



THE
JERE BEASLEY REPORT JULY 2008

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I. CAPITOL OBSERVATIONS

THE AMERICAN PEOPLE ARE AGAINST FEDERAL PREEMPTION

A recent survey was conducted to get the public's views on federal preemption and the results were just about what I figured they would be. It was clear from the survey that Americans strongly oppose the policy of federal preemption. Those opposed (64%) far exceeded those who support (31%) the policy being pushed hard by President Bush and powerful corporate special interests. It's most significant that only 7% of those who supported the policy were "strongly in favor." Folks are even stronger in this opposition when they learn that "federal preemption" policy means that if a product meets federal safety regulations, no suit can be filed against the product manufacturer for personal injuries suffered as a result of using the product. Those against the policy become even more strongly opposed when they find out that the Bush Administration is behind it.

Another significant finding from the survey was that Americans "worry" they or some family member "will be harmed by an unsafe product" and believe strongly that companies "often cut corners when it comes to safety." In fact, 51% of the people hold that belief, while only 41% disagree. Interestingly, 72% of the folks who say they plan on voting in November are "worried" that they will be harmed by an "unsafe product." The percentage of voters believing manufacturers put profits over safety and "cut corners when it comes to safety" increases to 57%, with those who disagree slips slightly to 40%.

It's my firm belief that when the American people begin to really understand what federal preemption is all about the numbers in opposition will soar even higher. The

Bush Administration has been flying under the radar on this issue so far. But, that is slowly changing and people are becoming aware of how federal preemption will affect them. By the time November 4th comes around, I am convinced federal preemption will be a hot political issue. Members of Congress will have to respond in their respective states because of the strong feelings on this issue.

WALGREENS TO PAY \$35 MILLION TO SETTLE FRAUD LAWSUIT

Walgreens Co. has agreed to pay \$35 million to settle a federal whistleblower lawsuit alleging it boosted the price for prescriptions paid by Medicaid by switching from capsules to tablets, or vice versa, depending on which was most expensive. According to federal officials, the practice of switching dramatically increased the amount of taxpayer money that Walgreens, which operates drug stores in 48 states and Puerto Rico, charged to the Medicaid program. The federal government, 42 states and Puerto Rico will share the \$35 million. Of the states that are included, Alabama will receive \$193,018, which will go to the state Medicaid program to settle the allegations of improper billing. This is just another example of corporations that participate in the Medicaid program cheating the government, hoping they won't get caught and then settling their wrong-doing.

This was the third settlement by a major pharmacy chain resulting from the whistleblower suits, joined in by the federal government, that alleged switching of tablets and capsules. In March of this year, CVS Caremark Corp. agreed pay \$36.7 million and Omnicare Inc. settled for \$49.5 million in November 2006. Daniel R. Levinson, inspector general of the U.S. Department of Health and Human Services, made this statement:

Let this serve as a reminder of our priority to investigate and

prevent illegal schemes that abuse Medicaid programs at the expense of taxpayers and vulnerable recipients.

The settlement in the Walgreens case covers allegations that for three drugs—Ranitidine (generic Zantac), Fluoxetine (generic Prozac) and Eldepryl or Selegiline (generic Eldepryl)—Walgreens switched Medicaid patients from a cheaper version to a more expensive version to boost its reimbursements from the Medicaid program. For example, Medicaid patients who

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had prescriptions for 150- or 300-miligram tablets of Ranitidine were switched to more expensive capsules. Those with prescriptions for 10 mg or 20 mg capsules of Fluoxetine were switched to more expensive tablets. Also, prescriptions for 5 mg tablets of Eldepryl were switched to more expensive capsules. Pharmacists are allowed to make such switches only if the form of the compound they are switching to is therapeutically equivalent and costs less than the one specified in the prescription.

Source: *Associated Press*

EXPRESS SCRIPTS SETTLES WITH 28 STATES

Express Scripts Inc. has reached a settlement with 28 states that alleged the pharmacy benefits manager (PBM) misled consumers when it encouraged doctors to switch patients' cholesterol drug brands under the guise of controlling costs. The agreement resolves a four-year investigation of St. Louis-based Express Scripts. This isn't the first time a PBM has been caught cheating the government. It follows a similar \$38.5 million multistate settlement in February with a rival PBM, and a 2004 drug-switching settlement with Medco Health Solutions Inc. As a result of these settlements, state attorneys general believe they "have changed how these companies treat patients and doctors when they ask to change their prescription medications." As a part of the settlement with Express Scripts, the company must disclose full information and the reason for the proposed switch. In fact, that appears to be the most significant part of the settlement. These disclosures must be "clear and conspicuous."

Express Scripts will pay \$9.3 million of the total settlement to the states and the District of Columbia. Another \$200,000 will be paid which will provide no more than \$25 per claimant to individual patients to reimburse them for visits to doctors and tests linked to switches between rival

brands of cholesterol-controlling drugs known as statins. The participants in the settlement are: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Illinois, Iowa, Louisiana, Massachusetts, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington and the District of Columbia. The same states were involved the settlement mentioned above with Caremark's parent company, CVS Caremark Corp. Express Scripts fraudulently told doctors in some cases that patients and their health plans would save money by switching to a different drug brand to treat the same condition. Express Scripts failed to disclose to its client plans that money earned by Express Scripts accrued from the drug switching process would be retained by the company. Instead, it wasn't passed on to the client plan.

While the amount to be paid under the settlement was small, it's believed by the Attorneys General that the changes brought about in how Express Scripts will operate in the future are significant. This is just another example of corporate fraud by companies dealing with government programs. There is a belief in a good number of corporate boardrooms that cheating the federal and state governments is acceptable. That sort of thing can't be tolerated since it costs the taxpayers a great deal of money. In fact, I would like to hear somebody explain why it's OK to cheat the government!

Source: *Law.com*

THE RILEY ADMINISTRATION HAS BEEN GOOD FOR ALABAMIANS

The first six years of the administration of Governor Bob Riley have been very successful. If the last two years of his tenure are anything like the first six this administration may well be the best ever in Alabama. The record on

industrial development is without question the best ever and that's a good place to start when measuring a governor's success. Considering that our nation's economy is in deep trouble makes Alabama's economic progress even more significant. The strides forward in public education have also been very good even though there is much yet to be done. Perhaps the fact that there have been no scandals in his administration is one thing that the Governor is most proud of.

GOVERNOR RILEY LEADS TRADE MISSION TO SOUTH AMERICA

Governor Bob Riley had a successful trade mission to South America last month. The governor spent the ten-day trip visiting Colombia, Chile, Argentina and Brazil. He was accompanied on the mission by a number of executives from Alabama companies seeking to develop markets in South America. The State Docks in Mobile gives Alabama a unique opportunity to develop the South American market and Governor Riley is taking advantage of the docks in his sales pitch. He is trying very hard to develop that market since South America is a prime target for Alabama products. From all accounts the trip was successful and should pay economic benefits for our state's manufacturers and farmers.

Source: *Associated Press*

RESULTS OF A RECENT SURVEY

A recent survey of Alabama citizens conducted by the Capital Survey Research Center reveals what I had already suspected. It shows that Alabamians are "most dissatisfied" with the way things have been going in the country. The survey taken between May 15th and June 1st showed that 73.6% of the people in our state are dissatisfied, with only 18.1% saying they are satisfied. Only 8.2% indicated that they either had no opinion or they failed to respond. Those results are an indication

that folks are definitely fed up with the Bush Administration and are demanding change in the direction of our nation on all fronts.

Source: Capital Survey Research

II. POLITICAL OBSERVATIONS

A BUSH THIRD TERM IS UNTHINKABLE

John McCain is trying his best to keep his now-cozy relationship with President Bush off the evening news and not allow it to become the main topic of discussion on the cable talk shows. It doesn't take a public opinion poll to know the president's own popularity is at an all-time low for American presidents. It's evident McCain's handlers are fully aware of how low the President's numbers are. Even McCain allies privately say that Bush is an "albatross" for the Republican nominee's campaign. Regardless of his connection to Bush, it's readily apparent that McCain is on the wrong side of the two main issues that are of great concern to the American people: the prolonged Iraq war; and the weakened U.S. economy. Even without Bush around his neck, those are issues that are major problems for the GOP nominee.

To his credit, Senator McCain is trying hard to rally the Republican base and raise campaign funds from the GOP faithful, some of whom don't like him, and that is why he can't afford to dump the president. The GOP standard bearer is facing a Democratic party which has unrivaled enthusiasm and also is enjoying from ordinary citizens record-breaking fundraising. The raising of funds—including a record number of small donations—has been an amazing and unprecedented feat by the Obama campaign.

While President Bush and his would-be successor have been appearing together, the McCain handlers are trying

very hard to keep their meetings out of the limelight. That's a tough thing to accomplish when the president and his gang are flying around the country on Air Force One trying to help the GOP nominee. It's pretty hard to keep that sort of thing quiet. Nevertheless, the McCain handlers are holding the Bush-McCain fundraisers with the GOP faithful in private homes. There are no media around to document these meetings—and that is highly unusual. The only time Bush and McCain are captured on camera are after a night event—when it's too late to make most evening newscasts—and obviously that's by design. McCain's fundraisers typically are closed to the press and that apparently suits Bush just fine. Can you remember a time when a nominee of either party wanted a sitting president's help—but didn't want the voters to know about it?

The American people must eventually answer one question and that is simply—do we want to continue George Bush's policies? Since the failed policies of the Bush Administration are exactly what John McCain has promised to continue for another four years, the GOP candidate has insurmountable problems with all Democrats, most Independents and a significant number of Republications. It has become evident that John McCain has become just an extension of Bush, offering the same policies and with no hope for change. While McCain has struggled to break from Bush on the two key issues—the Iraq war and the economy—he is joined at the hip with the president on each of them. Both men support continued military involvement in Iraq, and both back the same free-market economic principles. The American people want our troops out of Iraq and are demanding a reversal of our country's economic woes. That's why we won't have a third Bush term starting in January of 2009. The voters want change and that means a Bush third term is totally unacceptable.

A TIME FOR UNITY AND COOPERATION AMONGST ALL DEMOCRATS

In my opinion, now that the primary season is over, the many facets of the Democratic Party will unite and get ready for the general election. Both Barack Obama and Hillary Clinton ran tough and aggressive campaigns and wound up very close in the popular vote. It may take a few weeks for the Clinton supporters to get over the hurt of a second place finish, but time should heal any lingering wounds. Once the millions of Democrats who voted for Senator Clinton reflect on the possibility of a third Bush term led by John McCain they will rally behind the Democratic nominee.

Without question, Senator Obama has been a very strong candidate. He has exhibited the ability to energize folks who have been shut out of the national political scene in past elections. They now see a bridge over the wide gap that separated them from the elite and powerful in America. Minorities are not the only folks who have been virtually shut out of this country's political system and a meaningful place in the operation of the national government. Working men and women of all races have been on the outside looking in. It was evident that women had a champion in Senator Clinton, and those who supported her will certainly join the Obama campaign. There is no way that all of those folks who have been shut out can support the GOP candidate.

I believe you will see all Americans joining forces to bring about meaningful change in the way our national government has been run. The powerful special interests have had their way during the years of the Bush Administration and folks won't tolerate four more years of Bush-Cheney-Rove rule. The issues left for John McCain to base his candidacy on can't be viewed as good news for the GOP nominee.

The Iraq war and the horrendous state of our nation's economy are a millstone around John McCain's politi-

cal neck and he is definitely on the wrong side of these critical issues. I look forward to working for the election of a man who has the right vision for America and the ability to carry it out. There is much to be done and a short time in which to do it. There are a number of critical issues that will assure Senator Obama's election as the next President of the United States of America. The most compelling reasons we can't afford an older version of George W. Bush are that:

- We can't afford for oil companies to promulgate our nation's energy policy.
- We can't afford a national policy that leaves millions of American citizens with no health insurance.
- We can't afford for the powerful drug industry to control the FDA and put dangerous drugs on the market and at prices many folks can't afford.
- We can't afford for powerful lobbyists for large corporations and other special interests to literally set policy for and run the federal government as an unofficial fourth branch of government.
- We can't afford for our court system to be closed to ordinary citizens who would be at the mercy of the powerful in Corporate America.
- We can't afford for global warming to destroy our environment and harm people all over the world as a result of the effects of climate change.
- We can't afford the outsourcing of industrial jobs to foreign countries.
- We can't afford to continue putting the tax burden on middle-income Americans while allowing the rich and powerful—including many large corporations—to avoid paying their fair share of taxes.
- We can't afford the wild and uncontrolled spending by the rich and powerful in political campaigns

which may be the root cause of many of our nation's problems.

- We can't afford to put our troops in future wars that have no justification when judged by any military or national security interest standard.
- We can't afford to continue the record trade deficit, which has put our nation in bad economic times.
- We can't afford the record budget deficits built up during the Bush years, going from a healthy surplus to a deficit that our grandchildren will be paying.

When you consider the sad shape in which George W. Bush has left our country—while his political buddies have become even richer—it's easy to see why the Democrats should win, not only the presidency, but also both Houses of Congress. I am firmly convinced that Barack Obama will be the instrument of meaningful change our country so badly needs, starting in January of 2009. I believe he will put together a team of competent individuals who collectively will run the national government in an honest and ethical manner. There won't be any Dick Cheneys or Karl Roves in the Obama inner-circle with agendas that aren't in the best interests of the American people.

MORE ON THE BUSH LEGACY

There is much compelling evidence of the toll that President Bush and his gang have taken on America and it will haunt John McCain over the next few months leading up to November 4th. The abuse and hurt that the American people have endured over the past seven years is a part of the Bush legacy. The war in Iraq and the economic woes are two issues in the presidential and congressional races that give Democrats an opportunity for a clean sweep in the general election. The following are some data that John McCain and the cadre of lobbyists who are

running his campaign will have to live with during the next few months as they attempt to convince the American people that four more years of Bush-Cheney-Rove wouldn't be so bad:

- \$103 Billion—this is the economic toll the housing crisis has taken on American families so far—with 7.3 million forced out of their homes.
 - 107%—this is how much gas prices have increased during the Bush Administration—the average American family will spend \$4,500 on gas this year.
 - 7 Billion—this is how many tons of greenhouse gases the United States emits every year—and that amounts to 25% of worldwide emissions.
 - 7.4 Million—this is the number of Americans who are unemployed as of June 1, 2008. Sadly, average wages have dropped by 2.4% for American workers.
 - 78%—this is the increase in the cost of health insurance since 2001—a major reason 47 million Americans are uninsured currently.
 - \$275 Million—this is how much we spend every day in Iraq—with the total cost of this Bush-Cheney-Rove war estimated at \$3 trillion.
 - \$311 Billion—this is the amount of the record national debt as of April. It is rising every day—with much of what we owe being to China.
 - \$30.2 Billion—this is the amount of the trade deficit for this country currently.
- Our nation must have an effective leader during the next four years who can unify the American people and who can rebuild our shattered image on the international stage. Our world is threatened on so many fronts that many in this country have lost hope. It's essential that hope is restored for the good of our nation. Our future has been put in serious jeopardy by this

administration and that's quite clear. Many political observers say this is the most important national election since the Hoover days. The Democratic Party must rise to the challenge facing America and put the ship of state back on course. Electing a President who can lead us back to the greatness that our country enjoyed in years past is an absolute necessity. A leader like Franklin Roosevelt—Harry Truman—John Kennedy—or Bill Clinton—must serve our nation and its people for the next four years. We can't afford to put an older version of George Bush in the oval office in 2009.

MAYOR BOBBY BRIGHT WINS DEMOCRATIC PRIMARY IN ALABAMA'S SECOND DISTRICT

Montgomery Mayor Bobby Bright won the Democratic primary in Alabama's 2nd Congressional District. His convincing victory is proof that the working families of Alabama want a voice in Congress from this district who can make a real difference in their lives. Cheryl Sabel, who opposed Bobby in the primary, ran a good, clean race. While Cheryl had very little financial support, she made a very good impression in her first political race and may have a future in Alabama politics. The third place finisher in the race, Dr. Cendie Crawley of Troy, also made a very good impression in her campaign throughout the district. She too was in her first political race. In accepting his party's nomination, Bobby had this to say about his primary win:

I am thankful to the voters of Alabama's Second District who supported me tonight and want to thank God, my family and my supporters for this opportunity. Alabama's working families are struggling with the rising cost of gas, groceries and health care and are ready for a leader who puts aside political fights and works for solutions. I look

forward to sharing my ideas with the people of Alabama in the next five months, and showing them why I will represent our values in Congress.

Bobby will face either State Representative Jay Love or State Senator Harri Anne Smith in November. These two GOP candidates, who will meet in a run-off on the 15th of this month, emerged as the leaders over a pretty strong field of candidates. One of the candidates who didn't make the run-off was my good friend, David Woods, who ran an excellent race and made an extremely good impression on folks. It will be interesting to see if the winner of the run-off will invite President Bush or Vice President Cheney down to campaign in the general election. In any event, it should be an exciting fall.

BLUE DOGS BACK SENATOR GRIFFITH FOR CONGRESS IN 5TH DISTRICT

On June 10th, the Blue Dogs, a 49-member coalition of conservative Democrats in Congress, announced its endorsement of Parker Griffith in Alabama's 5th Congressional District. In making this significant endorsement, Rep. Mike Ross, (D-AR) commented:

We believe he will join us in putting an end to the partisan bickering in Washington and pushing through commonsense fiscal policies and restoring accountability to our government.

Griffith, who is serving his first term in the state Senate, is running to replace Rep. Bud Cramer, D-Huntsville, who is retiring. His Republican opponent will be determined by a primary runoff on the 15th of this month. Rep. Cramer, in assessing the race, told reporters in Huntsville:

It appears that the Democrats have an excellent chance of retaining the seat. I think Parker Griffith has a very good chance of

bonding with the people of the 5th District ... where party label is not as important.

I believe Democrats will retain the Cramer seat. Early polling indicates that Senator Griffith will draw from Democrats, Independents and Republicans and win by a comfortable margin. He is considered to be very much like the man he is seeking to replace and that's important.

Source: *Birmingham News*

A LOOK AHEAD IN ALABAMA

There has been a great deal of early posturing in the 2010 race for Governor in Alabama. In fact, I have been contacted by a number of our readers who want to know who all will be running for the top job in Alabama to succeed Bob Riley. I have also been contacted by a few people who say they are looking at the race themselves. So, I gave some thought to this matter and have decided to set out those persons who—according to some pretty good sources—would like to succeed Governor Riley.

On the Democratic side the persons who might run are:

- U.S. Representative Artur Davis;
 - Lt. Governor Jim Folsom;
 - Speaker of the House Seth Hammett; and
 - Agriculture Commissioner Ron Sparks.
- The following are being mentioned as potential candidates on the Republican ticket:
- Secretary of State Beth Chapman, who appears to have significant GOP support;
 - Dr. Jack Hawkins, a former Marine, who is Chancellor of the Troy University System;
 - Representative Mike Hubbard, who is minority leader in the Alabama State House;

- State Treasurer Kay Ivey;
- Tim James, who is a successful Greenville businessman;
- Attorney General Troy King;
- Stan Pate from Tuscaloosa, who is also a successful businessman;
- Jimmy Rane—(“Yella Fella”), who is a successful businessman from Abbeville; and
- Former Lt. Governor Steve Windom, who is now a successful lobbyist.

While there has been no indication he is currently running, I would add Dr. David Bronner to one of these lists. In fact, it would be most interesting if he decided to run as an independent. I may be the only person who believes a man like Dr. Bronner—who always says exactly what he believes and thinks—can win, but I do. In fact, considering the political climate that exists today, he might be exactly what the people of Alabama want in a person to lead the state. Of course, all of that may change drastically after November’s national elections. There is one thing for certain and that is the state Governor Riley will leave to his successor will be a whole lot better than the one he inherited from Don Siegelman in 2001.

HANK AARON DOING FUNDRAISERS FOR ALABAMA SENATE CANDIDATE

The general election race between Vivian Figures and Jeff Sessions has failed to attract much attention thus far. Each of the candidates survived the primary elections with no difficulty. But, things will soon heat up in this race which may be lots closer than originally thought. Baseball legend Hank Aaron, a native of Mobile, has come in to help Vivian. He participated in two successful fundraisers. The Mobile Senator got a real boost for her campaign from the former Atlanta Braves slugger. Hank Aaron is a tremendous person and a genuine American hero. His support comes at a critical

time for her. Vivian became a close friend with the Mobile native when she served on the Mobile City Council. In fact, Mobile’s Double A baseball stadium was named in honor of the hometown hero during her time on the council. Figures and Sessions will face off in the general election on November 4th.

III. LEGISLATIVE HAPPENINGS

THE SPECIAL SESSION WAS A GOOD ONE

The passage of the education budget was accomplished by the legislators in record time and that makes the special session a complete success. Rather than criticize the Legislators’ failure to pass the budget in the regular session, I commend them for getting the job done in this session. While the budget has some obvious shortcomings, considering the shortage of funds, it’s the best that could be put together. Hopefully, sufficient revenues will be available to fully fund the budget so as to avoid proration. We need to keep up the progress that’s being made in public education. Hopefully our nation’s economy will get better in 2009 so that revenues will be available to take our education system to a much higher level.

THE TAX BREAK BILL FOR SMALL BUSINESSES SIGNED INTO LAW

One of the good things that came out of the session was the bill to provide a tax break to small businesses that provide health insurance to their employees. Governor Riley signed the bill into law at the Capitol on June 10th. The bill will make health insurance more affordable so that more small businesses will offer it as an employee benefit. It will allow businesses with fewer than 25 employees to deduct from their state income taxes 150% of

the amount they pay for health insurance for employees. Likewise, small business employees who earn less than \$50,000 annually will be able to deduct from their state income taxes 150% of what they pay toward their health insurance.

Source: Associated Press

LEFT-OVER ISSUES FOR THE NEXT SESSION

Unfortunately, there are many issues that didn’t make it in the regular session and weren’t addressed in the special session. Some of the items of unfinished business are:

- Campaign finance reform;
- Passage of the “Exxon Bill;”
- Taking the sales tax off groceries;
- Constitutional reform; and
- Reform of Alabama’s Workers’ Compensation Laws.

There will likely be at least one more special session before November. If so, at least some of the left-over business can be tended to. I would like to see a session with one subject in the call in order to isolate that one issue. Such a session would make it impossible for the special interest lobbyists to hide behind other issues in order to defeat the one issue they are being paid to kill.

IV. COURT WATCH

HIGH COURT ALLOWS SUITS ON RETALIATION IN RACE AND AGE CASES

The U.S. Supreme Court justices have given workers more leeway to sue when they face retaliation after complaining about discrimination in the workplace. In two employment cases, one involving race and the other age, the high court took an expansive view of workers’ rights. In doing so, the court

avoided the narrow, ideology-based decisions that marked its previous term. The justices construed parts of an 1860s civil rights act and the main anti-age bias law to include the right to sue over reprisals even though neither provision expressly prohibits retaliation. The outcomes in the two cases contrasted with rulings last term in which majorities of the court insisted on literal readings of federal laws over the objections of dissenters who favored more expansive interpretations.

Justice Stephen Breyer, writing for the court in a case involving a black employee at a Cracker Barrel restaurant who was fired, said that previous Supreme Court decisions and congressional action make clear that retaliation is covered. Justice Breyer wrote that a provision of the Civil Rights Act of 1866, known as section 1981, “encompasses retaliation claims” and “is indeed well-embedded in the law.” The Cracker Barrel case grew out of the firing of a black associate manager at a Cracker Barrel restaurant in Illinois. The employee contended that he was fired after complaining about race discrimination by other Cracker Barrel supervisors. He filed a lawsuit claiming both discrimination and retaliation. Each claim was dismissed by a federal judge, but only the retaliation claim was appealed. The Chicago-based U.S. Court of Appeals for the Seventh Circuit said the employee could pursue his retaliation claim under section 1981. The high court upheld that ruling in the case on appeal.

In the age retaliation case, Justice Samuel Alito wrote the court’s opinion allowing a federal employee to pursue retaliation claims under the Age Discrimination in Employment Act. Justice Alito concluded for the court that a U.S. Postal Service employee may pursue that claim in her lawsuit. While the anti-age bias law specifically bars reprisals against private sector employees who complain about discrimination, it is silent as to federal workers. Justice Alito said the law applies to

both categories of employees. The case involves a postal worker in Puerto Rico who alleged she was being discriminated against because of her age. The employee, who was then 45, said that after she filed a complaint with the Equal Opportunity Employment Commission, she suffered a “series of reprisals” from her supervisors. Her suit was filed under the ADEA, claiming retaliation in violation of the law. The U.S. Court of Appeals for the First Circuit in Boston upheld a lower court’s dismissal. The Supreme Court reversed that ruling.

The decisions in these two cases relied, in part, on a 2005 ruling that called retaliation another form of intentional, unlawful discrimination under Title IX, which bars sex discrimination in education. Title IX, like the two laws at issue, doesn’t explicitly talk about reprisals. Justice Sandra Day O’Connor wrote the 5-4 decision in 2005. Interestingly, Justice O’Connor, upon her retirement, was replaced by Justice Alito. That is interesting to say the least when you consider that many court observers have expressed shock at Justice Alito’s stand in the case in which he wrote the majority opinion. I believe it simply means the justice will follow the law and that’s the way it should be.

Source: *Associated Press*

JUSTICES TURN DOWN T-MOBILE APPEAL OVER CONTRACTS

In another significant decision, the U.S. Supreme Court handed a defeat to T-Mobile USA Inc., rejecting the company’s appeal in three cases involving the legal remedies available in millions of cell phone contracts. The issue in those cases is the same: whether state laws that limit the ability of companies to prohibit consumers from banding together to pursue class action lawsuits are preempted by federal law. This was a very important decision since it dealt with forced arbitration and the banning of class action prohibi-

tions in consumer contracts.

T-Mobile included a prohibition on class actions in a part of its contracts that also required consumers to resolve any complaints through arbitration. The company’s position was that federal law, which generally requires that arbitration clauses be enforced, overrules those state laws that limit the ability of companies to ban class actions. Under contract laws in many states, class-action bans are considered inherently unfair and courts, including those in California, where the dispute originated, can choose to not enforce them. Large companies love arbitration and claim it’s a faster and cheaper way to resolve disputes than is the case with litigation. As we now know—all too well—clauses requiring arbitration are included in millions of consumer contracts issued by credit card, cell phone, cable companies, and many others. In fact, it’s hard to find a consumer contract that doesn’t have an arbitration clause.

A federal appeals court ruled in one of the cases (*T-Mobile v. Laster*) last October that courts can refuse to enforce arbitration clauses if they include bans on class actions. The Supreme Court’s decision in the *Laster* case—without comment—lets that decision stand and allows the case to proceed to trial. Consumer groups have correctly stated that class action bans are unfair. That’s because in legal disputes over small amounts of money, individuals may not have the incentive to file a lawsuit. As a result, banning class actions could essentially allow companies to avoid liability for practices that cost large numbers of people small amounts of money. Public Citizen was involved in this case on behalf of American consumers and it had good lawyers working for the public good.

The T-Mobile case began when a woman named Jennifer Laster sued the company after buying a phone and signing up for wireless service in California in 2005. She alleged that T-Mobile engaged in unfair and deceptive busi-

ness practices by promising free and significantly discounted phones, while charging sales taxes based on the full price of the phone. T-Mobile, which is owned by German telecommunications company Deutsche Telekom AG, responded that it was required to charge sales taxes on the full retail price under California law. There were two companion cases involving T-Mobile that were also decided by the high court in a manner similar to the Laster appeal.

Source: Associated Press

A NEW CLASS ACTION LAWSUIT FILED FOR BLACK FARMERS

A class action law suit has been filed against the U.S. Department of Agriculture in the Federal District Court for the District of Columbia. The suit is on behalf of the five farmers who are named plaintiffs and all other *Pigford* “late filers.” The suit seeks damages from the USDA for decades of racial discrimination in the operation of the agency’s farm loan and support programs. It’s intended to provide relief for the thousands of African-American farmers who were shut out of the 1999 settlement in *Pigford v. Glickman*, the original discrimination lawsuit against USDA. The *Pigford* case awarded almost \$1 billion to African-American farmers whose civil rights had been violated by the USDA, but did not reach all farmers potentially eligible for the relief.

In hearings held by Congress in 2004 and again last year, it was determined that tens of thousands of potential *Pigford* claimants had not gotten fair notice of the settlement from the television, radio, and print campaign about the settlement in early 1999, and that, as a matter of fundamental fairness, they should be given another opportunity to obtain relief for the USDA discrimination. That opportunity was authorized by Congress in the recently enacted 2008 farm bill. A provision was included authorizing African-American farmers who would have qualified for

Pigford relief—but were left out—to seek redress in Federal court. The bill provided \$100 million to cover all new claims. J.L. Chestnut, from Selma, Alabama, and David Frantz of Washington, D.C., represented the *Pigford* plaintiffs and have filed this latest suit.

APPEALS COURT REVIVES LAWSUIT AGAINST HALLIBURTON

A federal appeals court has revived lawsuits against military contractors over a deadly ambush in 2004 that killed civilian truck drivers in Iraq. The suits, filed by truckers and their families, accuse Halliburton and a former subsidiary, KBR Inc., of knowingly sending a convoy into a dangerous area where six KBR drivers were killed and several others wounded in the ambush. A federal judge in Houston dismissed the lawsuits in September 2006, saying the courts can’t second-guess the military’s battlefield decisions. But the U.S. Court of Appeals for the Fifth Circuit in New Orleans reversed that ruling and has sent the three cases back to the lower court for further proceedings. A three-judge panel from the appeals court said it may be possible to resolve the lawsuits without making a “constitutionally impermissible review of wartime decision-making.” Judge Leslie Southwick, writing for the court, stated:

Cases spawned in a war zone involve constitutional issues and “practical considerations” that can prevent them from being resolved in court. It appears, though, that these tort-based claims of civilian employees against their civilian employers can be separated from the political questions that loom so large in the background.

At least 110 of KBR’s employees have been killed in Iraq since the company started working there in 2003 under a multibillion-dollar military contract. Although Halliburton is named in the lawsuit, the activity involved was apparently carried out pursuant to a KBR

contract. Christina Fountain, a lawyer representing the families of the truck drivers who were killed in the convoy and the drivers who survived, had this to say about the ruling:

We believe they (the court) applied the law properly to the facts as well as to the allegations and causes of action in the case.

Under the appeals court ruling, the truck drivers’ families will be able to prove their fraud and misrepresentation claims against KBR over the company’s hiring practices without second-guessing the Army’s actions. However, the negligence claims may implicate the political question doctrine, according to Judge Southwick. For that reason, the judge wrote, “further factual development very may well demonstrate that those claims are barred.” It will be interesting to see how this case winds up. Hopefully, the lawyers for the plaintiffs will be able to withstand and overcome the defendants’ challenges. The politically-connected defendants in this case are making a fortune out of the Iraq war, but that’s a story for another day!

Source: Associated Press

OVER ONE HUNDRED ORGANIZATIONS BACK FEDERAL WORKER WHISTLEBLOWER RIGHTS

A coalition of 112 religious, scientific, consumer, civil liberties, civil rights, peace, small-business, labor, libertarian, journalism, environmental, and good-government organizations, representing millions of Americans, is urging key U.S. Senate and House negotiators to agree to the strongest possible federal employee whistleblower protections. They want a bill delivered this year to President Bush. In a letter delivered to Capitol Hill last month, a diverse array of organizations, including the American Civil Liberties Union, Society of Professional Journalists, American Association of Small Business Owners, Consumers Union, the Liberty Coalition and the Rutherford Institute, praised congress-

sional whistleblower rights leaders for the steps they have taken to conclude an eight-year struggle to provide meaningful whistleblower protections to federal employees.

The letter was spearheaded by the Government Accountability Project (GAP), Public Citizen, the Project On Government Oversight (POGO), and the Union of Concerned Scientists (UCS). Stronger whistleblower protections are badly needed. The public, and the groups that represent them, define that to mean “jury trials for all employees paid by the taxpayers.” Government corruption sustained by secrecy can’t be tolerated and whistleblowers are the public’s eyes and ears.

Last year, both the House and Senate passed versions of whistleblower rights legislation designed to restore meaningful protections to federal employees who expose waste, fraud, abuse, and illegality. Over the past several months, the House Oversight and Government Reform Committee and the Senate Homeland Security and Governmental Affairs Committee have been meeting informally to resolve differences between the two bills. Senator’s Daniel Akaka (D-HI), Joseph Lieberman (I-CT), and Susan Collins (R-ME) are championing the measure in the Senate. In the House, lead sponsors and negotiators include Reps. Henry Waxman (D-CA), Tom Davis (R-VA), Todd Platts (R-PA), and Chris Van Hollen (D-MD). This legislation is an essential building block toward restoring a more accountable, responsible, and effective government for all of its citizens.

In the letter, the 112 groups offer their support to “expeditiously conclude” the reconciliation of the two bills. The letter stipulates that certain reforms must be part of a meaningful, final comprehensive whistleblower law, such as:

- Ensuring that the fundamental right to a jury trial in a federal court is provided to all federal employees;

- Including specific protections for scientist-whistleblowers; and
- Extending meaningful protections for national security whistleblowers at the FBI and intelligence agencies.

Public Citizen has been fighting to protect whistleblowers and their efforts should now pay off. David Arkush, director of Public Citizen’s Congress Watch division, had this to say about the need for Congress to act:

Government workers who warn us of waste, fraud and abuse should be protected, not punished. All federal employees—including scientists, contractors, and intelligence agents—should be able to expose wrongdoing without fear of reprisal. Congress should send a bill with an unmistakable message to the White House: We stand by the patriots who keep the public trust.

It should be noted that the critical reforms for government scientists and national security whistleblowers passed the House by an overwhelming, veto-proof margin, despite a threat from the administration to veto the House bill, H.R. 985. Other organizations endorsing the letter include Common Cause, the American Association for Justice, the National Treasury Employees Union, American Federation of Government Employees, National Taxpayers Union, and many more.

Source: Public Citizen

COURT WILL AGAIN REVIEW \$79.5 MILLION AWARD IN TOBACCO CASE

The U.S. Supreme Court will review a \$79.5 million punitive damages judgment against Marlboro-maker Philip Morris for the third time. The justices have twice struck down the award to the family of a longtime smoker of Marlboros, made by Altria Group Inc.’s Philip Morris USA. To their credit, Oregon courts have repeatedly upheld the judgment. As I understand it, the

justices will consider only whether the Oregon Supreme Court in essence ignored the U.S. high court’s ruling, not whether the amount of the judgment is constitutionally permissible. The case will be argued in the fall.

Source: Associated Press

V. THE NATIONAL SCENE

EXXON SUBMITS \$800 MILLION CLAIM WITH STATE OF ALASKA

We wrote last month that ExxonMobil Corp. was threatening to sue the State of Alaska. Well, the powerful oil giant has now submitted a claim with Alaska for reimbursement by the state of \$800 million. The company and its partners claim they have invested that much in the Point Thomson gas field development. It is just another example of this company’s greed and arrogance. We will watch developments in this case closely. You may recall that in Alabama, ExxonMobil sued the state and an administrative law judge ruled in the oil giant’s favor. This came after the state had sued ExxonMobil for fraud. The Alabama case is now on appeal to a state trial court judge and will likely wind up in the state’s Supreme Court.

Source: Alaska Journal of Commerce

CHILDREN IN KATRINA TRAILERS MAY FACE LIFELONG AILMENTS

It now appears that children who have had to live in FEMA trailers may face lifelong health problems. It’s being estimated that there may be tens of thousands of youngsters who may face lifelong health problems because the temporary housing supplied by FEMA contained formaldehyde fumes up to five times the safe level. As previously reported, the chemical, used in interior glue, was detected in many of the

143,000 trailers sent to the Gulf Coast in 2006. FEMA and the Centers for Disease Control and Prevention, didn't even begin until this past February to get folks out of these trailers. According to members of Congress and CDC insiders, the agencies' delay in recognizing the danger has caused problems. It has resulted in there being no plan in place to treat children as they grow older. Christopher De Rosa, assistant director for toxicology and risk assessment at the federal Agency for Toxic Substances and Disease Registry, an arm of the CDC, observed:

It's tragic that when people most need the protection, they are actually going from one disaster to a health disaster that might be considered worse. Given the longer-term implications of exposure that went on for a significant period of time, people should be followed through time for possible effects.

The Environmental Protection Agency has classified Formaldehyde as a probable carcinogen, or cancer-causing substance. There is no way to measure formaldehyde in the bloodstream. Respiratory problems are an early sign of exposure. Young children are at particular risk. Thousands who lived in trailers will be in the prime of life in the 10 to 15 years doctors believe it takes cancer from this source to develop. FEMA and CDC reports so far have drawn criticism in Congress. The more we learn about the Katrina-related problems the worse things seem to be.

A CDC study released on May 8th examined records of 144 Mississippi children, some of whom lived in trailers and others who did not. But the study was confined to children who had at least one doctor's visit for respiratory illness before Katrina. It was said to be largely inconclusive, finding children who went to doctors before the August 2005 storm were still visiting them two years later. A larger, five-year

CDC study will include up to 5,000 children in Louisiana, Mississippi, Alabama and Texas, according to CDC officials. The government says this study should begin next year. But members of Congress, pointing to the decade or longer it could take for cancer to develop, say a five-year look is inadequate. More than 22,000 FEMA trailers and mobile homes are still being used in Mississippi and Louisiana. FEMA and the CDC say they will create a registry of those who stayed in trailers for possible future study. But they admit that the task of keeping track of everyone is made difficult by the rush to get families into other housing. FEMA is a classic example of a government agency that doesn't seem to have a clue about its mission.

Source: Associated Press

FEDERAL GOVERNMENT HASN'T BEEN TRUTHFUL ABOUT OUR TROOPS

The federal government has been less than candid in its assertions concerning the plight of our troops returning from combat duty in Iraq and Afghanistan. The number of troops diagnosed with post-traumatic stress disorder (PTSD) jumped by roughly 50% in 2007, the most violent year so far in the conflicts in Iraq and Afghanistan, according to Pentagon records. The Defense Department has now disclosed a more realistic number for PTSD cases from the two wars. Officials say nearly 40,000 troops have been diagnosed with the illness since 2003 and that many more are likely keeping their illness a secret. Army Surgeon General Eric Schoomaker has admitted that he still doesn't believe he has "good numbers." While that's understandable, it doesn't excuse the numbers that had been disclosed by the government previously, which were apparently under-stated. It should be noted that the 40,000 cases of PTSD currently being reported cover only those that the military has tracked. There may well be many more that weren't followed by

the Department of Defense.

Officials have estimated that roughly 50% of troops with mental health problems don't get treatment because they're embarrassed or fear it will hurt their careers. An accounting of diagnosed cases released by the Surgeon General to the media in late May reveals the hardest hit last year were troops from the Marines and Army, the two ground forces bearing the brunt of combat in Iraq and Afghanistan. The Army reported more than 10,000 new cases last year, compared to more than 6,800 the previous year. More than 28,000 soldiers altogether were diagnosed with the disorder over the last five years. The Marine Corps had more than 2,100 cases in 2007, compared to 1,366 in 2006. They have had more than 5,000 PTSD cases diagnosed since 2003.

Increased violence in both wars and the fact that a number of troops are serving their second, third or fourth tours of duty—a factor mental health experts say dramatically increases stress—are all contributing to this most serious problem. It was reported in a recent private study that up to 300,000 of those who've served in these wars have symptoms. Regardless of how a person feels about the ill-advised war in Iraq, our government has a legal and moral duty to take care of all the men and women who have put their lives on the line for their country. There have been lots of instances where those returning troops have been largely ignored and that's inexcusable.

Source: Associated Press

OUR PUBLIC OFFICIALS IN WASHINGTON HAD BETTER WAKE UP

The company responsible for putting *Grand Theft Auto IV* on the market is getting filthy rich, and the game is doing great harm to young people and to this country. The release of the video game has also been a financial success for a number of corporations—in addition to the outfit responsible for putting this video game on the market—and that

has been largely overlooked. Microsoft, maker of the Xbox 360, brags that the release of the video game drove up sales of gaming console hardware by 54%. When you consider what this video game is all about, it is reason for concern. I am greatly concerned over what it can do to young people. Many adults don't have a clue what this game is all about. Videogame reviewer Lou Kesten reports:

Eight hours into Grand Theft Auto IV, I've stolen 17 cars, run over 20 people and killed another 15 (some of whom had it coming). I've shaken down a couple of store owners and beaten up an old lady...It has lots of blood, some nudity and a nearly constant stream of filthy language. And it's very entertaining.

That's a pretty sad commentary on what young people are seeing and thinking while playing this video game. It's high time that the public officials in our nation's capital wake up and start doing their job. They must put a curb on the sale and use of video games of this sort. If they don't take action, present and future generations will be adversely affected by such things as *Grand Theft Auto IV*. There must be a limit on the violent content of video games as well as with the content of television programming. It makes no sense to allow a video game to portray gangsterism and violent criminal behavior in a positive and acceptable light for youngsters. Can you believe that this game actually awards points for killing police officers? Strong regulation of the industries that are making a financial killing teaching young folks how to kill is an absolute necessity. If you agree, let your U.S. Senators and House members know how you feel.

Source: Public Television Council

BETTER LATE THAN NEVER

The Commodity Futures Trading Commission (CFTC) should be com-

mended for publicly acknowledging what most educated observers have been saying for months: Wall Street speculators are reaping unconscionable profits by exploiting and manipulating the unregulated energy trading markets. Commodity traders have pushed oil prices far higher than what can be explained by basic supply and demand. Under mounting pressure from Congress, the trading commission announced recently that it has been investigating oil trading practices for the past six months. Joan Claybrook, President of Public Citizen, says she remains a bit cynical, commenting:

We can't get too excited about the trading commission doing exactly what it's supposed to do, which is to investigate irregularities in the futures market. Its announcement is similar to the local Fire Department putting out a statement that it is now going to start responding to fires.

According to Joan, it's not difficult to trace the root of today's crisis. She says—and I agree—it was the deregulation of the energy trading markets, pushed through Congress in 2000 at the behest of Enron by its political allies, that has allowed oil companies and financial firms to manipulate prices with little regulatory oversight. The timing of the CFTC announcement has to make the public question the trading commission's sincerity. Why did the commission wait until after the Memorial Day holiday to speak up, when gas prices have been growing exponentially?

What is yet to be seen is whether the CFTC will aggressively root out wrongdoers, issue subpoenas and hold traders accountable by pursuing stiff civil and criminal penalties. Public Citizen is also concerned that the commission's investigation may focus solely on large, institutional investors and ignore the actions of oil companies and producers. It is well past the time for the Bush Administration and federal regulators to step in and end this frenzied, free-for-all in the energy futures markets. American consumers have suffered far

too long. Our citizens need real, immediate solutions to this energy crisis and not mere lip service. Unfortunately, I fear we will have to wait for a new president and vice-president—with no ties to the powerful oil companies—before anything of real consequence is done. But I am hopeful that the CFTC is serious about doing its duty and will continue the investigation.

Source: Public Citizen

THE PENTAGON NEEDS HELP TO MEET ITS AUDIT RESPONSIBILITIES

It now appears that Defense Department auditors have been unable to oversee tens of billions of dollars in military spending because of manpower shortfalls, leaving the Pentagon "more vulnerable to fraud, waste, and abuse." The Defense Department's inspector general, in a report to Congress obtained by a watchdog group, admitted its internal auditors have been unable to keep pace with the expansion in the military budget in recent years. According to the report, the defense budget doubled to \$600 billion in fiscal 2007 from \$300 billion in fiscal 2000, while the number of auditors essentially remained constant. That left individual auditors responsible for more than \$2 billion each in defense spending last year, up from the \$642 million each auditor had to oversee in 2000.

It appears that large amounts of military spending have received little to no oversight, according to the report. The Pentagon watchdogs were able to "provide sufficient audit coverage" to just \$158 billion of the \$316 billion the Pentagon spent on weapons acquisitions last year. The audit personnel wrote:

The capabilities of the [inspector general] are not keeping pace, in terms of qualified personnel, with the growth in the size of the defense budget and the numbers of contracts. The continual degradation of audit resources... leaves

the Department more vulnerable to fraud, waste, and abuse and undermines the department's mission.

Recent military-contracting scandals and fraud cases have been a matter of great concern. It now appears that the lack of enough trained auditors to prevent such abuses from occurring in the first place is a real problem. In the spring of 2005, the special inspector general for Iraq reconstruction concluded that U.S. officials overseeing small reconstruction projects in 2003 and 2004 failed to keep proper records on \$89.4 million and couldn't account at all for an additional \$7.2 million. According to the inspector general, at least some of the money appeared to have been stolen. Military officials at the time contributed the failings, in part, to a lack of adequate numbers of government auditors. The March self-assessment by the Pentagon auditors was written at the direction of Congress and obtained by the Project on Government Oversight, a private watchdog group in Washington. Nick Schwellenbach, the group's national security investigator, commented;

The Pentagon's top cop is out-gunned and it's high noon. It's stunning that we've been spending so much for so long with so little oversight.

In this year's budget, Congress approved an additional \$24 million for Pentagon auditors. But the auditors, according to the report, will need at least \$25 million more to meet their requirements. The Pentagon inspector general said it plans to hire at least 481 personnel in the next seven years, expanding to more than 1,900 full-time employees. If our government is going to be capable of stopping fraud and abuse when it comes to government contracts, Congress must provide the funds necessary for auditors and other personnel required to investigate fraud and corruption.

Source: *Wall Street Journal*

VI. THE CORPORATE WORLD

BROCADE TO SETTLE BACKDATING SUIT FOR \$160 MILLION

Brocade Communications has agreed to pay investors \$160 million to resolve a class-action lawsuit arising from allegations that already have led to a criminal conviction of former chief executive Gregory Reyes. The Brocade settlement—arising out of the stock-options backdating scandal—is the largest to date among dozens of cases filed in the nationwide scandal over rigged stock-option compensation. Several of these scandals involved Silicon Valley firms. This is one of the top recoveries in terms of ratio of settlement to damages sought by aggrieved investors that I am aware of. Arkansas Public Employees Retirement System was the lead plaintiff in this case.

A San Francisco federal court ruled in May that Brocade, a San Jose-based maker of networking hardware, was legally responsible for Reyes' conduct and would have to pay damages. The settlement is subject to court approval. The Brocade case has been closely watched in Silicon Valley, in part because of the high-profile personalities involved in the case. As we previously reported, Reyes was sentenced in January to 21 months in prison and fined \$15 million for his role in hundreds of instances of backdating. In March, Brocade's former human resources chief, Stephanie Jensen, was sentenced to four months in prison and ordered to pay a \$1.25 million fine for her role.

Since most securities fraud class action suits settle for less than 10% of investor losses, this \$160 million settlement was a great one. It's certainly one of the largest—if not the largest—backdating settlements to date. The fact that it's close to a 100% recovery of the class's total damages makes it most significant.

The Brocade case was emblematic of a national scandal involving scores of companies that were found to have improperly manipulated the value of options, but failed to disclose their actions. Options provide recipients with the right to buy a share of stock at a set price, typically the closing share price on the date a grant is made. Brad Beckworth, a Texas lawyer, represented the lead plaintiff in this case and did a super job.

Source: *Mercury News*

MEDTRONIC TO PAY \$75 MILLION TO SETTLE LAWSUIT

Under a recently agreed upon settlement, Medical device maker Medtronic Inc. will pay \$75 million to settle fraud allegations with the federal government. The Department of Justice charged that spinal catheter maker Kyphon, before its November 2007 acquisition by Medtronic, fraudulently caused hospitals to file inflated reimbursement claims with Medicare for back surgery known as kyphoplasty. Federal prosecutors maintained that the company wrongfully marketed the procedure and defrauded Medicare of hundreds of millions of dollars. Medtronic will sign a corporate integrity agreement with the Office of Inspector General for the Department of Health and Human Services, as part of the settlement. The company reports that the amount required to be paid under the settlement had already been set aside before the companies' merger was complete.

It was alleged that Kyphon, which Medtronic acquired in 2007, improperly persuaded hospitals to keep people overnight for a simple outpatient procedure to repair small fissures of the spine. Medicare then reimbursed the hospitals at a much higher cost than it otherwise would have for the procedure, which was developed as a noninvasive approach that could usually be done in about an hour. By marketing its products this way,

Kyphon was able to artificially drive up demand among hospitals, increasing its revenue and driving up its stock price. Medtronic subsequently bought the company, its competitor, for \$3.9 billion, making Kyphon's senior executives very rich.

Since we have seen so many cases of corporations cheating the government, I am going into more detail on how this fraudulent scheme works.

The scheme at Kyphon was based on Medicare's practice of reimbursing hospitals more for complex inpatient back surgery than for outpatient care. It was alleged that Kyphon had deliberately urged doctors to admit patients overnight, knowing the admissions were unnecessary. Hospitals, seeing the overnight admissions as a way to raise revenue, bought Kyphon's products, even though they were expensive, starting at \$3,500 to repair one spinal fissure. The hospitals could recover the cost through the improper reimbursements for overnight stays. Kyphon sold so much equipment this way that at one point it enjoyed a 90% profit margin, according to allegations in the lawsuit. The scheme began in 1999, when Kyphon's products first came to the market. Kyphon's rapid sales growth and profitability eventually gave rise to a patent dispute with Medtronic, which was conveniently dropped when Medtronic acquired the company. The acquisition richly rewarded Kyphon's shareholders, particularly its top executives. The company admits its top 15 executives stood to receive about \$145 million by cashing in their options and restricted stock.

This scheme involving Kyphon is just another example of a corporation cheating the government—knowing that the government has had difficulty detecting fraud because of the nature of the activities engaged in—and eventually getting caught. When that happens the guilty party simply paying money—thereby settling the matter—and continues to cheat the government. This sort of thing can't be tolerated.

Source: *Associated Press*

IBM To Pay \$20 Million To Settle Shareholder Suit Over Options Expensing

Armonk, New York-based IBM Corp. has agreed to pay \$20 million to settle a shareholders' lawsuit that claimed the technology company misled the public about employee stock-option expenses in 2005. The settlement comes a year after the Securities and Exchange Commission determined that IBM's conduct had violated federal law. Interestingly, the SEC stopped short of finding that fraud had been committed, and it imposed no fine on IBM. The shareholder lawsuit and the SEC investigation looked into whether IBM manipulated expectations for its first-quarter earnings announcement in 2005. It surely did look like fraud but maybe the SEC saw the facts differently.

Source: *Insurance Journal*

New York Court Says Dell Misled Customers

A New York state judge says Dell Inc. has engaged in repeated false and deceptive advertising of its promotional credit financing and warranty terms to consumers. State Supreme Court Justice Joseph Teresi says New York Attorney General Andrew Cuomo showed that "many customers" are entitled to restitution, but the record was insufficient to determine how much. When the Attorney General sued the computer maker last year, a Dell spokesperson said the company's conduct had been honorable, customers were its top priority, and it had six million transactions in New York between 2003 and 2006. However, in May 2007, the New York Attorney General's office had received 700 complaints against Dell and they were still coming in.

Source: *Associated Press*

Settlements Delay Cheaper Drugs

According to the Federal Trade Commission, pharmaceutical companies are using settlements with generic drug makers to delay the introduction of cheaper medicines. In a 12-month period that ended September 30, 2007, 14 of 33 agreements to settle patent litigation between brand-name drug companies and generics included both a restriction on the generic company's ability to market a drug and compensation to the generic manufacturer. The Commission maintains that by jamming the pipeline of cheaper drugs, agreements of that sort harm consumers. The agency has sued to block some agreements and is supporting legislation in Congress that would ban the practice. It's apparent that the FTC has had limited success in blocking settlements. Two appeals courts ruled in 2005 that similar agreements reached by Schering Plough Corp. and Astra Zeneca PLC with generic companies were legal.

The FTC's report revealed that settlements with restrictions on generic drug makers increased from three in fiscal year 2005 to 14 in 2006, the same total as last year. Drug companies are required to report the settlement of patent litigation with generic drug makers under a 2003 law. FTC Commissioner Jon Leibowitz observed:

Pay-for-delay settlements continue to proliferate. That's good news for the pharmaceutical industry, which will make windfall profits from these deals. But it's bad news for consumers, who will be left footing the bill.

The FTC did not name any companies in its report. Pharmaceutical companies and some generic manufacturers defend the settlements as a way to reduce costly litigation and allow generic companies to introduce cheaper drugs before patents expire. The FTC says that the most common form of compensation by the drug companies

to generics, included in 11 of the 14 settlements, was an agreement to not introduce a competing generic drug once a generic company is able to introduce its product.

In the other three cases, the companies reached side agreements that allowed the generics to market products that were not the subject of the patent litigation. In February, the FTC accused Cephalon Inc. in a lawsuit of illegally blocking generic competition to its drug Provigil, which combats sleepiness in patients with sleep disorders. The FTC said the company paid four generic drug makers \$200 million as part of agreements reached in 2005 and 2006. Cephalon's position was that the agreements were lawful settlements of patent litigation that allowed generics to enter the market three years before its patents expired.

Source: Associated Press

FEDERAL GOVERNMENT SUES HONEYWELL OVER FAULTY BULLETPROOF VESTS

The government has sued diversified manufacturer Honeywell International Inc. for selling material used in bulletproof vests. It's alleged the company knew the vests were defective. According to the Justice Department's lawsuit, Honeywell had scientific data showing that the ballistic material, known as Zylon Shield, "degraded quickly over time, especially in hot and humid conditions." The department says it left the vests unfit for use by law enforcement agencies and military personnel. It was alleged that Honeywell failed to notify the government or the vest manufacturer, Armor Holdings Inc., of the defect. But it was reported by the Associated Press that the U.S. government paid \$1.3 million for more than 1,700 vests sold by Armor Holdings that contained Honeywell's Zylon Shield between 2000 and 2005. The government also paid roughly \$20 million more for over 11,000 bulletproof vests made with the Zylon Shield.

The Zylon fabric used in Honeywell's

Zylon Shield was supplied by Japan's Toyobo Co. Ltd. and its U.S. subsidiary, Toyobo America Inc. Honeywell patented its Zylon Shield and later sold it to Armor Holdings and its subsidiaries according to the complaint. The Justice Department also alleges that Honeywell "discouraged" Armor Holdings from taking any steps to notify buyers about problems with the fiber. The lawsuit, filed in the U.S. District Court for the District of Columbia under the False Claims Act, is part of an ongoing investigation of several vendors who played a role in making the defective bulletproof vests. Several agencies are working together on the probe including the FBI and the Army Criminal Investigative Division.

It should be noted that in October Aerospace supplier Hexcel Corp. agreed to pay \$15 million to resolve allegations over its role in making defective vests used by law enforcement agencies. At that time, the federal government alleged that the Stamford, Connecticut-based company knew that the Zylon fiber it used had been defective. That same Zylon had also been supplied by Toyobo and the vests were sold by Second Chance Body Armor, DHB Inc. and its subsidiaries, Armor Holdings and its subsidiaries, and Gator Hawk Armor.

Source: Associated Press

SUITS FILED AGAINST SOME MAJOR PLAYERS IN REAL ESTATE TITLE INDUSTRY

Four major real estate title and escrow companies now face class action lawsuits filed over a number of business practices, including allegedly charging customers for services performed by other companies involved in the residential real estate settlement process. The class actions also allege that two of the companies are earning interest from pooling clients' funds and steering customers to the companies' own higher-cost subsidiaries for unnecessary services. Title companies act as the middlemen in residential real estate

transactions by taking money from the buyer or the buyer's lender in exchange for the title. They also pay off the seller's loans and give the balance of funds to the seller. These newly filed lawsuits challenging the companies' practices are the latest wave of litigation to involve this industry. There had already been a number of antitrust lawsuits filed, claiming that the industry's major players fixed prices and those cases appear to have merit.

The new lawsuits, filed in federal court in California and Washington state, are against Chicago Title Insurance Co., Fidelity National Title Co., First American Title Insurance Co. and Old Republic Title Ltd. These companies are accused of participating in a number of schemes. For example, it's alleged that:

All of the companies improperly charged fees for re-conveyance, which is the process of extinguishing liens and trust deeds connected to loans paid off in the transaction. The lender of prior mortgages on the real estate typically does this work and charges a fee. The First American lawsuit also accuses the company of allegedly using a fraudulent scheme to "reap duplicate, unearned, and unreasonable" re-conveyance fees by steering customers to a subsidiary for re-conveyance work, even though the prior lender was doing the re-conveyance work.

The Fidelity National and First American lawsuits also claim the companies kept interest earned from funds and loans escrowed by the customers and their lender during the real estate settlement process, without disclosing that they were retaining pooled interest.

Source: National Law Journal

AGA MEDICAL CORPORATION GETS BRIBERY PROSECUTION DEFERRED

AGA Medical Corporation (AGA), a privately-held medical device manufacturer, was charged last month with bribing Chinese officials. But, by having its prosecution deferred, the company will get out of the problem by paying \$2 million. AGA specializes in the manufacture of products designed for the minimally invasive treatment of congenital heart defects. The two-count criminal information charged AGA with one count of conspiring to make bribe payments to Chinese officials and one count of violating the FCPA in connection with the authorization of specific corrupt payments to officials in China.

It was alleged that between 1997 and 2005, AGA, a high-ranking officer of AGA and other AGA employees agreed to make illegal payments to doctors in China who were employed by government-owned hospitals and caused those payments to be made through AGA's local Chinese distributor. In exchange for these payments, the Chinese doctors directed the government-owned hospitals to purchase AGA's products rather than those of AGA's competitors. The criminal information also alleges that from 2000 through 2002, AGA sought patents on several AGA products from the People's Republic of China State Intellectual Property Office. As a part of this effort, AGA and a high-ranking officer of AGA agreed to make payments through their local Chinese distributor to Chinese government officials employed by the State Intellectual Property Office in order to have the patents approved.

Source: *Corporate Crime Reporter*

U.S. GOVERNMENT GIVES AN INDICTED SAUDI A \$80 MILLION GOVERNMENT CONTRACT

When you start to think you have seen some weird happenings relating to federal contracts, something even more bizarre occurs. The U.S. military has awarded an \$80 million contract to a

prominent Saudi financier who has been indicted by the U.S. Justice Department. The contract to supply jet fuel to American bases in Afghanistan was awarded to the Attock Refinery Ltd, a Pakistani-based refinery owned by Gaith Pharaon. This man is wanted in connection with his alleged role at the failed Bank of Credit and Commerce International (BCCI), and the CenTrust savings and loan scandal, which cost American taxpayers \$1.7 billion.

The Saudi businessman was also named in a 2002 French parliamentary report as having links to informal money transfer networks called "hawala," known to be used by traders and terrorists, including Al Qaeda. Interestingly, Pharaon was also an investor in President George W. Bush's first business venture, Arbusto Energy. According to media reports, Pharaon is not wanted in connection with the French report, but he is still being sought by the U.S. Justice Department. Richard Kolko, a spokesman for the FBI, put out this plea:

Gbaith Pharaon is an FBI fugitive indicted in both the BCCI and CENTRUST case. If anyone has information on his location, they are requested to contact the FBI or the US Embassy.

The U.S. military purchases jet fuel from Attock through a contractor Supreme Fuels, according to a U.S. government Web site. The \$80 million contract for 2008 was posted last month on the Web site. Attock supplied the U.S. military more than \$40 million worth of jet fuel in 2007, according to a spreadsheet posted on the site. *ABC News* reported that an official at Attock confirmed the refinery was supplying thousands of tons of jet fuel to the U.S. base at Bagram Air Base every month.

I wonder why this sort of stuff really doesn't come as a surprise. When the book is finally written on Iraq I suspect there will be a tremendous number of scandals and financial abuse to read about.

Source: *ABC News*

CYPRESS DEFENSE CONTRACTOR PLEADS GUILTY TO BRIBERY

A Texas-based defense contractor has entered a guilty plea in federal court for its role in a bribery scheme to influence government contracts in Iraq handled by an Oklahoma military officer. Raman International Inc., which is based in Texas, pleaded guilty in U.S. District Court in Oklahoma City to one count of conspiracy to commit bribery and agreed to pay a \$500,000 fine and more than \$325,000 in restitution to the Department of Defense. A federal grand jury indictment, handed down in January, accuses Raman's former Iraq manager, Elie Samir Chidiac, of bribing an Oklahoma military officer who was responsible for awarding and administering government contracts at Camp Victory in Iraq. Some of the contracts were for communications and networking equipment.

Source: *Associated Press*

VII. CAMPAIGN FINANCE REFORM

EXXONMOBIL SPENT NEARLY \$3.1 MILLION LOBBYING IN THE FIRST QUARTER

Over the past several years, ExxonMobil Corp. has pretty well had its way in all of its dealing with governments at every level. That may be a result of the company's strong political connections as well as its intense lobbying efforts. The giant oil company spent almost \$3.1 million to lobby the federal government on energy tax credits, climate change and other issues in the first quarter of the year. The company also lobbied on various appropriations bills and on legislation dealing with consumer product safety among other things. ExxonMobil spent more than \$16.9 million to lobby the federal government in 2007. Of course, the company and its officers and employees—as well as law firms and consult-

ants who work for them—also contribute huge sums to political campaigns.

The oil giant also contributes to the shadow groups (527 committees) that pay a large part of the GOP political operations. It appears the lobbying and contributions paid off since the energy bill President Bush signed in December failed to include billions of dollars in higher taxes for large oil companies. Many Democrats in Congress wanted these proposed taxes to fund incentives for various clean energy industries, but that effort was derailed by the oil giants and as a result nothing happened. You can chalk that up as another win for ExxonMobil.

Source: Associated Press

VIII. CONGRESSIONAL UPDATE

SENATORS QUESTION ROOF STRENGTH SAFETY RULES

On July 1st, as has been widely reported, the National Highway Traffic Safety Administration will enact rules that would increase vehicle roof strength standards. Consumer advocates and a number of U.S. Senators have demanded that NHTSA come up with a strong rule that will actually protect folks. At a Congressional hearing last month, it was pointed out that the regulatory agency needs to get the rules “right” rather than get them done “quickly.” NHTSA is expected to enact the first significant upgrade to its so-called “216 Rule” since it was created in 1973. As we have reported, the rule requires a vehicle to withstand at least 1.5 times the weight of the vehicle, slowly applied to one side of the vehicle by what is called a “static crusher.” The new proposal would increase that standard to 2.5 times the weight of the vehicle—possibly to both sides—and might include a controver-

sial preemption clause that would essentially keep consumers from filing lawsuits against automakers whose vehicles kill or injure them in rollovers.

Although rollovers comprise less than 5% of all crashes, 25% of all vehicle fatalities are from rollovers—approximately 10,000 every year. Although the upgraded standard is expected to save some lives, it won’t save enough. NHTSA needs to spend more time testing to find a better standard. Senator Tom Coburn (R-OK) commented on the proposed rule:

I don't think it's as important they get it done in July 2008 as it is they get it done right. NHTSA did not provide any information as to why it chose 2.5 over any other ratio. If we have a little increase in roof strength and that has a little effect on fatalities, then we've done nothing.

The hearing was held by the Senate subcommittee on Consumer Affairs, Insurance, and Automotive Safety. Senator Coburn was moved by the story of Kevin Moody, a constituent whose 18-year-old son died when his Ford Explorer rolled in 2003. It obviously had an effect on the Senator when Mr. Moody testified at the hearing. There’s no question that Congress will have to step in and set the rule if NHTSA refuses to do it properly on July 1st.

It was significant that pertinent and probing questions were also raised at the hearing about federal preemption. Pointed questions from Sen. Claire McCaskill (D-MO) on the proposal’s preemption clause were handled poorly by NHTSA officials. For example, the Senator asked:

What does this (proposal) have to do with wiping out everyone's right to use their state courts? Is this coming from the White House? Where are these boilerplate preemption rules coming from?

It was reported by the media that a NHTSA representative answered almost every question by “meekly thanking” Senator McCaskill for the question and saying some variation of “we included it as part of the public discussion. It may not appear in the final ruling.” Senator Mark Pryor (D-AR), chair of the subcommittee, warned NHTSA that the agency is “overstepping (its) bounds.” The Senator made it clear that if NHTSA continues to pursue this preemption language, it will get “bipartisan opposition to it.” Under the Bush administration these preemption clauses have appeared in many of the rulemakings for NHTSA and other regulatory agencies. Stephen Oesch, senior vice president of the independent Insurance Institute for Highway Safety, told the subcommittee members that the Institute’s own tests reveal that the new standard will save lives by 28% and that increasing that standard only increases the percentages of lives saved. In this regard, he added:

There is a direct correlation of increased roof strength and decreased risk of injury.

Joan Claybrook, president of the not-for-profit consumer advocacy group Public Citizen and former director of NHTSA, said an overall increased roof strength acts like a strong chassis that keeps the car safe in rollovers and durable during other crashes as well. Joan believes the agency should also test vehicles with a dynamic test that would put a vehicle through a realistic simulation of a test—similar to the tests many luxury European car manufacturers such as Volvo and BMW already perform. The strong consumer advocate said the Jordon Rollover System, which has been used by insurance companies for years, accurately details roof strength within a few degrees of separation for each test

By proposing a roof crush rule that fails to require manufacturers to test both the driver and passenger sides of vehicles and does not even consider

dynamic testing, NHTSA has ignored a congressional mandate to reduce rollover deaths, which have surged with the popularity of top-heavy sport utility vehicles. In its 2005 highway bill, Congress demanded that NHTSA write new performance standards that would improve vehicle stability, reduce passenger ejections and increase roof strength. The legislation also clearly called for testing both sides of the vehicle roof. Studies show that the initial impact of a rollover can break the windshield, which can substantially weaken the other side of the roof, greatly increasing the chance it will crumple and injure the occupants.

Instead, NHTSA's proposed rule relies solely on measuring the ability of the driver's side roof to resist 2.5 times the vehicle's weight, which is an increase from the existing standard but does very little by itself to improve safety, Claybrook said. NHTSA estimates that its proposal will save, at most, only 476 lives a year. "These estimates show that NHTSA has neither looked at the problem of rollover fatalities in a new light nor made a real attempt to correct the problem," Claybrook said. "In the face of more than 10,500 fatalities a year, an 'upgraded' rule that barely addresses 5% of the fatalities is just gross negligence."

Until the agency can issue a dynamic crash test standard, it should provide consumers with information about the roof strength of vehicles on the market using an upgraded static consumer information test, as well as highlight whether other safety equipment in the vehicle, such as safety belt pretensioners and side curtain airbags, are designed to operate in rollover crashes. This will allow consumers to make an assessment of the roof strength of vehicles on the market until a dynamic test is implemented.

Roof crashes should be highly survivable and safety advocates have known about the problem for almost 20 years. It's apparent that a significant number of Senators will keep the dialogue

going on the issue of roof safety. While the options vary from giving NHTSA more time to develop a more substantial rule, to Congress passing a law to trump the agency's efforts, one thing seems very clear: NHTSA has few allies in Congress on the issue. It's good to see Congress getting involved in this fight. Safety should be a top priority for the automobile industry and it surely should be on NHTSA's priority list. I have never believed that NHTSA was free of undue influence from the industry. The agency will definitely get a good test of its independence and commitment to safety on July 1st. Hopefully, it will do the right thing!

Source: Public Citizen

SENATE SHOULD ENACT GLOBAL WARMING LEGISLATION

The U.S. Senate should pass legislation to combat global warming by imposing mandatory reductions in carbon dioxide and other greenhouse gases. I doubt that many of our readers will be surprised to learn that a few powerful Republicans in the Senate oppose the bill and will make its passage very difficult. A request by Democrats to begin considering substantive changes in the bill was initially blocked by the GOP senators. Senate Majority Leader Harry Reid of Nevada has promised a thorough debate. It should be undisputed that "global warming is real." I believe Congress has a moral responsibility to take all action necessary to attack the global warming issue. Thus far, the powerful oil companies—with the backing of the Bush Administration—have successfully stalled all real efforts to combat this most serious problem. Supporters of the most recent bill have acknowledged passage will be difficult—perhaps impossible—and that the GOP filibuster threat against the legislation, as long as Bush is in control, will put off action on global warming until the next Congress with a new next president.

The Senate measure, which has wide

Democratic and limited Republican support, would cap U.S. emissions of carbon dioxide and other greenhouse gases, cutting them by 18% by 2020 and by two-thirds by mid-century. It would specifically target refineries, power plants, factories and transportation for 70% reductions and make emissions allowances available to be traded in an open market. I find it hard to find any justifiable reason for opposing this legislation. Nevertheless, it appears the GOP Senators will be able to delay passage of the bill. As a result, the bill will go over to the next Congress. Hopefully, it will then pass.

Source: Associated Press

THE KID-SAFE CHEMICALS ACT IS NEEDED

The nation's toxic chemical regulatory law, the Toxic Substances Control Act (TSCA), is in drastic need of reform. The industry-friendly act was passed in 1976 and has never been changed since that time. TSCA is widely regarded as the weakest of all major environmental laws on the books today. When passed, the Act declared some 62,000 chemicals that were on the market to be safe, even though there were little or no data to support this declaration. Since that time another 20,000 chemicals have been put into commerce in the United States; again, there was little or no data to support their safety. That's unacceptable from a safety perspective and can't be tolerated.

It's widely believed that there are hundreds of industrial chemicals in use with little or no understanding of the environmental or health and safety consequences. Babies are born pre-polluted with as many as 300 industrial chemicals in their bodies when they enter the world. Testing by Environmental Working Group has identified 455 chemicals in people, but, no one has any idea if these exposures are safe. We are at a tipping point, where the pollution in people is increasingly associated with a range of serious diseases and conditions from childhood cancer,

to autism, ADHD, learning deficits, infertility, and birth defects. Although the knowledge about the link between chemical exposure and human disease grows, the government has almost no authority to protect people from exposure to even the most hazardous chemicals on the market.

Senator Frank Lautenberg and Representatives Hilda Solis and Henry Waxman have introduced bills in the House and Senate to protect Americans—especially children—from toxic chemicals in everyday consumer products. Their bill, the Kid-Safe Chemicals Act (KSCA), should be passed by Congress. The current law does not require chemicals to be proven safe to get on the market or stay on the market. Under TSCA, the EPA has no authority to demand the information it needs to evaluate a chemical's risk. Neither manufacturers nor the EPA are required to prove a chemical's safety as a condition of use, which is difficult—if not impossible—to understand. The Kid-Safe Chemical Act will change all this through a fundamental overhaul of our nation's chemical regulatory law. Specifically, the Kid-Safe Chemicals Act:

- requires that industrial chemicals be safe for infants, kids and other vulnerable groups;
- requires that new chemicals be safety tested before they are sold;
- requires chemical manufacturers to test and prove that the 62,000 chemicals already on the market that have never been tested are safe in order for them to remain in commerce;
- requires EPA to review "priority" chemicals, those which are found in people, on an expedited schedule;
- requires regular biomonitoring to determine what chemicals are in people and in what amounts;
- requires regular updates of health and safety data and provides EPA with clear authority to request additional information and tests;

- provides incentives for manufacturers to further reduce health hazards;
- requires EPA to promote safer alternatives and alternatives to animal testing;
- protects state and local rights; and
- requires that this information be publicly available.

Passage of the Kid-Safe Chemicals Act will give our children a safer and healthier future. If you agree, contact your U.S. Senators and House members and ask for their support. This is too important an issue for us to sit on the sidelines and do nothing.

Source: News Release from the office of Senator Lautenberg

IX. PRODUCT LIABILITY UPDATE

A NEW WARNING RELATING TO AGED TIRES

After years of delay, the National Highway Traffic Safety Administration has finally issued a consumer advisory, warning motorists that outdated tires, even if they appear to be brand new, can lead to "catastrophic failure." We wrote on this issue last month. NHTSA has dragged its feet on the issue and that's fairly typical of the way the agency has dealt with safety issues. In this instance it was hard to understand the delay because of the agency's past acknowledgement that aged tires are a serious safety risk. Sean Kane, who is an auto safety expert, had petitioned NHTSA in 2004 to issue a consumer advisory on aged tires, but until this advisory no action had been taken. In commenting on the agency's action, Mr. Kane observed:

The vehicle industry, the tire industry and the government have known about this problem for years, but consumers have been kept in the dark.

NHTSA's advisory warns motorists as they prepare for summer travel that "Old tires also are subject to greater stress, which increases the likelihood of catastrophic failure." The advisory also informs consumers how to determine the age of their tires by reading the DOT code on the sidewall. A 20/20 investigation by *ABC News* into the dangers of aged tires got lots of public attention. The investigation detailed how as tires age, they can dry out and become brittle, leading to a possible catastrophic tread separation. Despite more than 100 deaths in this country attributed to aged tires, NHTSA turned down a petition by Ford Motor Co. to impose a six-year shelf life on tires. This advisory does note that "some tire and vehicle manufacturers have issued recommendations for replacing tires that range from six to ten years of age. Consumers are advised to check with their tire or vehicle manufacturer for specific guidance."

Source: *ABC News*

STOVES THAT CAN TIP OVER CREATE A HAZARD

Our firm has handled a number of lawsuits involving death or serious injury caused by a hazardous condition where the culprit was a stove. Most folks don't realize that kitchen stoves can be hazardous. They don't know that freestanding stoves which are installed without safety brackets are extremely dangerous. Such a stove can tip over and cause serious injury and even death. Over the years, even if consumers didn't know about this hazard, the manufacturers, retailers and the Consumer Product Safety Commission certainly have. In fact, they have had this knowledge for years. It's significant that their knowledge included the statistical data showing that children and the elderly are the most at risk.

A settlement involving freestanding and slide-in gas and electric ranges sold by Sears was announced in February. This settlement called for payments of

as much as \$546 million to as many as 4 million Sears' customers. Sears has failed to install the safety brackets that come with every stove. This special hardware prevents the stove from tipping over when an open door has weight placed on it. The ranges which have now been recalled were sold and installed by Sears between July 2, 2000, and September 18, 2007. Claims must be filed by September 18th of this year. Complete settlement details can be obtained by going to www.searsrange-settlement.com. It's important to note, however, that persons with individual claims for serious injury or death are usually much better off filing individual lawsuits. Persons should always consult a lawyer before making a decision of this nature. Kendall Dunson in our firm has had good success in handling cases of this sort. If you want additional information, you may contact him at 800-898-2034.

Source: Public Citizen

DEATHS AND SERIOUS INJURIES CONTINUE TO MOUNT FOR THE YAMAHA RHINO

In February of this year, in two separate accidents within minutes of each other at a recreation area in California, two people were killed while riding in Yamaha Rhino ATVs. Despite wearing her seatbelt, 26-year-old Stephanie Ann Katin was partially ejected from a rented Yamaha Rhino that was being driven by her husband. She suffered fatal head injuries as a result of the rollover. Her husband was not injured. The seatbelt restraint did nothing to help restrain Katin during the rollover accident. A mere 90 minutes later, a 14-year-old boy was killed at the same recreation area after he was ejected from a Yamaha Rhino in which he was a passenger. The roll cage of the ATV landed on top of him resulting in massive head injuries. In June, 2007, a Texas couple lost their nine-year-old son in a Yamaha Rhino ATV accident. The ATV in which the young boy was riding rolled over while going only 15

mph, pinning the boy underneath it.

Dwight Grimes lived on a small ranch in central California. On his first use of the Rhino, the ATV rolled over on him and crushed his leg during a simple low speed turn. Dwight was alone and miles away from his home with his badly fractured leg. Ultimately, he had to endure eight major surgeries to correct his injuries. David will have a badly disfigured leg and considerable pain for the rest of his life.

The effects of Yamaha Rhino ATV rollover accidents have been devastating, leaving adults and numerous children severely injured, permanently disfigured, and even dead. Rollover accidents often pin victims beneath the vehicle, which can break bones, crush limbs, and damage vital organs. In some cases, victims are killed instantly due to the vehicle slamming down on top of them. Adding to the severity of these injuries is the fact that many of the locations where these vehicles are driven are far removed from immediate medical attention.

Yamaha designed the Rhinos to be narrow and top-heavy. In addition, Yamaha selected small tires for it. These design features make the Rhino very unstable and unusually prone to roll over. Rollovers occur even when the terrain is flat and the driver is turning at low speeds. Until Yamaha addresses its defective design of these unstable ATVs, the deaths and injuries will continue to mount. Our firm is handling these cases. If you need additional information, contact Mike Andrews or Dana Taunton at 800-898-2034.

LAWSUIT FILED AGAINST MAKER OF BABY BOTTLES WITH BPA

An Arkansas woman has filed a lawsuit in federal court accusing Playtex Products, a Connecticut company, of making plastic baby bottles with a dangerous chemical linked to serious health problems. This lawsuit, which is the latest challenge involving the industrial chemical

bisphenol A, seeks nationwide class-action status. If a class is certified, thousands of people who bought plastic bottles containing the chemical from Playtex or other companies will be included. In April Canada said that the chemical, found in hard plastic water bottles, DVDs, CDs and hundreds of other common items, was potentially harmful and that its use in baby bottles might be banned. Some parents are turning to glass bottles because of the safety concerns over bisphenol A.

The U.S. government's National Toxicology Program says there was "some concern" about BPA from experiments on rats that linked the chemical to changes in behavior and the brain, early puberty, and possibly precancerous changes in the prostate and breast. While such animal studies only provide "limited evidence" of risk, the government admits a possible effect on humans couldn't be dismissed. With more than 6 million pounds produced in the United States each year, BPA is found in dental sealants, baby bottles, the liners of food cans, CDs and DVDs, eyeglasses and hundreds of household goods. Wal-Mart, the world's largest retailer, has said its baby bottles would be BPA-free early next year.

Playtex, which is part of Energizer Holdings, based in St. Louis, says BPA is safe. Citing "consumer confusion," Playtex has offered a free sample of a bottle system that uses disposable liners that are BPA-free. The company has said it will convert the balance of its product line to BPA-free materials by the end of the year. The chemicals industry maintains that polycarbonate bottles contain little BPA and leach traces considered too low to harm humans. The industry cites multiple studies in the United States, Europe and Japan to back up its claims. But the lawsuit, filed in U.S. District Court in New Haven, Connecticut, contends that hundreds of studies and papers have repeatedly shown that BPA can be toxic even at extremely low doses.

This case will be watched closely for future developments.

Source: *Associated Press*

X. MASS TORTS UPDATE

UPHOLDING PREEMPTION WOULD LEAD TO MORE PHARMACEUTICAL CATASTROPHES

We have written many times about the failures of the FDA to protect the American public from dangerous medications. Dr. David Graham at the FDA testified in 2004 that he estimated somewhere between 70,000 and 100,000 lives were lost as the result of Vioxx. It has recently been estimated that the lives of 22,000 patients could have been saved if U.S. regulators had been quicker to remove a Bayer drug used to stem bleeding during open heart surgery, according to a medical researcher interviewed by CBS television's *60 Minutes* program. The drug Trasylol was withdrawn in November 2007 at the request of the FDA after it was linked to kidney failure requiring dialysis. It had been given to as many as a third of all heart bypass patients in the United States at the height of its use. Dr. Dennis Mangano said in the CBS broadcast that Bayer failed to disclose to the FDA during a FDA advisory panel meeting in September 2006 that the drug maker had conducted its own research which confirmed the same dangers established by the study. Bayer will certainly face a growing number of product liability lawsuits filed by patients who have taken this medicine. Our firm is investigating and handling those claims at this time.

The prospect of product liability litigation is a huge deterrent to drug companies. Even with this deterrent in place, we have seen the catastrophes caused by dangerous drugs being approved by the FDA and put on the market, like Vioxx and Trasylol. Can you

imagine the potential catastrophes coming down the pike for consumers and patients if the U.S. Supreme Court rules this year that drug companies can never be sued for the harms their drugs cause if the medication was approved by the FDA? No matter how many deaths or injuries they cause, the drug companies could never be held accountable by the courts if preemption becomes a reality. The Supreme Court, by granting pharmaceutical companies immunity from lawsuits, will have surely turned on the green light for drug companies to push the envelope relating to safety on the medications they are willing to sell without adequate testing to an unknowing public. A catastrophe for patients and a potential catastrophe for the law would be a certainty if the Supreme Court rules for the drug industry and against the American people on this issue. Our firm has been fighting federal preemption and we encourage all of our readers to call or write your Senators and Representatives in Washington and ask them to stand up for the Constitutional right to trial by jury.

Source: *Reuters*

THERE MAY BE A LINK BETWEEN RHEUMATOID ARTHRITIS DRUGS AND CANCER

An investigation by the FDA has been launched involving the potential link between Tumor Necrosis Factor (TNF) blockers and the development of lymphoma and other cancers in children and young adults. TNF blockers currently approved for pediatric use include Enbrel (marketed by Amgen & Wyeth), Humira (marketed by Abbott Labs) and Remicade (marketed by Centocor). The makers of these products have been asked to supply the FDA with information regarding cancer cases in children receiving the treatment.

To date approximately thirty cases of cancer have been reported during a ten year period extending through April

2008. About half the cancers were Hodgkin's and Non-Hodgkin's lymphomas. Some cases involving leukemia, melanoma and some solid organ malignancies were reported. A review process is in place. Once the review is complete, the agency will communicate its findings and resulting recommendations to the public. We will watch this matter closely.

Source: *MedScape Medical News*

THE ACNE DRUG ACCUTANE IS LINKED TO DEPRESSION

Use of isotretinoin, the active ingredient in the acne drug Accutane, apparently more than doubles the risk of depression, according to results of a recently published study. However, the researchers concluded the absolute risk is probably very small. The study is the first controlled investigation to find a statistically significant link between isotretinoin and depression. Dr. Anick Berard, from CHU Sainte-Justine Research Centre in Montreal, and colleagues published the report in the *Journal of Clinical Psychiatry*. The report stated:

Depression is likely to be a rare side effect of isotretinoin therapy. Nonetheless, current guidelines should possibly be modified to include psychiatric assessments of patients prior to and during isotretinoin therapy.

Dr. Berard's team studied 30,496 people from Quebec, Canada, who received at least one isotretinoin prescription from 1984 through 2003. During the study period, 126 of these individuals had a depression-related diagnosis, hospitalization, or treatment. Based on previous research, the authors focused on isotretinoin use in the five months prior to depression diagnosis, which is referred to as risk period, compared with a five-month period a year before the diagnosis, known as the control period.

The team found that after accounting for potential factors that might influ-

ence the results, exposure to isotretinoin was associated with a greater than 2.6-fold relative risk of depression. Dr. Berard and his colleagues concluded that because depression could have serious consequences, close monitoring of isotretinoin users is recommended.

Source: *Journal of Clinical Psychiatry*

CLASS ACTION SOUGHT FOR BIOTECH RICE LAWSUIT

A federal judge will decide whether to consolidate several lawsuits over genetically engineered rice into a single class action suit that would include thousands of rice farmers throughout the United States. The issue before U.S. District Judge Catherine Perry is whether farmers suffered economic damage after a strain of Bayer CropScience AG's experimental rice was released into the food supply in 2006. Some foreign countries temporarily banned U.S. rice exports after the release of the so-called Liberty Link rice, drying up key foreign markets and causing the price for U.S. rice to drop. After those developments, several farmers filed suit, including some from Arkansas, which grows more rice than any other state.

If Judge Perry grants the suit class action status, it could have potentially enormous implications for the biotech seed industry. Every major biotech seed company grows experimental biotech crops outdoors. Rice farmers in the United States say the companies should be held liable for any economic losses on global grain markets if experimental strains escape and crimp export markets. The Liberty Link strain of rice was not considered harmful to humans, but it wasn't approved for human consumption by the U.S. Department of Agriculture. The department determined the rice likely escaped from a corporate-funded test plot at Louisiana State University, where it was being grown alongside commercial varieties.

Rice is a commodity whose price is set by global markets. As a general rule, farmers get a price for their rice that is closely tied to those prices listed by the Chicago Board of Trade. It should be noted those prices dropped sharply after the Liberty Link episode was announced. However, rice prices have rebounded in recent weeks which could affect damages in some of the filed cases. The total damages already suffered by farmers could be vast, however, according to Colin Carter, an agricultural economics professor at the University of California, Davis. Professor Carter has testified that the rice markets were "shocked" in 2006 when European nations restricted U.S. rice imports. Such a shock becomes a permanent factor in setting the price for a commodity like rice, because traders always know it could happen again. Leigh O'Dell from our firm is handling claims for farmers who have suffered damages. If you need additional information concerning claims of this sort, feel free to contact Leigh at 800-898-2034.

Source: *Wall Street Journal*

CHANTIX IS CAUSING MORE SAFETY CONCERNS

There appear to be new safety concerns for Chantix, Pfizer Inc.'s smoking cessation drug, and that's not good for the company. These developments could hurt the already stumbling sales acceleration of Chantix and will likely lead to legal problems for the pharmaceutical giant. A recent report from a watchdog group suggested Chantix may be linked to problems such as heart trouble, seizures and diabetes, adding to the already-known connection to psychiatric problems including suicide and depression. These safety and health concerns are not to be taken lightly.

The large number of adverse reactions in the study published recently by the Institute for Safe Medication Practices (ISMP) adds new urgency to the

previous safety concerns Public Citizen and others had about Chantix. It also highlights the dangerous inadequacy of the response of Pfizer and the Food and Drug Administration to the rapidly increasing number of serious, life-threatening adverse events seen with this drug. In September 2007, Dr. Sidney Wolfe, Director of the Health Research Group at Public Citizen, warned in the publication *Worst Pills, Best Pills News* (online at WorstPills.org) that people should not use Chantix until the year 2014. This reflects the inadequate amount of information about the safety of Chantix and concerns raised by the increased amount of adverse psychiatric events that occurred in the randomized trials preceding its approval. In one of the studies, 6.8% of patients using Chantix had adverse psychiatric events as opposed to only 2.4% of those given a placebo. In the May 2008 issue of the *British Drug and Therapeutics Bulletin* (DTB), the authors stated:

We are concerned about reports of psychiatric problems with this drug. Given such concerns, marketing claims of a 'favourable safety and tolerability Profile' are questionable.

The ISMP study of 173 serious reports of accidents and injuries, including 28 road traffic accidents, calls for a much stronger warning than in the recently revised new labeling and new patient medication guide for the drug (revised May 16). Dr. Wolfe says the new label inadequately states that "[p]atients should be advised to use caution driving or operating machinery until they know how quitting smoking with Chantix may affect them." The inadequacy of this "use caution" warning is further emphasized by the statement in the label that there were, in clinical trials with Chantix, "Frequent: Disturbance in attention, Dizziness, Sensory disturbance." None of these are compatible with safely driving (cars, buses, trains or planes) or

operating machinery. Instead, we agree with the advice this week in the DTB that “Patients taking varenicline should, therefore, be advised *not to drive or operate machinery* [emphasis added] until they know whether the drug will impair their ability to do so.” In addition to the warning against driving, Dr. Wolfe and Public Citizen also urge that the FDA take the following actions:

- Require a black box warning about the adverse effects including warning against driving as discussed above, the adverse psychiatric effects such as suicidal thoughts or actions, depression and agitation and serious adverse skin reactions;
- Require Pfizer to immediately send a dear doctor letter warning about these adverse effects;
- Require Pfizer to significantly strengthen the warning language in the label and patient medication guide.

There should be little doubt as to whether Chantix is a dangerous drug. Neither should there be any doubt about the capacity of the FDA to adequately protect the public because it can't. The FDA is controlled by the drug industry and is inadequately funded by Congress.

Source: Public Citizen

CONNECTION BETWEEN CELLPHONE USE AND CANCER REVISITED

A recent *Larry King Live* program on CNN has put the debate concerning a connection between cellphone use and cancer back on the table. Three prominent neurosurgeons told Larry King that they don't hold cellphones next to their ears. Dr. Keith Black, a surgeon at Cedars-Sinai Medical Center in Los Angeles, said: “I think the safe practice is to use an earpiece so you keep the microwave antenna away from your brain.” Dr. Vini Khurana, an associate professor of neurosurgery at the Australian National University, who is an outspoken critic of cellphones,

added: “I use it on the speaker-phone mode. I do not hold it to my ear.” Adding to the conversation as to the possible connection, CNN's chief medical correspondent, Dr. Sanjay Gupta, a neurosurgeon at Emory University Hospital in Atlanta, said that he too used an earpiece. Senator Ted Kennedy's recent diagnosis of a glioma, a type of tumor that critics have long associated with cellphone use, may have helped reignite the long-simmering debate about cellphones and cancer. That supposed link has been largely dismissed by many experts and a number of groups, including the American Cancer Society. The theory that cellphones cause brain tumors “defies credulity,” according to Dr. Eugene Flamm, chairman of neurosurgery at Montefiore Medical Center.

According to the Food and Drug Administration, three large epidemiology studies since 2000 have shown no harmful effects. CTIA—the Wireless Association, the leading industry trade group—says that cellphone use doesn't pose a health risk. The FDA notes, however, that the average period of phone use in the studies it cites was about three years, so the research doesn't answer questions about long-term exposures. Critics say many studies are flawed for that reason, and also because they fail to distinguish between casual and heavy use. Cellphones emit non-ionizing radiation, waves of energy that are too weak to break chemical bonds or to set off the DNA damage known to cause cancer. It appears there is no known biological mechanism to explain how non-ionizing radiation might lead to cancer. But researchers who have raised concerns say that just because science can't explain the mechanism doesn't mean one doesn't exist. Concerns have focused on the heat generated by cellphones, as well as the fact that the radio frequencies are absorbed mostly by the head and neck. In recent studies that suggest a risk, the tumors tend to occur on the same side of the head where the

patient typically holds the phone.

When I read about the cellphone-cancer debate, the late Johnny Cochran's death from brain cancer came to mind. Johnny and I became friends over the years and I can recall that when he was in my presence Johnny was constantly using a cellphone. There was suspicion that this use may have caused the cancer. At this point in time, however, it would be virtually impossible to link an association between cellphone use and cancer. Proving a causal relationship would be most difficult. However, that may change in time. Once long-term use can be tested, the causation problem may take on a different light.

Source: *Los Angeles Times*

THE FDA SHOULD TAKE A SECOND LOOK AT MERCK'S GARDASIL VACCINE

Gardasil was approved by the FDA in June 2006. The vaccine, manufactured by Merck, protects against sexually transmitted diseases caused by the human papillomavirus (HPV), which is responsible for 70% of cervical cancers. Following its approval, the Centers for Disease Control (CDC) recommended that all girls between the ages of 11 and 12 receive the vaccine. Merck has undertaken an aggressive campaign to force parents to subject their daughters to the vaccine, and approximately 16 million doses have been administered.

Several states have even pushed for federal mandates to make Gardasil mandatory for young girls. In 2007, the Governor of Texas issued an executive order requiring all sixth-grade girls get the vaccine. Fortunately, that order was defeated by the Legislature.

Since its approval, there have been over 3,000 complaints of adverse reactions, including nausea, vomiting, fainting, seizures and blood clots. There have been some reports of death, but according to the CDC, they have not been investigated and don't appear to be causally related. According to Merck, the most common complaint about the

vaccine is pain at the injection site. Gardasil was put on the fast track and approved quickly by the FDA. The side effects should be studied thoroughly and should not be forced on anyone.

Source: *Denton Record-Chronicle*

XI. BUSINESS LITIGATION

WHEN IT SUITS THEM, BIG FOLKS SEEM TO REALLY LIKE THE COURTS

Discover Financial Services filed a lawsuit several months ago against Visa Inc. and MasterCard Inc. in which it was asking for \$6 billion in damages. If the suit is successful, the damages can be tripled under the antitrust laws. It's alleged that the giant credit-card companies "squashed competition" from smaller companies. Confidential filings were unsealed recently by the judge in the suit which was pending in federal court in the Southern District of New York. Discover, the fourth-largest credit card network, filed the lawsuit in October 2004 against Visa and MasterCard, claiming the two largest networks broke the law by barring member banks from offering rival cards. As you may recall, Visa agreed last year to pay \$2.25 billion to American Express Co. in a settlement of a parallel suit. The big boss at Discover says that company settled way too cheaply!

The documents had been filed under protective order since the case began. The lawsuits by Discover and American Express followed a U.S. Supreme Court ruling that Visa and MasterCard violated antitrust laws in competing against smaller companies. Like New York-based American Express, Discover extends credit and runs a network that processes transactions for other lenders. Visa and MasterCard only operate networks and don't make loans to consumers. While some of the more powerful in Corporate America are

trying their best to shut down the courts to ordinary Americans, it appears some corporations still like the system.

Source: *Bloomberg News*

WYETH FILES SUIT AGAINST SANDOZ OVER GENERIC

Wyeth and Nycomed GmbH have filed a lawsuit against a Novartis AG unit, alleging the company's application to sell a generic version of heartburn treatment Protonix violates a U.S. patent for the branded drug. Novartis's Sandoz generic unit notified the companies in early April that it filed for Food and Drug Administration approval of a generic, injectable formulation of the drug, which Wyeth markets as Protonix I.V. Wyeth, which licenses the patent from Nycomed, also sells Protonix in tablet form. Wyeth, based in Madison, New Jersey, and Germany's Nycomed filed their lawsuit against Sandoz in U.S. District Court for the Northern District of Illinois in Chicago. The suit seeks a court ruling that Sandoz has infringed the Protonix I.V. patent as well as a permanent injunction barring Sandoz from selling a generic version until the patent expires in 2010.

Source: *Wall Street Journal*

AT&T SETTLES CELL PHONE FEES

AT&T customers who have seen unusual charges for ringtones and other content show up on their cell-phone bills will be eligible for refunds as part of the settlement of a group of class-action lawsuits. Customers will be able to claim refunds for spurious charges that appeared on up to three of their monthly bills between January 1, 2004, and May 30, 2008. I understand this is the first nationwide settlement over the business of third-party content. Similar suits have been filed against Verizon Wireless, Sprint Nextel Corp. and T-Mobile USA.

Vendors of ringtones and daily text-

message services, using a number of innocent-sounding messages, solicit customers to sign up by entering their phone numbers on Web sites or by sending text messages. The charges, which can be hidden or poorly explained, show up later on cell-phone bills, often as recurring charges. The cell-phone carrier keeps some of the fee and passes the rest on to the content provider. Sixteen class-action suits, which are part of the settlement, alleged that AT&T was legally responsible for failing to be more careful in vetting the services.

AT&T now requires customers who sign up for third-party services with recurring fees to confirm by replying to a text message. The company also requires the content providers to send monthly reminders with instructions on how to unsubscribe from such services. Notifications about the settlement are being sent out to 70 million current AT&T Mobility customers. The settlement received preliminary approval by the Superior Court of Fulton County, Ga. A final approval hearing for the settlement is scheduled on December 8th. Claims must be filed within 90 days of the final approval of the settlement. Jeff Edelson, a lawyer from Portland, Oregon, represented the class.

Source: *Associated Press*

XII. INSURANCE AND FINANCE UPDATE

UPDATE ON REGIONS MORGAN KEEGAN FUND MELTDOWN

Since December, class action lawsuits and arbitration filings have increased against Regions Morgan Keegan mutual funds. Of the seven Regions Morgan Keegan funds, six have lost more than 75% of their value in the past year. Morningstar analyst Lawrence Jones faulted James Kelsoe, the funds' manager, for this shocking decline.

According to Mr. Jones, who is a respected analyst, the funds' manager took on too much risk and failed to adequately communicate with investors as the asset priced declined.

Kelsoe established the Select High Income Fund in 1999. Over time he developed what has been labeled an "intoxication" for securities backed by subprime mortgages. A regulatory filing indicated that bonds backed by supprime mortgages reached as high as 25% in 2005. The fund was toppled by the subprime crisis that began in 2007. Chief among the risky investments by Kelsoe were mortgage-backed bonds, collateralized debt obligations and aircraft-leasing obligations. His Select High Income Fund fell a staggering 60% in 2007 and another 30% this year; ranking it last among all high-yield funds two years in a row. This obviously caused huge problems for investors in the fund.

Because of the dismal failure of the funds, an agreement was reached between the Regions Morgan Keegan funds' directors and Hyperion Brookfield Asset Management for the directors to step down and hand the management over to Hyperion. Shareholders will vote on the management change at a meeting on July 11th and it's expected to pass. The handoff highlights the extreme nature of the situation, as it is very unusual for an asset management firm to give up assets this way.

Roman Shaul and Scarlette Tuley from our firm continue to talk to devastated shareholders on a daily basis. The full extent of this disaster is not in the aggregate. Instead, it is the toll it has taken on an individual basis to investors. These funds were marketed, particularly to retirees, as being as safe as CD's, but with the extra advantage of an income stream. Many retirees transferred the bulk of their life savings into these funds on the assurance that there was no more risk than a CD. Now these people face an uncertain retirement future with their principal cut by an average of 67%. With the future of the fund uncertain, shareholders should

seek to recover their losses through arbitration rather than hoping on a market upswing to restore their life savings. We have heard some real horror stories from victims. If you need additional information concerning these claims, feel free to contact Roman or Scarlette at 800-898-2034.

FLORIDA REACHES \$4 MILLION INSURANCE SETTLEMENT WITH AON

The state of Florida has reached a settlement with Aon Corp., relating to the insurance broker having received undisclosed compensation in connection with the placement of insurance coverage on behalf of Florida policyholders, state officials said. Through the investigation, state investigators uncovered allegations that Aon improperly collected undisclosed compensation when it placed various insurance coverages with insurance companies. Undisclosed compensation is any form of compensation paid to the broker, but not reported to policyholders before binding the transaction for the purchase of a policy. As part of the agreement, Aon will pay \$2.6 million to reimburse affected Florida policyholders. Aon also will reimburse the three Florida agencies \$1.4 million in fees and costs, which were to be paid within ten days of the May 23rd agreement. The Florida Department of Financial Services, the Office of Insurance Regulation and the Office of the Attorney General conducted the investigation and determined that Aon brokered multiple insurance contracts in Florida from 1998 through 2004.

Aon's clients included several public entities in the state of Florida, including city governments and school boards. Insurance brokers represent their clients by advising them on their insurance needs and options and represent the clients when negotiating the price and terms of insurance coverage offered by insurance companies. Florida Insurance Commissioner McCarty says the settlement further

demonstrates the progress Florida is making toward establishing a national standard for transparency in insurance transactions.

Source: *Insurance Journal*

INSURER ORDERED TO PAY GROCERY CHAIN FOR KATRINA CLAIMS

A federal court jury in Louisiana has ruled that the insurer for five Robert's Fresh Markets must pay the grocery chain's owner more than \$21 million for unreasonably failing to pay what was necessary to fix Hurricane Katrina windstorm and other damage. The \$21 million award will provide the chain owner almost exactly what United Fire & Casualty Insurance Co. still owed the grocery chain to repair the stores—\$16.7 million—plus penalties for delaying payment.

The jury heard testimony "that this insurance company delayed and refused to make payments because of the financial stress put on that company because they didn't purchase enough reinsurance to cover the extent of the catastrophic losses caused by Katrina." Limited liability companies ran Robert's four Fresh Market stores in New Orleans, as well as the original Fresh Market store in Kenner, Louisiana. The award will provide funds to cover building damage, business interruption, tenant improvements and loss of business personal property from windstorm and from vandalism, theft or looting. The jury verdict also included \$1,080,000 to the owner of one of the buildings where a store was located. Philip Franco, a lawyer from New Orleans, represented the plaintiff in this case and did a very good job.

Source: *New Orleans Times Picayune*

CERTIFICATION OF NATIONWIDE FLSA CLASS ACTION OBTAINED AGAINST TIRE KINGDOM AND SUBSIDIARIES

Our firm filed a class-action lawsuit on behalf of current and former service managers of Tire Kingdom, NTW, Incor-

porated, doing business as National Tire and Battery and Merchant's Tire and Auto Centers ("employers"). The basis for the suit against their employers was a series of violations of the Fair Labor Standards Act (FLSA). The plaintiffs were not exempted from the FLSA and as a result, their employers were required to pay overtime compensation. The service managers worked under a uniform policy of salaried pay without overtime compensation. The plaintiffs were required to work well in excess of 40 hours per week.

The store managers were in charge of the stores and delegated the majority of the non-managerial duties to the service managers and other store employees. Moreover, the plaintiffs had no authority to hire, fire, promote, or discipline store employees. Neither did the plaintiffs routinely make or participate in the decisions relating to personnel hiring, firing, promoting, or discipline. In substance, the plaintiffs spent little, if any, time performing managerial duties. Therefore, despite their job titles, plaintiffs were not "executive" employees and thereby exempt from the overtime requirements of the FLSA.

In our case, the plaintiffs sought to represent a class of all similarly situated service managers who were subject to the uniform policy of salaried pay without overtime compensation. Recently, in a most significant ruling, the United States District Court for the Southern District of Georgia, Brunswick Division, conditionally certified the class. Before conditional certification could be granted, the court had to determine whether there were other employees of the employers who desired to "opt-in" and whether the former service managers were similarly situated with respect to their job requirements and with regard to their pay provisions. Initially, 28 individuals filed consents to become parties in the action. Therefore, the court concluded that the plaintiffs carried their burden of demonstrating that other plaintiffs

existed who desired to opt-in.

The second inquiry was whether the proposed class consisted of individuals who were similarly situated. The court quoted the Eleventh Circuit which had found the similarly situated requirement of § 216(b) was more elastic and less stringent than the requirements found in Rule 20 (joinder). The court stated that in order to satisfy the similarly situated requirement, the plaintiffs only had to show that their positions were similar, not identical, to the positions held by the putative class members. The affidavits and deposition testimony submitted by the plaintiffs were sufficient to satisfy the court that there were other employees who were similarly situated.

The 28 individuals who filed consents to become party plaintiffs were from nine different states and each asserted they routinely worked in excess of 40 hours per week for a salaried amount without overtime compensation; that they did not have the duty or authority to hire, fire, or promote any employees, nor make recommendations or suggestions regarding decisions affecting the employment status of other employees; that they worked at the direction and alongside the store manager; that the store manager relegated most, if not all, non-managerial duties to the service manager and other store employees; and that they spent the majority of their time performing non-managerial duties.

This was a most significant ruling by the court. Lance Gould is the lead lawyer for the firm in this case. If you want further information relating to this case, you can call Lance at 800-898-2034.

***NATIONWIDE CLASS CERTIFICATION
OBTAINED AGAINST WEST TELEMARKETING***

Our firm received an order from a federal district court recently conditionally certifying a nationwide collective action against West Telemarketing. Roman Shaul is the lawyer in our firm

who is heading up this litigation. The lawsuit was filed under the Fair Labor Standards Act (FLSA) and alleges that West Telemarketing had a corporate policy of not paying certain telemarketers for their training time. The complaint also faults the company for not paying the class members overtime and in many instances, not paying the monetary equivalent of the federal minimum wage. The putative class contains a little over 31,000 present and former employees.

The gist of the lawsuit is that the Plaintiffs are treated as independent contractors and not employees. Individuals who are true independent contractors are not protected under the FLSA. Yet, the Plaintiffs really are employees since the company controls almost every aspect of their job.

The intentional misclassification of employees has been a hot topic in Washington D.C. lately and Congress has scheduled a number of hearings on this issue. Many companies intentionally misclassify their employees as "independent contractors" so they can avoid paying any benefits, avoid paying payroll taxes, workers' compensation premiums and other obligations that traditionally fall on legitimate employers.

Shortly after we filed this lawsuit, West Telemarketing changed the very corporate practice for which our client sued them. We hope that this change in policy has benefited many of the hard working individuals still employed there. We are equally hopeful that many of the former employees will get compensated for all the hard work they have already performed.

***THE ELEVENTH CIRCUIT COURT OF APPEALS
SENDS OUR DOLLAR GENERAL CASE BACK
TO THE DISTRICT COURT***

We have several Fair Labor Standards Act (FLSA) cases we are pursuing against the retail giant, Dollar General. Presently, we represent over 1600 store managers who allege they were mis-

classified and improperly labeled as bona fide “executive” employees. This label means that they are no longer eligible to receive overtime pay. Believe me, no matter what label Dollar General assigns to our clients, they were certainly not treated like any “executive” that I have ever run across. These store managers for Dollar General are some of the most hard-working folks out there today. They work anywhere from 60-80 hours every week and spend almost all of this time unloading trucks, stocking shelves, cleaning up the store and waiting on customers. Many times they are forced to work in the store alone because the corporate office will not provide enough payroll to have the stores sufficiently staffed.

Earlier in this litigation, a federal district court entered an order granting summary judgment against us relating to seven specially set cases. However, in the court’s written opinion, the judge explained that these were very difficult issues to decide and it recognized that the Eleventh Circuit Court of Appeals had not yet ruled on a fact pattern similar to the one before it. Nevertheless, the judge felt that he was bound by a previous ruling of the Eleventh Circuit in a different case, and therefore, was compelled to dismiss our 7 lawsuits.

We promptly filed an appeal of these seven cases. Roman Shaul, the lawyer heading up this litigation, presented our side of the dispute at oral arguments to the Eleventh Circuit. Recently, we received an order from the Appeals Court asking that the district court revisit its decision in light of a new case they had just issued, and one which the district court never had an opportunity to review. This new opinion, issued after the district court made its ruling in our case, was factually similar to how Dollar General runs its business and went a long way toward clarifying some of the complicated issues the court raised in its initial order. The new case, *Rodriguez*

v. Farm Stores Grocery, Inc., 518 F.3d 1259 (11th Cir. 2008) was a very important ruling that will greatly enhance the protections afforded employees under the FLSA. Based on this new opinion, and its obvious application to our cases, we are hopeful that we can proceed to trial by the end of this year.

XIII. PREDATORY LENDING

CRACKDOWN ON PAYDAY LENDERS IN OHIO

Ohio Governor Ted Strickland has signed legislation that caps the allowable interest on a payday loan in that state at 28%. In Ohio, the going interest rate for these short-term loans had been 391%. The new law also limits a payday loan to \$500 and requires the loan to be at least 31 days instead of two weeks. The Community Financial Services Association, which represents a majority of the payday loan companies in the country, claims the rate cap will force the 1,600 stores in Ohio to close. Any lending outfit—including pay day loan shark operations—that can’t make it charging borrowers 28% interest should close its doors.

Payday lenders are “legalized loan sharks” and must be regulated. Over the past decade, this industry has made a financial killing off the backs of lower income citizens. The industry’s model is to trap people in a cycle of debt and keep them captive. The bulk of payday loans are made to folks who are getting loan after loan after loan. According to a December 2007 report from the Center for Responsible Lending, the vast majority of families taking out payday loans are ensnared in long-term debt, “making them worse off than they would be without high-cost payday lending.” The study found that more than 60% of payday loans go to borrowers with 12 or more transactions a year. Payday loans are marketed as two-week

loans, but the report concludes they only work as a one-time quick cash solution about 2% of the time. Payday loan sharks prey on the most desperate working people in our society and that’s morally wrong.

The new law in Ohio is “a huge deal,” according to Jean Ann Fox, director of financial services at the Consumer Federation of America. She says, “the tide has turned on legalizing these high-cost small loans.” Michigan was the last state to allow pay day lending and that was back in 2005. Last year, Congress capped the annual interest rate for payday loans to military families at 36%. And more than a dozen states have taken steps to put controls on payday lenders. For example, the following states have taken action:

- Georgia has the toughest statute on the books. It makes payday lending a violation of anti-racketeering laws.
- Payday loans are no longer permitted in North Carolina or the District of Columbia.
- In Oregon, payday loans are capped at 36%, plus an initial fee of \$10.
- In New Hampshire, payday loans will be capped at 36% beginning in January of 2009.
- Payday lenders pulled out of Arkansas, after the state attorney general told them he would enforce the constitutional cap on interest at 17%.

If you think I don’t like payday lenders, you are absolutely correct. Unfortunately, my State of Alabama has given them a safe haven where they can continue to take advantage of low-income people. Hopefully, our legislators will eventually put some real controls on this industry. In the meanwhile, we should commend those states which have reigned in this industry and we should encourage others to follow suit.

Source: MSNBC

XIV. PREMISES LIABILITY UPDATE

AMUSEMENT PARKS MUST BE REGULATED

As we approach the summer months and children are out of school, it's appropriate that safety at amusement parks be a topic of discussion. We have written on several occasions about the number of deaths and serious injuries that have occurred at a number of the parks around the country. It has been reported by the Consumer Product Safety Commission (CPSC) that as many as 7,000 people are treated in emergency rooms each year as a result of amusement park rides. The industry has done a good job of keeping safety regulation to a bare minimum to the detriment of persons going to these parks. The CPSC has limited ability under existing law to regulate this industry and that is due to the effective lobbying efforts by the industry. For example, in 1981 an exemption for fixed-site theme parks like Six Flags was granted to that part of the industry. That left only mobile operations under the purview of the commission.

According to Kathy Fackler, founder of Safer Parks, California-based non-profit consumer advocacy group, the CPSC has not been proactive on amusement ride safety. Instead, it restricts its efforts to post-incident investigations. In addition, neither the Commission nor any other federal agency requires reporting of amusement ride injuries. State requirements relating to reporting vary widely. Critics contend that, as a result, the true injury toll is vastly underreported. The CPSC used to compile estimates on amusement ride injuries, utilizing data gathered from emergency rooms around the country. Over an eight-year period—1997 to 2004—the Commission estimated that 60,000 emergency-room injuries were related to amusement rides. Then, in 2005, for some reason the CPSC

stopped compiling estimates. According to Ms. Fackler, this was the result of industry pressure.

U.S. Representative Ed Markey (D-MA), has introduced a bill, the National Amusement Ride Safety Act, which would repeal the exemption for fixed sites and enable the CPSC to collect injury data. Hopefully, his bill will make it through the legislative process and become law.

Source: *Associated Press*

\$5 MILLION AWARDED IN MEDICAL CENTER DROWNING

A jury in Gwinnett County, Georgia, has awarded \$5 million in damages to the family of a new mother who drowned in a bathtub at Gwinnett Medical Center. It's reported that Wendy Wyckstandt, 34, was too weak to shower without assistance. Ms. Wyckstandt, a native of England who was being treated for post-partum high blood pressure, collapsed in a bathtub while taking a shower five days after Thanksgiving in 2000. Her mother later found her in the bathtub and she died a day later. In 2002, the family filed a wrongful death lawsuit against the hospital's parent company, Gwinnett Health System. It was alleged that the hospital altered medical records and kept evidence from the family's lawyers.

Gwinnett County Superior Court Judge Michael Clark said he would sanction Gwinnett Health System for not following the rules of discovery, which required the defendant to turn over hospital policies on showering. Three cameras were mounted in the hallway outside Ms. Wyckstandt's room that show when nurses or doctors entered her room. The family's lawyers asked for video footage for the 24-hour period before her death, but the hospital's lawyers turned over tapes from only two cameras. It appears there was a 30-minute gap when no activity is shown on the tapes, which happens to be during the same time frame the hos-

pital claims a nurse checked on the patient. The hospital says the cameras briefly weren't recording because the tapes must be switched out during shift changes. Jeff Harris, a lawyer from Atlanta, represented the family and did a very good job for them.

Source: *Atlanta Journal Constitution*

CONTRACTOR AND MANUFACTURER SUED OVER CHILD'S DEATH

The father of a 12-year-old girl who died after equipment fell on her last year at a construction site in Redding, California, has filed suit against the contractor and the equipment manufacturer. Tess Stevens died last summer after jumping to grab a metal bar. The L-shaped piece hooks onto front-end loaders to pick up equipment, much like a forklift. When Tess grabbed the bar, the machine tipped back on her and crushed her skull. In the suit, filed in a California state court, it's alleged that the contractor, N&T Digmire Inc., should have fenced off the site or chained the equipment so that it would not tip over. Tess and three of her friends were passing through the subdivision construction site after working hours when she saw the bar. The four girls were on their way to a neighborhood park when the incident happened. It's also alleged that the manufacturer, Iowa-based Cascade Manufacturing Co., was at fault because there was no warning label attached saying the device would tip easily if grabbed.

Source: *Associated Press*

XV. WORKPLACE HAZARDS

CRANE INDUSTRY GROUPS PUSH FOR NATIONAL STANDARDS

In the wake of a number of construction crane accidents in the past three months that claimed at least 11 lives, in

several states, the crane industry is calling for nationwide safety standards. An industry council agreed on a set of standards in July 2004 and recommended them to the Department of Labor, but the proposal hasn't been acted on by the Occupational Health and Safety Administration. Bill Smith, president of NationsBuilders Insurance Services, which provides insurance to crane operators, made this comment:

It cannot be overemphasized that the time for action is now. National uniformity of standards is essential and government must expedite the process.

The proposed standards include a requirement that all crane operators obtain licenses, either under state programs or from accredited groups. Fifteen states currently have similar rules, including New York, where two of the recent accidents have taken place. Florida, where a third accident occurred, doesn't require certification, but apparently is one of five states considering doing so. The proposed rules, which also cover crane design and construction, have been sent to the White House's Office of Management and Budget for review. After the review, the public will then comment on the rule for another 12 to 18 months before it can be issued.

OSHA's existing rules for workers who operate cranes have not been updated since 1971, though the agency acknowledges modernized standards could help prevent future accidents. Dozens are killed each year in crane accidents. In 2006—the most recent year for which federal numbers are available—72 workers were killed. In May, the Labor Department estimated there are as many as 82 fatalities annually associated with cranes in construction. The Department said a more up-to-date standard would help prevent deaths. I have to wonder why the government hasn't put this safety issue on its top priority list.

Source: *Insurance Journal*

\$7 MILLION AWARDED IN CASE INVOLVING ASBESTOS DEATH

A jury in Pennsylvania returned a \$7 million verdict recently in favor of the family of a man who died of exposure to asbestos while working at a Koppers building in Ross, Pennsylvania and at two other locations. The jury found Koppers Co. Inc., which was taken over by Beazer PLC in 1988, to be responsible for 40% of the damages. The building was owned by Koppers Holdings Inc., Downtown, which was later sold off by Beazer. Dravo Corp., (which was acquired by Belgium's Carmeuse Group), and Fisher Scientific International Inc., (part of Thermo Fisher Scientific Inc.), were each found to be responsible for 10% of the damages. The remaining damages will be split among a litany of other defendants, mostly companies that made and sold asbestos products.

The asbestos victim worked on and off as a union contractor in the Koppers building for about seven years, beginning in 1968. He worked for Dravo and Fisher Scientific. All three job sites contained asbestos, but Koppers hid what it knew about the dangers. Even though it knew of the damages, Koppers failed to warn anybody about what it knew. The employee died at 68-years-old in 2006, about six months after he was diagnosed with mesothelioma—a cancer formed by exposure to asbestos. In 2006, as part of a separate case, an Allegheny County judge ruled that Koppers officials knew of the dangers of asbestos since 1918, when it was a member of the National Safety Council. Rick Nemeroff, a Dallas lawyer, represented the family and did a very good job.

Source: *Tribune-Review*

NEW LIFE GIVEN TO THOUSANDS OF ASBESTOS SUITS IN FLORIDA

It's believed that the Fourth District Court of Appeals in Florida may have

breathed new life into thousands of pending asbestos-related lawsuits when the court invalidated "retroactivity" in a state law designed to limit the number of people eligible to sue. The ruling is said to be a victory for thousands of people still awaiting their day in court. Judge Gary Farmer wrote for the unanimous court that the Florida Asbestos and Silica Compensation Fairness Act "may not constitutionally be applied to eliminate the existing vested rights in the lawsuits pending when the act became effective" July 1, 2005. Two other judges concurred. The ruling reversed 13 decisions by a trial court judge upholding retroactivity. Some of the cases date all the way back to 1999. The decision revives them in the lower court.

The 2005 law set impairment standards for plaintiffs. People with nonmalignant asbestosis must have lost at least 20% of their breathing capacity to sue, and those with lung cancer would have to have asbestosis and diminished breathing capacity to discount the effects of smoking. The appeals court said it could not sever the provisions of the act dealing with retroactivity from other provisions. The court ruled:

The act in its entirety may not constitutionally be applied to require claimants with accrued causes of action for damages resulting from exposure to asbestos to plead and prove that any malignancy or physical impairment results from their exposure to asbestos. Instead, their accrued causes of action required them to show only that they suffered from an injury from an asbestos-related, nonmalignant disease.

Observers say the court's ruling means the 2005 law cannot be applied to any person with an asbestos-related disease whether or not they sued before the law took effect. That appears to be a very good result and one that is legally correct.

Source: *Daily Business Review*

FAMILIES SETTLE SAGO MINE EXPLOSION LAWSUIT AGAINST TWO SUPPLIERS

The manufacturer of concrete foam blocks destroyed in the Sago Mine explosion and the company that supplied them have settled lawsuits with the families of coal miners involved in the deadly 2006 blast. Terms of the settlements with Burrell Mining Products and Raleigh Mine and Industrial Supply are confidential. The families have all agreed to the settlement amount and how much each family will receive. A court must approve the settlements, which is expected.

The latest agreements end the case of former miner Randal McCloy Jr., who was seriously injured and is the lone survivor of a 13-man crew trapped underground by the 2006 explosion. McCloy and the estate of another miner, David Lewis, had already settled with mine owner International Coal Group for confidential sums. The families of ten of the miners who died at Sago, along with McCloy, sued ICG and several other companies. There are still claims pending against some of the defendants. New Kensington, Pennsylvania-based Burrell manufactured concrete foam blocks—also referred to as Omega blocks—used to seal mined-out and abandoned sections of the Sago Mine. A methane gas explosion destroyed Omega block seals and subsequently trapped the miners underground. Mount Hope-based Raleigh supplied Omega blocks to the mine. ICG controls approximately 960 million tons of coal reserves and operates mines in West Virginia, Kentucky, Maryland, Virginia and Illinois.

Source: *Forbes*

GOVERNMENT RECORDS INDICATE DUPONT FOUND ELEVATED CANCER RISK

DuPont Co. has discovered evidence of elevated cancer rates among employees at its Washington Works plant in West Virginia, according to records turned over to the U.S. Environmental Protection Agency. DuPont says

it hasn't determined why there may be a fivefold increase in certain cancers for employees at the plant near Parkersburg, Virginia. Of significance, the company claims not to know if the increase is related to the chemical C8. However, DuPont reported the information to the EPA in 2006 and updated the agency the following year. But, interestingly, the findings have never been released to the public.

C8, a suspected carcinogen, is the subject of intensive scientific research that started as part of a class-action lawsuit that claimed C8 releases from the Washington Works plant contaminated water supplies. About 69,000 people participated in the C8 Health Project, which is aimed at determining whether the chemical has any effect on humans. Results aren't expected until 2011. DuPont has used C8 for more than 50 years in making nonstick and stain- and water-resistant coatings for cookware, carpets and other products. DuPont has said it plans to phase out use of C8—ammonium perfluorooctanoate—by 2015.

Source: *Associated Press*

XVI. TRANSPORTATION

AMERICANS DON'T WANT LARGER AND HEAVIER TRUCKS ON U.S. HIGHWAYS

A new national survey shows that Americans overwhelmingly oppose efforts by the trucking and shipping industries to relax safety standards and allow longer and heavier trucks on our nation's highways. The poll results counter a lobbying effort by the trucking and shipping industries to increase the size and weight of trucks in a six state "demonstration project." The states in the project are Georgia, Maine, Michigan, South Carolina, Texas and Wisconsin. The two industries have been lobbying Congress to increase the load limits for trucks in these states from 80,000 pounds to 97,000 pounds.

According to a coalition of safety groups, larger and heavier trucks will mean more deaths and more damage to roads and bridges in this country.

Officials of Advocates, Public Citizen for Highway and Auto Safety, and the Truck Safety Coalition, a partnership of Citizens for Reliable and Safe Highways (CRASH) and Parents Against Tired Truckers held a news conference at the U.S. Capitol which included relatives of people killed in large truck crashes, or who were injured themselves recently to make their case against the project. Also participating in the news conference were U.S. Senators Frank R. Lautenberg (D-NJ) and Claire McCaskill (D-MO) and U.S. Rep. James McGovern (D-MA), who were called consumer and safety champions. Public Citizen President Joan Claybrook, in discussing the issue, observed:

There is overwhelming scientific evidence that shows the larger trucks get, the more difficult they are to control, the longer they take to stop, and the more dangerous they are to the motoring public. Today, we are telling the trucking and shipping industries that we don't need a demolition derby on U.S. highways.

The independent survey of a representative sample of U.S. motorists conducted by Lake Research Partners found that 66% oppose changing laws to allow larger trucks carrying heavier loads. More than 80% believe that trucks pulling two or three trailers are not as safe as single-trailer trucks. The survey also found that the strong opposition to bigger trucks transcends political party, gender, age, and region. Jacqueline S. Gillan, vice president of Advocates for Highway and Auto Safety, commented:

The American people have to share the roads with these super-sized trucks and are frighteningly aware of the dangers they pose. Increasing the size and weight of big trucks is an invitation for

more deaths and road and bridge damage.

Each year, about 5,000 people are killed and more than 100,000 injured in crashes involving large trucks. While large trucks make up only 3% of all registered vehicles, they account for 9% of all fatal crashes. Heavy trucks also cause heavy damage to roads and bridges and increase the likelihood for catastrophic failure, such as the collapse of the Interstate-35 bridge in Minneapolis last summer, which killed 13 and injured another 145.

The trucking and shipping industries are pushing for larger and heavier trucks as Congress prepares next year to reauthorize the multi-billion dollar surface transportation bill. Congress must consider, not only the lives lost in crashes involving large trucks, but also the burden these trucks put on the nation's infrastructure. The proposed legislation would protect our nation's infrastructure and improve safety on U.S. highways by helping keep dangerously large and heavy tractor-trailer trucks off of them. It's reported that one 80,000 pound tractor-trailer truck does as much damage to roads and bridges as 9,600 cars. Additionally, the cost of large truck crashes exceeds \$41 billion per year. There are obvious safety risks created by these supergiant trucks. Congress should say no to even larger commercial trucks on our nation's highways.

Source: Public Citizen

SAFETY VIOLATIONS FOUND AT TRUCK FIRM INVOLVED IN FATAL BUS CRASH

It appears that a Kentucky trucking company, involved in a school bus crash that killed one student and injured 12 people, had violated a number of federal and state safety regulations. It was reported that a review by the Kentucky Vehicle Enforcement agency found eight safety violations for XXL Trucking. Three violations for the company were labeled by the agency

as critical and included drivers failing to keep time sheets or records of duty status. Also, none of the four trucks was periodically inspected. The vehicle enforcement agency conducts safety reviews when a company is involved in a fatal crash.

On May 1st, a dump truck owned by XXL Trucking crashed into a school bus near Falmouth, Kentucky. A 16-year-old student was killed. Ten students and both drivers were injured. The owner of XXL Trucking told the enforcement agency that the company was unaware of the alleged violations, but would correct them. A wrongful death lawsuit, alleging negligence by the trucking company and the dump truck driver, has been filed.

Source: *The Kentucky Enquirer*

CELL PHONES AND DRIVING JUST DON'T MIX

Common sense tells me that talking on a cell phone while driving a motor vehicle isn't safe. While that seems obvious, what happens in the brain while it juggles the two tasks is not so easily understood. A study by a University of South Carolina psychology researcher featured in the journal, *Experimental Psychology*, provides a better understanding of why language—talking and listening, including on a cell phone—interferes with visual tasks, such as driving. In two different experiments, associate professor of psychology Dr. Amit Almor found that planning to speak and speaking put far more demands on the brain's resources than listening. In explaining what had been done, Dr. Almor observed:

We measured their attention level and found that subjects were four times more distracted while preparing to speak or speaking than when they were listening. People can tune in or out as needed when listening.

Forty-seven people participated in the experiment. One experiment

required participants to detect visual shapes on a monitor, and a second experiment required participants to use a computer mouse to track a fast-moving target on the screen. In both experiments, participants performed the visual task while listening to pre-recorded narratives and responding to the narratives. Dr. Almor calls the finding "very strong" and expects it to be even stronger in actual, interactive conversation. The experiment was repeated using 20 pairs of friends who engaged in real conversation while completing visual tasks. Those results are being compiled this summer.

The National Highway Traffic and Safety Administration reported in April that 25% of all motor vehicle accidents are caused by distractions. A survey done by Nationwide Mutual Insurance in 2007 indicated that 73% of drivers talk on cell phones while driving. Since cell-phone sales have increased to 254 million in February 2008—up from 4.3 million in 1990—according to the Cellular Telecommunications & Internet Association, there is good reason for researchers to study the brain. That's a sure way to find out how talking and listening on a cell phone interferes with driving a car. At the University of South Carolina, Dr. Almor conducts research on language and memory (the brain's ability to acquire, organize, revise and store information). Hopefully, his work relating to cell phone use while driving a motor vehicle will, in conjunction with other studies, encourage state legislative bodies to ban cell phones while driving.

Source: *Insurance Journal*

GOLF CARTS INJURE 1,000 PERSONS EACH MONTH

About 1,000 Americans a month are being injured in golf cart accidents, with many mishaps occurring at places other than golf courses. The small low-cost vehicles are being increasingly used for general transportation, according to a UAB study released last month.

The study is the first to estimate the number of golf cart injuries in the United States. The study—published in the *Journal of Trauma: Injury, Infection and Critical Care*—was conducted after doctors at UAB treated a number of serious injuries suffered in golf cart accidents. It found that golf carts are routinely involved in collisions and rollovers as well as in other accidents in which people are ejected from the cart.

The researchers analyzed a national database of emergency room records from 2002 through 2005. They conservatively estimated there were about 48,000 golf cart accidents nationwide during that four-year period, or about 1,000 a month. Roughly half the accidents occurred on golf courses, with the other half taking place at homes, on streets and on other public property. Gerald McGwin, associate director for research at the Center for Injury Sciences at the University of Alabama at Birmingham, observed:

A lot of people perceive golf carts as little more than toys, but our findings suggest they can be quite dangerous, especially when used on public roads. There is little federal regulation, and most states do not require operators to be of a certain age, use any sort of safety equipment or obtain an operator's license.

According to a story on the study appearing in the Birmingham News, fractures and head trauma were the most common injuries found in the study. The highest injury rates were found in 10- to 19-year-old boys and men older than 80. The study noted that golf carts are designed specifically for use off public roads, with speeds not to exceed 15 mph, although they can be easily modified to travel faster. They lack many of the safety features required for vehicles traveling public streets, such as windshields, signal lights and mirrors.

There are a hodgepodge of state and

local regulations governing golf carts. For example, it is illegal to operate an unlicensed vehicle, including a golf cart, on public streets in Alabama. In Florida, golf carts can be used on streets, but only if they have been modified to run at a top speed of 20 to 25 mph. Florida counties and cities can still ban them, too. Lots of folks have golf carts at home and for use at business locations. Golf carts are increasingly being used for short trips in affluent subdivisions and senior citizen communities because they are relatively inexpensive, quiet and usually have low emissions.

It should be noted that the rate of accidents for all-terrain vehicles is ten times higher than that for golf carts. Also, there are more than 6 million auto-accident injuries a year, including more than 40,000 deaths. The researchers made some safety recommendations, especially for people who use golf carts on public roadways:

- Parents should carefully monitor children operating golf carts.
- Seat belts should become mandatory in golf carts.
- Drivers and passengers should wear helmets while in golf carts operating on public roads.

While golf carts are relatively safe—when compared on a statistical basis with ATVs and motor vehicles—they can still be dangerous. The UAB study can be most helpful if folks will read it and put the recommendations to good use.

Source: Birmingham News and Reuters

PUNITIVE DAMAGES TO BE ALLOWED IN COMAIR SUITS

A federal judge has ruled that the estates of the victims of the crash of Comair Flight 5191 are entitled to seek punitive damages in a trial set for August 4th. In an order made public last month, U.S. District Judge Karl Forester ruled there is enough evidence to allow a jury to decide if the airline's

management was responsible for the August 2006 crash at Lexington's Blue Grass Airport that killed 49 people. Since punitive damages are awarded to punish a wrongdoer, this ruling seems to be legally correct based on the known facts of the case.

Comair has admitted its pilots made mistakes in taking off from the wrong runway, but says the company should not be subject to punitive damages because it did not "authorize or ratify" their conduct. But Judge Forester ruled that the plaintiffs produced sufficient evidence that Comair's training and policies were negligent, including its failure to require pilots to look at their instruments to verify runway headings. The National Transportation Safety Board has ruled pilot error was the principal cause of the crash. As you may recall, the crash occurred seconds after the Comair jet tried to take off from the wrong runway. Also, that runway was unlit and too short for jetliners. In a pleading filed in the case, Comair has "accepted responsibility for mistakes made by its crew," and says the pilots failed to maintain "situational awareness." But it also claims that the airline had no reason to anticipate that Capt. Jeffrey Clay and First Officer James Polehinke "would fail to perform their duties."

The plaintiffs contended there was "overwhelming" evidence Comair was grossly negligent in its corporate oversight of its safety program and that the reckless operation of the aircraft was a "foreseeable consequence" of decisions by Comair management. The plaintiffs also asserted that "a pilot is in the same position as a corporate officer who is in control of corporate activities." In allowing punitive damages to be decided by a jury, Judge Forester noted the plaintiffs had presented evidence that Comair knew that one of its flight crews had previously taken off from a wrong runway; that it failed to adopt a written checklist to require cross-checking the runway heading; and that it had no policy prohibiting pilots from taking off

on an unlit runway at night. The judge concluded by writing in his order:

It is the opinion of this court that these and other additional circumstances with the expert testimony in support are sufficient to raise a jury question as to whether Comair should have anticipated the conduct of its pilots.

Approximately one-third of the lawsuits arising out of this crash have been settled, but the rest are still pending. The trial, set for August 4th, is expected to go as scheduled.

Source: *Louisville Courier Journal*

FAA ISSUES CALL FOR SAFETY CHECKS OF BOEING PLANES

U.S. aviation regulators have proposed mandatory inspections of hundreds of Boeing Co. jetliners to check for potential fuel-system problems that could cause engines to stop running and prevent pilots from restarting them. The proposed regulations, released by the Federal Aviation Administration last month, would require airlines to look for air leaks that “could result in multiengine flameout,” or engine stoppages. The proposal says the problem could result in “an inability to restart the engines, and consequent forced landing of the airplane.”

The proposed rules technically affect more than 3,500 aircraft flown by U.S. carriers, but both FAA and Boeing officials said many of the planes already have been checked. It was reported that Boeing previously had changed the design of its fuel systems. It urged carriers to conduct such operational checks last year, but it’s not clear how many planes have been inspected so far.

According to the FAA, the move, which applies to nearly all plane models, was brought about by engine stoppages on six different Boeing aircraft between 2002 and 2004. Some of those incidents occurred during flight,

while others took place during taxiing, according to the FAA. Fortunately, the incidents didn’t result in any crashes or injuries. Both Boeing and the FAA say the latest measure isn’t considered a high-priority safety item, which is rather difficult to comprehend. It certainly would appear that inspections relating to safety issues would be a top priority for all concerned. Boeing’s family of airliners share common fuel-system design features.

Source: *Wall Street Journal*

XVII. ARBITRATION UPDATE

MARYLAND BANS PRE-DISPUTE ARBITRATION CLAUSES IN INSURANCE CONTRACTS

The state of Maryland has taken some badly-needed action concerning the inclusion of arbitration clauses in insurance policies. Governor Martin O’Malley recently signed new legislation prohibiting the enforcement of pre-dispute mandatory arbitration clauses in insurance agreements entered into by consumers, such as those involving life, property and health care coverage. The sponsor of the bill, Representative Luiz Simmons, said there has been “an explosion” in the use of pre-dispute mandatory arbitration clauses, which require consumers to waive their right to a trial. The new law was designed to address the increasing use of these clauses in the insurance field, according to Representative Simmons. This is a noteworthy act on behalf of the citizens of Maryland and one that will prove to be of benefit to all concerned.

The states have a duty to regulate insurance companies and to protect the public. The McCarran-Ferguson Act, passed by Congress, enables states to regulate the business of insurance. As a result, the states can bar the use of pre-dispute arbitration clauses in consumer

insurance contracts. It should be noted, however, the new law in Maryland does not prohibit the use of post-dispute arbitration agreements and I have no problem with that. Interestingly, the bill passed without opposition from the insurance companies. It was signed by Governor O’Malley and became law on May 22nd. The new law provides that with one exception, “any provision in an insurance contract with a consumer that requires arbitration is void and unenforceable.” The exception is for an arbitration agreement that is part of a process for determining the appraisal value of a property. The legislation applies only to individuals who seek or acquire “any goods or services primarily for personal, family, or household purposes including financial services, health care services, or real property.” It will become effective January 1, 2009 and apply prospectively.

Maryland is not the only place where arbitration in consumer contracts is being questioned. Other proposed legislation is pending before Congress that would affect consumer and other types of arbitration agreements. For example, S.B. 1782, introduced July 12, 2007, in the Senate by Sen. Russ Feingold (D-WI) proposes to amend the Federal Arbitration Act to invalidate pre-dispute agreements that would require arbitration of employment, consumer, or franchise disputes, and disputes arising under statutes that protect civil rights or regulate contracts between parties of unequal bargaining power. The Judiciary Committee held a hearing on the Feingold bill on December 12, 2007, but I don’t believe it has reached the Senate floor for debate.

Source: *ADRWORLD.COM*

USE OF ARBITRATION BY HEALTHCARE PROVIDERS SHOULD BE BANNED

In previous issues, we have written about The Fairness in Nursing Home Arbitration Act, which is currently pending in Congress. It now appears that the American Health Care Associa-

tion and National Center for Assisted Living is opposing the bill. This legislation, which was introduced by U.S. Representative Linda Sanchez (D-CA), would prohibit the use of arbitration agreements at the time of admission to a nursing facility or assisted living residence. The long term care groups claim use of pre-dispute agreements throughout the healthcare sector brings about more timely, less adversarial settlements, and at a lesser costs. Anybody who has been involved with a claim that went to arbitration knows those statements are simply not true.

The Sanchez bill, co-sponsored by Representatives Ileana Ros-Lehtinen (R-FL), John Conyers (D-MI), Hank Johnson (D-GA), Dennis Kucinich (D-OH), and William Delahunt (D-MA), should be passed by Congress without delay. It seems enough members of Congress have committed to help improve the quality of care provided to the nation's long term care patients to assure prompt passage.

Banning pre-dispute arbitration clauses in nursing home admission agreements would indeed be good news for residents and their families. Our nation's frail, elderly and disabled citizens who live in nursing home facilities, assisted living residences, subacute centers and homes for persons with intellectual and developmental disabilities must be protected. There is no way to justify requiring a person who needs to be admitted to such a facility having to submit to arbitration in order to be admitted. In fact, our firm's experience is that on many occasions persons seeking admission to a nursing home facility—or their families—don't even realize that an arbitration agreement has been included in the forms they are asked to sign. At a time when persons needed to be admitted to a facility—when the residents or their families are in need and certainly not even thinking about a dispute—making an agreement to pre-dispute arbitration a condition of acceptance to the facility is wrong, both morally and legally.

XVIII. NURSING HOME UPDATE

ALABAMA MAKES PROGRESS IN NURSING HOME INSPECTION BACKLOG

It was reported by the *Birmingham News* last month that the Alabama Department of Public Health expects to eliminate by the end of September a backlog of nursing home inspections that has plagued the state for years. As you may recall, there had been harsh criticism from the federal government concerning the efforts in Alabama. Since then more inspectors have been hired and two branch offices opened to help regulate the state's 233 nursing homes. Rick Harris, director of the department's bureau of health provider standards, says that in addition to catching up for the first time in years on annual nursing home inspections, as required by federal law, Public Health officials have eliminated a backlog of investigations into complaints about nursing homes. In this regard, Mr. Harris said:

We've never been caught up on abuse allegations; we're current on abuse allegations. We've never been caught up on informal dispute resolution meetings; we're totally current on those. We're doing better than I can ever remember us doing. We've got plenty of staff to get the work done.

Harris's comments follow a May 9th report by the Government Accountability Office, the investigative arm of Congress. The report said many nursing home inspectors routinely overlook or minimize problems that pose a serious, immediate threat to patients—things such as malnutrition, severe bedsores or overuse of prescription medications. Nursing homes are supposed to be inspected once a year by state employees working under contract with the federal government, which sets stringent standards. Federal officials validate the work of state inspectors by accom-

panying them or doing follow-up surveys within a few weeks. The GAO found that state employees nationwide missed at least one serious deficiency in 15% of the inspections checked by federal officials.

In nine states, including Alabama, inspectors missed serious problems in more than 25% of the surveys analyzed from 2002 to 2007, according to the report. The other eight states most likely to miss serious deficiencies were Arizona, Missouri, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee and Wyoming. The GAO report was based on federal analysis of surveys that were conducted two years ago, when Alabama was struggling with a shortage of inspectors, according to Mr. Harris.

Over the past two years the state has increased wages for inspectors, who are registered nurses. It has also opened branch offices in Shelby and Mobile counties so inspectors won't have to travel from Montgomery to nursing homes throughout the state.

The result has been a significant increase in inspectors, and the state is on track to clear up its backlog of inspections by the end of this fiscal year, Sept. 30th. In addition, training has improved, and there have been no further problems with missed deficiencies. The state has been down to 33 nursing home inspectors, but now has 60 and that's good news.

Source: *Birmingham News*

XIX. HEALTHCARE ISSUES

ONLINE PHARMACIES SHOULD BE AVOIDED

How many of you get e-mails on a regular basis offering popular prescription drugs online at discount prices? I suspect—like me—most all of you do. Lots of folks are getting their prescription drugs online and that's a risky alternative to traditional pharmacies, in

my opinion. It's my belief that the millions of Americans who buy prescription drugs online are putting themselves in danger. There are a number of reasons so many people are turning to the Internet for prescription drugs. More and more people are finding themselves without health insurance coverage and are unable to afford the expensive drugs they need. Even those who have insurance find drugs to be very expensive. The Web appears to offer a cheaper alternative for them. It's reported that some folks simply want to by-pass a doctor and buy online. It makes no sense for a layperson to go to the Internet and leave doctors completely out of the equation when taking drugs that have to be prescribed. It's a very dangerous practice. Neither does it make sense to buy online—even at a cheaper price—and run a safety risk.

In some cases, the problem is the pills are either placebos, made of sugar with only a minimal amount of the drug in them, or are actually counterfeits. Some of the online drugs have been found to contain other substances that are dangerous, even potentially deadly. When an Internet drug is counterfeit, however, that creates a real danger. Most national drugstore chains, such as CVS or Walgreens, have their own Web sites, and so far as I know, those are completely legitimate. According to reports, most Canadian sites are considered safe, since they are regulated by that country's government. But sites you become aware of from unsolicited, spam e-mails, could be operating offshore and be completely unregulated. Even though some Web sites where drugs can be obtained online are legitimate, I wouldn't buy any prescription drugs online. The risk is simply too great. My advice has always been to stick with a local pharmacist—one whom you know and can trust—and that's still my recommendation. Of course, your doctor should be the person who prescribes the medicines you should be taking and that's a

rule that should never be broken. Your doctor or local pharmacist—working together—protects you from the unknowns of the internet.

Source: CBS News

APPLESEED FILES CLASS ACTION LAWSUIT FOR LOW-INCOME FAMILIES

Nebraska Appleseed filed a class action lawsuit recently challenging the state's authority to take away medical assistance from low-income families. The suit alleges that the Nebraska Department of Health and Human Services overstepped its bounds by removing vital Medicaid health care coverage from families who fail to fully meet work requirements under Nebraska's welfare-to-work program known as Employment First. According to Nebraska Appleseed, 465 Nebraska families were sanctioned in the first three months of 2008. The state Legislature never approved Medicaid sanctions, which Health and Human Services is unauthorized to carry out. The lawsuit seeks to get an order holding that the Medicaid sanction regulation violates the separation of powers clause in the Nebraska Constitution. Erin Ching, staff attorney for Nebraska Appleseed, stated:

This policy prevents parents from receiving the health care they need to remain healthy enough to care for their children. It can result in emergency room visits that are more costly in the long run, and it runs contrary to state law. The removal of health care is an important policy decision that should only be made by the Legislature, and the Legislature did not authorize Health and Human Services to remove adult Medicaid.

The State Welfare Reform Act, in which the Nebraska Legislature declared that only cash assistance should be removed as a penalty for failure to participate in the Employment First program, is the basis for the

suit. The lawsuit seeks to stop the state from removing Medicaid from adults in families that have received a sanction for failure to participate in the Employment First program, and to require that the program's regulations be modified to align with the intent of the Nebraska Legislature and the Welfare Reform Act.

Source: Appleseed News Release

NEW SAFETY PROGRAM TO MONITOR MEDICARE DRUG USE

At a time when President Bush is trying hard to sell federal preemption to the U.S. Supreme Court, the Food and Drug Administration is equally busy trying to repair and polish its tarnished image. The agency is issuing news releases almost daily telling folks all about plans to change the way the FDA operates. For example, for the first time, the FDA will begin monitoring prescription drug usage by millions of Medicare participants in an effort to identify potential safety problems. I have to wonder why it took the agency so long to figure this one out. I have to wonder if the push for federal preemption prompted the FDA to show some signs of life!

Source: Associated Press

JURY AWARDS \$20.5 MILLION FOR FATAL LIPOSUCTION

A Philadelphia jury awarded a \$20.5 million verdict to the parents of an 18-year-old college student who allegedly died from a liposuction procedure gone wrong. Of the \$20.5 million award, \$15 million was for punitive damages. The jury returned the verdict seven years to the day of the elective liposuction Amy Fledderman, 18, sought for her chin, abdomen and flanks with a plastic surgeon. The verdict was against the doctors and nurse anesthetist.

A blood vessel in Amy's neck was severed during the liposuction, and she was administered medication to which she was allergic. Despite a respiratory

emergency, the defendants kept Flederman in the doctor's office for over two hours and failed to call an ambulance until she was on the verge of death, including appearing cyanotic, or blue. Her oxygen levels had dropped from the normal high 90s to the 60s. Amy died two days later as she was being transferred from Montgomery Hospital to the Hospital of the University of Pennsylvania. It was alleged that Amy had an agonizing death and spent the 24 hours before dying in severe pain, intubated and vomiting blood. A massive cover up was alleged, which included lying to the Pennsylvania Department of State Investigators, to the Pennsylvania Department of Health Investigators, and to detectives from the Montgomery County District Attorney's Office.

The doctor's liposuction privileges had been restricted at Main Line Health Hospitals, and he was required to be under the supervision of another liposuction surgeon, according to the plaintiffs' lawyers. His office was not licensed by the Pennsylvania Department of Health. Shade McLaughlin and Maxwell S. Kennedy, who are with the Beasley Firm out of Philadelphia, Pennsylvania, represented the family and did an outstanding job.

Source: *Law.com*

PROPOSED GLAXO ANTIBLEEDING DRUG NO BETTER THAN PLACEBO

The Food and Drug Administration says that a drug proposed by GlaxoSmithKline PLC to treat a bleeding condition decreases bleeding events similar to a placebo. In documents posted to the FDA's Web site, it's indicated that GlaxoSmithKline's study of the proposed drug "does not provide robust evidence" to support proposed labeling claims that it decreases the frequency and severity of bleeding in people with chronic idiopathic thrombocytopenic purpura. Chronic ITP is a condition in which the blood doesn't clot as it should because of a lower

number of blood cells called platelets. Patients with the disease tend to bleed spontaneously or after minimal trauma.

GlaxoSmithKline, the pharmaceutical giant based in London, is seeking approval for the proposed drug Pro-macta to treat previously-treated patients with chronic ITP. An FDA panel will decide whether to recommend approval for the drug. While the FDA doesn't have to follow the panel's advice, it generally does. In briefing documents, GlaxoSmithKline says there is a "high unmet medical need" for a well-tolerated short-term treatment for patients with chronic ITP. Citing the *New England Journal of Medicine* the company said every available treatment for patients with chronic ITP has failed to improve platelet counts. GlaxoSmithKline says its proposed drug will "effectively and consistently" raise platelet levels during short-term treatment in patients who had previously been treated for chronic ITP. According to the FDA, GlaxoSmithKline's studies show the drug produces a trend toward reduced incidence of bleeding when compared to a placebo. The agency says, however, that this trend isn't "statistically significant."

Source: *Wall Street Journal*

TYSON PULLS MISLEADING ADS

Tyson Foods has "voluntarily withdrawn" advertising and labels claiming that its poultry products don't contain antibiotics. This came after a federal court issued an injunction stopping the practice. The world's largest meat producer has notified the U.S. Department of Agriculture that it would stop using the "raised without antibiotics" chicken label. Tyson had claimed it based the slogan on the absence of any antibiotic "believed to affect humans." A federal judge in Baltimore had set a deadline to stop Tyson from running any of the advertisements. The injunction came after competitors, Maryland-based Perdue Farms and Mississippi-based Sanderson Farms, filed suit claiming

Tyson's advertising was misleading. Tyson appealed the ruling, but a federal appeals court in Virginia denied a motion to stay the order. The Arkansas-based company operates Alabama poultry processing plants in Albertville and Blountsville. It will be interesting to see how the litigation—if it continues, now that the ads have been pulled—will turn out.

Source: Associated Press

HOSPITAL AGREES TO SETTLEMENT FOR DUMPING PATIENT

Hollywood Presbyterian Medical Center has settled charges that it left a paraplegic man crawling around downtown Los Angeles' skid row in a hospital gown and colostomy bag. In other words, they dumped the man. The Medical Center agreed to pay \$1 million and be monitored by a former U.S. Attorney for up to five years. The resolution marks the largest settlement thus far in the City of Los Angeles' efforts to crack down on hospitals and other institutions that "dump" patients along skid row. Kaiser agreed to a smaller settlement last year. Currently, the city attorney's office is investigating more than a dozen other hospital and medical offices suspected of dumping.

As part of the settlement, Hollywood Presbyterian agreed to adopt new discharge rules and enhance services for homeless patients. The one million dollars will go to nonprofit groups that aid indigent and homeless patients in the Hollywood area and other parts of the city. It's impossible to comprehend that any hospital—regardless of location—would do what this medical center did. It's an example of how little concern some folks have for their fellow human beings. This was a heartless example of the worst of what appears to have been countless episodes of patient dumping.

Source: *Los Angeles Times*

MERCURY DENTAL FILLINGS MAY BE HARMFUL TO SOME

Silver-colored dental fillings containing mercury may be harmful to pregnant women, children and fetuses, according to the U.S. Food and Drug Administration. The agency settled a lawsuit filed by several consumer advocates. The FDA, under the settlement, agreed to alert consumers about the risks on its Web site and to issue a more specific rule for fillings that contain mercury by July 2009. Millions of people in this country are said to have the metal fillings, called amalgams, in their mouths. The FDA said on its Web site:

Dental amalgams contain mercury, which may have neurotoxic effects on the nervous systems of developing children and fetuses. "Pregnant women and persons who may have a health condition that makes them more sensitive to mercury exposure, including individuals with existing high levels of mercury bioburden, should not avoid seeking dental care but should discuss options with their health practitioner."

Interestingly, the FDA does not recommend the removal of silver fillings. I believe that July of next year is too long to wait for a rule relating to this safety issue. This problem is not one that has just surfaced since much has been written about the potential for harm relating to the metallic content of the dental fillings.

Source: Reuters

XX. ENVIRONMENTAL CONCERNS

SENATORS GET INVOLVED IN EPA OFFICIAL'S RESIGNATION

We wrote last month about the EPA's regional administrator for Region 5

being forced to resign. It's now significant that two United States Senators are looking into the matter. Ms. Gade has linked her forced resignation to her efforts to get the Dow Chemical Company to "clean up their mess." Dow has admitted to dumping massive amounts of dioxin, believed to cause cancer and disrupt immune and reproductive systems, throughout most of the last century ending in the mid-1980s. The toxin has contaminated rivers and wetlands around Dow's Midland, Michigan headquarters including the Saginaw River and Lake Huron's Saginaw Bay. However, the company has still not provided a plan for the cleanup.

Senators Barbara Boxer, (D-CA) and Sheldon Whitehouse (D-RI) have asked whether the White House or Dow Chemical were involved in any discussions surrounding Ms. Gade's departure. Dow has denied any involvement and the EPA states it will respond appropriately to the request for a "full explanation of the circumstances". The Senators' involvement in this matter is certainly a good sign. Most Americans—regardless of how they feel about the environment—are greatly concerned over the Bush Administration's policy of protecting large corporations when they do bad things. When a person like Mary Gade—who is in a position to do good—is punished for her efforts, that is wrong. That person must be protected. Also, those who participated in the efforts to get rid of her should be exposed and punished.

Source: Boston Globe

JUDGE APPROVES W.R. GRACE'S \$250 MILLION CLEANUP FOR MONTANA ASBESTOS

A federal bankruptcy judge has approved an agreement for W.R. Grace & Co. to reimburse the federal government \$250 million for the investigation and cleanup of asbestos contamination in Libby, Montana. The Columbia, Maryland-based chemical maker agreed to the amount in March to settle a bankruptcy claim brought by the govern-

ment to recover money for the past and future cleanup of contaminated schools, homes and businesses in Libby. The contamination has been blamed for sickening hundreds of people, some of whom have died. This is a classic example of a corporation that had no regard for the consequences of its actions.

According to an order signed by U.S. Bankruptcy Judge Judith K. Fitzgerald, Grace must pay the amount within 30 days. The settlement would be the largest-ever reimbursement through the government's Superfund program, according to the U.S. Environmental Protection Agency and the Justice Department. James D. Freeman, a Justice Department lawyer, says the settlement was a "substantial compromise" for the government, but the prompt payment would allow the cleanup to continue without budgetary concerns.

Thus far, taxpayers have been footing the bill for the EPA's investigative work and cleanup in Libby, which began in 1999. The EPA estimated in March that expenses totaled \$168 million and another \$175 million in costs were likely. The asbestos came from vermiculite mine and processing facilities a few miles from the town in northwestern Montana. The facilities were owned and operated by Grace from 1963 until the site's closure in 1990. Millions of tons of the asbestos-contaminated vermiculite ore were shipped from the mine near Libby to about 270 processing plants across the United States for use in insulation, fireproofing, gardening and other products. Exposure in Libby has been blamed for lung-scarring asbestosis and mesothelioma, a fast-moving cancer that attacks the lungs.

The EPA has said the remaining cleanup work in Libby is likely to take three to five years. Grace sought Chapter 11 bankruptcy protection in April 2001 because of lawsuits over asbestos. In 2001, the government filed a lawsuit to recover costs. Two years later, the EPA won a \$54 million judg-

ment for cleanup costs incurred through December 31, 2001. But that amount went unpaid because of Grace's bankruptcy proceedings. This recent settlement announcement included the 2003 judgment. In April, Grace reached an agreement to resolve current and future asbestos claims in a settlement valued at \$3 billion in cash and equity.

Source: *Insurance Journal*

FORMER COLORADO NUCLEAR PLANT CONTRACTORS ORDERED TO PAY \$925 MILLION

Two companies that were contractors at the now-defunct Rocky Flats nuclear weapons plant have been ordered to pay \$925 million to nearby residents. Contamination blew from the facility, endangering people's health and devaluing their property. Dow Chemical Co. denies any wrongdoing and said it will appeal. The other contractor, Rockwell International Corp., has in part been purchased by Boeing Co., which said it had no liability for the site. A federal judge ordered Dow to pay \$653 million and Rockwell \$508 million in compensatory damages, but capped the amount to be collected at \$725 million. Dow and Rockwell also were ordered to pay exemplary damages of \$111 million and \$89 million, respectively.

The lawsuit, filed by a group of homeowners, affects up to 13,000 people who owned land near the former plant when it shut down in 1989 because of safety violations. The lawsuit claimed the companies intentionally mishandled radioactive waste and then tried to cover it up. Judge John L. Kane stayed his judgment pending the appeals. Boeing is responsible for Rockwell's portion of the judgment, according to Judge Kane's order. Rockwell retained responsibility for any Rocky Flats claims when Boeing obtained its defense and space businesses in 1996.

Both companies say the Department

of Energy had agreed to be responsible for any settlements or judgment costs. The trial in the case ended in February 2006. The federal jury decided the two contractors damaged land around the plant through negligence that exposed thousands of property owners to plutonium and increased their risk of health problems. Dow Chemical operated Rocky Flats for the Department of Energy from the 1950s until 1975. Rockwell ran it from 1975 until 1989, when the plant closed. The plant made plutonium triggers for nuclear warheads. Violations documented by state and federal officials included the outdoor storing of barrels of waste oil and solvents contaminated with plutonium. State health officials have said some of those barrels leaked and contaminated the surrounding soil, which later blew downwind. The federal government has since spent \$7 billion to clean up the site and turn it into a wildlife refuge.

Source: *Associated Press*

STUDY TIES DIRTY AIR TO BLOOD CLOTS IN LEGS

Researchers say that exposure to air pollution increases the risk for deep vein thrombosis (DVT), the blood clots that commonly occur in the leg veins. And the worse the air pollution, apparently the higher the risk. Researchers studied 871 DVT patients in the Lombardy region of Italy, comparing them with 1,210 healthy people. They tested levels of particulate air pollution—dust, soot and other tiny bits of matter suspended in the air—in areas where the patients lived, using monitors at 53 sites over a one-year period. The study can be found in *The Archives of Internal Medicine*.

After adjusting for various health factors, the researchers found that for each increase of ten micrograms per cubic meter in particulate matter, the risk for DVT increased by 70%. The effect of air pollution was smaller in women and not apparent at all in those

using oral contraceptives or taking hormone therapy. Oral contraceptives themselves increase the risk for blood clots, but air pollution apparently showed no added effect. Dr. Andrea Baccarelli, the lead author and an assistant professor of environmental health at the University of Milan, stated:

It's a risk to live where pollution is high. But air pollution is not the only risk for DVT. Rather, this emphasizes the need for having a healthy lifestyle. That's important wherever you live, but even more important if you live where pollution is high.

The findings referred to above are just another good reason for the EPA and state regulatory agencies to work toward reducing the causes of air pollution.

Source: *New York Times*

LAWSUIT ALLEGES POLLUTION SICKNESS

A lawsuit has been filed against the former owners of a window manufacturer now based in Mosinee, Wisconsin. It's alleged that six residents in Wausau were sickened or had their property damaged by pollutants that leaked from a defunct Wausau plant. The suit, filed in state court, alleges that toxic chemicals from the Crestline Window plant on Wausau's west side were released into the environment over a 40-year period. The suit alleges that the owners of the manufacturing plant, then known as SNE Corp., knew or should have known of the hazards of the chemicals used.

In 1984, SNE notified the Wisconsin Department of Natural Resources that it released "Penta," a product used to treat raw lumber, at the site. Penta includes an ingredient called pentachlorophenol and is known to contain dioxins—both of which are known to cause cancer. It is alleged in the lawsuit that more than 100,000 gallons of Penta were released into the soil and ground water between the

plant and the Wisconsin River up until 1986. The plaintiffs are seeking damages and reimbursements of insurance.

Site cleanup is being overseen by the DNR, and according to an agency report, 468 gallons of “product” were recovered. The suit names Stevens Point companies Sentry Insurance and its subsidiary, WAULECO Inc. as defendants. SNE was not named in the lawsuit, and the current owners of SNE do not own the Wausau property.

Source: *Wausau Daily Herald*

A NEW STUDY ON THE EFFECTS OF LEAD POLLUTION

A new study on lead pollution and crime indicates that even relatively low exposure can affect a child for life. The researchers found that regardless of socioeconomic or other factors, children exposed to lead developed smaller brains, particularly in the areas that regulate attention, impulse control and decision-making. They were more likely to be arrested for violent crimes. It was reported that the higher the concentration of lead in the blood, the more likely was a criminal future, but negative effects were seen even among those with lead levels that are common among children today. The children with brain damage were obvious victims of lead exposure. The victims of their crimes and the taxpayers who paid for policing and prisons are also victims of the lead exposure to the young children.

Even though the United States has sharply curtailed the use of lead, banning it from gasoline and paint, the Centers for Disease Control estimates that 310,000 preschool-age children still have levels of the heavy metal that exceed federal guidelines. The latest study indicates that there might be damage even at levels within the guidelines. The lead study took three decades to complete. Meanwhile, the U.S. Environmental Protection Agency did little for 16 years in acting on Congressionally-ordered regulations for lead paint

removal. It also has been stalling on meaningful rules for mercury, another heavy metal that affects the brain. It will probably be years before the public learns the real costs for these delays. At least the CDC recommends that all children be tested for lead, and that should be done.

Source: *Los Angeles Times*

PCB CONTAMINATION DEVALUES PROPERTY

Last month Monsanto Chemical Co., Columbia Paint and Coating Co., and the State of Montana agreed to settle a class action lawsuit for \$6 million. The case involved 202 landowners in Lewistown, Montana, who claimed that their property had been devalued due to Polychlorinated biphenyls (PCBs) found in nearby Big Spring Creek.

In 1997 a 10-year-old boy’s school science project discovered Big Spring Creek’s PCB contamination. After further investigation the Big Springs Trout Hatchery located upstream was claimed to be source of the PCB pollution. During the 1960s, the fish hatchery raceways were coated with paint containing PCBs. As a result, paint chips containing the harmful pollutants were carried downstream contaminating the fish, surface waters and nearby property. According to the Toxic Substances and Disease Registry, PCBs are suspected carcinogens and are known to harm the reproductive system.

Of the \$3.3 million dollars going to the landowners, \$1.3 million will be for reduced property values and \$2 million will compensate for emotional distress. Although the actual terms of the settlement are confidential, it’s known that the state agreed to pay \$700,000. Additionally, Columbia Paint revealed that it had contributed \$350,000 to the settlement funds. Consequently, it can be presumed that Monsanto will pay nearly \$5 million to settle the claims. The only issue yet to be resolved is how much the defendants will pay to remediate the contaminated waterway.

Source: *Great Falls Tribune* and *AOL News*

XXI. THE CONSUMER CORNER

FEDS ACCUSE COMPU CREDIT OF DECEIVING CUSTOMERS

Federal regulators are seeking to recover an estimated \$217 million in restitution and fines from credit card companies that officials say deceived subprime customers and left some of them deeper in debt. The Federal Deposit Insurance Corp. and the Federal Trade Commission, in separate complaints filed last month, alleged that Atlanta-based CompuCredit and two partner banks—First Bank of Delaware and First Bank & Trust in Brookings, South Dakota—failed to disclose fees and terms to subprime borrowers who have blemished credit histories and often little experience with credit cards. A third bank, Columbus Bank and Trust, of Columbus, Georgia, has settled with regulators and agreed to pay \$10 million in fines and restitution. These filings are to be among the largest actions of this kind thus far in the subprime lending mess.

Hundreds of thousands of subprime consumers across the nation could be eligible for reimbursement for credit card fees if money is recouped in these actions. The regulators are coming down hard on aggressive credit card lending. The Federal Reserve recently proposed rules that would crack down on “unfair and deceptive” credit card practices. The FTC filed the lawsuit in the U.S. District Court for the Northern District of Georgia, alleging that CompuCredit “misled” consumers in marketing a credit card with a \$300 credit limit. Borrowers were hit with up to \$185 in upfront fees that reduced their available credit to as little as \$115. The FDIC, in an enforcement action, levied similar charges against CompuCredit and its partner banks. CompuCredit, through brands such as Tribute and Salute, is one of the nation’s largest

marketers of credit cards to subprime borrowers, according to Andrew Davidson, vice president of Synovate Mail Monitor, which tracks these offers. In 2007, under the Tribute brand alone, CompuCredit sent out 34.2 million offers for credit cards, according to Mr. Davidson.

Source: USA Today

TOMATOES PULLED OFF SHELVES BECAUSE OF SALMONELLA SCARE

As this issue went to the printer, federal officials were still trying to find the source of a 17-state salmonella outbreak linked to three types of raw tomatoes. The list of supermarkets and restaurants pulling those varieties from shelves and menus continued to grow. McDonald's, Wal-Mart, Burger King, Kroger, Outback Steakhouse, Winn-Dixie and Taco Bell were among the companies that voluntarily withdrew red plum, red Roma or round red tomatoes unless they were grown in certain states and countries.

The FDA is investigating the source of the outbreak. Cherry tomatoes, grape tomatoes, tomatoes sold with the vine still attached and homegrown tomatoes are likely not the source of the outbreak, according to federal officials. Also not associated with the outbreak are raw red Roma, red plum and round red tomatoes from Arkansas, California, Georgia, Hawaii, North Carolina, South Carolina, Tennessee, Texas, Belgium, Canada, Dominican Republic, Guatemala, Israel, Netherlands and Puerto Rico. According to Agriculture Commissioner Ron Sparks, tomatoes grown in Alabama are safe for consumption.

The Centers for Disease Control and Prevention has identified since mid-April 167 people infected with salmonella with the same "genetic fingerprint." A number of people have been hospitalized. It appears that the death of one person has been linked the salmonella strain as a contributing factor. The cancer patient, whose death was officially attributed to his cancer,

had been hospitalized after eating pico de gallo, a tomato-based condiment, in late May while celebrating good news about his cancer treatment.

Salmonella is a bacteria that lives in the intestinal tracts of humans and other animals. The bacteria are usually transmitted to humans by eating foods contaminated with animal feces. Most infected people suffer fever, diarrhea and abdominal cramps starting 12 to 72 hours after infection. The illness tends to last four to seven days. The Food and Drug Administration warned consumers in New Mexico and Texas as early as June 3 about the outbreak. The agency expanded its warning during the weekend and chains began voluntarily removing many red plum, red Roma or round red tomatoes from their shelves in response. The salmonella causing the outbreak is a very unusual type called salmonella saintpaul, according to the FDA.

Source: Associated Press

COMPANY WILL PAY \$10 MILLION FOR TAINTED LUNCH BOXES

A judge has ordered a Los Angeles-based company to pay more than \$10 million for selling lead-tainted lunch boxes. The company, T-A Creations, sold 100,000 children's lunch boxes to the California Department of Health for a giveaway promotion after the company had been warned about the health risks posed by its products in 2006. The state announced a recall of 56,000 of the giveaway lunch boxes last September. It also warned parents about another 300,000 lunch boxes that were distributed by the state in the past several years. This recent judgment stemmed from a lawsuit filed in San Francisco Superior Court by the Center for Environmental Health. Pursuant to terms of the court's order, \$7.5 million will go to the state, and \$2.5 million will go to the nonprofit center. Michael Green, executive director of the Center for Environmental Health, an Oakland-based nonprofit group, observed:

We are shocked that a company would knowingly sell lead-tainted lunchboxes intended for California's children. The judgment sends a strong signal that companies that put our children's health at risk will pay the price.

The center notified T-A Creations in April 2006 that it had found unsafe lead concentrations in one of its lunchboxes sold to a summer camp. When the company did nothing to correct the problem, the center sued T-A Creations in July 2006. The order by Superior Court Judge Richard A. Kramer also permanently bars T-A Creations, which sells a variety of bags and cases, from "offering soft food and beverage containers, including lunchboxes, lunchbags and coolers, for sale in California without providing clear and reasonable warnings of carcinogenic and reproductive harm caused by lead and lead compounds."

Source: Insurance Journal

U.S. COURT APPROVES PET FOOD MAKER'S \$24 MILLION LAWSUIT FUND

A federal court has given preliminary approval to a settlement agreement covering lawsuits in U.S. and Canadian courts. Menu Foods was hit by more than 100 class action lawsuits last year after pet foods it distributed were found to contain toxic ingredients imported from China. In March 2007, the company, whose products were sold under such labels as Iams, Eukanuba, and President's Choice, recalled tens of millions of containers of wet dog and cat food. The agreement, which was announced in principle in April, will resolve class action lawsuits filed in U.S. and Canadian courts. The agreement calls for Menu Foods and its insurer to create a fund of \$24 million to pay for up to 100% of damages incurred by pet owners, subject to certain limitations.

The lawsuits were filed in the wake of the largest pet-food recall in history

after owners watched helplessly as dogs and cats inexplicably got sick and, in many cases, died starting in early 2007. The deaths were traced to tainted wheat gluten grown in China. It was the first of a number of problems involving products from China, including the anticoagulant drug heparin, toothpaste, fish and toys. At least 81 deaths have been linked to tainted heparin from China.

The culprit in the pet food was a chemical used to make plastics that was added to the wheat gluten before it was imported to the United States. Two Chinese businesses and two executives, along with the owners of a Nevada company, were charged this year in connection with the importation of the pet food. The federal civil case has been closely watched by pet owners and the animal-rights community, which hoped it might increase the ability of pet owners to be compensated for emotional distress. Animals have long been viewed as property in the eyes of the law. To date, few courts have allowed owners to recover for the emotional value of their pets.

In my opinion, pets should be recognized as more than just personal property. The main defendant in the litigation was Menu Foods Inc., the Canadian manufacturer of about 100 of the tainted product lines, but other companies that made or distributed the food also were named. In a news release in April, Menu Foods said that its estimate for recall costs remained \$56 million, and that the settlement would be funded by various defendants, including Menu Foods and its product-liability insurer. The idea that pets are treated like property and no more is pretty hard to take for pet owners, and I happen to be one of those folks.

The fund will be operated by a neutral claims administrator and will be available to U.S. and Canadian consumers who purchased or obtained recalled pet food. The settlement will provide restitution to the pet owners

affected by the 2007 pet food recalls. Menu Foods and other pet food producers say they themselves were victims of “a terrible fraud committed by a company in China.” The recall, which involved more than 150 brands of dog and cat food, was tied to contaminated wheat gluten and rice protein concentrate imported from China. That may be true to some extent, but the companies had a definite duty to protect pet owners and they failed to do that. I believe those companies should be punished in the criminal courts for their conduct.

Source: *Insurance Journal*

A SIGNIFICANT COURT ORDER RELATING TO THE RESALE OF SOFTWARE

A federal judge has ruled that a California software company’s “license agreement,” which is included with copies of its products, doesn’t prohibit buyers from reselling the software on sites such as eBay or anywhere else. Judge Richard A. Jones refused to dismiss the lawsuit against Autodesk, an eBay seller. The plaintiff sued Autodesk after the company prevented the man from reselling copies of “AutoCAD Release 14.” Autodesk filed several Digital Millennium Copyright Act (DCMA) notices with eBay claiming the sale would infringe its copyright. The plaintiff acquired a used copy of AutoCAD at a garage sale in 2005 and put it up for auction on eBay. Autodesk sells this product in a shrink-wrapped box that includes a license agreement.

Public Citizen represented the plaintiff and contended that Autodesk’s actions suppressed competition and led to higher prices for consumers. It was contended in the complaint that the owner of a copyrighted product can resell that product without permission. The court was asked to protect the plaintiff’s rights to resell AutoCAD software. The judge’s ruling, filed in the U.S. District Court, Western District of Washington at Seattle, stated that the plaintiff is entitled to protection under

the First Sale Doctrine, which allows a person who owns a lawfully-made copy of a copyrighted work to sell or dispose of the copy. Public Citizen lawyer Greg Beck, commenting on the ruling, stated:

This sends a clear message to copyright owners that once they sell a copy of their products, they have no right to control subsequent sales. Consumers deserve protection against these types of abusive tactics that can force consumers to pay higher prices.

The plaintiff’s lawsuit against Autodesk will proceed to trial. Seattle lawyer Michael Withey and Gary Rick, Public Citizen’s lawyer, represented the plaintiff in this suit and each did a very good job.

Source: Public Citizen

CONSUMERS CAN NOW LEARN THEIR CREDIT SCORE

More than 160 million Americans would be able to learn their all-important credit scores at no charge—and with no strings attached—under a settlement by credit reporting giant TransUnion Corp. of a long-running class-action lawsuit. The agreement would entitle consumers to at least six months of a TransUnion monitoring service, giving them access to the latest information in their credit reports as well as their current scores at any time. The service also would notify consumers by e-mail of significant changes to their files, including reports of late payments or accounts opened in their names. The latter information could help stop attempted identity theft. Since TransUnion normally sells the service for \$59.75 or more, the settlement has a value that could top \$10 billion. This information could be especially useful for people who are borrowing more because of difficulties caused by the slowing economy or who simply need loans or credit cards with better terms. Ken McEldowney, executive director of

Consumer Action, a national advocacy group based in San Francisco, has this to say about the settlement:

It's everything we tell consumers that they need to find out if they have problems with their credit. They are getting information on how to improve it and information about whether they are creditworthy. This is astonishing.

A credit report supplied by TransUnion or its rivals, Equifax Inc. and Experian, contains information about your current and recent home and auto loans, credit cards and other credit accounts, including how much is borrowed, your credit limits and whether payments are made on time. A credit score, which is calculated using a formula based on that data, is a three-digit number that can determine what interest rate you pay on a loan or credit card, or whether you are even approved for one.

Federal law entitles everyone to a free copy of his or her credit report once a year from each of the three major credit-reporting companies, but it doesn't provide access to credit scores. The case being settled stems from a business operated by TransUnion that sliced and diced data from the Chicago-based company's massive credit files to generate customized lists of consumers. Retailers, lenders and other businesses would buy the lists to use in their marketing. Federal law bars the sale of a person's private credit information except under certain circumstances, such as when he or she has applied for a loan. Although companies can gather and sell public consumer information, such as mortgage lien information that's filed with counties, the plaintiffs in the lawsuits contended that TransUnion had overstepped those bounds, violating privacy protections. The plaintiffs alleged that anyone who had a credit file maintained by TransUnion had suffered damages, mainly by being inundated with junk mail from marketers who bought data about them.

The suits were combined into one class action in federal court in Chicago. TransUnion and the plaintiffs in that case have agreed to a preliminary settlement. It requires final court approval, which is expected in September. Based on the number of people in the class, the settlement would be the largest in U.S. history. Under the settlement, anyone who had any type of loan account between January 1987 and Wednesday would be able to select one of two options:

- A basic service would provide free credit monitoring for six months. It normally retails for \$59.75, according to the settlement. Those who select this service can also apply for a cash payment.
- An enhanced service would provide nine months of free monitoring, plus use of a "mortgage simulator" that lets consumers see whether improving their credit score would affect their mortgage rates and how much they could save if it did.

This option also includes access to an individual's insurance score, which is used by some insurers to set rates. The settlement values this option at \$115.50. Under the settlement, a credit card number would not be required to sign up for either service. After the free service ends, TransUnion cannot charge for an extension unless it was requested by the consumer. The agreement also creates a \$75-million fund that would be used to notify class members about their rights, to pay lawyers' fees and pay any damages agreed to for people who opt out of the class and sue TransUnion on their own. If there is money left in the fund after two years, it would be paid to people who applied for the cash. Consumers who received the enhanced service don't have the right to apply for the money. Claims started to be filed last month. If you need more information, go to the settlement Web site at www.listclassaction.com or you can call (866) 416-3470.

Source: *Los Angeles Times*

DATA BREACH AT ARMY HOSPITAL

It appears that sensitive information on about 1,000 patients at Walter Reed Army Medical Center and other military hospitals has been exposed because of a security breach. This gave rise to identity-theft concerns and an investigation by the Army. Names, Social Security numbers, birth dates and other information were accessed, according to an Associated Press report. The computer file that was breached might not have included information such as medical records, or the diagnosis or prognosis for patients, according to the report. However, the fact that any patient information could be obtained is a most serious matter.

Source: *Associated Press*

FDA URGED TO BAN FOOD DYES

Center for Science in the Public Interest, a consumer advocacy group, has called on the Food and Drug Administration to ban the use of eight artificial colorings in food because they have been linked to hyperactivity and behavior problems in children. Controlled studies conducted over three decades have shown that children's behavior can be worsened by some artificial dyes. According to the Center, the group noted the British government is successfully pressuring food manufacturers to switch to safer colorings. Over the years, the FDA has consistently disputed the center's assertion. The agency's Web site contains a 2004 brochure that asks the question:

Do additives cause childhood hyperactivity? No. Although this hypothesis was popularized in the 1970's, well-controlled studies conducted since then have produced no evidence that food additives cause hyperactivity or learning disabilities in children.

Julie Zawisza, an FDA spokeswoman, told CNN that color additives undergo safety reviews prior to approval for

marketing and that samples of each artificial coloring are tested. She said the agency reviewed one of the studies that the center cites in calling for a ban, but that the FDA hasn't changed its opinions. Dyes are used in countless foods and are sometimes used to simulate the color of fruits or vegetables. The additives are particularly prevalent in the cereals, candies, sodas, and snack foods marketed to children. The Center's executive director, Michael F. Jacobson, commented:

The purpose of these chemicals is often to mask the absence of real food, to increase the appeal of a low-nutrition product to children, or both. Who can tell the parents of kids with behavioral problems that this is truly worth the risk?

The Center's petition asks the FDA to require a warning label on foods with artificial dyes while it considers the group's request to ban the dyes outright. Hopefully, the FDA will make sure that the dyes used in foods are safe.

Source: CNN

XXII. RECALLS UPDATE

POLARIS INDUSTRIES EXPANDS RECALL OF ATVs DUE TO FIRE HAZARD

Polaris Industries Inc., of Medina, Minnesota, has recalled about 700 more Polaris All-Terrain Vehicles. As you may know, about 95,000 of the ATVs have been recalled previously. The ATVs can have defective Electronic Control Modules (ECM) that overheat, posing a fire and burn hazard to riders. Since the recall expansion announced in February 2008, Polaris has received four more reports of ECMs melting and two reports of smoke or fire contained to the ECM. No injuries have been reported. This recall involves the Polaris ATVs with model year 2004 and model numbers listed below that have been serviced for electrical problems and

received a defective EMC during service work. The ATVs were sold under market names Scrambler 500 and Sportsman 400, 500, or 6 x 6. Consumers should disconnect the negative (black) battery cable from the battery when the ATV is not in use. Consumers should contact their local Polaris dealer to schedule a free repair. Registered owners received direct mail notification of this recall. To find out if your ATV is affected by this recall, contact Polaris toll-free at (888) 704-5290, or visit the firm's Web site at www.polarisindustries.com.

MTD RECALLS UTILITY VEHICLES DUE TO FIRE HAZARD

Approximately 700 Cub Cadet 4 x 4 EFI Volunteer Utility Vehicles are being recalled by the manufacturer, MTD of Brownsville, Tennessee, due to excessive heat that causes the wiring harness to melt. MTD has received five reports of heat damage to the vehicle, but there have been no reports of personal injury. The recalled utility vehicle is a four-wheel drive vehicle with "Cub Cadet, Tracker Edition" printed on the side panel. This vehicle has roll over protection and an open cargo bed in the back with "Volunteer" printed on the side. It is equipped with a Kohler electronic fuel-injected engine. The model/serial plate is located under the driver's seat. The recalled vehicles were sold at Cub Cadet dealerships and Bass Pro retail outlets nationwide under the Cub Cadet brand name from March 2008 through April 2008. For more information, contact the firm at (888) 848-6038.

ATRIUM RECALLS DRAINAGE CATHETERS

Atrium Medical Corporation has recalled selected lots of HYDRAGLIDE™ Brand Heparin-Coated Thoracic Drainage Catheters. Limited lots of Atrium heparin-coated Hydraglide Thoracic Catheters were manufactured with heparin found to have been con-

taminated with oversulfated chondroitin sulfate (OSCS). Apparently, the patient risk associated with the presence of OSCS in heparin-coated medical devices is not known at this time. The U.S. Food and Drug Administration has received reports of serious injury and death in patients who have been administered injectable heparin products containing high levels of OSCS.

While Atrium's HYDRAGLIDE Catheters, according to the company, do not contain high levels of heparin, there still exists a potential exposure of OSCS to the patient. Customers with affected lots are advised to immediately discontinue use of these devices and obtain replacement catheters from Atrium. The company says it will replace the affected product as soon as possible. Atrium says it has not received reports of any OSCS-related adverse events arising from any use of their Hydraglide Thoracic Catheters. The company says a voluntary recall was initiated as a precaution to minimize any future potential risk. The Customer Notification actions were being taken with the knowledge of the U.S. Food and Drug Administration. Physicians and hospital personnel with product-related questions should call the company at 1-800-5-ATRIUM.

KIDS STATION RECALLS ONE MILLION TOY CELL PHONES

Kids Station Toys International Ltd has recalled about one million Little Tikes Chit 'N Chat toy cell phones due to a choking hazard. The hinge cover on the Chinese-made toys can detach from the phone, posing a choking hazard to young children. The CPSC and the Miami-based firm have received three reports of the toy breaking, including one report of a child beginning to choke on a small part, according to the CPSC. The toys were sold at department, juvenile product and drug stores nationwide from June 2006 through March 2008 for about \$8 each, or about \$20 for a set.

FRIGIDAIRE CANADA RECALLS KENMORE WALL OVENS DUE TO FIRE AND BURN HAZARDS

Frigidaire Canada, a sister company of Electrolux Home Products Inc., of Cleveland, Ohio, has recalled about 7,500 Kenmore Wall Ovens. During extended broiling, gas can build in the oven cavity and escape when the oven door is opened. This poses a burn and possible fire hazard to consumers. Electrolux has received 16 reports of incidents involving gas build-up, including flames escaping from the oven door, burns to the hands and face and singed hair. This recall involves Kenmore 24-inch-wide gas and propane, wall-mounted ovens. The self-cleaning ovens were sold in white, black, bisque and stainless steel, and have the Kenmore name printed on the oven control panel. The model and serial numbers of the ovens that are part of this recall can be found on the frame on the left side of the oven cavity. The ovens were sold at Sears, Sears Hardware, Kmart and the Great Indoors stores nationwide and Sears.com from September 2004 through October 2007 for between \$760 and \$1,150. Consumers should immediately stop using the “broil” feature on recalled ovens and contact Sears to schedule a free repair. Sears says consumers may continue to use the “bake” feature. For additional information, contact Sears toll-free at (800) 479-6408 between 7 a.m. and 9 p.m. CT Monday through Saturday or visit the firm’s Web site at www.sears.com.

LITTLE RIDER TOYS RECALLED DUE TO VIOLATION OF LEAD PAINT STANDARD

Master Toys & Novelties Inc., of Los Angeles, California, has recalled about 6,000 Cowboy on a Horse Little Rider toys. Surface paint on the shoe and pants of the rider toy contains excessive levels of lead, violating the federal lead paint standard. No injuries have been reported. This recall includes a battery operated cowboy riding a horse toy. The model number 8610B is

located on the product packaging. The horse and rider together measure about 8.5 inches in height by 7.5 inches in length. The rider is wearing blue pants and a red shirt and the horse is brown. Only Little Rider Toys with UPC code 603678086101 printed on the product packaging are included in the recall. These toys were sold at dollar and discount stores nationwide from April 2007 through January 2008 for between \$5 and \$7. Consumers should return the toys to the store where purchased for a full refund. For additional information, contact Master Toys & Novelties Inc. at (800) 237-5020 or visit the firm’s Web site at www.master-toys.com.

THE HOME DEPOT RECALLS CANDLE HOLDERS DUE TO FIRE HAZARD

The Home Depot, of Atlanta, Georgia, has recalled about 14,000 candle holders. Sunlight passing through the glass portion can cause nearby flammable materials to ignite, posing a fire hazard. The firm has received one report of a fire. No injuries or property damage have been reported. The sun-shaped candle holder is glass and metal, and was sold in four colors (red, green, blue, and yellow). “15.75” Candle Holder” is printed on the product’s hang tag. The Home Depot stores in the southern and western regions of the U.S. sold the candles from January 2008 through March 2008 for about \$10. Consumers should immediately stop using the recalled products and return them to The Home Depot for a full refund. For additional information, call toll-free (866) 403-5504 between 8:30 a.m. and 5:30 p.m. ET, or visit the company’s Web site at www.home-depot.com.

AMERICAN FLAME RECALLS FIREPLACES TO REPLACE GAS VALVES

American Flame Inc., of Fort Wayne, Indiana has recalled Fireplace Gas Valves. Gas can continue to flow into

the fireplace pilot light area after the switch has been turned “off,” posing a fire or explosion hazard to consumers. American Flame has received two reports of incidents involving valve failure and continuous gas flow. Thus far, no injuries or fires have been reported. The recall involves American Flame AF-4000 series fireplace gas valves installed in residential fireplaces made by twelve manufacturers under the following brand names: Pacific Energy, Travis Industries, CFM Corporation, Canadian Heating Products, Portland Willamette, Rasmussen, Chimeneas de Columbia, Twin Eagles, FDM, Inca Metals (Savannah Heating), Even Temp, and Valley Comfort.

The valves were installed in some but not all fireplaces. Date codes included in the recall include 0622 through 0718. The gas valve model number is located on a label on the bottom of each gas valve. The date code is located above the label. The valves were sold at fireplace retailers and distributors nationwide from September 2006 through July 2007 for between \$500 and \$2,000 for the fireplaces, with additional costs for installation. Consumers should immediately stop using the recalled fireplaces and contact their dealer for a free repair. The repair involves replacing the fireplace’s valve if it leaks gas in the “off” position when tested by a qualified service technician. For additional information, contact American Flame toll-free at (888) 672-8929 between 9 a.m. and 5 p.m. ET to determine if your fireplace is included in the recall and to arrange for a free repair, or visit the firm’s Web site at www.skytechsystem.com.

CHILDREN’S HOODED JACKETS WITH DRAWSTRINGS RECALLED

About 6,000 Squeeze Kids Girl’s Corduroy Jackets have been recalled. The garments have a drawstring through the hood, which can pose a strangulation hazard to children. In February 1996, CPSC issued guidelines to help

prevent children from strangling or getting entangled on the neck and waist drawstrings in upper garments, such as jackets and sweatshirts. No injuries have been reported. The recalled garments are brown corduroy jackets with a pink hood and pink sequins on the front pockets. "Squeeze Kids" and style number 4JZ642FK are printed on the care label sewn into the back collar area of the garment.

The sweatshirts were sold in a number of sizes for girls. They were sold at TJ Maxx retail stores nationwide during January 2007 for about \$13. Consumers should immediately remove the drawstrings from the sweatshirts to eliminate the hazard, or return the garments to the place where purchased or to Maran Inc. to receive a refund. For additional information, contact Maran Inc. toll-free at (866) 431-5698 or visit the firm's Web site at www.Sqz.com.

CHILDREN'S HOODED SWEATSHIRTS RECALLED

Adio Footwear has recalled about 300 Boy's Hooded Zip Fleece Sweatshirts. The garments have a drawstring through the hood, which can pose a strangulation hazard to children. In February 1996, the CPSC issued guidelines to help prevent children from strangling or getting entangled on the neck and waist by drawstrings in upper garments, such as jackets and sweatshirts. Fortunately, no injuries have been reported thus far. The boy's "Champ Custom" hooded zip fleece sweatshirt is white with blue pin-stripes on the front and red panels on the sides. ADIO is spelled out across the front. The sweatshirt was sold in boys' sizes: small, medium, large and x-large. They were sold at Tilly's and Bob's stores nationwide from October 2007 through December 2007 for about \$40. Consumers should immediately remove the drawstrings from the sweatshirts to eliminate the hazard, and return the item to the place of purchase or to Adio Footwear for a full refund. For

more information please visit www.adiofootwear.com.

CHILDREN'S MATTRESS RECALLED

Simmons Kids has recalled about 20,000 crib mattresses due to an entrapment hazard. Some of the crib mattresses can measure smaller than the 27 1/4 inch minimum width requirement for cribs, creating a gap between the mattress and crib side rails, posing an entrapment hazard to infants. Simmons Kids and the CPSC have received one report of a six-month old baby becoming wedged between the mattress and crib's frame. Fortunately, the baby was removed from the crib by the parent without injury. The recalled mattresses involve open coil crib mattresses manufactured between July 1, 2006 and March 23, 2008 with a color label attached to the top or side of the mattress that has the following model names: Pottery Barn Kids by Simmons Kids Lullaby; Simmons Kids Slumber Time Evening Star Luxury Firm; Simmons Kids Baby Mattress Series 400; and Simmons Kids Baby Mattress 234 Coil Count.

The mattresses were sold at Pottery Barn Kids and nursery furniture retailers from July 2006 through May 2008 for between \$100 and \$150. It's recommended by the CPSC that consumers should measure the width of their mattress using a reliable measuring device, such as a yard stick or tape measure, by removing all outer coverings, placing mattress on floor and measuring the width near the middle, from the outside edge of the tape binding to the opposite side of the mattress. Consumers should immediately stop using the mattress if it measures less than 27 1/4 inches and contact Simmons Kids to receive a free replacement mattress.

BASSETTBABY CRIBS RECALLED

Bassettbaby, of Bassett, Virginia, has recalled about 550 Wendy Bellissimo

Hidden Hills Collection Cribs. The space between the spindles on some cribs can fail to meet federal standards and can pose an entrapment hazard to infants. Bassettbaby has received no reports of incidents or injuries. This recall involves a full-size crib from the Wendy Bellissimo Hidden Hills collection, model number 5446-0521. The model number is located on the bottom rail of the headboard. The crib was sold in a Navajo Pine finish. The cribs were sold at Babies "R" Us stores nationwide from November 2007 through February 2008 for about \$500. Consumers should stop using the crib immediately and contact Bassettbaby to schedule an in-home inspection of the crib. Recalled cribs will be replaced. The firm has contacted consumers directly. For additional information, contact Bassettbaby at (866) 618-5446 or visit the firm's Web site at www.bassettbaby.com.

CHILDREN'S ANIMAL TRACKING EXPLORER KIT RECALLED BY MINDWARE

About 2,200 Animal Tracking Explorer Kits have been recalled by MindWare, of Roseville, Minn. The powder in the kit marked "plaster of paris" is actually calcium hydroxide, which poses a risk of skin and eye irritation to children using the product. It also includes nature study tools and equipment (field lens, specimen jars and bags, labels, puff bottle, plastic gloves, spatula, cardboard strips, paper clips, mixing pot, tweezers, spoon, notebook) and Explorer Guide. The kits were sold online at www.MindWareOnline.com, and by MindWare's catalog from September 2007 through December 2007 for about \$25. Consumers should immediately take all recalled explorer kits away from children and contact MindWare to receive either a free replacement product or for a full refund.

CHILDREN'S JEWELRY RECALLED BY DAISO

Daiso Seattle LLC, of Lynnwood, Washington, has recalled Children's Jewelry that contains high levels of lead. As we all know, lead is toxic if ingested by young children and can cause adverse health effects. This recall involves children's bracelets and Zodiac-sign necklaces. The necklaces have a black, non-metal cord and a silver rectangular pendant. An abstract design and a zodiacal name is printed on the front. The bracelets have a black, non-metal cord and plastic beads. Silver pendants shaped as a knife, Cupid, sun, heart and bird wings are sold with the bracelets. The jewelry has UPC numbers 984343144040 (necklace) and 947678164466 (bracelet) printed on the back label. The jewelry was sold at Daiso retail stores in Washington State from October 2007 through December 2007 for about \$2. Consumers should immediately take the jewelry from young children and return the item to the store where purchased for a full refund. For additional information, contact Daiso LLC toll-free at (866) 768-4620, or visit the firm's Web site at www.daisollc.com.

XXIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

DEE MILES

Dee Miles, who joined the firm in 1991, manages our Consumer Fraud Section. He has been instrumental in pioneering consumer fraud litigation for the firm, especially in the areas of "bad faith litigation" and life insurance litigation, with specific attention given to so-called "vanishing premium" cases. Dee oversees all of the cases being litigated in this section. On a national level, Dee is currently serving as lead counsel in a number of extremely important cases, including the pharma-

ceutical pricing litigation for the States of Alabama, South Carolina, Mississippi, Alaska, Hawaii and Utah. State Attorneys General throughout the country seek advice on litigation from Dee, specifically on matters dealing with insurance and pharmaceutical litigation. Dee is currently heavily involved in the trials on behalf of the State of Alabama case against 79 pharmaceutical companies. In the past, Dee has spearheaded several national global settlements concerning "opt out litigation" against a number of top Fortune 500 companies. Nearly all of these settlements involved confidentiality and can't be discussed publicly. Dee's leadership in the consumer fraud and commercial litigation area of law is unprecedented.

Dee is presently a Sustaining Member and a member of the Executive Committee for the Alabama Trial Lawyers Association and past President of the Montgomery Trial Lawyers Association. He is also an active member of the Trial Lawyers for Public Justice. In the recent past, Dee was named "Boss of the Year" by the Montgomery Association of Legal Secretaries. Dee was most recently honored by the American Trial Lawyers Association as one of the Top 100 Trial Lawyers in America.

Dee and his wife, the former Sandra Turnblad, have four children, two girls and two boys. They are active members of The Holy Spirit Catholic Church in Montgomery. In 2003, the Roman Catholic Church honored Dee and Sandra by inducting them into the Equestrian order of the Holy Sepulchre of Jerusalem and this past April, Dee was promoted to Lieutenant Colonel in that organization for his community service and dedication to the Catholic faith. The Order is responsible for promoting Christianity within the Middle East and protecting the holy shrines in that region of the world. Dee is also a volunteer for the Montgomery County YMCA, and Dee has coached several soccer teams. He has also worked on a successful fundraiser for the Boy Scouts of America. Dee is on the Advi-

sory Board of the Cumberland School of Law at Samford University. Dee has done a tremendous job for the firm and we are blessed to have him with us. His section has brought about lots of good for consumers in this country.

GIBSON VANCE

Gibson Vance, a native of Troy, Alabama, is a graduate of Jones School of Law. While at Jones, Gibson received the Advocacy award given each year to the top graduate. After graduation, Gibson was instrumental in forming the Future Trial Lawyers Association at Jones. Gibson is the past president of the Montgomery County Bar Association, young lawyers section; past president of the Montgomery Trial Lawyers Association and past president of the Montgomery County Bar Association. Gibson became President of the Alabama Association of Justice last month. He is currently serving as Vice President of the American Association of Justice, which is the national organization for trial lawyers. This busy lawyer also is the current president of the Alabama Civil Justice Foundation.

Gibson has worked in numerous political campaigns on the local, state and national level. In fact, he is in great demand because of his "people skills," something most candidates are looking for these days. In addition to all of his activities outside the courtroom, Gibson handles various types of cases for the firm and has helped obtain several major verdicts for our clients, including a \$2.9 million verdict in a significant securities fraud case. Gibson is married to Kate Vance and they have two boys, Carter and Andrew. Gibson has the unique ability to combine the practice of law with his political activities and that's a talent few lawyers possess. We are fortunate to have Gibson with the firm. He is a very good lawyer, a good person and does outstanding work for the firm and his clients.

SUSAN BAKER

Susan Baker has been working in the

legal profession for over 27 years and has been with our firm for over 12 years. She started with the firm in the Fraud section and worked for several years in the Business Litigation section. Since moving to the Product Liability Section in the fall of 2000, Susan has been involved in cases dealing with Firestone tires and Ford Explorers. She is currently working for Rick Morrison, assisting him in handling a variety of products liability cases. Currently, Susan's primary focus is on tire litigation. She assists in all areas of case preparation for trial.

Susan, a native of Andalusia, Alabama, has been married to her husband, Phil, for over 21 years. They have three children—Jessica, who is currently attending graduate school at Auburn University, pursuing her Master's degree in Aquaculture; Callie, who graduated from high school in May as valedictorian of her class, and will begin her college career in the Fall majoring in Pharmacy; and Joshua, who will be spending the summer months volunteering as a "Counselor in Training" at Bible camp, will be a senior at Macon East-Montgomery Academy next year. The Baker family attends Good News Baptist Chapel. When not busy at home with all of the family's activities, Susan loves to read, travel and go antiquing. Susan is a very good employee and is dedicated to helping our clients. We are most fortunate to have her with us.

CAROL STANLEY

Carol Stanley has been with the firm since November of 1999 working as a Legal Secretary. She currently works in the Personal Injury Section as a secretary to our team of Investigators. Carol is kept very busy and does a great job of helping the investigators do their work, which is very important to the firm. Previously, Carol worked as a Secretary in the Public Relations department as well as serving as a secretary in our Consumer Fraud Section and Mass Torts Section. Carol is married to Mike and they have two children: Shannon,

who is 27 years old, and Jason, who is 21 years and a college student at Auburn University. Carol has two precious grandchildren: Dylan is 6 yrs old and Kailey is 16 months. She enjoys boating on the lake with her family and friends. Carol is a very good and dedicated employee and a definite asset for the firm.

VIOXX TEAM WORKING HARD TO MEET DEADLINES

All of the personnel in the Mass Torts Section—lawyers and non-lawyers—have been working very hard to meet all of the deadlines imposed by the global settlement of the Vioxx cases. All are due a huge thanks for a job well done. It has been very difficult and most stressful for all of them and it has been amazing to see how much has been accomplished. It's gratifying to see how folks—working together as a team—can do what some outside observers said couldn't be done.

LAWYER FROM FIRM ELECTED TO ALABAMA STATE BAR BOARD OF BAR COMMISSIONERS

We are pleased to announce that LaBarron Boone, a lawyer in our Personal Injury Section, has been elected as an at-large member of the Board of Bar Commissioners for the Alabama State Bar. LaBarron's term will last three years beginning on July 1, 2008. This is quite an honor and LaBarron will do a great job for the Association.

XXIV. SPECIAL RECOGNITIONS

ALABAMA ARISE WORKS HARD ON BEHALF OF "THE LEAST OF THESE"

An organization that probably does—and has done—more to improve the lot of working folks in Alabama than any other, especially the working poor, is

Alabama Arise. As you may know, Alabama Arise is a coalition of approximately 150 congregations, associations, and community groups that promote fairer public policies affecting low-income Alabamians. Many local and statewide churches and church-affiliated associations are members of Arise. But its diverse membership also includes health-related organizations, environmental and environmental justice groups, associations of teachers and college graduates, groups focusing on criminal justice issues, statewide coalitions on hunger, domestic violence, and human relations; advocates for fair housing; groups concerned about child care; and student chapters at several Alabama universities.

Celebrating its 20th anniversary this year, Alabama Arise hired its first full-time staff member, my good friend Kimble Forrister, in 1991. Kimble remains the State Coordinator, but Arise now has ten staff members working to analyze poverty issues. Throughout its history Arise has tackled a broad range of issues faced by low-income Alabamians. These include state funding for public transit; the inequities of the death penalty; funding for elderly, child, and low-income health care; predatory lending practices; constitutional reform; and education reform. Among other things, Arise actively fought in the school equity funding war. They have worked tirelessly for legislation to outlaw or regulate the extortionate practices of payday lending that prey on those outside the "normal" banking system, even though the lenders ultimately succeeded in watering down substantially the protections for consumers for which Arise had fought. They have pushed for increases in funding for AFDC (Aid to Families with Dependent Children) and Medicaid. They spoke out and organized against the shameful veto by George W. Bush (and the acquiescence in that veto by many congressional Republicans) that blocked the expansion of the federal SCHIP program that would have pro-

vided insurance to millions of Alabama and other American children. In 2006 they helped win passage of Alabama's historic, first landlord-tenant law, establishing basic rights and duties of both landlords and tenants.

Possibly Alabama Arise's best, most persistent, and almost surely most difficult work has been aimed at reforming Alabama's **regressive tax system**. That tax system severely under-taxes the property of big, politically-connected corporate landholders such as ALFA, leaves public services (including education, health care, and infrastructure) at permanent risk of being cash-poor and underfunded, and places a disproportionate burden on middle and especially lower-income Alabamians. As one of the fruits of a several-year campaign, Alabama Arise helped spearhead passage of legislation that put to a popular vote the comprehensive tax reform package that was a centerpiece in Governor Bob Riley's first term—although the package ultimately was voted down by voters after an expensive, misleading ad campaign by its well-heeled opponents. In 2006, Alabama Arise succeeded in winning passage of an increase in the income-tax threshold from \$4,600—well below the poverty level for a family of 4, and among the lowest in the U.S.—to \$12,600. This past Legislative session, working once again with key legislative allies (including Rep. John Knight, D-Montgomery), Arise fought to remove the sales tax on groceries—which only a handful of states other than Alabama impose. The bill came close to passage, but died on the last day of the session.

Although constantly battling against entrenched and wealthy special interests (who are quick to appeal to voters' fears because they can't win on the merits), with the poverty rate in Alabama—especially for children and even working families—still among the highest in the U.S., Alabama Arise continues to fight aggressively for policies to improve the lives of low-income Alabamians. If you would like to have a list of these programs that are priori-

ties, you may visit their Web site at www.alarise.org.

The priorities set by the coalition's membership are all steps toward Alabama Arise's longer-term, 15-year goals which are:

- A fair, adequate, transparent and simple state tax system
- A restorative criminal justice system rather than a punitive one
- A new state constitution that reflects Arise's core values
- A state budget that provides equitable and adequate services for low-income people
- Wages, benefits and policies that provide economic security for all working people in the state
- Safe, affordable, accessible and adequate housing for all Alabamians

Against long odds, Kimble Forrister and the others at Alabama Arise have achieved some historic improvements of conditions for low-income residents and Alabamians generally. But, as we all know, much remains to be done, and Arise needs your support. Alabama Arise takes seriously Jesus' words,

Whatever you did for one of the least of these brothers of Mine, you did for Me!

Matthew 25:40

For more information, to become a member, or to contribute, go to their Web site, www.alarise.org, or contact them in Montgomery at (334) 832-8060.

COACH TUBERVILLE DID A VERY GOOD THING

A number of college football coaches made a trip in May to visit U.S. troops in the Middle East. Auburn's Tommy Tuberville was one of the coaches who made the trip. Joining Coach Tuberville were Georgia's Mark Richt, Miami's Randy Shannon, Notre Dame's Charlie Weiss and Yale's Jack Siedlecki. The

coaches' tour of the Middle East was well-received. These coaches brought a little bit of home—college football—to the young men and women who are fighting a war far away from home. Coach Tuberville says he went to honor the troops and also to honor his father. In commenting on his experience, Coach Tuberville had this to say:

I was fortunate. I grew up with a military dad who fought in World War II... He was in the Army and drove a tank. He drove a tank down the middle of Paris when they liberated it.

Coach Tuberville and his fellow coaches were the "stars" of this trip, organized by Armed Forces Entertainment and a private firm, Morale Entertainment. The coaches visited the hospital at the Ramstein Air Force Base in Germany, then went on to Bahrain, Qatar and the United Arab Emirates. This was a great thing for these coaches to do and we are proud of them for sacrificing of their time to visit our troops. We are proud of the young men and women who are fighting in a war they didn't ask for. They are bravely doing their duty in a tremendous manner and it's a good thing that Coach Tuberville and his fellow coaches did! I saw Coach Tuberville at an Auburn function on June 4th and it was quite evident that his trip to visit the troops had made a definite impact on him. He was obviously moved by his experiences. While serving as his lawyer, I have gotten to know and appreciate this man. As a result, I wasn't a bit surprised to see him making this trip and doing it for the right reasons!

ACJF AWARDS GRANTS TO MONTGOMERY NONPROFIT ORGANIZATIONS

The Alabama Civil Justice Foundation has announced its 2008 grant awards to a number of Alabama nonprofit organizations whose programs and services assist communities, children, families and seniors. This year, more than

\$703,000 will be awarded statewide. The Foundation is especially proud of its Justice grants which further efforts by the organizations to create a just and caring society for all Alabamians.

In Montgomery, more than \$130,000 was awarded on June 4th to nonprofit organizations which include Aid to Inmate Mothers, Alabama Shakespeare Festival, Child Protect, Family Sunshine Center, Montgomery AIDS Outreach, Partners in Education, Renaissance, Success by 6, VOICES for Alabama's Children, Alabama Network of Children's Advocacy, Alabama Appleseed Center for Law and Justice and Volunteer Lawyer Program of Alabama. I, along with Jimmy Pool, Chad Cook, and Roman Shaul, attended the presentation of the grants in Montgomery on June 4th. I was touched to hear the comments by the representatives of the groups who told us how much they appreciated what was being done for them. It was quite evident that the grants were badly needed and would be put to good use. Sue McInnish, ACIF Executive Director, has done an outstanding job and should be commended for spearheading this effort.

XXV. SOME CLOSING OBSERVATIONS

A HUGE DIFFERENCE IN THE TWO CANDIDATES AND THEIR PARTIES

While a huge difference exists between the two candidates for president this year, there is one that is about as wide as it gets. That deals with who is running their respective campaigns and who all is financing the candidates. As has been reported and documented, Senator McCain is tied to the special interest lobbyists in Washington and that is a matter of record. They are calling the shots for the GOP nominee's campaign and raising money from the rich and powerful for their candidate. On the other hand, Senator

Obama has made it clear that he will not accept one dime from Washington lobbyists or any political action committee and that is great news. Neither will the National Democratic Party and that is even better news.

This has sent shockwaves through Washington and especially on K Street. The lobbyists see the handwriting on the wall—they will soon be losing control of what happens in the White House and in Congress—and I expect them to pour on the coal for the McCain campaign in an effort to keep their grip on our nation's capital. In my opinion, shutting lobbyists out of the political process and letting ordinary folks in is long overdue and a most welcome happening. It will allow the next President and the next Congress to do the "people's business" for a change!

A TIME FOR HEALING

Jeremy Sherer, a lawyer from Birmingham, wrote an op-ed piece that appeared in the *Montgomery Advertiser* recently that is well worth reading. It appeared in the June 5th edition and dealt with the year 1968 and the legacy of Robert Kennedy. As we all know, Bobby Kennedy would most likely have been elected President that year had he not been tragically killed. That year was one filled with turmoil and strife. As Jeremy put it, "our nation and its people were in the midst of a crisis of conscience. Conflict raged between seemingly every part of our society. The conflict put whites against non-whites; young against old; the economically privileged versus those who were seemingly locked out of the 'American Dream.'"

Bobby Kennedy never had the opportunity to lead this nation as its President, but he did have an impact on those who followed him. There is a bit of irony in the fact that 40 years after Bobby Kennedy was tragically killed, an African-American may well be elected president of the United States of

America, a prediction made by the New York Senator shortly before his death. I suggest you read Jeremy's piece in its entirety. It will help you understand where we are as a nation and where we need to go.

There was a quotation included by Jeremy in his piece, made years before 1968 by an American president, which is well worth reading. I am setting it out below:

*We are not enemies, but friends.
We must not be enemies. Though
passion may have strained it must
not break our bonds of affection.
The mystic chords of memory,
stretching from every battlefield
and patriot grave to every living
heart and hearthstone all over
this broad land, will yet swell the
chorus of the Union, when again
touched, as surely they will be, by
the better angels of our nature."*

*Abraham Lincoln,
First inaugural address,
March 4, 1861*

It would be most fitting if the American people could finally put aside any prejudices left over from years past and fulfill Bobby Kennedy's prediction made 40 years ago. To elect a black man to the highest office in the land, would be a fitting tribute to Bobby Kennedy, a man whose destiny was never fulfilled. I have a feeling that the time has come for that to happen!

Source: *Montgomery Advertiser*

A NEW CAREER FOR A JOHNNY CASH LOOK-A-LIKE

My longtime friend Ted Cheek, a highly successful Montgomery businessman, is convinced that he also is a great songwriter. Ted, who is a look-alike of the fabulous, but now departed, Johnny Cash, sent me a song he wrote recently that he says is about my "life in court." He insisted that it be included in the Report and in a weak moment, I agreed to do so.

The Big Man

*Just a country boy from Alabama
He had a great big heart
The champion of the little man
That's how he got his start
He stood tall when things got
rough and
When it bit the fan
He had the gall to hang in
there and
Help the little man*

Chorus

*The big man has made his stand
He gave the little man a helping
band*

*The little man is a bigger man
The big man is a better man*

*As time moved on this
country boy*

*Learned to play the game and
As he would hit his fortune
He made himself a name
But he always knew where
he came from
Back when he farmed the land and
Made a vow that he'd step out
And help the little man*

Chorus

*The big man has made his stand
He gave the little man a
helping band
The little man is a bigger man
The big man is a better man*

*At first he tried at politics and
Thought he'd reach the top
But when he almost made it
He decided he would stop
How could he help the little folks
And be an also ran? He
started filing
Lawsuits to help the little man*

Chorus

*The big man has made his stand
He gave the little man a
helping band
The little man is a bigger man
The big man is a better man*

*The moral of this story is simple
as can be*

*The country boy from Alabama
Had made us plainly see
That no matter where we travel
You'll stand on sinking sand
If you don't take a little time
To help the little man*

Chorus

*The big man has made his stand
He gave the little man a
helping band
The little man is a bigger man
The big man is a better man*

Composed by: Ted Cheek

If you believe that Ted should give up his day job and head to Nashville, you can let me know and I will pass your suggestions on to him. However, I must confess that I liked this song. When I finally see my life in court winding down, which I hope is at least eight more years down the road, it's my hope that folks will say I really did work to help the "little man." God knows I tried!

FAVORITE BIBLE VERSES

We continue to have folks sending in their favorite Bible verses each month, which is appreciated. Unfortunately we can't use them all. This month, my long-time friend, Bill Fuller, sent in two of his favorite Bible Verses. Each of them is quite timely and each conveys a strong message.

Do you seek great things for yourself? Do not seek them." says the Lord. "But I will give you your life as a prize in all places, wherever you go.

Jeremiah 45:5

Therefore do not worry, saying, 'What shall we eat?' or 'What shall we drink?' or 'What shall we wear?' For your heavenly Father knows that you need all these things. But seek first the kingdom of God and

His righteousness, and all these things shall be added to you.

Matthew 6:31-33

Bill, a native of Lafayette, Alabama, is currently working to improve the lives of senior citizens in Alabama. He is attempting to bring about the passage of legislation that will make life better for all Alabamians and especially those who are considered to be seniors.

Jo Hancock, who has a ministry, His Vessel Ministries, in Montgomery, sent a verse in for inclusion this month. Jo's choice is timely since it reminds all of us who it is that we must serve regardless of what our life's work is.

And whatever you do, do it heartily, as to the Lord and not to men, knowing that from the Lord you will receive the reward of the inheritance; for you serve the Lord Christ.

Colossians 3:23-24

Jo has been working hard to stir folks and challenge them to love God with all their heart, soul, and strength so they become "the vessel that pleases God." She believes strongly that Montgomery, the capital city, is a very special place in God's master plan. If you want more information, you can email Jo at jo@hisvessel.org or go to the ministry's Web site, www.hisvessel.org.

XXVI. SOME PARTING WORDS

For a Christian there is a continuing question as to how to combine our time spent in church and the time spent in the workplace and at home. It's said that there is a constant pull between the calling of the spiritual and secular in our daily lives including the time we spend in each of these places. In reading the Upper Room recently, I

found a reference to how the Apostle Paul dealt with this problem as he described the spiritual unity in the lives of a Christian. It's highly significant that Paul doesn't make a distinction. In other words, he doesn't draw lines that divide the spiritual and the secular. The real world and worship must be a part of our daily lives and our discipleship. Here is how Paul puts it:

Whatever you do, in word or deed, do everything in the name of the Lord Jesus, giving thanks to God.

Col. 3:17

If we follow Paul's advice and counsel on a daily basis—regardless of the circumstances facing us—whether it be watching television at home or trying a lawsuit in a court of law or sitting in a Sunday School class, we will do the right thing and for the right reason. It's impossible to make wrong choices or to do the wrong thing when

we act as Paul instructs. In fact, it would be a good thing if we started each day by reading or saying these words from Paul. It would definitely make for a better day!

Several of our readers have asked for a copy of the daily prayer that we included in a prior issue. Rather than mailing to them, I have taken the liberty of setting out "My Daily Prayer" below:

*I begin this day with you, God—
You are my loving Father, and I
place all my love and confidence
in You. Nothing can disturb me
when I trust You. I know that You
love me and sustain me in all
things, under all circumstances. I
lean on your mighty power to
help me. I rest in your love that
bids me not be troubled about
anything. With You all things are
possible. With you I can do all
things. I trust Your wisdom to
guide me this day. I trust Your life*

*to renew me and strengthen me.
You are my help in every need.
You are my Shepherd and I shall
not want for any good thing. You
are my supply, and I trust You to
fulfill my needs. You are my
comfort—You work through me
to accomplish Your good pur-
poses. And I trust Your perfect will
for me. Whatever I need to do
today I shall do it calmly, trusting
Your spirit within me to guide me
to success. Your light makes my
way plain. Your love opens doors
for me. My heart is at peace, for I
trust You, God.*

I believe this request for the daily prayer came in to remind me that not only must I believe in God—but I must trust in Him—and be obedient to Him in all things. That reminder came at a most appropriate time for me. God sometimes has to get my attention and this did!

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