American Fidelity of Pensacola and Trans World Assurance of San Mateo, California. The state Office of Insurance Regulation says it received allegations that the companies sold insurance policies after providing gifts valued at over \$25, offered referral fees to military personnel who recruited others to buy policies, and misrepresented that they were affiliated with the military. There are also allegations that the companies hired a Marine corporal who used his military identification to gain access to a military base and picked up military personnel and drove them to the companies' offices.

The state has filed an Order to Show Cause which requires the insurance companies to show cause why their

licenses should not be revoked. If they fail to respond within 21 days, the state can taken action against them. The order is tied to a rule adopted last September by the Florida Financial Services Commission that is aimed at providing safeguards for military personnel who are targets of predatory sales practices. It's good to see state officials taking action to protect members of the military and their families.

Source: *Associated Press*

### **STATE FARM SETTLES KATRINA CASES**

State Farm Fire and Casualty Co., the nation's largest insurance company, has settled out of court with more than a dozen Mississippi policyholders whose lawyers were barred from representing them in lawsuits against the insurer over Hurricane Katrina damage. State Farm initiated or reopened settlement talks with policyholders after a federal judge in April disqualified their lawyers from handling up to 200 suits against the Bloomington, Illinois-based company. At least 13 homeowners were representing themselves, without a lawyer, when they agreed to settle their suits for undisclosed terms.

State Farm made settlement overtures in letters it sent to policyholders whose lawyers were disqualified in April by U.S. District Judge L.T. Senter Jr. in Gulfport, Mississippi. Judge Senter's ruling cited ethical breaches by Dickie Scruggs, who led a team of lawyers in filing hundreds of cases against State Farm after the August 2005 hurricane. Judge Senter said Scruggs made improper payments to Cori and Kerri Rigsby, sisters who were helping State Farm adjust Katrina claims on the coast. You may recall that the Rigsby sisters copied internal State Farm records and gave them to Scruggs. Scruggs later hired the sisters as consultants.

Scruggs, who has since pleaded guilty to criminal charges, withdrew from representing dozens of State Farm policyholders after he was indicted last year on charges that he tried to bribe a state judge. Judge Senter also barred

Scruggs' former associates from working on the State Farm cases because the judge said they knew about the improper payments to the Rigsby sisters and didn't try to stop them. The Scruggs story is an incredible example of how greed and stupidity can combine to cause harm to persons who trusted their lawyer to protect their interests. Hopefully, the clients the Scruggs team represented were able to reach satisfactory settlements with State Farm. Hundreds of coastal property owners have sued State Farm for denying their claims after the August 2005 hurricane. Many of the lawsuits challenged the company's refusal to pay for damage from Katrina's storm surge. Hopefully, those persons who had the misfortune to hire the Scruggs team to handle their claims received fair settlements from State Farm.

Source: *Associated Press*

### **STATE FARM SETTLES ANOTHER KATRINA CASE IN MISSISSIPPI**

State Farm Fire and Casualty Co. has settled one other Katrina lawsuit in Mississippi that deserves special mention. Norman and Genevieve Broussard, the Mississippi couple whose Biloxi home was destroyed by Hurricane Katrina, have reached a confidential settlement of their claim. You may recall that a jury awarded \$2.5 million in punitive damages to the Broussards in 2007. U.S. District Judge L.T. Senter Jr. later reduced that amount to \$1 million. However, the U.S. Court of Appeals for the Fifth Circuit ordered a new trial, saying Judge Senter shouldn't have allowed jurors to consider punitive damages. This settlement resolves the matter and hopefully it was a good settlement for these plaintiffs.

Source: *Insurance Journal*

### **CASINO OPERATOR SETTLES KATRINA CASE**

Pinnacle Entertainment Inc. will receive an additional \$48 million from Allianz Global Risks US Insurance Co. to settle a lawsuit related to Hurricane Katrina damage at a former Mississippi

casino and its Boomtown New Orleans facility. The Las Vegas-based casino operator, according to a filing with the Securities and Exchange Commission, will receive payment from Allianz this month in exchange for the release of all claims and an agreement that Pinnacle will dismiss its lawsuit with prejudice. Pinnacle had previously received \$5 million from Allianz. The \$53 million total payment includes a \$3 million interest payment. Pinnacle is still pursuing a claim against RSUI Indemnity Co. To date, the company has received a total of about \$191.8 million in payments or payment commitments from its insurers related to the hurricane claims.

Source: *Claims Journal*

## **XIII. PREDATORY LENDING**

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### **FREEDOMWORKS DEFENDS PAYDAY LENDERS**

It appears that payday lenders are being helped by organizations linked to former House Majority Leader Dick Armey. FreedomWorks, a conservative nonprofit organization chaired by Armey, and the Consumers Rights League, an advocacy group run out of the FreedomWorks offices, are actually defending the payday lenders. They claim borrowers can decide for themselves whether to take on these high-interest-rate loans that are loaded with all sorts of other fees and charges. The Consumers Rights League argues that payday loans represent the "democratization of credit" and promises to counter the "numerous, self-appointed 'consumer advocacy' groups that are aggressively lobbying to restrict the choices" borrowers have.

Armey made \$403,333 in 2006 as chairman of the FreedomWorks Foundation, the organization's tax-deductible educational group, and another \$100,833 as chairman of FreedomWorks Inc., its advocacy and lobbying arm, according to the latest public filings.

Interestingly, Arme y, a Texas Republican, is also a one-time board member of Rent-A-Center Inc., Plano, Texas. This is a rent-to-own company that made a big push into payday lending in 2005, during which time the former Texas congressman was on its board.

Frankly, I am shocked that even a man like Arme y could stoop to the level of defending payday lenders. It would be interesting to see who all contributes money to FreedomWorks. The group raised \$4.2 million from the public in 2006, the last figure the organization has made public. I suspect that the payday lenders have given a pretty good bit to this outfit. It's also of extreme concern that FreedomWorks Foundation enjoys tax exempt status. That doesn't meet the smell test!

Source: *Wall Street Journal*

#### **WACHOVIA SETTLES MARKETING ALLEGATIONS**

Wachovia Corp. has agreed to pay an estimated \$144 million to settle federal allegations that it failed to stop telemarketers charged with taking advantage of thousands of elderly consumers. According to the federal Office of the Comptroller of the Currency, Wachovia didn't act quickly enough to block telemarketers and payment processors who maintained their accounts at the bank. The marketers obtained customers' bank account numbers while selling products including vouchers for discount travel and groceries and medical discount plans. Wachovia will pay up to \$125 million in claims, \$8.9 million toward consumer education programs and a \$10 million fine.

The Wachovia case, the subject of an 18-month investigation by bank regulators, involved the telemarketers' use of "remotely created checks," which do not require a customer's signature. Regulators said telemarketers would make sales calls, obtain customers' bank account information, create a check and withdraw cash from customers' accounts. The government said a "large percentage" of the consumers

complained, saying they never authorized the payments or didn't receive the products or services offered. Those affected included customers with accounts at numerous banks, including Wachovia. The OCC says that, although the bank became aware of the situation, it "failed to take quick action to terminate these account relationships or otherwise correct the problem."

Federal and state officials have been pursuing cases for a good while against the telemarketing firms involved in the case. In 2006, federal prosecutors filed a civil case against Pennsylvania-based Payment Processing Center LLC. A federal judge in February 2007 appointed a receiver to return customers' money. According to the receiver, 345,000 consumers were affected. The Federal Trade Commission in summer 2007 froze the assets of Largo, Florida-based FTN Promotions, also known as Suntasia Inc. or Strategia Marketing LLC, after more than 5,000 people complained to authorities that the telemarketing firm used deceptive sales tactics to get consumers to reveal their bank account information. The FTC said the company—operating under at least 15 different company names—would call consumers, offer trial memberships to travel clubs or discount programs and make it difficult to cancel.

Last December, the FTC and officials in seven states filed similar civil charges against Florida-based Your Money Access LLC, which used several business names—Netchex Corp., Universal Payment Solutions, Check Recovery Systems, Nterglobal Payment Solutions Subscription Services, Ltd. and YMA Company, LLC. Under the terms of the settlement Wachovia is required to return payments to consumers who have claims against Your Money Access. Wachovia also agreed to take a series of steps designed to ensure the problem doesn't happen again.

Source: *Associated Press*

#### **COUNTRYWIDE LOSS FOCUSES ATTENTION ON ABUSES BY OUTSIDE BROKERS**

If we didn't have so much knowledge about the fraud and corruption in industry, we would be shocked to read that Countrywide Financial Corp. had an \$893 million loss for the first quarter of this year. Nobody in the know would be shocked to learn that there may be serious problems with Countrywide underwriting of many home loans. A federal probe of Countrywide, the nation's largest mortgage lender, is turning up evidence that sales executives at the company deliberately overlooked inflated income figures for many borrowers. Some of the problems surfaced in a mortgage program called "Fast and Easy," in which borrowers were asked to provide little or no documentation of their finances. Both Countrywide and Fannie Mae, the government-sponsored company that bought many of the loans, classify the loans as "prime," meaning low-risk. It now appears many of these loans were far from being "prime."

The Federal Bureau of Investigation is looking into a wide variety of Countrywide mortgages that didn't require full documentation. So apparently this involves more than just the Fast and Easy loans. It was reported that the FBI has concluded that extensive fraud occurred on the loans, and it is looking into whether the company violated securities law by failing to disclose that to investors. The folks running Countrywide let a combination of arrogance and greed override good judgment and fair play. That has resulted in lots of folks being badly hurt.

Source: *Wall Street Journal*

## **XIV. PREMISES LIABILITY UPDATE**

#### **HIGH-RISE FIRE SUIT IN CHICAGO SETTLED FOR \$100 MILLION**

A settlement has been reached on behalf of victims of a 2003 fire in a

downtown Chicago office building. The \$100 million to be paid under the terms of the settlement includes \$50 million from the City of Chicago, \$24 million from building management, and \$9 million from Cook County, which owned the building. The lawsuit, which was brought by 22 victims, had been set to go to trial. The judge who would have presided over the trial of the case in the Circuit Court of Cook County, Illinois, has approved the settlement.

As you may recall, six people were killed and many others injured in the October 2003 blaze. Under the settlement, the City of Chicago will pay \$15 million from its self-insurance program and the remaining \$35 million will be covered by the following four private insurance companies: AIG, Lexington Insurance, Clarendon America Insurance Co. and Westchester Insurance. There were actually 21 separate lawsuits filed against the city.

Source: Reuters

#### **COMPANIES AGREE TO \$30 MILLION SETTLEMENT IN RHODE ISLAND CLUB FIRE**

Several foam manufacturers have agreed to pay \$30 million to settle lawsuits brought by survivors and family members of those who died in the 2003 nightclub fire in Rhode Island that killed 100 people. Among the several foam companies that agreed to settle are Leggett & Platt Inc. (based in Carthage, Missouri), and Wm. T. Burnett & Co. (based in Baltimore). The companies have offered more than \$100 million to victims of the February 20, 2003, fire at the Station nightclub in West Warwick. Previous settlements have come from Home Depot, Clear Channel Broadcasting and fireworks makers. The most recent settlements must be approved by the hundreds who have sued as well as the federal judge overseeing the case.

A Duke University law professor has been appointed to meet with survivors and victims' relatives to calculate a formula for how much money each person would receive under the settlements, based on the injuries they suf-

fered. Investigators blame flammable, egg-crate-style foam on the walls and ceiling of the club for fueling the fire, which was started when a pyrotechnics display for the rock band Great White ignited the soundproofing material. The foam was sold to the club owners by American Foam Corp., which bought foam from a handful of manufacturers.

The companies were accused of failing to adequately test their foam before distributing or selling it and failing to educate users about the material's dangers. The lawsuits allege that the foam was sold without any flame-retardant chemicals and produced "unreasonably dangerous toxic smoke and gases" once it was ignited. Polyurethane foam is well-known throughout the industry as being flammable and not safe in places such as hotels and nightclubs. This fire was the fourth-deadliest nightclub blaze in U.S. history. Besides the 100 people killed, more than 200 others were injured.

Source: Associated Press

#### **SETTLEMENT IN TRAGIC EXPLOSION CASE**

A lawsuit involving three children who watched their vacation cabin burn, knowing their parents were inside and unable to get out, has been settled. The children will receive more than \$21 million from the settlement of the lawsuit. The 16-year-old twin boys and 14-year-old daughter of Patrick and Margaret Higdon filed a suit in U.S. District Court in Green Bay claiming negligence caused propane explosions in a Door County, Wisconsin, resort community in 2006. The lawsuit named the Cedar Grove Resort, some construction companies, a utility and their insurance companies as defendants. Adult relatives, including Margaret Higdon's parents and siblings, who were vacationing with the family and were injured, also filed suit and reached a settlement. The amounts of those settlements haven't been made public.

The \$21 million settlement of the children's case, reached last month, will be divided between Megan, Patrick and

James—the three children. Under the settlement trust funds will be set up for them. The money is expected to grow to nearly \$38.5 million over their lifetimes. Their parents, Patrick and Margaret Higdon, who were from Bloomfield Hills, Michigan, died early July 10, 2006, while vacationing in a cottage with their children and other family members. The resort was located about 200 miles north of Milwaukee. Twelve other people were injured as a result of the explosion.

On the evening of the explosion, the family had enjoyed its usual routine which consisted of a family meal at a local restaurant followed by family time spent in the rental units talking, playing cards and other activities. They were asleep when several explosions rocked the resort in the early morning hours. Margaret Higdon's parents, James and Margery Brooks, and the Higdon's three children escaped. But Patrick and his wife were trapped inside, and Margaret's voice could be heard, calling for help.

Two of the children suffered injuries. Megan's spleen was shattered, and she had burns on the left side of her chest and blistering on her lips. She also suffers from post-traumatic stress disorder. Her brother Patrick, then 14, suffered multiple facial fractures and first and second degree burns over 2% of his body. Patrick may have permanent loss of sensation in his left cheek, according to his doctor, and he probably won't be able to ever fully open his mouth. His twin, James, suffered no physical injuries, even though he went back into the building to rescue his grandfather. The emotional distress suffered by these children was horrific and will affect them permanently. All three children now live with their grandparents.

An electrical contractor installing some underground electric lines for an upgrade of the resort's docks ruptured a buried propane line three days before the explosion. The lawsuit claimed Arby Construction, Inc., severed the underground propane gas line while performing work for the resort. The four defendants who agreed to pay in the settlement are now taking the fifth

defendant who refused to pay to court in an effort to force it to participate in the settlement by paying a portion of the total amount agreed to by the Plaintiffs. Ralph J. Tease Jr., a lawyer with Habush, Habush & Rottier in Green Bay, represented the plaintiffs in this lawsuit and did a tremendous job.

#### **COURT FINDS FOR HOMEOWNERS IN MOLD LAWSUIT**

A jury in Ohio has returned a \$3 million verdict in a mold case. A moldy house that has been a headache for a central Ohio family was the subject of the lawsuit. A judge in Franklin County, Ohio, awarded Roman and Jennifer Costner \$3 million last month for their three-year-saga. Earlier, another judge said Maronda Homes, the construction firm, has to pay the family's legal expenses which totaled almost \$700,000. Maronda Homes has called the ruling "completely unfair" and claims the homeowners stopped the company from fixing the mold problems at the house. There will likely be an appeal by the defendants. The Costners bought their house, which was located in a subdivision, for \$219,000. They were forced to move out after toxic mold took over. The couple alleged that the south side of the house wasn't attached to the foundation, the wrong windows led to leaks and waterproofing wasn't done properly. All of this was said to have contributed to the mold problem.

Source: Associated Press

## **XV. WORKPLACE HAZARDS**

#### **ALABAMA MAN URGES CONGRESS TO TIGHTEN WORKPLACE SAFETY**

An Alabama man has been fighting for years to make the workplace safer for American workers. Ron Hayes, whose son died in an industrial accident 15 years ago, went to Capitol Hill

to press Congress for stiffer penalties against companies that put employees in jeopardy. The Fairhope native told a Senate committee that little has changed in federal workplace enforcement since his 19-year-old son suffocated beneath 60 tons of corn in a grain silo in 1993. Ron said the Occupational Safety and Health Administration is still "coddling employers that don't protect their workers," in part because Congress has failed to update the minor fines and misdemeanor charges that companies face under current law. Ron told the committee:

*It's ridiculous. We have prosecution in everything else. I can kick a mule ... in this country and I'm going to jail. But a business owner can negligently or willfully ignore worker safety and face only a small fine, even in cases of death or serious injury.*

Ron's son, Patrick, was killed as he cleaned a silo at a Florida plant. Among other things, Patrick hadn't been furnished with a retrieval system—essentially a lifeline in case of a grain collapse—and as a result he wasn't wearing the safety device. An OSHA field inspector initially recommended citing the company for "willful" safety violations, and recommended a \$530,000 fine. But OSHA supervisors and lawyers refused to go along and instead reached a settlement that reduced the fine to \$42,000 and eliminated possible prosecutions. Since that time, Ron has acted as an OSHA watchdog, helping families from across the country navigate the agency's handling of tragedies. At the hearing, the safety advocate also proposed allowing victims' families to sit in on any OSHA settlement negotiations. Ron and other witnesses at the hearing argued that managers who disregard safety regulations should be hit with much larger fines as well as criminal felony charges. The hearing was before the Health, Education, Labor and Pensions Committee.

Ron, who has formed an advocacy group for grieving families, worked with lawmakers several years ago on similar legislation that ultimately

stalled. But Congressional Democrats—arguing that the Bush Administration has relied on voluntary compliance—are proposing a variety of bills aimed at strengthening oversight. Senator Ted Kennedy, chairman of the education and labor committee, has introduced legislation that would provide new protections for whistleblowers and significantly toughen penalties for employers, including larger fines and, in some cases, stiff prison sentences. The measure has been stuck in committee, however, with opposition from business groups and many Republicans who question the effectiveness of imposing stiffer penalties. Regardless of what happens in Congress, Ron Hayes should be commended for leading the fight for workplace safety. He has been a tireless worker and has refused to be intimidated by the powerful forces that oppose legislation designed to make the workplace safer.

Source: Associated Press

#### **JURY RETURNS VERDICT OF \$8,000,000 FOR SEAMAN**

A San Francisco jury has awarded an \$8,000,000 verdict to a 17-year employee of Seariver Maritime, Inc. and its predecessor, Exxon Shipping Co. The employee developed kidney cancer as a result of the unsafe working conditions provided by the companies. The jury found that the plaintiff, Mack Shelby of Rock Springs, Georgia, was frequently exposed to benzene and other toxins during the course of his employment and ultimately developed kidney cancer as a result. As part of his job, Mr. Shelby was required to clean tanks, unload cargo and was repeatedly exposed to unsafe levels of airborne benzene and other toxins.

The jury found that Exxon was negligent in failing to provide Mr. Shelby with a safe working environment and that the dangerous conditions of his work on its vessels caused his cancer. As compensation for his injuries, the jury awarded Mr. Shelby \$350,000 for lost future earnings, \$1,125,000 for pain, suffering, mental anguish and loss

of enjoyment of life in the past and \$6,525,000 for pain, suffering, mental anguish and loss of enjoyment of life in the future. Mr. Shelby was represented by Robert A. Chaffin, a lawyer with the firm Chaffin & Stiles, Houston, Texas; S. Reed Morgan of the Law Offices of S. Reed Morgan, Comfort, Texas; and Lyle Cavin of the Law Offices of Lyle C. Cavin, Jr., Oakland, California. They did an outstanding job.

Source: *Marketwire*

### **RAPE CASE AGAINST HALLIBURTON EMPLOYEES WILL GO TO TRIAL**

A federal judge has ruled that the woman who says she was raped by co-workers while employed by a contractor in Iraq can take her claims to trial. Jamie Leigh Jones filed a federal lawsuit last year, alleging she was attacked in 2005 while working for a Halliburton Co. subsidiary at Camp Hope, Baghdad. Her lawsuit contends that, after she endured harassment from some of the men where she lived in coed barracks, she was drugged and raped by firefighters employed by Halliburton and KBR. Ms. Jones says a KBR representative actually imprisoned her in a shipping container for a day so she wouldn't report the assault. KBR and other subsidiaries that have been sued have denied Ms. Jones' allegations but I predict they will have a most difficult time defending this case.

Halliburton's lawyers had argued that the employment agreement Ms. Jones signed required any claims made by an employee against the company that in any way touch on his or her employment to be settled through arbitration. If that position had prevailed, a third party would resolve the case through a private hearing process. The decision by U.S. District Judge Keith P. Ellison says the court will not compel the plaintiff to go to arbitration for her claims related to being assaulted. However, those claims cannot be pursued until other workplace-related claims are arbitrated.

As you will recall, Ms. Jones detailed her allegations to a Congressional sub-

committee in December. Several members of Congress have criticized the Justice, State and Defense departments for how her case was handled. Congress has pressured the Bush Administration to force U.S. contractors in Iraq to offer better protection for their employees from crimes. But so long as Vice-President Cheney is in power, you can rest assured that nothing that would "hurt" Halliburton will take place. A Washington-based lawyer, Stephanie Morris, represents Ms. Jones in her case and she has done a great job in avoiding arbitration for her client. A court and jury should hear this case and hopefully the media will give the trial the attention it deserves.

Source: *Associated Press*

### **IT APPEARS BP HAS VIOLATED BLAST VICTIMS' RIGHTS**

A federal appeals court has ruled that the rights of victims of the 2005 BP explosion in Texas City were violated by Houston federal prosecutors and a federal judge in connection with a plea bargain. The U.S. Court of Appeals for the Fifth Circuit said a 2004 law that gives crime victims a say in the process was violated when the prosecutors got a U.S. District Judge, who was handling miscellaneous courthouse items, to allow a plea bargain to be reached with BP without letting the victims know about the plan.

In October 2007, BP's North American products division agreed to plead guilty to a felony violation of the federal Clean Air Act, pay the \$50 million fine and serve three years of probation for the blast, which killed 15 people and hurt many more. The plea agreement, which is still on the table, must be accepted by a judge to be final and that has not yet happened. Paul Cassell, a professor at the University of Utah College of Law, along with lawyers, David Perry of Corpus Christi, Mark Lanier of Houston and Brent Coon of Beaumont all worked for the victims and asked U.S. District Judge Lee Rosenthal, the trial judge on the case, to listen to the verdicts relating to

the guilty pleas.

The appellate ruling came after the victims asked the Fifth Circuit Court to dissolve the plea agreement since it violated to the Crime Victims' Rights Act of 2004. They wanted the legal remedy provided in the act—that BP and prosecutors be forced to start all over—to take into account the views of the injured people and families of the dead. Prosecutors have defended the plea bargain and noted that the \$50 million fine was the harshest available under the Clean Air Act. It might be considered harsh, but for the conduct of BP, it isn't that bad. Lawyers for the victims will ask the entire 5<sup>th</sup> Circuit Court, not just the three-judge panel, to consider the case. This is an important case since it involves the victims' rights law, which has not yet been the subject of many appellate cases.

### **CONGRESSMAN CALLS FOR A CRIMINAL INQUIRY OF A MINE COLLAPSE**

It appears that the general manager and possibly other senior staff members at the Crandall Canyon Mine near Huntington, Utah, where nine miners died last August, withheld information from federal officials that could have prevented the disaster. If that is true they should face a criminal inquiry. Rep. George Miller, who is the chairman of a Congressional investigation, accused the company of concealing the extent of an earlier collapse in the mine that involved the same high-risk technique, retreat mining, that was being used when the disaster began. Rep. Miller said that if federal mine officials had known the extent of that earlier collapse, they would not have allowed the company to continue using the method. Retreat mining is where miners remove coal from the pillars that hold up the tunnels. Rep. Miller had sent a referral letter late last month to the Department of Justice asking an investigation of whether the mine's manager, Laine W. Adair, on his own or in conspiracy with others in the company, concealed facts or made false statements to federal investigators

about the condition of the mine before the disaster.

On August 6<sup>th</sup>, the pillars that supported the roof in a section of the mine gave way in a major collapse that left six miners fatally entombed. Ten days later, three miners who were working as rescuers died after more tunnels fell. Rep. Miller believes the deaths were avoidable. He cited the investigation's findings that in March, five months before the disaster in the south section of the mine, a similar collapse had occurred in a northern section. This should have been a clear "red flag" that the mine was unstable. Rather than informing the proper federal mining officials about the true extent of the March collapse, the investigation by the House Committee on Education and Labor found that the mine operator cleaned up the site and went on with work in a nearby section. The company has maintained that the collapse was caused by an earthquake. Rep. Miller wrote in a memorandum:

*Even after the near-disaster in March the company forged ahead with plans to do the same kind of retreat mining in the South Barrier that it had done, with nearly catastrophic consequences, in the North Barrier.*

A similar investigation by the Senate Health, Education, Labor and Pensions Committee, led by Senator Ted Kennedy, has also called for the Justice Department to open a criminal investigation. The Senate panel said it found evidence that Murray Energy was illegally mining the remnant barrier pillar just before the accident in August. Many mine safety advocates have criticized MSHA for not rigorously enforcing mine safety laws. In March, the agency's inspector general said MSHA had been negligent in protecting the safety of workers at Crandall Canyon. Aside from the instability indicated by the March collapse, known as a bump or bounce, notes in 2004 from the federal Bureau of Land Management, which leased the Crandall Canyon site to Murray Energy, indicated that pillars had begun to deteriorate. The House panel's investi-

gation found that the March bump was a clear indicator of the likelihood of the August collapse.

The families have filed a lawsuit against the company. Aside from initially ignoring clear warnings, mine operators later seemed to have tried to play down the significance of those warnings, according to findings from the investigation. A federal mining official, Allyn Davis, who inspected photographs of the mine after the March bump, said the images differed significantly from the description of the event given to him by the mine manager. The House committee, which began its inquiry within weeks of the disaster, hired Norwest Corporation, an engineering firm, to review the mine and its retreat mining plans. The panel had to subpoena the safety agency to get about 300,000 pages of documents concerning the mine; it also received about 100,000 pages of documents from Murray Energy.

To conduct the inquiry, the committee was also given subpoena power to take depositions. All five employees of the companies associated with the mine who were called to testify, including Mr. Murray, invoked their Fifth Amendment right against compelled self-incrimination and refused to cooperate. Three current or former federal mining officials and one official from the Bureau of Land Management were also asked for depositions and they complied. Cecil Roberts, who is president of the United Mine Workers of America, said the Congressional report further indicated the need for a bill that was passed by the House in January, which hasn't moved in the Senate. The measure would require more thorough review and monitoring of retreat mining plans. Sadly, the six miners who died after the August 6<sup>th</sup> collapse remain entombed at the site, which has to be very difficult for their families.

Source: *New York Times*

## XVI. TRANSPORTATION

### **TRUCKING COMPANY TO PAY \$18 MILLION SETTLEMENT**

A trucking company, whose driver caused a fiery crash that killed four female relatives, will pay \$18 million to the victims' families. Pro Logistics Inc., its parent company, CenTra Inc., and two CenTra subsidiaries, settled the case after a federal jury found them liable for negligence in the June 2006 deaths of three of the four women. The jury had awarded their children and grandchildren \$15 million in actual damages. At the time of the settlement the jury was considering how much to award in punitive damages. The crash killed Beverly Garrett, head of the local federal government employees union and a United Way board member, her mother, Beulah Hunter, and Mrs. Hunter's sister, Elois Jeans. Also killed was Anita Gibbs, Ms. Garrett's niece. Gibbs's husband has sued in a separate action that is scheduled to go to trial later this year.

The evidence at trial revealed that the defendants did not properly screen their drivers and failed to ensure they were getting proper rest. The truck driver is charged with four counts of second-degree involuntary manslaughter and is awaiting trial in that case. The lawsuits alleged that the truck driver was negligent when his tractor-trailer slammed into the rear of the Garrett vehicle on June 1, 2006. Ms. Garrett and her three passengers were headed to a family member's wedding anniversary when the wreck occurred on an Interstate highway 30 miles east of Columbia, Missouri. According to the Highway Patrol and witnesses, the eastbound tractor-trailer failed to slow down and plowed into a line of seven slowed cars, "strewing them like bowling pins across the highway." The tractor-trailer then snapped through safety cables, crossed the westbound lanes and jackknifed on an embankment north of the interstate. Two other women, who were relatives, were in a separate car.

They were injured in the accident and they settled for an undisclosed amount two weeks before the trial.

Evidence in the case showed that the truck driver had been convicted for reckless driving of his car in 1990 and cited for speeding in a tractor-trailer rig in Ohio in 2002. He had a heart attack and stroke in 1997 and suffered high blood pressure and non-insulin-dependent diabetes. On the day of the collision, the man was taking a large number of prescription drugs that he failed to report on a medical form. This was a classic example of what can happen when a trucking company fails to screen persons seeking employment as drivers. It's also imperative that these companies have safety programs in effect that both monitor drivers and make sure safety regulations are followed.

Source: *Kansas City Star*

#### **SETTLEMENT REACHED FOR MINNESOTA BRIDGE COLLAPSE VICTIMS**

A \$38 million agreement to compensate victims of the Minneapolis bridge collapse that killed 13 people and injured 145 others was reached last month. A House and Senate conference committee agreed to the settlement and the full Legislature approved it. Governor Tim Pawlenty has signed the bill into law. The bill recognizes "a catastrophe of historic proportions." Everyone who was on the bridge when it fell, as well as their survivors and legal guardians, would qualify for up to \$400,000 under the plan. Those whose injuries and losses were more severe could get more money for uncovered medical costs and wage losses from a \$12.6 million supplemental fund. Exact amounts will be determined later by a panel of lawyers. The bill also contains \$750,000 for administration and \$610,000 for social services for a group of child victims through a Minneapolis community center.

The bridge buckled and collapsed into the Mississippi River during the evening rush hour, in August of last year, sending cars and construction equipment into the water and leaving a

yellow school bus and other vehicles clinging precariously to tilting pavement. It took divers almost three weeks to recover all of the bodies. The National Transportation Safety Board is investigating the cause of the disaster. As reported, officials have focused on a design flaw involving beam-connecting steel plates and the weight of construction materials at vulnerable points in the bridge. Lawsuits by victims are on hold until a final determination is made. Victims who take a settlement must give up the right to sue the state and other units of government in Minnesota, but they do not waive the right to sue others. Under the settlement, the state is not admitting any liability. The Minnesota Supreme Court must appoint the compensation panel by June 30<sup>th</sup>, and collapse survivors have until October 15<sup>th</sup> to file a claim.

Source: *Associated Press*

#### **A GOOD RESULT IN A TEXAS TRIAL**

The Terry Bryant Law Firm holds the record for the largest personal injury verdict in Texas for 2007. The verdict of \$29,391,378 is also the largest ever returned in San Jacinto County, Texas. The jury award was for Kent and Tamara Peterson, both of whom suffered serious injuries in a motor vehicle crash that took place near Brenham, Texas. Tamara Peterson had a stroke a few days after the wreck and now suffers cognitive problems and has lost the use of her left side permanently. She will require lifelong care. The crash occurred on March 28, 2006 as the Petersons were returning home from a weekend outing. A pickup truck crossed the center line of the highway and hit the Petersons' vehicle. Both of the Petersons had multiple serious fractures. Kent Peterson had to have his wrist fused and is unable to return to his job as an airline mechanic. Tamara Peterson's stroke left her institutionalized for more than a year after the crash.

The driver of the pickup truck who hit the Petersons and his employer, Universal Cable Holdings, were defen-

dants. The Petersons sued the driver for crossing the center line and for driving in the rain with cruise control. The driver also was blind in one eye. The Petersons will face massive bills in the future for their medical care. No amount of money can restore them to their previous lives, but at least as a result of the jury award, they can now get the care they need. The defendants admitted liability, conceding they were responsible for the wreck on the first day of the trial. So the trial was held to determine damages. Terry Bryant and Gregg Anderson handled this case for the Petersons. They did an outstanding job for the Peterson family.

Source: *Forbes*

#### **LAWSUIT FILED IN FATAL I-95 CRASH IN LAKE WORTH**

The father of a 17-year-old honor student killed in a January automobile crash on Interstate 95 has sued the contractor and engineering firms in charge of a road construction project. The driver of the vehicle that rear-ended the car in which the teen was a passenger was also sued. Philip Davis, on behalf of his son, Brian Davis, alleges that abrupt lane closures and inadequate lighting and warnings caused the four-vehicle crash on January 8<sup>th</sup>. Astaldi Construction Corp. and Corradino Group Inc., as well as Mark Best (the driver), are the named defendants. The Chevrolet truck driven by Best rear-ended the Toyota Camry in which young Davis was a passenger. The wreck occurred near a construction zone. Brian Davis was coming home from an English study class at the time. At Palm Beach Gardens High School, the young man was captain of the swim team and also a member of the varsity track team. As we have reported, construction sites can be very dangerous. Construction companies and others working in the area have a duty to take the steps necessary to protect the motoring public. Persons operating vehicles in construction zones also have a duty to be extra careful. This case is an example of what can happen when safety meas-

ures aren't in place and aren't being enforced.

Source: *South Florida Sun-Sentinel*

### **ALABAMA'S RAILROAD CROSSING WRECK STATISTICS ARE AMONG THE WORST**

Railroad crossing wrecks cause a great deal of misery for families of victims around the country. Unfortunately, Alabama has once again found itself on the wrong end of the top states for 2007. The state ranked seventh nationally with 15 persons killed at highway rail crossings. Alabama is listed as number eight by the Federal Railroad Administration for having 104 train crossing collisions in 2007. The top 15 states account for 77% of all crashes and 65% of all fatal crashes nationwide. Common sense indicates that there must be a reason for that statistic. Texas and California were tops in both categories. Alabama, with its 3,500 miles of railroad tracks and 6,000 highway crossings, has been in the top 15 for at least the past 12 years. That doesn't bode well for Alabama citizens and persons driving through our state.

Source: *Montgomery Advertiser*

### **RUNWAYS ARE THE DANGER ZONE FOR AIRLINES**

While most of the media attention has been on the groundings of thousands of flights and to a lesser degree on skipped airplane safety inspections and botched repairs to wiring, there appears to be another safety issue that really concerns aviation specialists: runway collisions. The chairman of the National Transportation Safety Board, Mark V. Rosenker, made this observation:

*Where we are most vulnerable at this moment is on the ground. To me, this is the most dangerous aspect of flying.*

For the six-month period that ended March 30<sup>th</sup>, there were 15 serious "runway incursions," compared with eight in the period a year earlier.

Another occurred at Dallas-Fort Worth International Airport on April 6<sup>th</sup> when a tug operator pulling a Boeing 777 along a taxiway failed to stop at a runway as another plane was landing, missing the tug by about 25 feet. You can imagine what would have been the result, had a collision occurred.

The last airliner crash in the United States, a regional jet in Lexington, Kentucky, in August 2006, was a runway incursion because the crew tried to take off on the wrong runway. The problem—defined broadly as the unauthorized presence of a plane, vehicle or pedestrian on a runway—continues despite efforts by the Federal Aviation Administration and airports to improve lighting and signs on the ground, to train pilots and to identify intersections that are particularly problematic. Everyone agrees the number of incursions is too large. While runway collisions are caused almost entirely by human error, they are still mostly preventable. The risk can be substantially reduced with existing technology, ranging from paint on the pavement to electronic warning systems. Some of the more sophisticated electronic systems are commercially available, but are not required by the FAA.

The most recent decision by the agency about a new generation of equipment for navigation and surveillance appears to delay the widespread adoption of in-cockpit warning technology by at least more than a decade. Solving the runway incursion problem has been on the National Transportation Safety Board's "most wanted list" of safety improvements since the list was created in 1990. But the FAA's response hasn't kept pace with the demands for action. In fact, the board rates the FAA's response as "unacceptable."

The board recommended in 2000 that the FAA require a collision warning system that would alert crews directly, rather than alerting tower controllers, but the FAA has said that the complexity and expense, in combination, are too great. It has, however, committed to installing more runway status lights, which warn pilots at intersections when a runway is in use. The

board also recommended requiring tower controllers to clear planes for each runway crossing, rather than simply clearing a plane to proceed from a gate to a runway end. So far, the FAA hasn't agreed to that change. Runway safety has loomed larger as a problem partly because other issues have been resolved. For example, in the last decade, all jet airliners have been equipped with systems that make it much harder to accidentally fly into a mountain or collide with another plane. Fire extinguishers and smoke detectors have been put in cargo compartments. Insulation that could feed an in-flight fire has been replaced. But the technology gap that remains between the air and the ground is both striking and alarming.

It's rather ironic that in the air, huge airliners have navigation systems based on Global Positioning System satellites that locate them in the air. It's reported that these are not generally linked to surface maps—which would locate them by taxiway and runway—and that's hard to understand. So as a result, an approaching plane can find a runway end in near-zero visibility, but can then get lost once the plane is on the ground. That simply doesn't make sense considering the advanced technology that's available today.

The *Times* reports that the FAA has announced a plan to embed traffic lights into the pavement in order to stop planes from going into intersections by mistake. And it is expanding use of a system that gives controllers a better view of traffic on the ground. This would involve a radar like screen that may take data from several sources. However, it appears that program will be late and over budget. One product that is commercially available gives warnings of many errors. Honeywell Aerospace makes a runway-awareness and advisory system that combines a GPS receiver with a database of runways and taxiways. It's pretty obvious that there is plenty of work to be done if runway collisions are to be avoided.

Source: *New York Times*

## DALLAS CONTROLLERS FALSIFIED REPORTS

It has been reported by the Federal Aviation Administration that Dallas air-traffic controllers hid dozens of safety errors that allowed planes to fly too close together. Air-traffic officials blamed pilots for the errors when air traffic managers were actually to blame. Though most of the incidents were not serious, a few were classified as significant safety risks. The revelations marked the second time in the past two months that federal whistle-blowers have raised safety concerns at the FAA. The FAA admitted in March that inspectors overseeing Southwest Airlines allowed the carrier to fly planes that had not received critical safety inspections. A subsequent review of all airlines' maintenance triggered massive groundings after additional safety violations were found, disrupting travel for hundreds of thousands of people.

A federal watchdog who shepherded whistle-blower allegations in both cases charged that the FAA suffers from a culture of "complacency and cover up." FAA officials said that the falsification of error reports appears to be limited to Dallas. Hopefully, that's an accurate appraisal. Even so, the problems in Dallas must be remedied. Similar allegations against the Dallas facility were made in 2004 by a whistle-blower and the FAA promised to reform how errors are reported. However, falsification of records continued.

Source: *USA Today*

## HUNTSVILLE BUS CASE REVISITED

Many of our readers probably remember the bus accident that occurred in Huntsville, Alabama, on November 20, 2006. Four students lost their lives and numerous others sustained physical injuries when the bus climbed a median wall and fell off the interstate to the ground below. The bus was equipped with a seat belt for the driver, but it lacked seat belts for the student passengers. Our firm continues to represent the family of Nicole Ford, who died in the crash. Kendall Dunson

is the lead lawyer for the firm in the case. After we filed suit on behalf of Nicole's family, Governor Riley appointed a task force to examine evidence on seat belts in school buses to determine whether the state should change its laws to allow Alabama school buses to include seat belts for student passengers.

After receiving information and testimony from experts, the bus manufacturing industry and safety advocates, the group recommended that Alabama test buses with seat belts statewide. Results from the study will apparently be used to make recommendations to the state legislature either supporting or opposing passenger seat belts on school buses. Regardless of the results of the study, certain parties will oppose seat belts on school buses. Seat belts on school buses increase costs to bus manufacturers, thereby cutting into their profits. Bus companies, such as the defendant in this case, Laidlaw, would be required to increase spending to train their drivers. In addition, school districts would be required to purchase new buses equipped with seat belts. Opponents will argue that changing the state's law would be too expensive.

Proponents of the change will counter that any increased cost is justified because buses with seat belts are safer for our children. Once again, the debate will turn on whether profits are more important than safety. There is little doubt in my mind as to whether school buses should be equipped with seat belts—I am convinced that they should be. There is also little doubt as to what generally takes precedence in far too many debates over vehicle safety—and that's profits. Hopefully, that won't be the case this time. The welfare of children on school buses—who can be protected by seat belts—should tip the scales this time toward safety.

Action by our state legislature could take months, or even years, or a change may not occur at all. In the meantime, bus accidents continue to occur and students are being killed or injured when a seat belt could have eliminated or reduced their injuries and prevented the deaths. Until the laws are changed,

it is incumbent upon bus companies like Laidlaw to ensure that their management and drivers are qualified, competent, have good moral character and follow the rules of the road including wearing their own seat belts, which are installed for drivers, while driving the bus. Our case against Laidlaw is set for trial in November of this year. The quality, competence, moral character and the ability of the driver in this case to follow the rules of the road will be important issues at the trial of this matter. Laidlaw failed to ensure that its employees were fit to perform the most important function of transporting children to and from school. By failing to live up to the requirements of its contract with the City of Huntsville, Laidlaw failed those students who died and were injured. We will keep you updated on the progress of this case. Kendall Dunson is the contact lawyer for our firm on the case. If you want any information on the case or the seat belt issue generally, feel free to contact him at 800-898-2034.

## XVII. ARBITRATION UPDATE

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### ***ARBITRATION SHOULD NOT BE ALLOWED IN CONSUMER CONTRACTS***

Knology, Inc., a leading provider of interactive communications and entertainment services in the Southeast, recently sent its customers a rather interesting notice regarding arbitration. While Knology is forcing customers to give up their right to a jury trial against Knology if it does wrong, the company has retained its constitutional right to a jury trial for actions by Knology against its customers. The exact language reads as follows:

*It is important that you read this section carefully. It provides for resolution of disputes (whether based in contract, tort, statute, fraud, misrepresentation, or any other legal or equitable theory) through*

*final and binding arbitration before a single neutral arbitrator instead of in a court by a judge or jury or through a class action. All disputes arising out of or relating to this agreement (other than actions for the collection of debts you owe us) including, without limitation, any dispute based on any service or advertising of the services related thereto, shall be resolved by final and binding arbitration, which shall be governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 1-16.*

In other words, Knology customers can't sue Knology, but Knology can sue the customers. Now that's real fairness! If arbitration is so fair, then why does Knology want the right to use the court system against its customers?

The notice also includes a limitation on the arbitrators. It states in the notice that an arbitrator may not award either punitive or consequential damages or attorney's fees. Therefore, no matter how bad Knology's conduct happens to be, whether it's intentional and specifically designed to cheat the customers, the company is immune from the awarding of punitive damages as a result of its wrongful conduct. In addition, the notice says that "if we prevail in the arbitration and we show that you acted in bad faith in bringing your claim against us, then we may seek to recover the AM's fees and a reasonable expense of the arbitrator from you." To make sure Knology is protected, the company adds a final sentence that makes certain the company retains the right to sue its customers.

This is a clear example that big businesses do not mean what they say when they talk about the fairness and reasonableness of mandatory, binding arbitration. That's all a bunch of baloney and this sort of thing proves it. What the big corporations want is a playing field that is anything but level. They want the upper hand to prevent individuals from being able to exercise their constitutional right to go to court and seek redress when they are wronged. This is a good example of

why binding arbitration clauses should be illegal and banned in consumer contracts. Since we have elections coming up for U.S. Senate and House seats, it would be a good time to let all of the candidates know how you feel.

#### **CHICKEN FARMERS TO HAVE MORE POWER IN DEALING WITH POULTRY COMPANIES**

The U.S. House of Representatives has voted to give small chicken farmers more power in their dealings with large poultry companies. A provision was put in the \$290 billion farm bill by amendment, which would ban mandatory, binding arbitration in the farmers' contracts with the giant poultry companies. Interestingly, President Bush has threatened to veto the legislation. But the overwhelming support in the House—it passed 318 to 106—means lawmakers will be able to override his veto. The poultry measures, which have attracted little attention in the farm bill debate, would affect the contracts small chicken growers sign with big poultry companies like Tyson and Purdue.

The growers go deeply into debt to build houses in which to raise the chickens and they operate with profit margins that are extremely thin. And, many growers complain, the relationship vests too much power with the poultry companies. Companies can generally cancel contracts at any time with little notice, leaving farmers holding the bag and often times facing bankruptcy. If a dispute arises, the contracts generally ban a farmer from going to court, instead mandating binding arbitration. The provision referred to above would ban mandatory binding arbitration, allowing poultry growers to retain their option of going to court to settle disagreements. Lobbyists for large poultry companies oppose the legislation, saying that "binding arbitration is in everyone's best interest." That's about as false a statement as could possibly have been made. Hopefully, this ban on arbitration will stand.

Source: Media General News Service

#### **CONCERNS ABOUT ARBITRATION IN CHINA**

Arbitration and China's manufacturing system have one thing in common—each is bad for American consumers. Western companies doing business in China are increasingly being asked to agree to what they consider a risky proposition—to resolve disputes through arbitration in China in the event a deal goes sour. Private arbitrations have proliferated internationally as the method of choice for resolving cross-border disputes. They claim to be cheaper and more efficient than court litigation and I wonder where they found that line? Since arbitration is private, bad companies can keep their dust-ups out of the public eye.

These arbitrations typically take place in neutral territory, a country foreign to both companies. But some Chinese companies, especially the state-owned, are pushing for their business contracts with Western companies to stipulate that conflicts go to arbitration in mainland China. Some believe the Chinese companies have such strong bargaining power that they can insist on China-based arbitrations. Investors wanting to get their facilities into China may be willing to give on that subject just to get in. The *Wall Street Journal* had an excellent article on May 9<sup>th</sup>. It relates in great detail how arbitration works in China.

#### **A SIGNIFICANT APPEALS COURT ORDER IN THE CREDIT CARD CASE**

A U.S. appeals court has reinstated a class-action suit against a group of banks that force their credit card customers to use arbitration instead of the courts to settle disputes. The credit card holders alleged that "the banks in combination with other co-conspirators, including American Express Co and Wells Fargo & Co. illegally colluded to force the cardholders to accept mandatory arbitration clauses in their cardholder agreements." The card holders argued that the banks had violated antitrust laws "by refusing to issue cards to individuals who did not agree

to arbitration.” The card holders are asking the court:

- to stop the banks from compelling arbitration;
- to prevent them from continuing their alleged collusion; and
- to invalidate the existing mandatory arbitration clauses.

A lower court judge sided with the banks, which include Bank of America Corp, Discover Financial Services, Capital One Bank, HSBC, JPMorgan Chase & Co, Citigroup Inc, and units of Washington Mutual Inc. and dismissed the case, saying the card holders lacked standing. The panel of three appellate judges from the U.S. Court of Appeals for the Second Circuit disagreed. The court’s opinion said the “cardholders have adequately alleged antitrust injuries.” The card holders are a large class coming from Pennsylvania, New York, New Jersey and California. Joe Ridout, who is with the nationwide nonprofit group Consumer Action, praised the ruling, saying:

*It’s unfair for consumers to have to give up their legal and constitutional rights just to get a credit card.*

This case will be watched closely since it involves “public enemy number one” for consumers, and that’s forced arbitration. It’s good to see the courts recognizing that arbitration should never be allowed to be forced on consumers.

Source: Reuters

## XVIII. NURSING HOME UPDATE

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### **JURY RETURNS A \$6 MILLION VERDICT IN MORPHINE OVERDOSE CASE**

A jury awarded a Tucson family \$6 million recently in a lawsuit brought after an ailing 81-year-old relative died of a morphine overdose. Mary Culpepper

and two other relatives were awarded \$2 million each in the wrongful death lawsuit. Ms. Culpepper sued Manor Care Health Services, Tucson Medical Center, a doctor, a nurse and the pharmacy over the December 8, 2003, death of her mother, Sylvia Culpepper. Her mother was admitted to TMC on December 2, 2003, suffering from sciatica, a painful nerve condition.

Two days after the admission, the patient was prescribed 15 milligrams of morphine twice a day. Two days later, her dosage increased to 30 milligrams, twice a day. When she was transferred from TMC to Manor Care, prescription orders contained both dosages. The Manor Care staff failed to note the discrepancy in the prescriptions and gave her both dosages, both twice a day. An autopsy determined that the woman died of acute morphine intoxication. The jury found the doctor, nurse and pharmacy to be without fault and not to blame for the death. Under the applicable law, Manor Care will pay 90% of the verdict and TMC will pay 10%.

Source: Tucson Citizen

## XIX. HEALTHCARE ISSUES

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### **FDA DEFENDS SAFETY OF BABY BOTTLE CHEMICAL**

The U.S. Food and Drug Administration won’t tell consumers to stop using products such as baby bottles made with BPA, a controversial chemical found in many plastic items, and that should concern the public. Norris Alderson, the FDA’s associate commissioner for science, says that, although the regulatory agency is reviewing safety concerns about the chemical bisphenol A (BPA), “a large body of available evidence” shows that products such as liquid or food containers made with BPA are safe. He made this statement in testimony before a Senate subcommittee. Alderson heads the FDA task force that is reviewing safety concerns surrounding BPA. The FDA’s

reliance on two industry-funded studies were cited for the agency’s determining that products containing BPA are apparently safe. As we have reported, however, many studies have found a variety of health problems in laboratory animals exposed to BPA.

Some senators faulted the FDA and the Consumer Product Safety Commission for failing to protect consumers in this country from BPA as well as phthalates, a class of chemicals used to improve flexibility in plastics. In March, the Senate passed legislation that would impose a nationwide ban on phthalates in children’s toys and products. New York Senator Charles Schumer was critical of the FDA and said the agency was “looking the other way” on safety concerns about BPA. The bill, introduced in April to ban BPA in children’s products, also would direct the Centers for Disease Control and Prevention to study health effects of BPA in children and adults. Consumer groups and other critics have accused the FDA of failing to act on safety concerns regarding BPA and other issues, bowing instead to industry positions.

A draft report, issued in April by the National Toxicology Program, part of the U.S. government’s National Institutes of Health, expressed some concern that BPA had the potential to cause neurological and behavioral problems in fetuses, infants and children. That should be enough to at least put the FDA on notice that there may be a serious problem with BPA. Relying on animal studies, the National Toxicology Program said there was evidence suggesting links between BPA exposure and early puberty and prostate and breast cancer in people. The National Toxicology Program is the first federal agency to embrace such concerns.

It’s reported that some retailers, including Wal-Mart and Toys R Us, will stop selling certain items made with BPA. As has been reported, BPA is used to make polycarbonate plastic, a clear shatter-resistant material in products ranging from baby and water bottles to sports safety equipment and medical devices. It also is used to make durable epoxy resins used as the coating in

most food and beverage cans and in dental fillings. People can consume BPA when it leaches out of plastic into liquid such as baby formula, water or food inside a container.

Source: *Associated Press*

#### **FAMILIES ARE PRESENTING CASE FOR VACCINE LINK TO AUTISM**

The Institute of Medicine said in 2004 there was no credible evidence to show that vaccines containing the preservative thimerosal led to autism in children. But thousands of families have a different take based on personal experience. Some of them have gone to court and are attempting to show that the mercury-based preservative triggers symptoms of autism. Two 10-year-old boys from Portland, Oregon, will serve as test cases to determine whether many of the children and their families should be compensated. Lawyers for the boys will attempt to show the boys were happy, healthy and developing normally—but, after being exposed to vaccines with thimerosal, they began to regress. Thimerosal has been removed in recent years from standard childhood vaccines, except flu vaccines that are not packaged in single-doses. The CDC says single-dose flu shots currently are available only in limited quantities. In 2004, a committee with the Institute of Medicine concluded there was no credible evidence that vaccines containing thimerosal caused autism.

Overall, nearly 4,900 families have filed claims with the U.S. Court of Claims alleging that vaccines caused autism and other neurological problems in their children. Lawyers for the families are presenting three different theories of how vaccines caused autism. The Office of Special Masters of the claims court has instructed the plaintiffs to designate three test cases for each of the three theories—nine cases in all—and has assigned three special masters to handle the cases. Three cases in the first category were heard last year, but no decisions have been reached. The two cases that

started on May 12th are among the three that focus on the second theory of causation: that thimerosal-containing vaccines alone cause autism. The plaintiff in the third case originally scheduled for hearing in May withdrew. Lawyers and court officials were working at press time to agree on a substitute case. The suit currently being heard is against the Department of Health and Human Services. The plaintiffs are asking for unspecified compensation for the injuries suffered. Damages supposedly would cover lost income after the person turns 18 and up to \$250,000 for pain and suffering.

Hearings in the test cases for the third theory of causation are scheduled in mid-September. Lawyers for the petitioning families in the current cases being heard will present evidence that injections with thimerosal deposit a form of mercury in the brain. That mercury excites certain brain cells that stay chronically activated trying to get rid of the intrusion. The families' attorneys hope to convince the special master hearing their case that thimerosal belongs on the list of causes for the inflammation that leads to regressive autism.

The case referred to above, which was still being tried at press time, was scheduled to last for several weeks. A final decision could take several more months. The families or the federal government can also appeal the decision of the special master to the Court of Federal Claims or to a federal appeals court. The court Web site says more than 12,500 claims have been filed since creation of the program in 1987, including more than 5,300 autism cases, and more than \$1.7 billion has been paid in claims. It says there is now more than \$2.7 billion in a trust fund supported by an excise tax on each dose of vaccine covered by the program.

Source: *Associated Press*

#### **DENTISTS WARN OF LEAD IN CROWNS**

The American public has been bombarded with almost daily news accounts of lead problems relating to

children's toys brought in from China. Another problem involving lead concerns its use by dentists. The American Dental Association has launched an investigation to find out the extent to which lead is used in bridges, crowns and fillings. The group has warned patients to make sure they know exactly what their dentist is putting into their mouths. The ADA confirmed last month that bridges, crowns and fillings put into people's mouths was testing positive for lead. The tainted crowns, which come from China, were seen as a way for U.S. dentists to cut costs. It's reported that patients pay about one-sixth as much for a Chinese-made crown as they would for a domestic, American crown. It's the patients who could end up paying a real price, however, because they're the ones fitted with dental work that can carry five times the amount of lead allowed in toys. The ADA is now testing both foreign- and domestic-made crowns to determine if they release lead into the patients' mouths once they're put in. In the meantime, many dentists are telling folks not to take any chances. It's recommended that patients need to have a very serious discussion with their dentist about the possibility of lead in a crown. Officials warned that even crowns from American companies could contain lead because they often outsource their work to Chinese-based manufacturers.

Source: *Associated Press*

## **XX. ENVIRONMENTAL CONCERNS**

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#### **OIL FIRMS SETTLE CLAIMS IN MTBE LEAK CASES**

About a dozen of the nation's largest oil companies have agreed to pay \$423 million to settle litigation with 153 public water providers in 17 states that had sued over groundwater contaminated by the gasoline additive methyl tertiary butyl ether (MTBE). The compa-

nies also agreed to pay cleanup costs that arise in the next 30 years. Terms of the settlement have been submitted for court approval in the U.S. District Court in the Southern District of New York. The settlement is the largest to date in a case involving the oil-refining byproduct. During the 30 years that oil companies added MTBE to gasoline to curb smog emissions, leaky storage tanks released the additive into the water table in communities throughout the United States.

MTBE is a chemical added to gasoline to boost its octane level and cut air pollution. It was first added to gasoline in 1979, but its use declined after it was banned in a number of states. Since 2006, MTBE has been replaced by other ingredients, including ethanol and alkylate. MTBE has been found in ground water, including in drinking water supplies of several communities. The EPA says the chemical is a potential human carcinogen at high doses, although it is unclear at what level it poses a health risk. MTBE moves quickly through soil and into groundwater from leaks in gasoline storage tanks and that is certainly well-documented.

MTBE has been detected in at least 36 states and has been banned in 23, including California and New York, which accounted for 40% of total MTBE consumption in the country. Fortunately, the settlement doesn't shield defendants from liability in the event MTBE is shown in the future to carry human health risks. MTBE producers have argued that, because the government mandated the addition of oxygenates to gasoline to help curb smog, the companies shouldn't be held liable for MTBE damages. The companies in the settlement include BP America Inc., a unit of BP PLC; Chevron Corp.; ConocoPhillips; Shell Oil Co., an arm of Royal Dutch Shell PLC; Marathon Oil Corp.; Citgo Petroleum Corp.; Sunoco Inc.; and Valero Energy Corp. At least six companies have refused to settle, the largest being—to nobody's surprise—ExxonMobil Corp. As I have learned in litigation, this company sincerely believes it is above the law.

Past estimates indicate that it may

take as much as \$30 billion to remediate all tainted sites. The local water providers will be compensated according to a formula based on MTBE levels and the size of wells. If MTBE is found to surpass the specified threshold at a given site during the next 30 years, defendants will pay 70% of the water-treatment cost for ten years from the point of detection. Payments will end if the affected area is deemed MTBE-free for one year. At the end of the ten-year period, payments can be extended five more years if the water source still shows a certain level of contamination. The affected community would be barred from suing over the contamination. The law firms of Baron & Budd P.C. and Weitz & Luxenberg P.C. represented the plaintiffs in this litigation and did an outstanding job.

Source: *Wall Street Journal*

#### **EPA MAY NOT LIMIT THE AMOUNT OF A TOXIN IN WATER SUPPLIES**

A top Environmental Protection Agency official told a Senate committee recently that there was "a distinct possibility" that the agency would not limit the amount of perchlorate, a toxic ingredient of solid rocket fuel, that is allowable in drinking water. State officials and water suppliers across the nation have been waiting for the EPA to set a standard for several years because perchlorate has contaminated the water supplies of at least 11 million people. Last year, California, tired of waiting on the EPA to act, set its own standard. The EPA will decide by the end of the year whether to regulate perchlorate. Scientific studies have shown that the chemical blocks iodide and suppresses thyroid hormones, which are necessary for the normal brain development of a fetus or infant.

The Senate Committee on Environment and Public Works, which is chaired by Barbara Boxer (D-CA), is conducting the hearing. When the EPA representative told the senators that it was "a distinct possibility that the agency would take no action." Senator Boxer was not very happy to hear that the EPA might not even set a minimum

standard. The Senator says the EPA is leaving Congress with little choice but to act on its own. She has introduced two bills that would order the testing of water supplies for perchlorate and require the EPA to set a standard within one year, based on scientific evidence showing what levels can cause harm to fetuses. Senator Boxer warned:

*Congress will not sit idle while EPA fails to adequately protect our children. We must step in to require action that will ensure that our children and families can turn on their taps and be assured that what comes out is safe to drink.*

Much of the water contamination comes from military bases and aerospace plants, as well as fireworks companies. The Pentagon and its contractors for years have been lobbying against a federal standard, saying there are no proven health effects at levels to which people are exposed, and that cleaning up perchlorate could cost billions of dollars. George Alexeeff, deputy director of California's Office of Environmental Health Hazard Assessment, told the committee that California had "sufficient data" to act two years ago, when his agency determined how much perchlorate was safe. California officials were particularly concerned because the Colorado River, a primary drinking water source for Southern California, is contaminated. Contamination is also widespread in much of the Los Angeles region, particularly in Riverside and San Bernardino counties. The chemical also is found in dairy products and food crops, as well as human breast milk and baby formula. Scientists reported in 2005 that it was contaminating "virtually all" human breast milk samples.

Source: *Los Angeles Times*

#### **EPA CHAMPION GOES DOWN FIGHTING**

Occasionally there will be a person who is willing to take on the powerful special interests and who seems destined to be able to make a real difference. One such person, Mary Gade, has

been the administrator for EPA Region 5 since being appointed by President Bush in September 2006. Since then a large portion of her time has been spent negotiating with Dow Chemical in an attempt to clean up the extensive dioxin contamination in and around the company's headquarters in Midland, Michigan. Last summer Ms. Gade had to invoke emergency powers to order the company to remove three hotspots of dioxin near the headquarters. In November, she demanded more dredging when a Saginaw park registered dioxin levels of 1.6 million parts per trillion, the highest amount ever documented in the United States. Ms. Gade then sought to negotiate a more comprehensive cleanup, which was obviously needed. She ended these negotiations in January, noting that Dow was refusing to take the action necessary to protect public health.

This announcement by Ms. Gade angered Dow and it quickly appealed to certain high-ranking officials in Washington. In April, the powers-that-be in Washington jumped Ms. Gade for sending contractors to test soil in a Saginaw neighborhood where Dow had already reported levels of dioxin six times greater than the national standard. I don't believe that political pressure should be able to curtail the regulatory activities of any federal agency and certainly not the EPA.

Let's take a brief look at Dow's Dioxin record and see what Mary Gade was up against. Dow released dioxin into the waterways for most of the last century, not ceasing until the mid-1980s. Dioxin, measured in trillionths of a gram because it is so toxic, was a manufacturing byproduct of the herbicide Agent Orange and other chlorinated chemicals. Company documents show Dow knew by the mid-1960s that it could make people sick or even kill them. Citing years of independent studies, the EPA says dioxin causes cancer and disrupts the immune and reproductive systems, even at very low levels. As you will likely recall, concerns about dioxin contamination were behind two of the most infamous environmental disasters in U.S. history: the evacuations of the

Love Canal neighborhood in upstate New York and the entire town of Times Beach, Mo. Those events received worldwide attention. But in the Saginaw area, cleanup remains stalled, mainly because Dow asserts the contamination does not threaten people or wildlife. Can you believe that?

So we now go back to Ms. Gade, who found herself at the center of the dispute, simply because she was trying to do her job. Ms. Gade, who as a corporate lawyer had represented big companies like Dow against environmental regulators, knew exactly what she was up against. Her aggressive action against Dow, local activists and her Washington bosses put her job at risk. But she still won high marks from EPA officials during her last performance evaluation. The steps Ms. Gade took were influenced in part by her experience as an EPA staffer during the early 1980s, when the agency's top official in Washington was forced to resign after he allowed Dow to censor an EPA study documenting dioxin's dangers. Ms. Gade found herself being forced to resign on May 1<sup>st</sup>. In her resignation, Ms. Gade observed:

*We have a responsibility to make sure people are living in a healthy and safe environment. This problem has been out there for more than 30 years, and it's unconscionable that action hasn't been taken.*

It is truly a shame when people like Mary Gade are forced to resign for simply doing their job—which is to regulate large corporate polluters—and have to fight both the polluters and the politicians in Washington. Just when you think you have seen the worst from the Bush Administration relating to protecting the environment, this sort of thing happens. The Bush crowd continues to punish those in government service who don't do exactly what corporate America wants and demands. The voting public will have the last say in November and Bush will go back to Texas. He will have plenty of time to reflect on the great damage he has done to America!

Source: *Chicago Tribune*

## **CONSUMERS ARE NOT THE ONLY ONES LEFT IN THE DARK**

As most Americans know, consumers have battled with companies for years trying to find out the dangers of their products. A significant amount of discovery in any products liability suit is aimed at determining what a company that designed and manufactured a product knew and when. Now the companies face another disclosure issue as shareholders find themselves surprised by the financial impact to their portfolios caused by successful lawsuits and product recalls. A recent study by Investor Environmental Health Network (IEHN), a collaborative partnership of investment managers, reviewed thousands of SEC filings. The study revealed that companies are failing to disclose financially important information on product toxicity risks despite SEC shareholder disclosure requirements. The consuming public aren't the only folks being left in the dark—it appears corporate shareholders are in the same boat.

Key findings from the study involved the knowledge of American toy companies of the risks of using Chinese imports, and the probable effects of the European Registration, Evaluation, Authorization, and Restriction of Chemicals (REACH) program due to go into effect later this year. Products linked to asthma, and concerns over nanomaterial, are among those that could cause difficulty for the manufacturers.

Some investors are already working to compel companies to disclose these risks by way of shareholder resolutions. Additionally, the IEHN report recommended that the SEC get more involved. Hopefully they will. However, it's not clear what success the commission will have. The attempts in this area thus far haven't been very notable. More information disseminated to the public can only make our society a safer place and that is very clear. It will be interesting to see how the battle for more and better corporate disclosure will turn out. We hear lots of politicians talking about a concept they call

“transparency.” Let’s see if they will back up their words.

Source: *Investor Environmental Health Network*

### **TOXIC PLUME CLEANUP SCHEDULED FOR 18 YEARS AFTER DISCOVERY**

Residents of a St. Petersburg, Florida neighborhood are concerned about the safety of their families, and for good reason. A toxic plume caused by 1,4-dioxane, TCE and vinyl chloride, all considered hazardous to humans, has migrated to the groundwater beneath their homes and parks. It was discovered 17 years ago by workers building the Pinellas Trail, a linear park and recreational trail which makes use of unused railroad easements and other rights-of-way. This plume was left untreated and has been migrating toward the Boca Ciega Bay and its seagrass, oyster beds, and marine life. Of imminent concern is the effect on the neighborhood that sits above its current location.

The plume currently lurks below hundreds of homes, parks, and playgrounds. Many of the homes use private wells to water their lawns. While a handful of the relatively shallow private wells were tested and found not contaminated, the test wells have shown the presence of the plume. Residents are frustrated at the lack of response by their government. Despite the issuance of 204 private well licenses within a half-mile of the Raytheon plant, no action has been taken by the DEP. Instead, it refers to the company’s obligation to test every private well within a quarter mile of the plume. The fact that DEP’s records only show the company testing one private well in the last 16 years does not comfort the residents.

It should be noted that Raytheon inherited the problem from the former owner of the plant site. Though the company produced newsletters in 1999 detailing the contamination, there is no evidence of additional notifications since environmental technicians identified the migration three years ago. The company claims the plume

isn’t a threat to the neighborhood and expects to finish its assessment and start the initial cleanup sometime next year. In the meanwhile, two class-action lawsuits have been filed against Raytheon Corp. on behalf of residents.

Source: TBO

### **\$25 MILLION SETTLEMENT REACHED IN COLSTRIP LAWSUIT**

A water contamination lawsuit against eastern Montana’s Colstrip power plant has been settled. The plant’s five corporate owners have agreed to pay \$25 million to settle the case. The 57 plaintiffs—including some plant workers—alleged plant officials knew the plant was contaminating water supplies beneath at least one Colstrip subdivision for four years before notifying the community. It was alleged that a second subdivision and trailer park also suffered contamination. No sicknesses resulted, but many homeowners and the Colstrip Moose Lodge lost use of their underground wells. It was difficult for the companies to dispute that a problem existed since the wells were tested and came up contaminated.

The lawsuit, filed in 2003, had been scheduled to go to trial this month. The defendants were PPL Montana, Puget Sound Energy, Portland General Electric, Avista Corp., and PacifiCorp. The contamination originated in the smokestacks of the plant and was removed to meet clean air requirements. At least two of the holding ponds where the toxins were dumped leaked.

The 2,100 watt plant is operated by PPL Montana to generate electricity for west coast markets. PPL acquired the plant in 1999, two years after the public disclosure of the contamination, as part of its acquisition of the Montana Power Company. While a PPL spokesman acknowledged the plant had contaminated a near-surface aquifer that would not affect the deeper residential wells, plaintiffs claimed many local wells had been contaminated. Additionally, they claimed the companies were responsi-

ble for leakage in sufficient quantities to raise the water level under the town causing structural damage to some homes.

Source: *Associated Press*

## **XXI. TOBACCO LITIGATION UPDATE**

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### **FLORIDA SMOKERS TO BE PAID FROM A \$600 MILLION TOBACCO FUND**

Tens of thousands of ill Florida smokers and families of those who died will share in a \$600 million fund created by major tobacco companies as part of a 14-year-old lawsuit against cigarette manufacturers. The Florida Supreme Court in 2006 threw out a massive \$145 billion damage award in the case, but the tobacco companies had previously set up the fund to be paid out even if the appeal failed. Recently, a Miami judge ordered the money divided equally among all Florida smokers who became ill before November 21, 1996. The total number of people who could qualify for payment is estimated at between 10,000 and 50,000.

There is a registration deadline of June 16 for the Engle Trust Fund, named for Miami Beach pediatrician Howard Engle who led the original group that filed the lawsuit in 1994. Applications can be mailed or filed via the Internet and are available at <http://www.engletrustfund.com>.

People who seek damages must submit proof of illnesses such as cancer, emphysema and heart disease that are linked to cigarette smoking. Some of the people involved in the case from the beginning are unhappy that Miller decided to distribute the money equally rather than focusing on the original class.

When it tossed out the original damage award, the state Supreme Court upheld a jury’s findings that the tobacco companies sold dangerous

products and hid the dangers of smoking. The 2006 decision authorized individual smokers to sue the companies on that basis, and more than 7,000 cases were filed by a January deadline. Tobacco company officials said they would vigorously defend themselves against the individual lawsuits. They also questioned whether people would be able to prove that misleading statements in cigarette advertising were a key factor in their decisions to smoke.

The defendant companies were Philip Morris USA (a subsidiary of Altria Group Inc.); R.J. Reynolds Tobacco Co. (a unit of Reynolds American Inc.); Brown & Williamson (now part of Reynolds American); Lorillard Tobacco (a Loews Corp. subsidiary); and the Liggett Group (part of Liggett Vector Brands Inc.) Stanley and Susan Rosenblatt filed the original lawsuit and did a tremendous job. They fought the good fight—never gave up—and should be commended by all of us for standing up for victims of the tobacco industry.

Source: Associated Press

## XXII. THE CONSUMER CORNER

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### **CHILD SEAT RECALL RAISES MORE QUESTIONS**

A recent recall involved one million Evenflo Discovery child restraints because of “catastrophic” failure in a crash test. Interestingly, the National Highway Traffic Safety Administration has refused to reopen an early investigation into an earlier Discovery model that may have a similar failing. The 2004 investigation found that eight infants died and 23 were injured in crashes after the Discovery model 561 in which they were seated came apart. That is the very same problem responsible for the recall earlier this year of newer Discovery models. After four months, the agency closed that 2004 investigation, which covered about 2.6 million seats built from 1998 to 2004.

Investigators said they could not find a defect and that some of the crashes occurred at high speeds. But the agency also noted that ending the investigation didn’t mean there wasn’t a defect, and that they reserved the right to reopen the case.

The Discovery models are for infants and face the rear. They are designed to be more convenient because the portion in which the baby is secured has a handle. It can be disconnected from the base, which is anchored to the vehicle. NHTSA discovered the “catastrophic” failure of the newer Discovery model last year during its regular side-impact crash tests of different vehicles. The newer Discovery seat came apart even though it was in a relatively protected spot—on the far side of the vehicle, away from the ram that caused the crash-test damage.

Evenflo eventually agreed to recall Discovery models 390, 391, 534 and 552, produced from April 2005 to January 29, 2008. But company officials have not admitted that those units contain a “safety related defect.” Evenflo claims the recalled seats are different from the ones investigated in 2004. The recalled models have an “additional load-bearing structure including reinforced and new buttressing ribs and thicker walls,” according to the company.

The fact remains—some of those old Discovery 561 models could still be in use. For that reason, NHTSA should reopen the old investigation. As pointed out by Christopher Jenson on *MSNBC*, the agency “could take one of the Discovery 561 seats, strap it into a vehicle scheduled to go through a side-impact test anyway and see what happens.” As he aptly pointed out, “if the Discovery 561 comes apart, the model could be recalled.” Apparently, NHTSA has no plans to reopen the 2004 investigation, because it accepts the company’s assertion that the Discovery model that was recalled is different from the model investigated in 2004.

Source: *MSNBC*

### **U.S. IDENTIFIES TAINTED HEPARIN IN 11 COUNTRIES**

A contaminated blood thinner from China was found in drug supplies in 11 countries. Federal officials have discovered a clear link between the contaminant and severe reactions now associated with 81 deaths in the United States. The contaminant was found in the drug heparin. Dr. Janet Woodcock, director of the Food and Drug Administration’s drug center, said that German regulators uncovered a cluster of illnesses among dialysis patients who took contaminated heparin. Dr. Woodcock, who said Chinese officials had conceded that heparin produced in their country contained a contaminant though they say it was not connected to the illnesses, observed:

*Heparin should not be contaminated, regardless of whether or not that contamination caused acute adverse events. We are fairly confident based on the biological information that we have had that this contaminant is capable of triggering these adverse reactions.*

The dispute is a sign of growing tensions between China and the United States over the safety of Chinese imports. China has in recent years exported poisonous toothpaste, lead-painted toys, toxic pet food, tainted fish and now, contaminated medicine. We have written on the problems relating to heparin in earlier issues of the Report and also in this issue.

The contaminant, identified as over-sulfated chondroitin sulfate, a cheaper substance, slipped through the usual testing and was recognized only after more sophisticated tests were used. The FDA has identified 12 Chinese companies that have supplied contaminated heparin to 11 countries—Australia, Canada, China, Denmark, France, Germany, Italy, Japan, the Netherlands, New Zealand and the United States. According to Deborah Autor, director of compliance at the FDA’s drug center, the agency did not know the original source of all the contamination or the points in the supply chain at which it

was added. Officials have discovered heparin lots that included the cheap fake additive manufactured as early as 2006, although a spike in illnesses associated with contaminated heparin began in November and persisted through February.

Source: *New York Times*

#### **SETTLEMENT REACHED FOR CHILD IN SUIT AGAINST TOYMAKER**

I am afraid that many Americans fail to grasp how serious the effects of toys with hazards can be to small children. A settlement reached in a lawsuit involving great harm done to a young child as the result of swallowing a pair of button magnets is an example of how bad the results can be. William Finley, a 4-year-old, became violently ill on August 2, 2005. At first, doctors were unable to diagnose his ailment. Finally, after two hospital visits, the child had emergency surgery. The surgeon found and removed the magnets which were stuck together within his pelvis. The magnets had come from a “Magnetix” toy the little boy had received the previous Christmas. But for the surgery, the child would have died within hours. Even now, his future will be filled with health issues which will be both costly and dangerous.

The settlement agreement calls for incremental payouts of more than \$1 million to William and his parents. It’s reported that the child, who must remain on a special diet for the rest of his life, will endure persistent constipation and diarrhea and severe abdominal pain. He also will be at risk of developing lifelong gastrointestinal problems. The child’s mother will immediately receive \$20,000 from Rose Art Industries, the New Jersey manufacturer of the toy. William’s problems have caused the entire family to suffer greatly. For example, his mother lost her job because of having to care for her child and the family car had to be sold because of the mounting expenses.

Rose Art will invest in an annuity that will pay William, now seven years old, \$100,000 on his 30<sup>th</sup> birthday, \$200,000

on his 40<sup>th</sup> birthday and \$418,000 on his 50<sup>th</sup> birthday. Montreal-based Mega Brands, which bought Rose Art in 2005, will invest in an annuity that will pay William \$5,000 semiannually between July 1, 2019, and January 1, 2024, and \$508 a month during the same period. While all of this sounds very good, the actual cost to the defendants is much less than the total of all the structured payments.

While there was a “choking hazard” label on the Magnetix sets, there was nothing to warn that the tiny magnets that held its pieces together were so powerful that, if ingested, could attract one another and cause intestinal blockages and perforations resulting in serious injury and death. It was alleged in the lawsuit that even after being notified of the potential dangers of the toy, Rose Art failed to institute any clearer warning or conduct a recall of the Magnetix toys. This inaction was said to have led to the serious injury of over 20 children nationwide and to have resulted in one death.

Mega Brands, which is publicly traded on the Toronto Stock Exchange, settled other lawsuits similar to the Finleys’ suit for a total of \$14 million. Magnetix is a modern-day tinker-toy set that attaches parts by magnets imbedded in the ends of various-size plastic sections. In 2005, they were advertised as appropriate for ages “3 to 100.” The recommended minimum age has since been changed to six. By March 2006, when the first of two recalls of the toy was announced, Mega Brands told the *New York Times* it had redesigned Magnetix, reinforcing the casing surrounding the magnets and was using a stronger adhesive to keep them from falling out. By June 2006, the products had a new caution label warning against the ingestion of magnets, according to the company. This case is a tragic reminder of how dangerous many toys are and especially for very small children. Most parents would never believe swallowing a small part of a toy could cause such pain, suffering and misery, but the manufacturers know that this sort of result is likely.

Source: *Sacramento Bee*

#### **CPSC PROMOTES THE BUILDING OF SAFER PLAYGROUNDS**

Now that the school year has ended, and we approach the summer months, children will be heading in mass to the playgrounds across the land. You can drop by any playground and you are bound to find dozens of active children swinging, sliding, climbing and having a good time. However, a good time on the community or school playground can be spoiled by a fall, entrapment, cut, or another type of injury. Each year, about 200,000 children are treated in hospital emergency rooms for injuries related to playground equipment.

The CPSC has released an update to the popular *Handbook for Public Playground Safety*. The handbook contains guidance for childcare personnel, school officials, designers, inspectors, parents and school groups on building safer playgrounds. Considered by many to be the model handbook of playground safety, the agency’s guidelines for public playgrounds have been incorporated by many municipalities into local and state building codes. The handbook provides specifications for creating safer play zones and avoiding hazards with equipment such as sharp points, entrapments, and entanglements.

The updated *Handbook for Public Playground Safety* contains new guidelines from CPSC staff for playground equipment for children as young as six months old, track and log rolls for older children, and playground surfacing, as well as suggestions on protecting children from sun exposure on playgrounds. CPSC offers the following tips to help prevent injuries and other hazards on public and home playgrounds: The Commission provides these important life-saving tips:

- Always supervise children on play equipment to make sure they are safe.
- Purchase playground equipment that meets the latest safety standards.
- Maintain at least nine inches of protective surfacing, including shred-

ded/recycled rubber, wood chips, wood mulch (non-CCA treated), sand or pea gravel under and around playground equipment to cushion children from falls.

- Check that protective surfacing extends at least six feet in all directions from play equipment. For swings, extend protective surfacing in front and back of the swing, twice the height of the suspending bar.
- Repair sharp points or edges on equipment. Replace missing hardware and close “S” hooks that can cause injuries.
- Never attach ropes, jump ropes, clotheslines, pet leashes or cords of any kind to play equipment due to the strangulation hazard.

To order free copies of the CPSC staff’s updated *Handbook for Public Playground Safety* (CPSC-325), CPSC’s *Outdoor Home Playground Handbook* (CPSC-324, PDF), *Home Playground Safety Checklist* (CPSC-323), or any CPSC publication, email us at [info@cpsc.gov](mailto:info@cpsc.gov). CPSC publications can also be downloaded at [www.cpsc.gov](http://www.cpsc.gov). You can find more information about National Playground Safety Week at [www.playgroundsafety.org](http://www.playgroundsafety.org) the Web site for the National Program for Playground Safety.

Source: CPSC

### **ALL OF US SHOULD USE HEAD RESTRAINTS CORRECTLY**

Lots of folks pay little attention to the head rests in their vehicles. They are in there for a purpose and should be used properly. Positioning your head rest—or head restraint—appropriately can help protect your neck from injury during a rear collision. In fact, you should always adjust the head restraint to fit you properly, just like wearing your seat belt. The Insurance Institute for Highway Safety (IIHS) recommends adjusting the head restraint, or seat, so that:

- The top of the head restraint is posi-

tioned even with the top of your head or at least level with the top of your ears.

- There is little space between your head and the head restraint, preferably less than four inches.

For more information, go to [www.IIHS.org](http://www.IIHS.org).

Source: IIHS

## **XXIII. RECALLS UPDATE**

### **FORD RECALLING MORE THAN 655,000 TRUCKS OVER HOSE**

Ford Motor Co. is recalling more than 655,000 Ford F-150 and Lincoln Mark LT pickup trucks to fix a hose that could affect the vehicles’ braking power. The recall includes 2005-2006 versions of the trucks with 5.4 liter 3-valve engines. According to Ford, more than 600,000 of the trucks are in the United States and about 50,000 are in Canada. About 1,500 are in other countries around the world. Ford says there have been 11 minor accidents and no injuries tied to the issue. Dealers will replace the hose at no charge to consumers. Owners are expected to be notified in late June, and the recall is expected to begin in July. For more information, owners can contact Ford at (800) 392-3673. Ford Motor Co.: <http://www.ford.com>. You can also get more information on the recall by going to NHTSA’s Web site, [www.NHTSA.gov](http://www.NHTSA.gov).

### **TOYOTA RECALLS 2008 HIGHLANDER**

Toyota is recalling 90,189 2008 Highlander and Highlander Hybrid vehicles equipped with a third-row seat to correct a faulty seatbelt component. In its summary of the problem, the NHTSA says there is a concern that the seatbelt webbing could spool out during normal driving maneuvers, “which could affect the stability of a child restraint installed at those seating positions.” This could “discourage the

use of a child restraint, and in the event of a crash, the child may not be adequately protected, possibly resulting in injury.” NHTSA said the automatic locking retractor on the seatbelts in the third row deactivates before the webbing is fully retracted, so that it will not lock when certain rear-facing child restraint systems that have a short seatbelt routing path are installed in the vehicle. Toyota dealers will install a newly designed seatbelt component free of charge. At press time, the automaker had not provided NHTSA with an owner notification schedule for the recall. Owners can contact Toyota at (800) 331-4331.

### **TJ POWER SPORTS RECALLS DUNE BUGGIES DUE TO EJECTION HAZARD**

TJ Power Sports LLC, of Irving, Texas, has recalled about 400 Twister Hammerhead Dune Buggies. The seat belt adjustment for the shoulder buckle can break during impact or stress, posing an ejection and injury hazard to driver and passenger. TJ Power Sports has received one report of a seat belt breaking that resulted in nerve damage to the rider’s right arm. This recall involves the dune buggies “Twister Hammerhead” with model number UM150IIR and model year 2004. The dune buggies were available in red, blue, or green. “Twister Hammerhead”, the model number, and the model year can be found imprinted on the bar behind the driver and passenger seats. They were sold through Twister dealers nationwide and online retailers from July 2004 through December 2004 for about \$3,000. Consumers should stop using these dune buggies immediately and contact TJ Power Sports for instructions on how to receive a replacement seat belt. For additional information, contact TJ Power Sports toll-free at (877) 857-7678 or visit the firm’s Web site [www.tjpowersports.com](http://www.tjpowersports.com).

### **LAWN MOWER RECALLED**

About 530 LawnBott lawn mowers, made in Italy by Zucchetti Centro

Sistemi S.P.A. and imported by Kyodo America Industries Co. LTD., have been recalled. It was because the cutting blades continue to rotate when the mower is lifted from the ground, posing a laceration hazard to consumers. Also, the spacing on the side of the lawn mower could allow room for a consumer's foot to be struck by the blade. Kyodo America has received one report of a consumer lifting the mower from the ground and suffering minor lacerations from the moving blade. The recalled products, with the model numbers LB2000, LB2100, LB3000, and LB3200, are robotic lawn mowers that automatically cut grass by detecting the signal of a perimeter cable. They were sold at Kyodo America dealers nationwide from January 2006 through December 2007. Details: by phone at 877-465-9636; by Web at [www.lawn-bott.com](http://www.lawn-bott.com) or [www.cpsc.gov](http://www.cpsc.gov).

#### ***PRESCRIPTION DRUG RECALL***

Actavis Totowa LLC is recalling all lots of the prescription drug Digitek, used to treat heart failure and abnormal heart rhythms, because some of the drug's tablets might contain twice the approved level of the active ingredient. Eleven people have reported getting sick after taking the drug. The Morristown, New Jersey, company says it's not aware of any deaths. The drug was distributed by Mylan Pharmaceuticals Inc. under a "Bertek" label and by UDL Laboratories Inc. under a "UDL" label. For more information, consumers can call 888-276-6166 or visit <http://www.actavis.us>. Any reactions should be reported to the Food and Drug Administration's MedWatch adverse event reporting program at <http://www.fda.gov/medwatch/report.htm>.

#### ***ABOUT 2,000 BECO BABY CARRIERS RECALLED***

The U.S. Consumer Product Safety Commission has issued a voluntary recall for 2,000 Beco Baby Butterfly Carriers. The shoulder straps of the baby carriers can unexpectedly

release tension, causing the straps to slip through and pose as a fall hazard. The baby carriers were made by Beco Baby Carrier Inc. of Newport Beach California and were sold between January 2008 and February 2008. The recalled carriers have a black label with a green "b" logo on the left side and a butterfly on the right side. Anyone who has one of the recalled carriers should stop using it immediately. Consumers can contact the company by calling a toll-free number at (888) 943-8232/9-GET-BECO and return the product for repair.

#### ***RIO FOLDING BEACH CHAIRS RECALLED***

About 800 Rio Beach High-Boy folding beach chairs, made in China by Rio Brands, have been recalled because the chair's rear leg can break, posing a fall hazard. The company has received one report of an incident involving minor bruises. The recalled chair has a wooden arm with an attached storage pouch and cell phone pocket. The chairs were sold at stores nationwide from January through March this year. Details: by phone at 800-866-8520 ext. 351; by Web at <http://www.rio-brands.com> or <http://www.cpsc.gov>.

#### ***DEWALT RECALLS TABLE SAWS***

DEWALT has announced a voluntary recall of table saws. The DEWALT DW744 Jobsite Table Saw was recalled amid concerns the saw could cause lacerations. The recalled saw is yellow and black and was sold from April 2007 through January 2008 for about \$500. The company said the pivot bracket on the saw can separate, misaligning the blade and causing kick back. The company said no injuries have been reported in connection with the recall. For more information about the recall, visit [www.dewalt.com](http://www.dewalt.com).

#### ***LOWE'S IS RECALLING CHILDREN'S STORAGE BINS***

Lowe's is recalling about 84,000 children's storage bins. Surface paint on the

storage bins could contain excessive levels of lead, violating the federal lead paint standard. The recalled storage bins are wooden with scalloped edges and were sold in pastel green or pink. Item number 226782 (pastel green storage bin) or 226781 (pink storage bin) is located on the bottom of the storage bin. No other storage bins or colors are included in this recall. The bins, which were made in Taiwan, were sold at Lowe's retail outlets nationwide from March 2007 through February 2008 for about \$6. Consumers should immediately take the recalled storage bins away from children and return them to any Lowe's store for a full refund. For additional information, contact L G Sourcing toll-free at (866) 493-6563 anytime, or visit [www.lowes.com](http://www.lowes.com).

#### ***GAS GRILLS RECALLED DUE TO FIRE HAZARD***

About 4,800 Broil King gas grills, manufactured in Canada by Onward Manufacturing Co., have been recalled because the bottom of the burner-containing cook box can melt or crack if a grease fire occurs. This poses a burn and fire hazard. No injuries have been reported. The grills were sold by independent retailers around the country between February 2006 and April 2008. Consumers can receive a free repair kit by calling (866) 434-7455 or by Web at [www.broilkingbbq.com](http://www.broilkingbbq.com).

#### ***PLAYWORLD SYSTEMS RECALLS SWING SETS***

Playworld Systems is recalling about 17,000 swing sets. The clevis bearing on the swing set can wear, causing the swing to detach and the user to fall. No incidents or injuries have been reported. Authorized dealers sold the swing sets, which were made in the United States, to day care centers and children's learning centers nationwide from January 2007 through February 2008 for between \$770 and \$3,100. Consumers, who should have received direct mail notices, must immediately remove the swing from the swing set

until a free repair kit is installed. For additional information, contact Playworld Systems at (800) 233-8404 or visit the firm's Web site at [www.playworldsystems.com](http://www.playworldsystems.com).

**BABY BOTTLE AND FOOD WARMERS  
RECALLED BY MUNCHKIN DUE TO FIRE  
HAZARD**

Munchkin Inc., of North Hills, California, has recalled about 5,000 Deluxe Bottle and Food Warmers. The bottle and food warmers can overheat, posing a fire hazard. Munchkin has received nine reports of units overheating, several of which ignited, causing damage to countertops. No injuries have been reported. This recall involves the Munchkin Deluxe Bottle and Food Warmer with Pacifier Cleaning Basket 2-in-1 Design, model #13301 and lot number TP-1487. The product is used to warm food and bottles of various sizes. The set includes a main basket, a lift-out basket, an adapter ring, and a measuring cup. "Munchkin" is located on the front of the warmer and "TP-1487" is located on the bottom. Only warmers bearing lot number "TP-1487" are included in this recall. They were sold at various retailers nationwide and company's catalog from June 2007 through April 2008 for about \$20. Consumers should stop using bottle and food warmers with lot number TP-1487 immediately and contact Munchkin to receive a free replacement. For additional information, contact customer service toll-free at (866) 619-8673 or visit the firm's Web site at [www.munchkin.com](http://www.munchkin.com).

## XXIV. FIRM ACTIVITIES

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### **TWO NEW ASSOCIATES JOIN THE FIRM**

#### **CHRIS BOUTWELL**

Chris Boutwell joined the firm as an associate last month. Chris, a native of Greenville, Alabama, graduated from the University of Alabama in 1992 with a

B.S. Degree in Commerce and Business Administration. While at Alabama, Chris served as President of Phi Kappa Psi fraternity. After ten years of managing a family owned sales business, Chris attended Thomas Goode Jones School of Law. While at Jones, he served as Executive Editor of the Law Review, completed an externship as a judicial clerk at the Alabama Supreme Court, and received recognition for Best Scholastic Achievement in eleven classes. In December of 2004, Chris received the Ronald A. Canty Memorial Scholarship which was awarded by our firm. In 2005, he graduated magna cum laude, was number one in his class, and was awarded the James J. Carter Scholarship Award.

After admission to the Alabama State Bar in 2005, Chris opened his law practice in Greenville, Alabama, as a solo practitioner. In his practice, Chris represented both plaintiffs and defendants in a variety of civil lawsuits. He was the lawyer for the Butler County Department of Human Resources and fought alongside that department to protect abused and neglected children. Chris also served as Assistant District Attorney for the Second Judicial Circuit. In that job, Chris gained extensive trial experience in both jury and bench trials. Chris will work in our firm's Toxic Tort Section.

Chris and his wife, the former Leitha Bland of Luverne, reside in Greenville with their two daughters, Catherine Ann and Mollie. They are active members of the First United Methodist Church of Greenville where Chris has served as Finance Chairman. Chris is the former President of the Greenville Area Arts Council, and currently serves on the Executive Board of Directors of Safe Harbor, whose mission it is to protect and counsel abused and neglected children in Butler, Crenshaw, and Lowndes counties. We are pleased to announce Chris' association with the firm.

#### **JOE HUBBARD**

Joe Hubbard, a native of Montgomery, is another new associate with the firm. Joe graduated with honors from Huntingdon College with a major

in Cultural and Religious Studies. He then attended Cumberland School of Law, where he studied federal practice and procedure and civil rights law. While at Cumberland, Joe served as the Articles Editor for the *American Journal of Trial Advocacy*, and as the Chair of the Cordell Hull Speakers Forum. He was also selected as an Abraham Caruthers Fellow and served on the Henry Upson Sims Moot Court Board. After graduating from Cumberland, Joe served as law clerk to Justice Champ Lyons on the Alabama Supreme Court.

Joe began his legal career in Montgomery with the firm of Webb & Eley, where he represented many of Alabama's County Sheriffs, County Commissioners, and County officials in civil rights litigation. In June of 2008, he joined our firm as an associate in the firm's Toxic Torts Section. Joe will be focusing much of his time, initially, on the developing Multi-District Litigation over "hot fuel." This is a very important segment of the section's work at present.

Joe has been appointed to several committees for the Alabama State Bar, including the ALA Referral Committee and the Spanish-Speaking Lawyers Committee. He has been active in the Young Lawyers Section of the Montgomery County Bar Association. Joe is also a member of the Hugh Maddox chapter of the American Inns of Court. Joe lives in Montgomery with his wife, Ashley and they are awaiting the birth of their first son, Hill. Joe and Ashley are active members of the Church of the Ascension, where they are involved in various lay ministries. In addition, both Joe and Ashley are involved in numerous community organizations. We are pleased to announce Joe's association with the firm.

### **EMPLOYEE SPOTLIGHTS**

#### **ROGER SMITH**

Roger Smith, a Shareholder in the firm, has been with our Mass Torts Section since 2001. In fact, Roger has been a valuable part of our Vioxx litiga-

tion team. He played a critical role in the development of the Vioxx Settlement Program protocol. Over the last three years, Roger has done an outstanding job managing our very large Vioxx staff. He is currently leading our efforts to prepare our cases for submission to the Vioxx Claims Administrator.

Roger has litigated and successfully resolved thousands of cases involving defective prescriptions and over-the-counter drugs and food supplements. He played significant roles in the firm's Rezulin, Serzone, PPA, and ephedra cases. He has spoken at numerous seminars across the country on topics related to Vioxx and the Vioxx Settlement Program, as well as topics related to federal MDL practice.

Roger is licensed to practice law in Alabama, Arizona, Mississippi, Tennessee, West Virginia, and Minnesota. He is married to the former Claudia C. Kennedy, of Vestavia Hills, Alabama. They have three children, Sarah Kennedy, Caroline Cecilia, and Sophia Clare. Roger and his family are active members of St. Peter's Catholic Church in Montgomery, Alabama. Roger has been a most valuable shareholder in our firm. His work as a lawyer has been outstanding and we are blessed to have him with us.

#### **ROMAN SHAUL**

Roman Shaul, a native of Tuscaloosa, works in our Consumer Fraud Section and his areas of practice are consumer financial services, wage & hour and securities litigation. He is licensed to practice in Alabama, Arkansas, Mississippi, Tennessee, Louisiana, South Carolina and West Virginia. Thus far, Roman has served as lead counsel in several nationwide class action cases. He has successfully argued before several appellate courts including the Alabama Supreme Court, the Eleventh Circuit Court of Appeals and the Fifth Circuit Court of Appeals.

Roman graduated from the University of Alabama and then attended law school there. While in undergraduate school, Roman helped his debate team at Alabama win two National Forensic Team Championships.

Roman is the immediate past president of the Young Lawyers Division of the Alabama State Bar and former Co-Chair of the Admission Ceremony for the Alabama State Bar. In 2007, the president of the Alabama State Bar appointed Roman as co-chairman of the important "Wills for Heroes" program—an ambitious and successful program to honor Alabama law enforcement and firefighter personnel by providing them free wills, living wills and powers of attorney. Roman, who is also a graduate of the Alabama State Bar's Leadership Forum, serves on the Board of Directors of Alabama Appleseed, a non-partisan, multi-issue advocacy organization that seeks to identify root causes of injustice and inequality. That organization seeks to craft practical and lasting solutions through legal advocacy, community involvement and policy expertise.

Roman is a member of First United Methodist Church in Montgomery and is married to the former Caroline Thames of Jackson, Mississippi. They have two Labrador retrievers, Bailey and Mollie, which gives them an A+ with me. Roman is a very good lawyer who works hard at getting better at his craft. He is dedicated to his clients' best interests and that's extremely important. We are most fortunate to have Roman with the firm.

#### **MICHELLE FULMER**

Michelle Fulmer, who is the Section Head Administrator of the Fraud Section, just celebrated her 14<sup>th</sup> anniversary with the firm. She assists Dee Miles in managing the Fraud Section. In addition to her management role, Michelle also enjoys being active in working up our Fraud cases and getting them ready for trial. Michelle and her husband Eric are the proud parents of two children. Fourteen-year-old Brandey just made the Junior Varsity Dance Team and is looking forward to starting Wetumpka High School this Fall. Logan, who is seven years old, attends Wetumpka Elementary School. Michelle enjoys spending time with her family, reading, gardening and collecting vintage baseball cards.

I would like to talk her out of that collection, but she tells me that will never happen. Michelle is a dedicated, hard-working employee who does outstanding work. We are most fortunate to have her with the firm.

#### **LINDA REYNOLDS**

Linda Reynolds, who started with the firm in November of 2000 as a legal assistant to Roger Smith in our Mass Torts Sections, currently oversees the Mass Tort section as the Section Head Administrator. Linda, who previously worked as a supervisor in the Montgomery County Circuit Clerk's office for 13 years, has a paralegal certificate and is currently enrolled at AUM, working on her Bachelor's Degree in Justice and Public Safety with an emphasis in Pre-Law. Linda is scheduled to graduate in December of 2008. Linda has been married to Denver Reynolds for 24 years. They have a 15-year-old daughter, Mandy, and a 12-year-old son, Terry. The Reynolds are members of Liberty Church of Christ in Pintlala. Linda, who is a dedicated employee, has a most demanding job and she does it extremely well. We are blessed to have her with the firm.

#### **A NEEDED CORRECTION**

Last month we spotlighted Kathy Farmer who works in our Mass Torts Department as a Legal Assistant to Ted Meadows. I said that Kathy was attending classes at Jones School of Law. I regret to say that was incorrect since actually she is attending classes at Faulkner University in the paralegal program. I apologize for this error. Everything else about Kathy—I am pleased to say—was correct.

## **XXV. SPECIAL RECOGNITIONS**

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#### **ALBERT PRESTON BREWER**

I was honored to have been chosen

to be one of the speakers when Albert Brewer was honored at Cumberland School of Law in April. The "Brewer Plaza" is a fitting tribute to a man who has selflessly served the people of Alabama and the legal profession. The Plaza was named in honor of Governor Brewer and his late wife, Martha, and it's a beautiful addition to the law school. Albert Brewer has been an exceptional leader in the State of Alabama. Albert served three terms in the Alabama Legislature, and was Speaker of the House during his third term. He won the 1966 Democratic primary for lieutenant governor without a runoff. Upon the death of Governor Lurleen Wallace on May 7, 1968, Albert became governor. As governor, he worked quietly to achieve several much-needed reforms and programs. During his administration appropriations for public schools received the largest increase in state history. He created the Alabama Development Office and introduced several measures to make the operation of state government more efficient. The Court of Appeals was divided into the Court of Civil Appeals and the Court of Criminal Appeals, and the state Supreme Court was expanded by adding two additional justices during Albert's time as governor. Also, the first Ethics Commission to promote honesty and integrity in state government was created.

Albert Brewer was recognized as an effective leader by national organizations. He served on the Executive committee of the National Governors' Conference, was chairman of the Appalachian Regional Commission, vice-chairman of the Southern Governors' Conference and chairman of the Tennessee-Tombigbee Waterway Authority.

When Martha and Albert Brewer moved to Birmingham in 1987, it marked the last stop in their journey together which began in 1950 on the campus of the University of Alabama. Their life together would take them to the pinnacle of success in the legal profession, in public office, and in the academy with side ventures into banking and other interests. Though

they dined with the nation's leaders at the White House and socialized with captains of business and industry, they never forgot the masses of people whom they claimed as friends and felt privileged to serve. And Cumberland School of Law was a wonderful finale to their life together. The Brewers loved the law students, enjoyed traveling with them on study-abroad programs in Great Britain, and having them in their home where Martha tried to be their "mom away from home." My daughter, Julia, was one of Albert's students and she is now one of his biggest fans. It meant much to Martha and Albert to establish a scholarship fund to provide need-based aid to deserving students.

Martha and Albert were strong in their faith and were grateful to God for blessing their marriage with two wonderful daughters, two fine sons-in-law, three grandchildren, and one great-granddaughter. Martha and Albert were devoted to each other beyond measure with a love that was obvious to anyone who saw them together. Truly made for each other, they shared their love with all who knew them. I have often wondered what Alabama would be like today had Albert Brewer served a full ten years as Governor of our state. I can only say that our state would have been better because of his service!

#### **JIMMY HITCHCOCK AWARD**

This year one of our lawyers, John Tomlinson, had the pleasure of serving on the Jimmy Hitchcock Award selection committee. The purpose of the Jimmy Hitchcock Award is to recognize outstanding high school senior athletes in Montgomery County, who by their actions have consistently represented the highest ideals of Christian leadership in athletics. These student athletes are nominated by their coaches and the administrators of their respective schools.

This year, John and a fellow selection committee member, Billy Cox of Montgomery, were charged with the responsibility of learning about Clark Hankins, a soccer, basketball and football star at

Saint James High School. They discovered a tremendous young man who provides a great example of leadership, character, sportsmanship, commitment, and hard work on the athletic field as well as in the classroom. Clark is also a tremendous Christian role model for his peers and for the community.

This year the Jimmy Hitchcock committee recognized Clark as its male recipient. Clark was an All-Star soccer player and a Team Captain in soccer, basketball, and football, as well as the team academic excellence winner in football. Clark was a Senior Peer Leader at Saint James High School and participated in several Christian youth groups in the Montgomery area, including Montgomery Young Life, Campaigners, and Wyldlife, a ministry for junior high students. Clark will attend the College of Charleston, where he received a soccer scholarship. We wish Clark the very best in the future and know that he will continue to be a success and be a Christian role model wherever he goes. There are always many outstanding young people nominated for this award. They are all winners. I am glad that this committee finds time to recognize outstanding Christian leaders in our schools.

#### **JILL CAWLEY VISITS OUR NATION'S CAPITAL AS AMERICAN HEART ASSOCIATION ADVOCATE**

Jill Cawley, Secretary to our firm's Investigators, traveled to Washington, D.C., April 28-29 to participate in the American Heart Association's "Lobby Day," part of its volunteer advocacy program called "You're the Cure." The Heart Association has been involved in congressional advocacy for more than 30 years, bringing volunteers from all walks of life to meet with legislators about issues of heart health, stroke, heart disease, awareness and prevention. Jill was among nearly 700 people from every state and territory who attended this year's Lobby Day. Also attending from Alabama was Bill Bryant, a Birmingham lawyer, and Dr. Walter Johnson, a pediatric cardiologist at UAB.

For more information about heart disease and stroke, visit the [American Heart Association](http://www.heart.org) online or call 1-800-AHA-USA-1 to find a local Heart Association near you. For more information about joining the “You’re the Cure” advocacy program, visit [www.yourethecureonthehill.heart.org](http://www.yourethecureonthehill.heart.org). You can also contact Jill at 800-898-2034 for more information about her involvement with the Alabama Heart Association.

#### **ALABAMA SENATE APPROVES FORMER MOBILE JUDGE FOR ETHICS PANEL**

The Alabama Senate has approved former Mobile County Circuit Judge Braxton Kittrell to serve on the State Ethics Commission. The Senate voted without a dissenting vote to approve the selection. Judge Kittrell will replace Commissioner Nancy Edwards Eldridge of Andalusia, whose term had expired. Judge Kittrell’s term will run until August 2012. Judge Kittrell was elected as a Mobile County Circuit Judge in 1976. He served until his retirement in April 1999, when he returned to private law practice. He was presiding judge over the circuit from 1989 until his retirement. All lawyers who went before Judge Kittrell can attest to his ability and fairness while on the bench. In my opinion, Judge Kittrell will be an outstanding member of the Ethics Commission.

#### **ALABAMA CIVIL JUSTICE FOUNDATION ANNOUNCES 2008 GRANTS**

The Alabama Civil Justice Foundation recently announced its 2008 grants to Alabama nonprofit organizations whose programs and services assist communities, children, families and seniors. The grants, which will total more than \$703,000, were awarded statewide. The association is especially proud of its Justice grants, which greatly furthers our efforts to create a just and caring society for all Alabamians. A list of all the non-profits can be obtained from the Alabama Civil Justice Foundation by calling Sue McInnish at

334-263-3003 or by emailing her at [ACIF@mindspring.com](mailto:ACIF@mindspring.com).

Source: ACJF

#### **NATIONAL DAY OF PRAYER SLIPPED BY QUIETLY**

May 1<sup>st</sup> was the National Day of Prayer in our country and I’m afraid that many Americans didn’t even know it. For some reason the media largely ignored it. At a time when our nation is at war—our economy in shambles— and millions living in poverty—it’s most difficult to understand how prayer for the country and its people could be seen as unimportant. We should be relying on God during such times to help us put things in order. If you have not seen it, the prayer given for our nation on May 1<sup>st</sup> is certainly worth reading. For that reason, I am setting out this powerful prayer below which was meant as a blessing for all of us.

*Holy Father, in a world where so many are hungry, You have given us food in abundance;*

*In a world where so many are hurting, You offer to bind up our wounds;*

*In a world where so many are lonely, You offer friendship to every heart;*

*In a world longing for peace, You offer hope.*

*Yet, we are so stubborn and resistant. Have mercy upon us, Lord.*

*Our nation is at a crossroads this year; we look to you to be our strength and shield.*

*Please give us the guidance to elect one who will honor you and to respond to the wisdom from above so that our hope may be renewed and our blessings be treasured.*

*In God’s holy name.*

*Dr. Ravi Zacharias  
2008 Honorary Chairman,*

#### *National Day of Prayer Task Force*

With all of the problems facing our nation, it’s hard to imagine that national prayer would take second fiddle to politics, sports, crime reporting, and the like. Not only is a prayer for our nation important, it’s a necessity in today’s world.

## **XXVI. SOME CLOSING OBSERVATIONS**

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#### ***IT TOOK A PERSONAL ENCOUNTER—BUT HE SAW THE LIGHT***

Sometimes it takes a personal encounter with a major problem to make us understand how important the court system is for all Americans regardless of who we are or what we do for a living. I have written about the experiences of Dennis Quaid with the pharmaceutical industry concerning his twin babies. It’s now quite apparent that the Quaid’s have seen the light and want the public to know that the courts must remain open, independent, and strong for the good of all U.S. citizens. Here is what Dennis Quaid had to say about the legal system:

*We’ve also learned a lot about the legal system in a very short time and it was very surprising, I must tell you. Like many Americans, I have always believed that a big problem in this country has been frivolous lawsuits. But now I know that the courts are often the only path that families have that are harmed by drug companies’ negligence. And now we face something that can cause grave harm to all Americans.*

*Dennis Quaid, Testimony to House Committee on Oversight and Government Reform, May 14, 2008.*

## HARD WORK AND PERSISTENCE

From my early days in Barbour Country, I have always believed in hard work and persistence. Also, it didn't take me long to learn that these two traits are an absolute necessity in the practice of law. Regardless of what folks might say about my ability, I am fairly certain that nobody who is in the know would dispute my work habits or willingness to stay on course. The following quotation was sent to me and I thought it was worth passing on:

*Nothing in the world can take the place of Persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent. The slogan "Press On" has solved and always will solve the problems of the human race.*

Calvin Coolidge  
30<sup>th</sup> President of U.S. (1872-1933)

## THE BIBLE VERSE OF THE MONTH

Ellen Cheek, who is from Montgomery, sent her favorite Bible verses in for consideration this month. We elected to use her verses and appreciate her sending them in. For your information, Ellen, a great country music vocalist cut out of the Loretta Lynn pattern, is also a Godly woman, which is the most important thing I can say about her. Ellen is a person who not only talks the talk—but walks the walk when it comes to her relationship with Jesus Christ. Her influences on others has been tremendous.

*The Lord is slow to anger and great in power; And will not at all acquit the wicked. The Lord has His way In the whirlwind and in the storm, And the clouds are the dust of His feet.  
Nabum 1 : 3(b)*

*Though the fig tree may not blossom, Nor fruit be on the vines; Though the labor of the olive may fail, And the fields yield no food; Though the flock may be cut off from the fold, And there be no herd in the stalls— Yet I will rejoice in the Lord, I will joy in*

*the God of my salvation. The Lord God is my strength; He will make my feet like deer's feet, And He will make me walk on my high hills. To the Chief Musician. With my stringed instruments.  
Habakkuk 3:17, 18, 19*

## XXVII. SOME PARTING WORDS

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As I was putting this issue together, I began to reflect on my life and my family. Sara and I have been blessed with a great family. Our children and grandchildren are a joy and we are proud of each one of them. God has been good to all of us and we can't thank him enough. Sometimes it's good to just sit back and reflect on our blessings and the provisions we receive from our Heavenly Father. If you haven't taken time to do this, I encourage you to do so. It will not only brighten your day, but it will make you a better person in every respect. God is good and that's a fact!

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