



THE  
**JERE BEASLEY REPORT** OCTOBER 2008

# Beasley Allen

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# I. CAPITOL OBSERVATIONS

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## THE MEDICAID FRAUD LITIGATION

The endorsement by AARP for our on-going battle against the powerful drug industry is extremely important and is appreciated. AARP has pledged the support of its legal staff which is most helpful. The drug companies are so powerful politically in Washington that they literally believe they are above the law. They have had their way in both the executive and legislative branches of government for years. Some believe they also have tremendous clout in the courts at the national level and maybe even at local levels. Without a doubt, it's time for the interests of the American people to be considered for a change. I received a copy of a letter written by AARP that is most significant and pretty well lays out the story of how important the litigation in Alabama has become. I felt that sharing it with our readers would be appropriate.

*Dear General King and Commissioner Hermann-Steckel:*

*I am writing to applaud the State of Alabama's most important work in the litigation pending against 72 drug manufacturers for false and deceptive practices and marketing prescription drug products.*

*AARP is dedicated to increasing the access and affordability of prescription drugs and we have followed with great interest the progress of the litigation. Because prescription drug spending has skyrocketed over the last fifteen years, thereby limiting access to medically necessary medicines, AARP advocates for policies that can broaden access to prescription drugs and for policies that lower the cost of prescriptions for consumers.*

*We congratulate you on damages*

*that have been returned to date. We understand that additional litigation is also being pursued later this fall. Your work is crucial not only to Alabama's 900,000 Medicaid beneficiaries, but also to Medicaid and Medicare beneficiaries throughout the country.*

*We support your efforts and look forward to working with you to lower drug prices and to secure additional resources for Alabama's Medicaid beneficiaries.*

*Sincerely,  
David P. Sloane  
Senior Vice-President  
Government Relations  
and Advocacy*

We have our next case in Alabama set for trial on October 27<sup>th</sup> against Bristol Meyers Squibb. We are currently engaged in settlement negotiations with 25 companies. The support of AARP is extremely significant and the fact they have 514,000 members in Alabama is critically important.

## TEXAS ATTORNEY GENERAL SETTLES WITH ABBOTT LABS

Texas Attorney General Greg Abbott has reached a \$28 million civil settlement with Chicago-based Abbott Laboratories Inc. The settlement resolves the state's May 2004 enforcement action, which charged the drug manufacturer with falsely reporting drug prices to the state and federal Medicaid programs. Under the agreement, the state of Texas will receive approximately \$28 million in damages, attorneys' fees and costs. The legal theories in the Texas case are identical to those in Alabama and other states where litigation is pending. The state of Alabama's case against Abbott is set for trial on February 2, 2009.

State and federal law requires that drug manufacturers report the prices at which they sell their products to various providers, including pharmacies, wholesalers and distributors. The Medicaid programs use this pricing information to estimate the costs Med-

icaid providers pay to acquire the drug manufacturers' products. Medicaid providers bill the state-run programs for these costs, plus prescription dispensing fees, and Medicaid reimburses the providers. When a manufacturer reports inflated prices to the Medicaid program, as happened in the Texas case, the taxpayer-funded program greatly overpays providers for their products. As we have reported, the difference between what a provider actually pays to purchase a drug and what is reimbursed by Medicaid is called the "spread." The Attorney General's office

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says that as a result of the illegal spreads created by Abbott Laboratories, Texas Medicaid over-reimbursed providers for Abbott's drugs. The windfall profits from these inflated reimbursements, which date back to the early 1990s, induced providers to favor Abbott Laboratories over other manufacturers, according to the Attorney General. The result was a long-term, but unlawful, market niche for the company in Texas.

In May 2004, at about the time the Texas Attorney General announced his filing of the lawsuit against Abbott Laboratories, the Defendant spun off its generic pharmaceuticals business unit and created Hospira Inc. The agreement with Hospira will govern its price-reporting practices in the future. The Abbott Labs enforcement action reflects Attorney General Abbott's continuing crackdown on waste, fraud and abuse in the Medicaid system. In 2006 alone, the Texas Medicaid program cost more than \$17 billion. To save taxpayer dollars, the Attorney General has dramatically expanded both the Civil Medicaid Fraud Section and the Medicaid Fraud Control Unit. Since he took office, the civil and criminal Medicaid fraud sections have recovered more than \$200 million.

With the passage of amendments to the Texas Medicaid Fraud Prevention Act in 1997, the Texas Legislature paved the way for whistleblower lawsuits involving industry insiders. Under the law, whistleblowers may be eligible for a percentage of damages recovered. To obtain more information about the Texas Attorney General's efforts to fight Medicaid fraud, access the agency's Web site at [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov). The Alabama Legislature should take a look at what Texas lawmakers have done to strengthen that state's laws.

Source: Texas Attorney General Press Release

### **THE BUSH ADMINISTRATION TAKES US CLOSE TO THE HOOVER DAYS**

As I was finishing this issue the Bush Administration's "bail-out" package was being hotly debated in Congress. Due to time constraints I will only say for

now that rewarding corporate executives whose greed, incompetence and total disregard for the rule of law led us down a path which almost caused the destruction of our economic system, makes no sense. Several years ago, a Republican-controlled Congress took away much of the regulatory authority that resulted in the financial institutions doing some highly questionable and really stupid things. According to Capitol insiders, while the projected cost was about \$700 billion, the actual cost of the bailout could be as high as \$1.3 trillion. There was little in the original version of the plan to protect the American taxpayers. Hopefully, that will have been changed if the bailout passes and is signed into law. There was a news report on the day we sent this issue to the printer that an agreement in principle had been reached.

The failed economic policies of the Bush Administration—combined with virtually no effective regulation of our financial markets—threaten to take us back to the "Hoover days." Hopefully, if there was a bi-partisan agreement in Congress, they were able to craft a remedy that will save our nation's economy without doing further irreparable damage to present and future taxpayers. Unfortunately, I don't see how that can be avoided. My initial response was to say "no" to the bailout, but I am fairly certain something will have been passed by the time this issue is received. I just hope and pray it's got as much taxpayer, homeowner, and small business protection as can be achieved.

### **GREED AND IRRESPONSIBILITY ARE THE ROOT CAUSE OF OUR NATION'S ECONOMIC PROBLEMS**

As stated above, the era of greed and irresponsibility on Wall Street and in Washington has created a financial crisis as profound as any we have faced since the Great Depression. While the bailout of our financial institutions with a price tag of more than \$700 billion in taxpayer dollars may actually be necessary, our leaders must take all steps necessary to correct the prob-

lems that caused this mess. Congress cannot underestimate or avoid its responsibility in taking such an enormous step. Regardless of the shape this recovery plan takes, it must be guided by core principles of fairness, balance, and fiscal responsibility. The following are absolute requirements—as proposed by Senator Obama—that must be in any bailout package:

- **No Golden Parachutes**—Taxpayer dollars should not be used to reward the irresponsible Wall Street executives who helmed this disaster.
- **Main Street, Not Just Wall Street**—Any bailout plan must include a payback strategy for taxpayers who are footing the bill and aid to innocent homeowners who are facing foreclosure.
- **Bipartisan Oversight**—The staggering amount of taxpayer money involved demands a bipartisan board to ensure accountability and oversight. No single person—regardless of background—can be trusted to have the sort of authority proposed by the Bush Administration.

The failed economic policies and the same corrupt culture that led us into this mess will not help get us out of it. All of our leaders must get to work immediately on reforming the broken government—and the broken politics—that allowed this crisis to happen in the first place. Clearly, we must all understand that a recovery package is just the beginning. Trying to solve the money crisis by throwing money at it—without more—is just another typical Washington approach to problem solving. This is the way the "Washington crowd" deals with matters of concern to the American people.

There must be a plan in place that will guarantee our long-term prosperity—including tax cuts for 95 percent of families, an economic stimulus package that creates millions of new jobs and leads us towards energy independence, and health care that is affordable to every American. To say it won't be easy is a gross understatement. It will be a challenge like none

most living Americans have ever experienced. But if we work together and stand by sound principles, the American people will get through this crisis and emerge a stronger nation. That is certainly my prayer and it should be the prayer of all of our citizens. Finally, I believe a good number of folks will likely be indicted before this sad chapter in our nation's history is completed and some may well go to jail.

### **AMERICA CAN'T WAIT ANY LONGER FOR A REAL ENERGY POLICY**

Our national leaders must develop a long range energy plan that will end our almost total dependence on foreign oil. The Republican Party has done a masterful job of allowing the powerful oil giants to run the show for the past eight years and as a result the American people are suffering greatly. It's become obvious that we have no real plan to deal with a most serious problem. The GOP leaders—including the nominees for President and Vice-President—are doing a good job of diverting the public's attention from the need for a strong, forward-looking energy policy into one that is not the answer and is backward-looking.

The Republican energy plan is to drill offshore and in Alaska and nothing more. That would help but not for ten years or more and we simply can't wait that long for relief. We must make finding alternative sources of fuel our government's highest priority and we must do it immediately. The next President should enlist the aid of T. Boone Pickens, who at least has a plan—and it appears to be a good one—in dealing with crafting a sound energy policy.

### **POLITICS DELAYS TANKER PROJECT FOR ALABAMA**

Some Alabama officials have accused the Pentagon of caving in to political and industry pressure by postponing an Air Force tanker contract that could bring a giant assembly plant to our state. Obviously, Alabama will lose about 1500 good paying jobs if the contract

isn't awarded. It seems pretty clear that the Department of Defense has an urgent military need that should be met as soon as possible. In my opinion, Defense Secretary Robert Gates and the Bush White House have some explaining to do on this deal. Gates says the bidding should start over because it couldn't be completed before George W. Bush leaves office. It sure looks like the Bush Administration wants Boeing to get the contract for political reasons and it has a Dick Cheney-Karl Rove-like smell. The awarding of this contract should be a non-political process carried out by the career professionals in the military and not one made for political or financial gain.

The massive contract—worth \$35 billion initially and possibly three times that amount in future years—has drawn close scrutiny from Congress. Air Force officials, who should know, say replacing the current Eisenhower-era tanker fleet is an urgent priority. As you know, Boeing Co. is competing for the work against an international team that includes Northrop Grumman Corp. and the European Aeronautic Defense and Space Co., the parent of Airbus. The Northrop team would assemble its planes at Mobile's Brookley Field Industrial Complex. After years of delays, the Air Force awarded the contract to the Northrop team in February. But for some reason the Pentagon reopened the competition in July after a protest by Boeing was upheld by government auditors who ruled that the bidding favored Northrop.

It's been revealed that Northrop Grumman Corp.'s bid for the U.S. Air Force tanker contract was almost \$3 billion cheaper than the offer from Boeing Co. John Young, the Under Secretary of Defense for Acquisition at the Pentagon, told the Washington Post in an article published on September 18<sup>th</sup> that Northrop offered to produce the first 68 tankers under a 179-plane contract for a cost of \$12.5 billion. Boeing's offer was \$15.4 billion. That's an average of about \$184 million per plane for Northrop, compared to about \$226 million apiece for Boeing. Young said the difference was notable

because Northrop's KC-45 tanker is a larger and more versatile aircraft than the KC-767 offered by Boeing.

When he put the project on hold, Defense Secretary Robert Gates said the Pentagon would focus on only a handful of contested points and finish the procurement within six months. But Boeing and its Capitol Hill allies loudly protested, arguing that Boeing could not fairly compete under such constraints, and threatened to quit the competition. This sure smells like politics to me!

Source: Associated Press

## **II. POLITICAL OBSERVATIONS**

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### **THE PARTY CONVENTIONS ARE OVER AND THE COUNTDOWN STARTS**

The Party nominating conventions this year were watched by extremely large television audiences. But even with these large audiences, it's hard to say which party gained the most from its convention. I thought each had some good and some not so good moments. The speeches by both Clintons, Governor Palin, and Senator Obama were very good and received very good reviews. Senator McCain read his lines fairly well, but his performance was too dull and uninspiring for most of the Americans who watched.

Personally, I felt the appearance of Senator Ted Kennedy was the most moving performance of all speakers who appeared at either convention. Even his critics had to appreciate the Senator's dedication to a cause. Senator Kennedy's overcoming physical limitations to make an appearance had to be admired by all Americans. I salute the Senator for his courage and grit and also pray that he will have a full recovery from his health problems.

I may be the only person who feels this way, but I am glad the conventions are over so the candidates can get out to the states where ordinary folks can get a look at them and hear their plans

for America. It's as clear as can be that the economy is the number one issue with the public and one the candidates must not only understand, but must have the capacity and ability to solve. In my opinion, that makes it sort of tough for the GOP nominee. Senator McCain has had to reverse his stand in a number of areas dealing with the economy. For example, McCain was totally against all forms of governmental regulation, but is now for regulation.

### **THE OPPOSING TICKETS WERE OFF AND RUNNING**

The presidential and vice-presidential nominees for the two parties were off and running once the conventions were over. The vice-presidential nominees were considered surprise choices by many political observers, with the biggest surprise clearly being the GOP nominee. Senator McCain's real choice—Senator Joe Lieberman—couldn't get past the extreme right wing of the Republican Party, so the McCain campaign had to go to a "Plan B" without doing much of a background check on this selection. That resulted in Governor Sarah Palin coming onto the national scene with a bang—no pun intended. Now, it will be quite interesting to see what real effect Senator Joe Biden and Governor Palin wind up having on the final outcome on November 4<sup>th</sup>.

There was a sudden stop in most all political activities because of Hurricane Ike and the anniversary of 9-11. While those activities pretty much brought things to a halt politically for a short time, all of the candidates hit the road again with a flurry on September 12<sup>th</sup>. Since then they have been hitting the campaign trail at a steady pace. But then the economic woes facing our nation took the spotlight, shocking the American people and the world. The nation's economy is clearly the number one issue on the minds of Americans. Whichever candidate deals with that issue effectively will be the next President. So far, it appears that person will be Senator Obama. His opponent, Senator McCain, appeared to be like a

deer in headlights since the economic problems facing our nation were put in sharp focus, dominating the news on every media outlet. McCain's flip-flops on concepts such as governmental regulation will become more and more evident between now and Election Day. To put it in simple terms, the weeks starting on September 14<sup>th</sup> weren't good ones for the "Palin-McCain ticket."

### **THE VOTERS WILL HAVE A CLEAR CHOICE**

Each person who goes into the voting booth on November 4<sup>th</sup> should ask one simple—but critically important—question and that is, "Am I better off today than I was when George W. Bush was first sworn in as President of the United States of America?" Obviously, the McCain campaign believes that the eight years of Bush-Cheney-Rove rule have been good for the country. In fact, they were in lock-step with the Administration and wanted to give us four more years of the same old failed policies that have virtually destroyed our nation's economy. When you consider how the economy has gone from excellent to very, very bad in eight years, taking us back to thoughts of Hoover in the White House, it's clear that the Bush-Cheney-Rove Administration will go down in history as the worst since President Hoover.

The resulting problems that all Americans are facing today should make choosing a President on November 4<sup>th</sup> an easy decision. However, the powerful corporate lobbyists are doing everything possible to give us four more years of Bush-Cheney-Rove. In any event, I believe the answer to the question posed above—by an overwhelming majority of voters on November 4<sup>th</sup>—will be a resounding no!

### **DEMOCRATS AND REPUBLICANS MUST JOIN THE FIGHT**

We are facing a morals crisis in this country that should have the attention of all American citizens. The filth that we see and hear on television screens

on a nightly basis is totally unacceptable. Morality and common decency have been put on the shelf. The Parents Television Council urged both major political parties to focus on entertainment issues of concern to parents at their conventions. This organization has been fighting to clean up television broadcasting and needs help. PTC President Tim Winter had this to say before the party nominating conventions took place:

*Being that millions of parents are deeply concerned at the messages being directed towards their children on television, we expect that both parties will establish clear positions on issues of broadcast decency and consumer cable choice. Our 1.3 million members, who hold a variety of political positions, can all agree that there needs to be some level of responsibility in the entertainment industry to help ensure that our children are not constantly assaulted by sex, violence and profanity on television and in other media.*

Each political party should make cleaning up the television broadcasting to which children in the U.S. are being exposed a top priority. This is so badly needed that it would appear the leaders of the two major political parties getting directly involved would be a given. In my opinion, they should be concerned for the safety and welfare of our young people. But we will have to wait and see what happens during the campaign since the issue was largely ignored at both conventions. The closest thing said by the nominees on the issue was when Senator Obama said parents should turn off their television sets. As I recall, Senator McCain had nothing to say on this issue.

This is one issue that most all Americans would agree needs to be addressed and dealt with if it were put to a vote of the people. Currently, there are no real restrictions on what can be shown and said on broadcast, cable, and satellite programming. If you

believe that we must clean up our television broadcasting, contact the leaders of both political parties in your state and ask for their help.

#### **FORMER ABRAMOFF LOBBYIST AND AIDE INDICTED**

A one-time Congressional aide who went on to work with Jack Abramoff has been indicted on public corruption charges. A ten-count federal indictment was returned by a grand jury last month, charging Kevin Ring with conspiring with Abramoff to corrupt Congressional and executive-branch officials by giving them things of value as a reward for helping Ring and his clients. Prior to becoming a lobbyist with Abramoff, Ring worked for a Republican member of Congress, Rep. John Doolittle (R-CA), who remains under investigation in the Abramoff probe. As you probably know, Abramoff was sentenced to four years in prison. There were a number of prominent political figures in Washington who had very close ties to Abramoff and I understand some of them are still mighty nervous.

Source: *Associated Press*

#### **POLITICAL FRONT GROUPS ARE HARD AT WORK**

For years front groups in this country have been able to operate pretty much under the public radar and have been very effective. I find, however, that lots of folks really don't know about these groups and what they are. As some of you may know, a front group is an organization that purports to represent one agenda while in reality it serves some other interest whose sponsorship is hidden or rarely mentioned—typically, a corporate or government sponsor. The tobacco industry is notorious for using front groups to create confusion about the health risks associated with smoking, but other industries use similar tactics. The pharmaceutical and healthcare industries use front groups and disguise them as “patients’ rights” advocates to market their prod-

ucts and to lobby against government policies that might affect their profits.

Food companies, corporate polluters—anyone who has a message that they are trying to sell to the public—can set up a front group to deliver messages that they know people will reject if the identity of the sponsor is known. Politicians backed by Corporate America have learned from Karl Rove and his gang how to use front groups most effectively. We have seen firsthand how these front groups operate, and they have been able to avoid any form of transparency.

The shadowy way front groups operate makes it very difficult to know whether a seemingly independent organization is actually representing some other entity. That's why these groups must be exposed. We have seen how a group with a clever name—The American Taxpayers Alliance—funneled large sums of money into the race for Chief Justice in Alabama in 2006. Nobody knew how much the group actually spent or who furnished their money. It's this sort of thing that must be exposed and stopped. Front groups with an agenda can't be allowed to influence elections at any level in this country.

### **III. LEGISLATIVE HAPPENINGS**

#### **THE OUTLOOK FOR PASSAGE OF A STRONG DUI BILL APPEARS TO BE BETTER**

Hopefully, the legislation needed to strengthen Alabama's DUI penalties will pass in next year's legislative session. Mobile County Senator Rusty Glover and two other southwest Alabama lawmakers, Marc Keahey of Grove Hill and Spencer Collier of Irvington, say they will work together to pass a bill next year. Their proposed bill would:

- Establish a second level of offense: aggravated DUI. Under current law, a driver with a blood-alcohol content

of 0.08 or higher is drunk. Once that level reaches 0.15, the driver would be subject to aggravated DUI and double the minimum penalty.

- Eliminate the five-year cutoff when considering an offender's DUI history, to open the way for stiffer sentences.
- Require offenders to participate in programs with victims of drunken drivers.
- Force people convicted of drunken driving to install devices on their cars that lock the ignition if alcohol is detected on their breath.
- Change the state law that currently requires less punishment for a fourth DUI offense than for a third.

As has been widely reported, a high percentage of those who are killed in motor vehicle accidents are involved in alcohol-related crashes. In such cases, someone is usually intoxicated. Some Alabama lawmakers believe DUI offenders are already punished harshly enough. I totally disagree with that view. Based on what we see in our practice, I am convinced we need to get tougher on drunk drivers. A significant number of the motor vehicle accidents we handle involve drunk drivers.

Rep. Collier, a former State Trooper, believes the line has to be drawn somewhere, saying that people with a 0.15 blood-alcohol level typically pose a greater risk and drive drunk more frequently than those caught with lower levels. The lawmaker says, however, that the provision requiring “ignition interlock devices” in the cars of DUI offenders is a separate matter and should be considered in its own bill. It would appear that such a measure is important enough for it to be included in the DUI bill. I doubt it would pass in a separate bill.

Alabama's DUI laws are too weak and should be upgraded. The current laws don't provide enough incentive for persons to avoid driving when they are drinking. Mothers Against Drunk Driving has been pushing hard for stronger DUI laws and will help get this

needed legislation passed. If you agree that we need to get tougher on drunk drivers, and that the legislators should do their part, let your Senators and House members know before the next session.

Source: *Mobile Press Register*

## IV. COURT WATCH

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### **THE COST OF RUNNING FOR A JUDGESHIP IN THE U.S. IS ON THE RISE**

The cost of running for seats on state appellate courts across the country is getting higher and higher with no apparent end in sight. The situation in states such as Michigan, Wisconsin, Mississippi and Alabama—where races for spots on their respective Supreme Courts have drawn millions of dollars in contributions—is of great concern to groups that want our courts to be independent and not controlled. A report released earlier this year by the Midwest Democracy Network and Justice at Stake Campaign, a Washington-based judicial watchdog group, points out how expensive state court races have become.

As I understand it, there are some 40 contested state Supreme Court races around the country this year. The reports reveal that spending by judicial candidates for the nation's highest state court races has gone up from \$62 million raised between 1993 and 1998 to \$165 million between 1999 and 2007. This raises questions about whether justices can remain impartial when so much money is spent to elect them. To get around the problem, some states are considering publicly financing judicial races. In Alabama all efforts to curb spending in the races for Supreme Court have failed. The sources of the big money have to be of great concern to ordinary citizens who depend on the courts for protection and relief when needed and deserved. Perhaps, the money spent by groups that don't have to report their sources or who gets the money is the biggest

concern. Examples of such groups are Freedom Watch, American Taxpayers Alliance, Citizens for a Sound Economy and Alabama Citizens Against Lawsuit Abuse. These are the attack dogs that influence judicial elections but don't have to be accountable to the voters. All anybody should want is a court system that is fair and independent. Taking away the perceived influence of large campaign donors should be a goal that all of us can agree on.

Source: *Associated Press*

### **THE FUNDING OF THE ALABAMA SUPREME COURT RACE**

According to media reports, Judge Deborah Bell Paseur's campaign has received over a thousand individual donations during the last reporting period, adding to the hundreds of contributions already supporting her campaign for the Alabama Supreme Court. During the last filing period, the Paseur Campaign received a total of 1,135 contributions totaling \$425,175.33, bringing the total number of donations to 1,417 and the total amount raised to \$531,009.44. The campaign's cash on hand at the end of the filing period was \$72,174.64. Marion Steinfelds, campaign manager of the Paseur Campaign, observed:

*Judge Paseur is supported by thousands of donors and volunteers across the state. We are incredibly proud and encouraged by the overwhelming number of these supporters who come from all walks of life. Judge Paseur has such a wide range of support because of her proven record as a judge who is tough but fair; her support from members of the law enforcement community and her commitment to continuing her extensive work outside the courtroom to keep children and young adults out of trouble and out of the legal system.*

The GOP candidate, Greg Shaw, has received a total of \$591,000 according to the *Associated Press*. Interestingly,

95% of the Shaw money came from PACs that passed on money to the campaign. The largest amounts came from The Alabama Civil Justice Reform Committee Pac, Biz Pac and Lawsuit Reform Pac of Alabama. Almost 100% of the funds coming to the Shaw campaign come from PACs associated directly with the giants of Corporate America and it's clear they will be Shaw's primary source of money and support. It will be most interesting to see how this is received by Alabama citizens who are witnessing what the arrogance and greed of corporate executives—with the help of the Bush Administration—have done to our nation's economy over the past eight years.

Source: *Associated Press*

### **FEDERAL PREEMPTION IS UN-AMERICAN**

Sometimes lawyers make things so complicated that even they don't understand what they are trying to communicate. That may be the case when it comes to attempting to explain federal preemption. This concept was virtually unknown, even in legal circles, until events of the last year thrust it into the spotlight. Basically it's nothing more than a shield against lawsuits against makers of government-approved products, including medical devices and drugs. When you consider that preemption would apply to prescription medicines and over-the-counter drugs, the concept becomes even more illogical. The FDA has been little more than an extension of the powerful pharmaceutical industry and the fact of approval by the agency of a drug has proved to be no indication that the drug is safe for use. Vioxx, an FDA-approved drug, is a prime example of that without any doubt. If federal preemption had been the law no Vioxx lawsuit could have been filed.

If federal preemption is upheld by the U.S. Supreme Court it will be the most far-reaching change in the law in my lifetime. It will have been a change brought about with almost no public debate. As you should know, the Bush Administration was unable to get Con-

gress—even with a Republican-controlled House and Senate—to limit lawsuits. So the Administration took an under-the-radar approach at accomplishing its goal of protecting corporate wrongdoers through the federal court system.

Until recently, the right to trial by jury in civil matters was a historic protection for consumers and victims of corporate abuse and wrongdoing. Now we see that constitutional right being trampled on like never before. In fact, the men who formed our Republic would turn over in their graves if they knew what the Bush crowd has done and is now trying to do to the U.S. Constitution. Federal preemption—if allowed—would be the last straw for ordinary citizens who have legitimate claims and who deserve their day in court. David C. Viadeck, a law professor at Georgetown, had this to say about the preemption issue: “This is a radical restructuring of the American civil justice system.” I totally agree with that assessment.

In its last days, the Bush Administration is having federal agencies reinterpret the laws on the books to conclude that jury verdicts in state courts would conflict with federal policy. That had never been the position taken by any previous administration including Eisenhower, Nixon, Reagan and George Bush (the father of the current president). In fact, until recently George W. Bush never took that view. This was a Karl Rove creation and one that has finally stirred up the American people as well as Congress. When folks really understand what federal preemption is they are 100% against it. This is an issue that will unify ordinary citizens like nothing else has been able to do. It's one battle we can't afford to lose!

#### **THE DEATH OF CORPORATE RESPONSIBILITY**

We will now take a closer look at the involvement of the U.S. Supreme Court in the preemption fight from a legal perspective. Many legal scholars don't believe that an ultra-conservative Supreme Court will judicially legislate

away 100 years of well-interpreted black letter law and specifically laws that were intended to protect states' rights. Others, however, having seen first hand what judicial activists at least three members of this Court have become, believe that the Justices are on the verge of dealing the most vicious blow ever dealt to the civil justice system. And if they do, it will certainly be the first of many to come. Hopefully, there are enough Justices on the Court who believe in the Constitution and states' rights to do the right thing.

The case before the Court is *Wyeth v. Levine*. Interestingly and perhaps by chance, the Court will hear oral argument on November 3<sup>rd</sup>, the day before Election Day. The Plaintiff in the case, Diana Levine, was a professional musician before her right arm was amputated below the elbow. The debilitating injury was caused by the administration of Wyeth's drug Phenergan<sup>®</sup> by an intravenous push (an injection into an IV line). Wyeth had warned physicians not to inject the drug into an artery, but did not warn against the IV push method even though such a technique could inadvertently result in the drug reaching arterial blood, as it did when administered to Ms. Levine. Ms. Levine won at the trial level and also before the Delaware Supreme Court.

As we have reported, the U.S. Supreme Court recently addressed preemption in the context of a medical device (not a prescription drug case) in *Reigel v. Medtronic*. In that case, the Court held that the preemption language contained in the Medical Device Act precluded lawsuits against manufacturers for devices that had undergone the FDA's most thorough review process: Pre-Market Approval. Unlike in *Reigel*, the portion of the Food, Drug, and Cosmetic Act (FDCA) which establishes the FDA's oversight regarding pharmaceuticals, contains no preemption clause. Therefore, the only way the Court can find federal preemption is to determine that Congress intended for the FDCA to preempt all state laws that allow patients injured by defective drugs to file a lawsuit against a drug's manufacturer in federal or state court. A

clear legislative record suggests that Congress had no such intent when enacting the FDCA.

In 1933 when the revised Foods and Drug Act (precursor to FDCA) was first introduced in Congress, it contained a provision that created a federal cause of action for those injured by violations of the Act. Congressional history makes clear that this provision was removed because injured parties were already able to seek recovery for their injuries under state law. Therefore, a federal cause of action was not needed. When Congress amended the FDCA in 1962 it included language which explicitly precluded preemption unless the state law provided a “direct and positive conflict” with the FDCA. This was done to prevent manufactures from asserting preemption as a defense; and it worked until the mid 1980's.

Finally, from the inception of the FDA until after George W. Bush became President, the FDA historically and repeatedly took the position that state tort laws “play an important role in consumer protection” and that “FDA product approval and state tort liability usually operate independently, each providing a significant, yet distinct, layer of consumer protection.” Unfortunately, the Bush Administration has abandoned “consumer protection” in favor of corporate protection and it has used the FDA as its main vehicle for change. It has charged the FDA and the Solicitor General with doing everything in their power (and perhaps beyond) to disenfranchise injured citizens from seeking redress in the courts against the largest, wealthiest, and most powerful corporations in America. Thus far, the Bush Administration has attempted preemption through regulatory fiat with medical devices and pharmaceuticals. The Bush Administration clearly has broader ambitions—the pharmaceutical field is only the beginning. The Administration and the U.S. Chamber of Commerce have already signaled that they will seek the preemption of state law claims by anyone injured from a defective car and any other industry with even the slightest level

of regulatory oversight.

On the bright side, over 60% of the American public, according to recent public opinion polls, understand that granting immunity to drug makers will only force insurance companies and the American taxpayer to foot the bill for the injuries and damages caused by defective drugs. Giving immunity to corporate wrongdoers is simply wrong. It's in the best interests of all Americans for the Supreme Court to rule that state law claims are not preempted by the FDCA, but are vital to the protection of all people who are injured by defective and dangerous drugs.

#### **PARTIAL SETTLEMENT REACHED IN EXXON VALDEZ CASE**

Part of the punitive damages awarded to Plaintiffs in the nation's worst oil spill will be paid to Alaska fishermen and other Plaintiffs, by ExxonMobil. A settlement was reached in the *Exxon Valdez* case which means about \$383 million will be released by Exxon. Under the agreement, the money will be distributed to nearly 33,000 commercial fishermen and others who sued Exxon after the 1989 oil spill. ExxonMobil was able to get the Plaintiffs' lawyers to agree on the company's offer to pay the punitive damages awarded by the Supreme Court on June 25<sup>th</sup>, less certain costs and amounts relating to earlier settlements with former Plaintiffs. The agreed-upon amount with the Plaintiffs is approximately \$383.4 million.

David Oesting of Anchorage, the lead lawyer for the Plaintiffs, told the Anchorage Daily News he and lawyers for Exxon negotiated the settlement. Lawyers will continue to negotiate over \$70 million and nearly a half billion dollars in interest. Fishermen and other Plaintiffs should see checks coming in beginning this month. Interest calculated since 1994 would add an estimated \$488 million, boosting awards to individuals from roughly \$15,000 to about \$29,400. Of course, Exxon contends it does not have to pay interest. Frank Mullen, a Homer, Alaska, commercial fisherman, had this to say concerning the payments:

"It's a damn small bone for an old, angry dog is what it is." History will record this legislation as a tremendous victory for Exxon and a bitter loss for lots of folks who were its victims.

Source: *Anchorage Daily News*

## V. THE NATIONAL SCENE

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#### **BRIBERY SCANDAL INVOLVING HALLIBURTON ROCKS BIG OIL**

Most Americans have never heard of Jack Stanley and that's understandable. But this man is well known in the oil industry. In the world of Big Oil, Albert "Jack" Stanley was legendary for winning billion-dollar contracts in Third World countries. He is the Halliburton executive who knew all the secrets of deals in places like Malaysia, Egypt and Yemen. Stanley has now admitted in a guilty plea that he had resorted to bribes, kickbacks and high-level corruption to secure deals in Nigeria. He is also at the center of a widening scandal in the oil industry that has implications for corporations and governments across the globe. The Stanley case may be the first of a string of indictments in coming months against U.S. corporate executives who have participated in bribing foreign officials in recent years. At least that's what is coming from sources in the Justice Department.

By agreeing to cooperate with prosecutors, Stanley, who ran KBR when it was a subsidiary of Halliburton, promises to become a "hammer" for federal investigators seeking to crack open additional cases under a 30-year-old statute designed to halt overseas corporate corruption. I understand about 80 cases involving major corporations accused of overseas bribery were under investigation at the end of last year. From all accounts, it appears that bribing officials of foreign countries has become a way of life in the oil industry. In the Stanley case, the \$182 million in bribes allegedly were paid

not just by Halliburton but by its partners, an international consortium of engineering companies from France, Italy and Japan. Having had some experience with the politically powerful and influential oil industry on a domestic level, I am not surprised at anything involving an oil company anymore.

Some believe Stanley's testimony may also pose concerns for Vice President Dick Cheney, who ran Halliburton between 1995 and 2000, when Stanley was appointed as KBR's chief executive officer. However, Cheney has consistently denied any wrongdoing. Larry Veselka, Stanley's lawyer, says his client will cooperate fully in any investigation. A judge will determine Stanley's final sentence depending on his compliance with the plea agreement. That should cause great concern to anybody connected with Halliburton or KBR who did anything wrong. Veselka had this to say: "He's going to cooperate with wherever they want to go and whatever they want him to do." That may concern lots of prominent men in our nation's Capitol.

The bribery scandal is one of many involving Halliburton's KBR subsidiary in the past several years. KBR has repeatedly been criticized for overbilling the U.S. government for providing food, fuel and other services to U.S. soldiers in Iraq. Last year, Halliburton spun off KBR into a separate corporation. Earlier this year, Halliburton reported that the SEC was dramatically widening the scope of the investigation to cover projects built during the past 20 years in multiple countries. Those investigations may focus on Stanley's activities in other countries. It appears from court documents that Stanley worked with another consultant, identified as a dual-national Lebanese and American citizen, in an elaborate kickback scheme. Under the scheme, Stanley hired the consultant to help Halliburton and its predecessor firms arrange deals to build liquefied-natural-gas projects not only in Nigeria but also in Egypt, Yemen and Malaysia. From 1991 to 2004, it's reported that the consultant directed \$10.8 million of the proceeds back to Stanley through a Swiss bank account. These deals involved

Stanley's original employer, M.W. Kellogg, as well as KBR. All of this will be watched very closely as events unfold.

Source: PBS News Report

### **CLASS ACTION FILED AGAINST FANNIE MAE**

The first class action lawsuit was filed last month arising out of the Fannie and Freddie bailout in the U.S. District Court in the Southern District of New York. The securities class action was filed on behalf of those who held publicly-traded securities of Fannie Mae between November 16, 2007 and September 5, 2008. That was before the federal government took over the company. Defendants in the suit are Stephen Ashley, chairman of Fannie Mae's board; Daniel Mudd, Fannie's president and chief executive officer; Stephen Swad, Fannie's ex-chief financial officer; and Robert Levin, formerly the company's executive vice president and chief business officer.

The complaint alleges that Fannie Mae's publicly-disclosed financial results misrepresented the financial health of the company, and that the Defendants either made false statements or failed to disclose the truth to investors. It's further alleged that as a result, the Defendants' "fraudulent scheme" was successful in deceiving the public, artificially inflating the prices of publicly-traded Fannie Mae stock, and causing class members to buy Fannie Mae stock at those inflated prices.

According to the complaint, Mudd received over \$14 million in compensation from Fannie Mae in 2006 and over \$12 million in 2007; Levin received over \$9.5 million in 2006 and over \$8.4 million in 2007; Swad received over \$4.8 million in 2007; and Ashley received over \$500,000 in 2007. It's alleged in the complaint:

*Because of their positions within the company and their access to material non-public information available to them but not to the public, the individual defendants knew that the adverse facts specified herein had not been disclosed to and were being concealed from*

*the public and that the positive representations being made were then materially false and misleading.*

The complaint details statements by the company in the fall of 2007 and spring of 2008 about its financial position and the capital raises Fannie Mae undertook. The four Defendants are accused of:

- making false statements;
- failing to disclose adverse facts known to them about Fannie Mae;
- deceiving investors about Fannie Mae's prospects and business;
- artificially inflating the prices of Fannie Mae's publicly-traded securities; and
- causing the Plaintiff and other investors to purchase securities at inflated prices.

I predict there will be lots of litigation involving Freddie and Fannie—directly and indirectly—before too awfully long. There are lots of folks in high places who may be getting pretty nervous as this sordid tale unfolds.

Source: Law.com

### **MYSPACE AND FACEBOOK SITES MUST BE CONTROLLED**

A report indicates that teens with MySpace or Facebook sites are far more likely to be contacted by strangers than those who don't have them. Forty-four percent of teens who have personal profiles on social networking sites have been contacted by people they don't know, compared to 16% for teens who don't. The Pew Internet and American Life Project reveals the dangers and risks that face teenagers. Family therapist James Thomas, Director of the Denver Family Institute, had this to say: "Parents ought to approach MySpace as if they were sending the child or teenager to an unchaperoned party." Parents must learn as much as they can about how these social networking sites work. They must also make sure

their children are aware of the dangers and risks involved.

Source: Associated Press and Denver Post

### **ARCTIC SEA ICE CONTINUES TO MELT AT A RECORD PACE**

New satellite measurements show that crucial sea ice in the Arctic Ocean has plummeted to its second lowest level on record. The National Snow and Ice Data Center announced recently that the extent of sea ice in the Arctic is down to 2.03 million square miles. The lowest point on record is 1.65 million square miles set last September. With the melt season winding down it was believed by some scientists that the record would fall but it missed the mark by a thin margin with the ice covering 1.74 million square miles on September 15<sup>th</sup>. Arctic ice always melts in summer and refreezes in winter. But over the years, more and more of the ice is lost to the sea and not recovered in winter. That's significant because the Arctic acts as a refrigerator for the globe. NASA climate researchers confirm that the amount of ice being formed during the winter months in the arctic has declined sharply in the last few years. Sea ice is crucial to worldwide weather patterns.

The amount of Arctic sea ice redirection seen last year is the largest documented in the 27 years satellite data has been available. Hopefully, the next President will recognize the tremendous problems associated with global warming and do something about it. We can't allow the do-nothing policy of the Bush Administration in this critically important area of concern to be carried forward into the next Administration. All of us should have an interest in saving our world for future generations. The next President will have to bring about a total change in how our government addresses global warming and climate change issues. How any national political leader could deny the existence of global warming and its effect is beyond me.

Source: Associated Press

## VI. THE CORPORATE WORLD

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### **FBI IS INVESTIGATING FANNIE, FREDDIE, LEHMAN, AND AIG FOR POTENTIAL MORTGAGE FRAUD**

We have learned that the FBI is investigating Fannie Mae, Freddie Mac, Lehman Brothers Holdings Inc. and American International Group Inc. and their senior executives for potential mortgage fraud. It is believed that the initial inquiries are part of a much broader probe by the FBI. The Bureau is trying to determine whether anyone in those financial institutions, including their senior executives, had any responsibility for providing “misinformation,” according to media reports. Currently, the FBI is looking at 26 cases of potential corporate fraud related to the collapse of the U.S. mortgage lending industry. It appears that there are some corporate executives who may well have committed both civil and criminal fraud. If so, they and their companies should be prosecuted in the criminal courts and also subjected to civil litigation. There are some folks who may well wind up in jail!

### **REGULATORS WERE WARNED OVER 25 YEARS AGO ABOUT CORPORATE WRONGDOING**

Over the past several years we have seen more corporate corruption than I would have ever guessed possible. I, along with lots of folks, are asking, how could this sort of thing have gone on for so long without the bad guys being caught? A most interesting article appeared in the December 1980 issue of Fortune Magazine entitled “How Lawless are Big Companies?” that should have alerted government regulators to serious problems in Corporate America. The opening paragraph of that article should have gotten the attention of the heads of the federal and state agencies that are supposed to be regulating the activities of Corporate

America in a number of important areas. The following is what the author had to say way back in 1980:

*Crime in the executive suites has come to command media attention of a sort formerly reserved for ax murders. An abundance of anecdotal evidence about corrupt practices—commercial bribery, price-rigging schemes, fraud against customers—has led critics of business to charge that far more crime exists than has come to light. Defenders of business, on the other hand, argue that the well-publicized episodes are aberrations, totally untypical of the way corporate America operates.*

How did it come about that Fortune magazine published one of the earliest mainstream exposes about corporate crime? Well for starters, a gentleman named Philip Mattera had something to do with it. Mattera is now one of Washington’s premiere corporate investigators. He currently heads the Corporate Research Project at Good Jobs First and is the man behind the Dirt Diggers Digest blog. Back in 1980, however, Mattera was just a young researcher at Fortune magazine. He was assigned by the editors at the magazine to do a story about corporate crime. It was believed that the problem was small in scope at that time and wouldn’t amount to much. But Mattera, through his research, learned that the real problem was not in the smaller companies, but instead was in the very large corporations.

Mattera went on to write four books about corporate power. He worked for Ray Rogers at Corporate Campaign in New York. Mattera then moved from New York to Washington where he spent a year at Kroll. And then he settled down at Good Jobs First. His current blog—Dirt Diggers Digest—gives tips to activists researching corporate wrongdoing. He has also published on his web site one of the best corporate research papers—“How to Do Corporate Research Online.” Mattera routinely breaks news stories about corporate crime, corporate

power and its control. He is also active in the Business Ethics Network—an umbrella group of corporate campaigners—and is well known in the board room of major U.S. corporations. Mattera had this to say about the public image that large corporations attempt to show:

*Corporations now like to give the impression that they are socially responsible. It has become the fashion for companies to brag about that. But I’m very skeptical about these corporate social responsibility claims. At the very least, there is inconsistency.*

When you think back to some of the “good deeds” performed by some very large corporations, you will realize they were among the worst when it comes to corporate wrongdoing. Mattera says we are at “an unusual time now where companies are trying to pretend that they are enlightened and benevolent.” But he says when you look below the surface, “much of the misbehavior is continuing.” That’s why the research is so important to debunk the greenwashing and the other misleading public relations efforts we are constantly bombarded with.

We need more folks like Mattera who have the ability to dig deeply into the vast operations of Corporate America. We have seen shocking examples of corporate abuse and wrongdoing over the past several years. It was unfortunate that government regulators ignored all of the early warning signs and failed to do their job. The GOP lines of smaller government, too much regulation and a free market have resulted in an almost total collapse of our nation’s economic system.

*Source: Corporate Crime Reporter*

### **FORMER FEDERAL PROSECUTOR SAYS BIG BUSINESS BROUGHT CRIMINAL PROSECUTIONS UPON ITSELF**

While it has taken a long time for the federal government to get involved in prosecuting corporate crime, once it got started it hasn’t let up. That’s the

good news. The government is continuing its across-the-board crackdown on corporate crime. As expected, however, the big business lobby led by the U.S. Chamber of Commerce continues to whine about it.

A former federal prosecutor, Frank Bowman III, has had some interesting things to say about the events leading up to the prosecutions. Mr. Bowman is currently special counsel to the U.S. Sentencing Commission and a professor at the University of Missouri School of Law. He says that big business should stop the whining and contends that the ongoing prosecutions of corporate crime are the fault of big business itself. Bowman wrote an article titled "Somebody Has to Cry Foul" in the August 18, 2008 issue of *Legal Times* and had this to say:

*Business should recognize this swarm of prosecutors as a pestilence it brought upon itself. In a period of chronic under-regulation of business behavior, federal prosecutors stand as perhaps the only remaining authority able to hold corporate outlaws accountable for the misconduct that inevitably follows concentrations of wealth.*

Interestingly, Bowman says that most wrongful business behavior should be handled by civil lawsuits and regulation. In this regard, he observed:

*But those mechanisms have conspicuously atrophied over the past several decades. The staffing and capabilities of regulatory agencies stayed static or declined, while the size, complexity, speed, and global reach of business organizations exploded—along with their potential for serious criminal mischief. If regulators won't regulate to prevent bad behavior before it happens, and prosecutors are barred from using broadly worded statutes to punish bad behavior after it happens, then only market mechanisms protect us from unscrupulous or criminally reckless businessmen. And*

*nothing in the economic history of modern times suggests that market mechanisms are enough. In an under-regulated world, the price of relative freedom from prospective civil regulation is retrospective criminal punishment.*

For years many executives in Corporate America believed they and their companies were above the law. They had no fear of being caught, and if they were they didn't believe there would be any criminal law consequences. Instead of cleaning up their act, they pushed for "tort reform" which protects corporate wrongdoers. Hopefully, the days where "crime pays" are over. Nobody is above the law!

Source: *Corporate Crime Reporter*

### **PROSECUTORS ALLEGE AIG SCHEME COST INVESTORS \$1 BILLION**

When American International Group Inc. was bailed out by the federal government last month most Americans were shocked beyond belief. It's hard to believe that this huge and powerful company had to be saved by a massive federal government bailout. In any event, at that time, U.S. prosecutors had been looking into a scheme to manipulate the financial statements of the world's largest insurance company which resulted in a loss of more than \$1 billion to investors. As reported previously, four former executives of General Re Corp. and a former executive of American International Group were convicted in February of conspiracy, securities fraud, mail fraud and making false statements to the Securities and Exchange Commission. Those persons are waiting to be sentenced. The prosecution filed papers in court, citing a study by its expert, concluding that the fraud-related losses to AIG shareholders totaled \$1.2 billion to \$1.4 billion. Another methodology from the same expert, however, put the losses at around \$543 million to \$598 million, still a big number.

Prior to the bailout, federal prosecutors said the Defendants participated in a scheme in which AIG paid Gen Re as

part of a secret side agreement to take out reinsurance policies with AIG in 2000 and 2001, propping up its stock price and inflating reserves by \$500 million. Reinsurance policies are backups purchased by insurance companies to completely or partly insure the risk they have assumed for their customers. We are heavily involved in civil litigation arising out of wrongdoing by AIG, General Re, and other related companies and several individuals. I predict we haven't heard the last of AIG's problems.

Source: *Insurance Journal*

### **SHAREHOLDERS SUE MERRILL OVER PROPOSED BANK OF AMERICA DEAL**

Shareholders have filed a civil lawsuit against Merrill Lynch Chief Executive John Thain and the company's board of directors over the buyout by Bank of America Corp. The lawsuit, filed in a New York State court on behalf of a single shareholder and a class of investors, said the proposed \$50 billion sale was "wrong, unfair and harmful to Merrill public stockholders." The lawsuit described the woes of the subprime mortgage crisis and said Merrill's attempt to mitigate its losses had failed. The suit contends that Merrill's public stockholders "have been and will continue to be denied the fair process and arm's length negotiated terms to which they are entitled in a sale of their company." I doubt seriously that top folks at Merrill disclosed all they knew. The lawsuit will be typical of what lots of corporations may well be facing in the coming months.

Source: *Reuters*

### **PROBE INTO GOLDMAN AND FIDELITY BY THE NEW YORK ATTORNEY GENERAL**

Long before our nation's economic woes became the news of the day, The New York Attorney General's office had been investigating whether brokers at Fidelity Investments were given incentives by Goldman Sachs Group Inc. to sell auction-rate securities to investors. Investigators are examining if Fidelity

pitched auction-rate securities that were underwritten by Goldman Sachs because it received other services from the investment bank. As you know from previous reports, Attorney General Andrew Cuomo is leading an investigation into how major Wall Street investment banks and smaller financial companies pitched auction-rate securities to customers. The securities were marketed as being as safe as cash until the market froze up amid the credit crisis, causing investors to lose tremendous sums of money.

Attorney General Cuomo, leading the investigation on behalf of state and federal authorities, has reached settlements with investment banks to buy back more than \$50 billion worth of auction-rate securities from eight global banks. Goldman Sachs agreed to buy back about \$1.5 billion in securities still held by private clients that were purchased through the firm before February 11<sup>th</sup> and also agreed to pay a \$22.5 million fine. The auction-rate securities market involved investors buying and selling instruments that resembled corporate debt, but the interest rates on the investments were reset at regular auctions, some as frequently as once a week. The market for them collapsed in February amid the downturn in the broader credit markets. Regulators have been investigating the collapse to determine who was responsible for its demise and whether banks knowingly misrepresented the safety of the securities when selling them to investors.

Source: *Associated Press*

### **U.S. COURT REVIVES CASES AGAINST ENRON EXECUTIVES**

A ruling in the federal appeals court in New Orleans revived Texas state court fraud cases targeting Enron Corp's former leaders and more than a dozen financial institutions accused of playing a role in the company's collapse. The ruling by the Fifth Circuit Court of Appeals, which reverses an earlier federal court decision, allows cases to proceed against individuals and institutions who have not yet

reached a settlement. In late 2001, the Houston law firm of Fleming & Associates filed seven securities-related lawsuits in Texas state courts on behalf of several hundred clients against various Enron-related Defendants. The federal court, which already had jurisdiction over various Enron-related cases, then issued an order prohibiting the law firm from filing any new Enron-related actions without leave of the court. In 2005, leave to file lawsuits against Enron-related Defendants for fraud in Texas courts was denied by the federal court. Under the appeals court ruling, the cases can now proceed in the lower court.

Source: *Reuters*

## **VII. CAMPAIGN FINANCE REFORM**

### **ALABAMA GETS FAILING GRADE ON CAMPAIGN FINANCE DISCLOSURE**

Alabama has received another failing grade in an annual study of states' campaign finance disclosure laws. The new Grading State Disclosure report says Alabama's grade of "F" has been unchanged since the annual reports began in 2003. Alabama ranks 49<sup>th</sup> among the states. The report notes that the Secretary of State's office has made improvements in the state Web site that shows candidates' campaign finance reports, but there is still no searchable online database of contributions. The annual report is prepared by the Campaign Disclosure Project, which is a collaboration of the California Voter Foundation, the Center for Governmental Studies and the UCLA School of Law. We have a long way to go in Alabama when it comes to upgrading our campaign financing and election laws generally. Doing so should be a top priority for the 2009 session of the Alabama Legislature.

Source: *Associated Press*

### **NEEDS FOR NEXT YEAR**

The federal bailout involving Corporate America should result in campaign finance reform taking center stage on the national scene next year. A bi-partisan effort in Congress—with the backing of the new President—will be needed to change the way Washington operates.

## **VIII. CONGRESSIONAL UPDATE**

### **CONGRESS PASSES BILL WITH PROTECTIONS FOR DISABLED**

Congress has given final approval to a major civil rights bill, expanding protections for people with disabilities and overturning several recent Supreme Court decisions. The bill goes to President Bush for his signature. The White House said Mr. Bush would sign the bill. The bill expands the definition of disability and makes it easier for workers to prove discrimination. It explicitly rejects the strict standards used by the Supreme Court to determine who is disabled. The bill declares that the Court went wrong by "eliminating protection for many individuals whom Congress intended to protect" under the 1990 law. Representative Steny H. Hoyer of Maryland, the House Democratic leader, observed: "The Supreme Court misconstrued our intent. Our intent was to be inclusive."

Senator Tom Harkin, Democrat of Iowa, the chief sponsor of the bill, said: "The Supreme Court decisions have led to a supreme absurdity, a Catch-22 situation. The more successful a person is at coping with a disability, the more likely it is the court will find that they are no longer disabled and therefore no longer covered under the A.D.A." Senator Orrin G. Hatch, Republican of Utah, said the bill, by establishing more generous coverage and protection, "will make a real difference in the lives of real people." Clearly, the members of Congress and all who worked to get

this legislation passed are due a vote of thanks!

Source: *New York Times*

### **NURSING HOME RESIDENTS AND FAMILIES GET A VICTORY**

The nursing home arbitration bill (S. 2838) passed the U.S. Senate Judiciary Committee last month without any amendments. This is a key step toward giving elderly residents and their families the ability to hold nursing homes and assisted living facilities accountable for abuse and neglect. Although the committee took a voice vote, three Senators wanted to be on record as voting no. They were Senators Jeff Sessions, Orrin Hatch, and Tom Coburn, all Republicans. One other Senator, Chuck Grassley, voted present. The bill will now go to the floor for a full vote, although that hadn't been scheduled at press time. If you have questions regarding the legislation, you can contact David Arkush in Public Citizen's Congress Watch Division at 202-588-1000. If you support this important bill, contact your Senators and ask them to vote for people and not Corporate America on this badly-needed legislation.

Source: Public Citizen

## **IX. PRODUCT LIABILITY UPDATE**

### **NEW ROLLOVER STUDY SHOWS FEDERAL GOVERNMENT'S ROOF STRENGTH STANDARD WILL NOT PROTECT VEHICLE OCCUPANTS**

Six vehicles that passed the federal government's roof strength standard did far worse when subjected to a real-world test that puts the vehicles and crash-test dummies through an actual rollover, according to the results of a new comparison released by three auto safety groups. In dramatic video released by the Center for Auto Safety, the Center for Injury Research (CfIR) and Public Citizen, crash-test dummies

involved in the dynamic (real-world) tests performed by CfIR were exposed to traumatic impacts that would have been fatal or paralyzing to human occupants. The dummies suffered their "injuries" despite being restrained by seat belts and in vehicles that had receiving passing grades under the National Highway Traffic Safety Administration's existing roof strength standard.

The comparison, sponsored by the Santos Family Foundation, involved the 2007 Pontiac G6, 2006 Chrysler 300, 2007 Toyota Camry, 2007 Volkswagen Jetta, 2006 Honda Ridgeline and 2006 Hyundai Sonata, which were tested on the Jordan Rollover System (JRS), a device designed to dynamically test the rollover occupant protection performance of motor vehicles. The vehicles, which were donated by State Farm Insurance, are the same ones that performed well in NHTSA's "static" test. The study underscores the need for NHTSA to adopt a similar dynamic test for passenger vehicles and light trucks, rather than the current static method of testing, which tests the strength of a stationary, upright vehicle's roof but disregards what happens to passengers during a rollover, as well as a rolling vehicle's ability to withstand crash forces. Public Citizen President Joan Claybrook said:

*NHTSA—complicit with Detroit auto companies—has wasted years considering a static standard it estimates will save only 13 to 44 lives out of 10,800 rollover deaths annually. It has refused to use dynamic testing for a comprehensive standard to save thousands of lives and reduce head injury and ejection. The Congress, the next administration, and/or the courts will be asked by consumers to right this wrong.*

Instead of adopting a dynamic test, NHTSA has proposed a slight upgrade for the 1971 standard for vehicle roofs that relies solely on measuring the ability of the roof to resist 2.5 times the vehicle's weight instead of the current

1.5 times. NHTSA, which was scheduled to release its final rule by October 1<sup>st</sup>, is continuing to endanger lives and doing little to reduce the more than 10,800 deaths a year in rollover crashes, according to Clarence Ditlow, director of the Center for Auto Safety. He observed:

*After 35 years of rollover fatalities increasing eight-fold due to weak roofs and weak standards, it's time to issue a dynamic roof crush standard to match the life-saving dynamic standards NHTSA has for front and side impacts where occupant fatalities have decreased by 25%.*

In its 2005 highway bill, Congress demanded that NHTSA write new performance standards that would 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. NHTSA's final rule should take into account not only roof strength, but the performance of safety belts, curtain air bags, door locks and latches, windows and roof racks. Donald Friedman, founder of the Center for Injury Research, says that the agency must develop a dynamic test that mimics an actual rollover and takes into account passenger ejection and containment. Friedman, a partner in Xprts, LLC, a California consulting firm, observed:

*A light truck and a passenger car with the same static roof strength can have grossly different rollover occupant protection capability as revealed in our dynamic JRS tests. The federal government's existing standard tests only roof structure performance, while dynamic tests measure injury potential in a rollover.*

Also, the proposed rule's preamble contains disturbing language that says any manufacturer whose vehicle com-

plies with the standard should not be held liable for occupant injuries in that vehicle. Ms. Claybrook stated:

*NHTSA's rule, which it says would save less than half of 1% of the 10,800 annual rollover deaths, urges state courts to pre-empt consumer injury lawsuits involving vehicles meeting this do-nothing standard. It reveals that NHTSA is more concerned with protecting auto companies than the families who needlessly lose loved ones each day.*

Hopefully, the next President and the next Congress will take a close look at NHTSA and how it operates. There must be meaningful changes that will mandate that the agency truly make safety its top priority.

Source: Public Citizen

#### **COMPARISON OF THE TESTS RUN BY NHTSA AND SAFETY GROUP**

The primary purpose of the Center for Injury Research JRS tests is to compare the dynamic roof crush performance of ten vehicles with the performance of the same vehicles under NHTSA's static roof crush tests. Unlike the passenger cars that CfIR tested, the Honda Ridgeline has side-curtain air bags that are designed to deploy in a rollover. NHTSA did not deploy air bags in its static roof crush tests, and CfIR did not deploy them in the JRS tests of the Ridgeline. Even if the side-curtain air bags had been deployed in the JRS test, they would not have affected the catastrophic roof intrusion into the occupant compartment, and the restrained dummy still would have indicated severe injury from the roof intrusion.

In rollovers, the side-curtain air bags are primarily designed to control ejection and perform well only in combination with a strong roof that resists serious intrusion in a rollover. For a number of years, the experts involved in these rollover tests, as well as other experts in the field, have provided extensive technical information to vehicle manufacturers about the impor-

tance of research and design choices concerning the control of roof crush in rollover occupant protection. NHTSA needs to upgrade its testing protocols and do a better job of dealing with safety issues.

#### **FEDERAL GOVERNMENT'S RELEASE OF EARLY WARNING DATA IS A LIMITED VICTORY FOR CONSUMERS**

The National Highway Traffic Safety Administration finally made its Early Warning Reporting data available on its [www.SaferCar.gov](http://www.SaferCar.gov) Web site. This was in response to Public Citizen's successful lawsuits and Freedom of Information Act requests. Auto manufacturers have been submitting this important data on deaths, injuries, damage claims and possible defects since 2003, but NHTSA kept it secret in violation of the law. Public Citizen was instrumental in pushing Congress in the 2000 Transportation Recall Enhancement, Accountability, and Documentation Act, (or TREAD Act) to require reporting of early warning data after NHTSA failed to identify the defects in the Firestone tire / Ford Explorer rollovers.

While it's a step in the right direction, NHTSA's action fell short of complying with the spirit of the law. The agency's searchable database is hardly user-friendly. Furthermore, NHTSA has decided to withhold critical information, such as the number of consumer complaints to the manufacturer, the number of field reports taken by company engineers and the number of claims involving death and injury. NHTSA has classified that information as confidential under pressure from the manufacturers. Joan Claybrook, President of Public Citizen had this to say:

*The clear vision of the TREAD Act is to raise public awareness about safety defects and improve public oversight of manufacturer and NHTSA decisions on defects and recalls. This information is important to buyers of new and used vehicles and people concerned about potential defects in their vehicles. But NHTSA must provide*

*the public a fuller and more comprehensive picture of the early warning information. Doing so will greatly benefit consumers and give automakers strong incentives to improve the safety of their vehicles. Public Citizen will seek to make this additional information public.*

Hopefully, Public Citizen and other consumer and safety groups will keep the pressure on NHTSA and I believe they will. Complete disclosure to the public is needed and hopefully will eventually become a reality.

Source: Public Citizen

#### **NHTSA ANNOUNCES NEW FIVE-STAR SAFETY RATING PROGRAM**

The National Highway Traffic Safety Administration has announced that it will implement new upgrades to the Five-Star Safety Rating Program. Beginning with model year 2010, NHTSA will make changes to its existing front and side crash rating programs. The current frontal crash test program involves a 35 mph impact into a frontal barrier. The upgrade to the front crash rating program will involve updated test dummies and new associated injury assessment criteria. For side impact tests, NHTSA will update the test to include side impact test dummies and new injury criteria that are used to assign a vehicle side impact star rating. Further, for the side impact tests, vehicles will be evaluated based upon a pole impact test and small female crash test dummies.

Perhaps the most significant update to the program involves a new criterion that will rate vehicles on the presence of select "advanced technologies" such as electronic stability control (ESC), forward collision warning (FCW) and lane departure warning (LDW). It's good to see that NHTSA will provide information concerning advanced safety technology to consumers. In our cases, we continue to see manufacturers who offer "safety as an option." Advanced safety options, such as ESC, are still being offered as "options." This

practice is still prevalent even though the manufacturers are aware of the substantial safety benefits of ESC. These new NHTSA ratings will provide consumers with more information and hopefully force manufacturers to implement these advanced safety features as standard equipment. In my opinion, safety should never be considered optional.

Finally, the new ratings program will set a new overall Vehicle Safety Score that combines the star ratings from the frontal, side and rollover programs of the five-star system. NHTSA has indicated it will initiate rule changes to incorporate the new overall combined crash rating on the price sticker of new vehicles. NHTSA has stated that “we believe that the combined rating and the new side impact score will provide consumers with the information they need to make comparative judgments on new vehicles.” Current information relating to NHTSA safety ratings for new vehicles can be found at [www.safercar.gov](http://www.safercar.gov).

Source: NHTSA

### **JURY AWARDS \$8.6 MILLION IN SUV ROLLOVER**

A man and his son were awarded \$8.6 million after a post-verdict hearing by a Staten Island judge for psychological damages stemming from a crash in which they were hurt and two family members killed. A jury had refused to award those damages as a part of its verdict. Justice Joseph J. Maltese said the jurors had failed to consider the “extreme emotional distress” that Gary Motelson and his younger son suffered in witnessing the deaths of their loved ones, while exposing themselves to the same dangerous conditions in a Ford SUV.

The man and his son were among four passengers in a 1998 Explorer driven by the man’s father, Steven Motelson, on July 1, 2000. The group was returning to Staten Island from a Boy Scout camp-o-ree in Narrowsburg, New York, when the vehicle overturned on a state highway. Steven Motelson, 60, a respected Scout leader and Mariner

Harbor resident, was killed in the wreck along with Gary’s nine-year-old son. Gary Motelson, then 36, and his five-year-old son survived the accident, as did a 21-year-old passenger. The Motelsons contended the SUV suddenly accelerated and lost its brakes as Steven Motelson fought to regain control. Ford maintained that the elder Motelson allowed the vehicle to drift off the road and sent it careening when he overcompensated on the steering wheel.

After a four-week trial, a jury found that Steven Motelson’s death was due to a defectively designed roof-support system. The elder Motelson was killed when the driver’s-side roof shredded on the first of nearly four rolls, exposing his head. The panel awarded \$6.5 million to Steven Motelson’s widow and estate. The jury, however, found that Ford was not liable for the death of Gary Motelson’s older son or for the injuries Mr. Motelson and his younger boy suffered.

Jurors determined the two boys and the 21-year-old passenger were not wearing seat belts when they were thrown from the SUV’s rear seats. Gary Motelson was sitting in the front passenger seat. The third rear-seat passenger, who was not a family member, settled prior to the trial with Ford Motor Credit Company, the vehicle owner and lessor. Ford Motor Company, the SUV manufacturer, was a named Defendant. After the trial, both the Plaintiffs and Defendants moved to set aside the verdict.

In his post-verdict ruling, Judge Maltese awarded Gary Motelson \$3.2 million and his younger son \$5.4 million for medicine and psychiatric care, as well as for past and future pain and suffering. While jurors found Ford not responsible for the younger boy’s physical injuries, the judge said the panel “failed to discern the difference” between those injuries and the psychological trauma he (the boy) endured in witnessing the death of his older brother and grandfather. The judge ruled that the boy was in the so-called “zone of danger,” which means he was threatened with bodily harm created by the defendant’s negligence and enti-

tled to compensation. In explaining his ruling, the judge wrote:

*As to the extreme emotional distress suffered by [the boy], it is irrelevant whether he was wearing a seat belt. He would still have witnessed the trauma of this horrific accident resulting in his uncontested permanent psychiatric condition.*

Judge Maltese said Gary Motelson also was entitled to recover damages. In addition, the judge also ruled that Gary Motelson’s wife, Elissa, was entitled to loss of consortium and awarded her \$150,000. Although Judge Maltese believed, based on the evidence, the rear passengers were seat-belted, he said he would not overturn the jury’s finding to the contrary. Consequently, he would not award damages to the estate of the Motelson boy who was killed. The judge, meanwhile, reduced by \$1.5 million the total \$6.5 million award for Steven Motelson’s estate and his widow. Ford contended the amount was excessive. Judge Maltese ruled the panel had overestimated Gary Motelson’s future potential earnings and reduced the award to the estate by \$173,000 to \$1.3 million. The judge reduced Mrs. Motelson’s award from \$5 million to \$3.7 million, saying part of it duplicated the estate award.

Source: Staten Island Advance

### **ATV ACCIDENTS BRING HEARTBREAK TO FAMILIES**

Over the past few years, we have seen more and more accidents involving children and ATVs. In fact, the loss of lives as a result of these accidents continues to grow. We have also seen that parents who have lost children in ATV rollover accidents suffer greatly. No matter how long ago the accident occurred, these parents deal with the grief every day of their lives. Every year 40,000 children and teens are seriously injured and even killed in ATV rollover accidents in the US, according to Concerned Families for ATV Safety.

One would think that the industry—

knowing what it knows—would change the way ATVs are designed. They can also have a direct influence on who is using the ATVs and how they are being used. But, ATV manufacturers blame the drivers of the ATVs for the fatal accidents. While some ATV rollovers are the result of inexperience on the part of drivers, the real blame lies with the manufacturers. There are safety features available for the ATVs. The Yamaha Rhino is one of the most dangerous ATVs on the market. For example, installing doors on the Rhino wouldn't be cost-prohibitive. But when the deaths of children are viewed only as statistics, rather than as individual tragedies, it's real easy for the industry to say the extra cost is not necessary. Obviously, Yamaha hasn't put doors in its Rhino design.

The industry knows that young people are exposed to unnecessary risk when riding ATVs. These vehicles tip over too easily and lack adequate safety features. The ATV industry shouldn't be allowed to get away with manufacturing such potentially dangerous vehicles. That's the bottom line. Thus far, only the court system—and the filing of lawsuits—have had any significant effect. The ATV industry must be made to design safer vehicles. The families file their lawsuits, hoping that the courts will hold the ATV manufacturers responsible for creating vehicles that tip over too easily, and that their lawsuits will result in design changes. If you want more information on ATVs and rollovers, you can contact Graham Esdale or Chris Glover in our firm at 800-898-2034.

Source: *Lawyers and Settlements*

### **U-HAUL TRAILERS AND MORE OF THE SAME**

Our firm has successfully handled two wrongful death cases recently against U-Haul. In each case, the U-Haul trailer was being pulled by a Ford Explorer. Also in each of the cases, the trailer began to sway and ultimately caused the vehicles to roll over, leading to the death of the drivers of the Ford Explorers. Soon after we resolved the

first wrongful death case against U-Haul, the company issued a new policy preventing any rental of its trailers when the customer was driving a Ford Explorer. The policy announcement was an attempt by U-Haul to blame the incidents on the instability of the Ford Explorer. While the Ford Explorer's propensity to roll over is well documented, U-Haul must shoulder the bulk of the responsibility.

Soon after U-Haul's announcement, I wrote in a previous issue of this Report that U-Haul's policy change was nothing more than a publicity stunt. That statement was recently confirmed when the firm received yet another case to investigate involving a U-Haul trailer. Similar to the prior two cases we successfully resolved for our clients, the driver of this vehicle lost control when the trailer began to sway, ultimately causing the vehicle to roll over resulting in the death of the driver. The only difference between this most recent occurrence and the prior cases is the latest victim was not driving a Ford Explorer. He was driving a Nissan Pathfinder.

If U-Haul is to remain consistent the company will soon announce a new policy of not renting its trailers to anyone driving a Ford Explorer or a Nissan Pathfinder. The first announcement won't prevent any deaths on the nation's highways, and a revised exclusion list won't either. The type of SUV pulling the trailer is irrelevant. U-Haul trailers have caused many different types of SUV's, trucks and other passenger vehicles to roll over in the past and they will continue to do so in the future. Rollovers while pulling U-Haul trailers are caused by the propensity of the trailer to sway in transit. Swaying is caused by the condition of the trailer and hitch, the existence and condition of the braking system, and the weight distribution between the towing vehicle and the trailer with its contents.

As noted in an earlier article, other major renters of trailers require the customer to pull the trailers only with larger six-wheeled vehicles. These vehicles are larger and heavier so they can

withstand the swaying of the trailer. If U-Haul was truly serious about safety, it would follow the industry. This is not a likely move considering U-Haul has a monopoly on this market and would be forced to forfeit high profits. U-Haul could prevent these incidents by maintaining its fleet of trailers, including making sure their respective braking systems are in good working condition.

In one of the prior cases we handled, the trailer's brakes were in need of maintenance. Additionally, the trailer had not been inspected and repaired on U-Haul's own schedule. Instead of making policy changes that do not affect safety, U-Haul should focus on making changes that actually limit swaying. Until U-Haul takes steps to upgrade its fleet of trailers with better braking systems and devices designed to limit or eliminate swaying, drivers of vehicles towing U-Haul trailers and those vehicles on the interstate in close proximity to them are in extreme danger. I will keep you updated on the progress of the latest case against U-Haul. If you want more information on U-Haul litigation contact Kendall Dunson or Cole Portis in our firm at 800-898-2034.

## **X. MASS TORTS UPDATE**

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### ***VIOXX CLAIMANTS BEGIN TO RECEIVE PAYMENTS***

Approximately 48,000 claimants have now enrolled in the Vioxx Settlement Program. On July 17, 2008, due to the overwhelmingly positive response by Vioxx claimants, Merck & Co., the maker of Vioxx, announced that all Enrollment thresholds had been met and that it is waiving its Walk Away Right under the Settlement Agreement, effective August 1, 2008. As a result and in accordance with the terms of the Agreement, the Enrollment Deadline Date to participate in the Resolution Program has now been extended to October 30, 2008.

Currently, the Claims Administrator is actively reviewing claimants' medical and pharmacy records ("claims packages") to determine which claims qualify for compensation under the Settlement Program. The deadline for submitting claims packages was July 1, 2008. With the built-in extensions outlined in Exhibit 1.5 of the Settlement Agreement, claimants have until November 30, 2008, at the latest, to submit additional medical and pharmacy records. The Claims Administrator is issuing Notices of Eligibility to all claimants who qualify for compensation under the Settlement Program. According to the Settlement Agreement, a claim qualifies for compensation if:

- The injury meets certain criteria for a heart attack or ischemic stroke as established by a claimant's medical records;
- The claimant's medical or pharmacy records document that at least 30 Vioxx pills were dispensed to the claimant within any 60-day period prior to the injury; and
- The claimant's medical or pharmacy records establish that Vioxx was being used by the claimant within 14 days of the injury.

The Claims Administrator is also issuing Notices of Ineligibility to claimants when the claimant's medical and pharmacy records do not meet the criteria outlined above. Following the receipt of a Notice of Ineligibility, claimants may choose to allow their claim to be extinguished following an appeal process, or they may elect to return to the court system and actively litigate their own claims.

For those claims the Claims Administrator deems to be eligible, the Claims Administrator will then issue Notices of Points Awards. A Notice of Points Award provides a detailed report of how the Claims Administrator evaluated a claim, including a report of the level of injury, overall duration of drug use, label adjustments, consistency adjustments, and risk factor reductions. The Claims Administrator's evaluation of the case whether for eligibility or points is

based upon the Administrator's objective review of the claimant's medical and pharmacy records.

On August 28<sup>th</sup>, the Claims Administrator began issuing interim settlement payments to eligible claimants in heart attack cases. The total amount of money each claimant receives in association with a claim is determined by multiplying the number of points awarded by the dollar value of each point. Though the final point values will not be determined until all Vioxx claims are evaluated, the current estimate of a point value for heart attack cases is approximately \$1915 per point. Interim settlement payments constitute 40% of the overall compensation that the claimant will receive. Final settlement payments will be made to heart attack claimants after all heart attack claims have been evaluated.

Interim payments to qualifying heart attack claimants are now being made on a rolling basis. The Claims Administrator will continue to issue interim, partial settlement checks on a monthly basis until all heart attack claims are evaluated. Approximately 30,000 heart attack claims have been enrolled into the Program. It is anticipated that all heart attack claims will be evaluated and, if qualifying, paid by mid-2009.

The Claims Administrator is also evaluating cases in which the primary injury is a stroke. Interim payments of 40% of the total estimated case value are scheduled to begin in stroke cases in February 2009 and will continue on a rolling basis. Final settlement payments will be made to stroke claimants after all compensable stroke claims have been evaluated. Approximately 18,000 stroke cases have been enrolled in the Vioxx Settlement Program. It is anticipated that all stroke claims will be reviewed and paid, if compensable, by the end of 2009. If you would like more information contact Leigh O'Dell or Roger Smith at 800-898-2034.

#### **COURT REINSTATES MERCK VIOXX SHAREHOLDER LAWSUIT**

Pharmaceutical company Merck & Co. must now face a shareholders'

lawsuit over its former blockbuster painkiller Vioxx. A federal appeals court reinstated the lawsuit which had been dismissed by a lower court. A three-judge panel from the Third Circuit Court of Appeals voted 2-1 to reinstate a class action securities lawsuit that had been dismissed in April 2007 by U.S. District Judge Stanley R. Chesler in Newark, New Jersey. The ruling will give thousands, perhaps tens of thousands, of Plaintiffs an opportunity to finally have a court hear their claims that Merck concealed the risks of Vioxx.

Judge Chesler had dismissed the lawsuit, filed in November 2003, ruling that all the Plaintiffs' claims were time-barred under the statute of limitation. Investors had charged Merck with providing misleading information or omitting information about the risks involved with Vioxx. In the ruling, two appellate judges concluded the Plaintiffs filed suit within the legal time limit to do so because amid early signs of trouble with Vioxx, Merck was still reassuring investors about the safety of Vioxx and financial analysts were projecting growth in sales.

Unless Merck is able to get the full Court of Appeals or the U.S. Supreme Court to review the divided decision to change the result, this case would return to Judge Chesler. Lawyers on each side will then begin trial preparation. This result has no effect on the \$4.85 billion settlement that would end roughly 50,000 personal injury lawsuits from Vioxx users or their survivors. That is an entirely different matter.

Source: *Forbes*

#### **FDA INVESTIGATES POSSIBLE VYTORIN-CANCER LINK**

U.S. drug regulators are investigating whether the cholesterol-lowering drug Vytorin might be linked to cancer. The U.S. Food and Drug Administration informed health-care professionals that the agency was investigating a report from the so-called Simvastatin and Ezetimibe in Aortic Stenosis (SEAS) trial of a possible association between the use of Vytorin and an increased risk of a variety of cancers. Vytorin is a combina-

tion drug made up of the compounds simvastatin and ezetimibe that's designed to reduce levels of LDL (bad) cholesterol and cut the risk of cardiovascular problems. It works by decreasing the production of cholesterol by the liver and inhibiting the absorption of cholesterol in the intestine.

The FDA has obtained preliminary results from the SEAS trial. The trial tested whether lowering LDL-cholesterol with Vytorin would reduce the risk of cardiovascular problems in people with narrowing of the aorta, the body's largest artery. The five-year trial did not show a reduced cardiovascular risk. But, according to the FDA, a "larger percentage of patients treated with Vytorin were diagnosed with and died from all types of cancer combined, when compared to treatment with a placebo." The FDA says patients can continue to take the drug. But the agency urged health-care professionals to monitor their patients for possible side effects and report them to the agency. While one recent clinical trial indicated higher rates of cancer for patients taking the drug, the FDA said two studies currently under way have shown no increased risk, according to an Associated Press report.

The FDA said it expects to receive a final study from the SEAS trial in about three months. It will then take an estimated six months to review and evaluate the trial data. Vytorin is made by the drug companies Merck and Schering-Plough Pharmaceuticals. It's a combination of Merck's Zocor (simvastatin), a statin, and Schering-Plough's Zetia. A report earlier this year found the drug failed to reduce the buildup of plaque in arteries any better than the generic drug Zocor. Several members of Congress have demanded data on the trial. I understand that Merck and Schering-Plough are cooperating with the requests. But the companies defended the drug, saying it is effective at reducing cholesterol—the use for which it was approved—but that doesn't address the cancer risk issue.

Source: *HealthDay*

### **LILLY AND AMYLIN MAY HAVE TO ADD BYETTA WARNINGS AFTER NEW DEATHS**

Eli Lilly & Co. and Amylin Pharmaceuticals Inc. may have to add tougher warnings to prescribing instructions for their diabetes drug Byetta after four more patients taking the medicine died from pancreatitis. The latest deaths bring the total to six. The U.S. Food and Drug Administration had announced two deaths earlier. However, no definite relationship between Byetta and the additional deaths has been proved.

Byetta, available in the U.S. since June 2005, is Amylin's leading product, with global sales that rose 25% in the second quarter to \$194.7 million from a year earlier. Lilly and Amylin agreed to warn of the risk of pancreatitis in October, after 30 milder cases were reported. Currently, the companies are talking with the FDA about the possibility of additional warnings.

The FDA could require the companies to display stronger, so-called "black-box" warnings. The companies' next version of the drug, Byetta LAR, is designed to be taken weekly instead of the standard injections given twice daily. Because the drug stays in the body longer and can't be neutralized if pancreatitis develops, the FDA may have concerns when it considers it for approval.

Source: *Bloomberg News*

### **MANY PRODUCTS CONTAIN THE CHEMICAL BPA**

We have previously written about Bisphenol A, or BPA, a chemical used in consumer goods. BPA was the subject of a federal safety hearing on September 16<sup>th</sup> where new preliminary research suggested it might be linked to a higher risk of heart disease and diabetes. As you know, BPA is used in lightweight, durable plastics. Products include some baby bottles, sippy cups and reusable food and drink containers, such as sports water bottles and Tupperware, compact discs, DVDs, eyeglass lenses and sports safety goggles and helmets.

Some manufacturers are phasing out

use of BPA in some products and Tupperware's Web site says it does not use BPA in children's products sold in the United States and Canada. BPA is also in epoxy resins used to make paints, adhesives and canned food liners. Animal studies have linked BPA with breast, prostate and reproductive system abnormalities and some cancers, but experts disagree on whether it poses health risks for humans. Government toxicology scientists say that to reduce exposure, people can avoid non-recyclable plastic containers that have the number 7 on the bottom; avoid using these plastics in the microwave, and don't wash them in the dishwasher with harsh detergents. The FDA, which apparently doesn't recognize a health or safety issue, continues to defend BPA and I certainly hope it is on solid ground.

Source: *Associated Press*

### **LILLY ZYPREXA GROUP BUYERS WIN CLASS ACTION STATUS**

A federal judge in Brooklyn, New York, ruled recently that pension funds, labor unions and insurance companies that bought Eli Lilly & Co's Zyprexa drug could sue as a group and were entitled to a jury trial of claims the medicine was overpriced. As we have reported, Zyprexa is approved to treat schizophrenia and bipolar disorder. The Plaintiffs claim Lilly urged doctors to prescribe Zyprexa for uses not approved by the FDA. The institutional buyers, who sought \$6.8 billion in damages, claim Lilly overpriced the drug by making excessive claims about Zyprexa's usefulness, violating the Racketeer-Influenced and Corrupt Organizations Act, or RICO. The judge found "sufficient evidence of fraud" by Lilly in selling the drug to justify a jury trial. The judge certified the case as a class action on the RICO claims for all Plaintiffs except individual patients who bought the drug, rejecting Lilly arguments that the pension funds, unions and insurance companies had claims too different to be tried together. These Plaintiffs, all third-party payors, bought the drug for members or customers.

The court has limited the claim for damages to four years, from June 20, 2001 until June 20, 2005 when the suit was filed. The third-party payors include: the United Federation of Teachers Welfare Fund, or UFCW (a Philadelphia-based fund representing 20,000 food and commercial workers), Mid—West Life Insurance, and the Sergeant Benevolent Association Health and Welfare Fund, which represents current and retired New York City Police sergeants and their families—33,000 people. The judge denied class action status to individuals with claims because he found their proposed leaders can't properly represent the proposed class.

This case will be watched closely for further developments. Since the Plaintiffs' state law claims weren't certified for class status, and claims by individual payors weren't included, the court's decision is said to be a partial win for both sides.

Source: *Bloomberg News*

#### **FDA REJECTS RECOMMENDATION BY ADVISORY PANEL ON USE OF DORIBAX**

The Food and Drug Administration has declined to approve an expanded use of Doribax, a Johnson & Johnson antibiotic, despite an advisory panel's favorable recommendation. That was the third time in a month for the FDA to refuse to follow the guidance of its outside experts. The FDA said it needed more information from J&J before it could approve Doribax to treat hospital-acquired pneumonia. The drug is currently approved for use in serious cases of abdominal and urinary-tract infections.

Although the FDA isn't obligated to follow an advisory committee's recommendations, it usually has done so in the past. In early August, however, a trend started when the FDA decided to reject Schering-Plough Corp.'s Sugammadex, a drug that helps patients recover from anesthesia, even though the panel decided unanimously to approve it. A week later, the agency said it needed three more months before it would decide whether to approve

Ustekinumab, a J&J biologic drug for treating psoriasis, again despite another panel's unanimous vote for approval. Now we see a third rejection with Doribax.

Hopefully, these decisions are a sign of the FDA's increasing caution as well as its heightened attention to safety. The agency appears to be taking more time and asking for more data before it makes decisions. In the calendar year 2007, the FDA approved the fewest number of new drugs—19—in more than two decades, and ordered new or enhanced "black-box" warnings—the most serious type—for about 75 drugs, double the number from four years ago. In the case of Doribax, the advisory panel's decision was mixed. Members voted 7-6 that the drug was efficacious and by 8-5 that it was safe. Several of the members questioned design aspects of the study used to test the drug. Interestingly, J&J said it was "reviewing the agency's letter" and said it would work to "resolve any outstanding questions." Regardless of what happens on Doribax, it's extremely encouraging to see the FDA doing its job in a manner that makes safety of drugs a very high priority.

Source: *Wall Street Journal*

## **XI. BUSINESS LITIGATION**

#### **FRAUD CLAIMS PROCEED AGAINST BRISTOL-MYERS EXECUTIVE**

A Manhattan federal judge has ruled that the U.S. Supreme Court's recent ruling in *Stoneridge Investment Partners v. Scientific Atlanta Inc.*, doesn't shield a Bristol-Myers Squibb Co. executive from securities fraud claims. The executive made no public statements, but his behavior was central to the company's alleged misconduct. Bristol-Myers shareholders are suing the company and two of its top executives for allegedly misleading them about patent litigation against Apotex, a manufacturer of a generic version of

Bristol-Myers' best-selling Plavix blood-thinning drug. According to shareholders, the company bargained away much of its right to seek damages for patent infringement to strike a licensing deal with Apotex that was subsequently rejected by regulators.

The company allegedly concealed the extent to which it had hamstrung its litigation options and publicly stated it would "vigorously pursue" patent litigation against Apotex. Andrew Bodnar, Bristol-Myers' former senior vice president for strategy, carried out the settlement negotiations with Apotex, but made no public statements about them. The *Stoneridge* decision limited liability for securities fraud by actors who were "too remote" from investors. But the district judge rejected that argument stating:

*Bodnar made no public statements himself, but investors relied on his good faith in negotiating the Apotex settlement agreement and committing the company to its terms.*

The judge also denied motions to dismiss by Bristol-Myers and former chief executive Peter Dolan. Bodnar was indicted in April for concealing the negotiations with Apotex from the Federal Trade Commission.

Source: *Law.com*

#### **VERMONT'S \$183 MILLION AMBASSADOR INSURANCE JUDGMENT UPHELD ON APPEAL**

The U.S. Court of Appeals for the Third Circuit has upheld the judgment of \$182.9 million returned in a malpractice case against the accounting firm PriceWaterhouseCoopers. The case filed by the State of Vermont arose out of the firm's dealings with the failed Ambassador Insurance Co. The company, a Vermont domiciled surplus lines insurance company with headquarters in New Jersey, was seized in 1983 and placed into court-supervised rehabilitation and subsequent liquidation as a result of its insolvency. Since that time, the state's insurance commissioner has been trying to collect and

distribute assets under court supervision in order to pay the claims of persons insured and owed money by Ambassador.

An accounting malpractice lawsuit, filed in 1985 by the Vermont insurance commissioners against PriceWaterhouseCoopers, charged Ambassador's outside accountants with negligence in connection with audits of Ambassador's financial statements that served to conceal from regulators the insurance company's financial weakness and near insolvency. A trial in federal court in Newark, New Jersey, resulted in a jury verdict against PriceWaterhouseCoopers and the estate of Arnold Chait, Ambassador's former president.

The U.S. Court of Appeals for the Third Circuit upheld the 2005 verdict and PriceWaterhouseCooper's obligation to pay all of the resultant damages, and confirmed judgment for the full \$182.9 million. Paulette J. Thabault, commissioner of the Vermont Department of Banking, Insurance, Securities and Health Care Administration said she considers the outcome another success for state-based regulation of insurance companies, noting that Ambassador policyholders and claimants will finally have the opportunity to receive the insurance proceeds they were due under Ambassador insurance policies as a result of these proceedings. Commissioner Thabault had this to say:

*As a department, we're committed to protecting the interests of policyholders, and pleased that the years of work in connection with these receivership proceedings should allow us to make full payment to all policyholders.*

With all the turmoil in the insurance industry, it's good to see a State Insurance Commissioner being aggressive in the regulatory field.

Source: *Insurance Journal*

#### **JUDGE REDUCES MEDTRONIC'S \$250 MILLION AWARD TO \$19 MILLION**

The import of the two words "inequitable conduct" are well-known

to patent owners. These words will cost Medtronic nearly \$170 million in damages that the medical device company won earlier this year in an infringement trial against Boston Scientific. Judge T. John Ward found that a key Medtronic patent agent, James Crittenden, withheld relevant information from the U.S. Patent and Trademark Office (PTO) when Medtronic sought two patents on catheters that could deliver drug-coated stents to cardiac patients. Among the omitted material was information on Medtronic's own prior inventions.

Crittenden, who is not a lawyer, suffered a seizure in 1999 and claimed during sworn testimony that he has memory problems as a result. A jury initially awarded Medtronic \$250 million after finding that Boston Scientific infringed three stent-related patents. While Boston Scientific has now been able to reduce that award down to \$19 million, the company still plans to appeal the jury's finding of infringement. Medtronic plans to appeal Judge Ward's ruling on the damages issue. Boston Scientific argued that the information Crittenden withheld was not relevant, and that he did not intentionally deceive the PTO. But Judge Ward disagreed, stating in his order that: "Crittenden, at best, chose to remain deliberately ignorant as to the scope of the prior inventions."

As reported by the *Wall Street Journal* notes, Boston Scientific and Medtronic are engaged in "a death match" over who will dominate the stent market. Boston Scientific is involved in at least 15 lawsuits. Medtronic's new Endeavor stent, with quarterly sales of more than \$80 million, is already being challenged in federal court in Delaware. All of this comes amid increasing doubts about the effectiveness of stents, according to the WSJ Health Blog. Also, a recent study found surgery worked better than stents for patients with especially dangerous artery blockages.

Source: *The American Lawyer*

#### **UNITED RENTALS SETTLES THREE CLASS ACTION SUITS**

United Rentals Inc., the largest U.S. construction-equipment rental company, has settled three class action lawsuits for \$27.5 million. The company's insurance carriers will pay some settlement and defense costs. The lawsuits were filed following an accounting probe by the Securities and Exchange Commission announced in 2004. That investigation is still ongoing and United Rentals says it will enter settlement talks with the SEC. Those involved in the lawsuits are investors who bought United Rentals securities from February 28, 2001, to August 30, 2004.

Source: *TheStar.com*

## **XII. INSURANCE AND FINANCE UPDATE**

### **RESPONDING TO THE ABUSE OF ELDERLY INVESTORS**

Jay Aughtman, a lawyer in our firm whose specialty deals with insurance and financial litigation, wrote an article recently dealing with annuities. He has condensed it for this issue of the Report. If you would like to have a copy of the complete article, which appeared in the Fall 2008 issue of the American Bar Association Life Insurance Law Committee Newsletter, let Jay know. This is the condensed version:

*An annuity is a contract between an investor and an issuer whereby the investor agrees to give the issuer principal and, in return, the issuer guarantees the investor fixed or variable payments over time. While annuities are not insurance policies, they are typically issued by insurance companies. An annuity is similar to a retirement plan in that one can fund it in a lump sum or a little at a time, and all capital in an annuity grows and usually compounds tax-deferred until one*

begins making withdrawals. Unlike retirement plans, however, there is no limit as to how much one can invest in annuities. Annuities are marketed as instruments to protect investors' principal. With a frequency that is disturbing, annuities are being used as instruments to defraud investors. Rather than protecting the principal of investors, the complexity of annuity provisions has been used to fleece people of their savings, especially those of senior citizens. In response, plaintiffs firms started class actions across the nation.

While the selling of unsuitable annuities is harmful to all consumers, seniors remain by far the most vulnerable. According to Consumer Action, a consumer advocacy group, people 60 and older make up 15% of the U.S. population, but they account for about 30% of fraud victims. There are many reasons for this statistic, especially as it relates to annuities. First, annuities, by their very nature, are complex. Second, many seniors, because of their age, often have diminished capacity to understand complex investment transactions. Many also have a heightened fear of outliving their assets. After a lifetime of saving money to retire, seniors harbor serious concerns about risky investments and worry about being a burden to their families or left alone in a nursing home. As such, seniors who may have no real familiarity with financial planning can be easy prey for unscrupulous insurance companies and are lulled into a false sense of security by their sales agents. Unfortunately, most seniors do not discover the fraud until it is too late.

One channel of annuity sales that has become quite common is the use of commercial banks as independent distribution channels. Banks have become one of the

leading marketers of deferred annuities, which are only regulated by state insurance departments. Because any bank employee, loan officer, or customer service representative can obtain a state insurance license by passing the state-required examination, insurance companies across the country have negotiated contracts with many of the larger and mid-sized commercial banks for selling these products. Banks have a captive clientele for which they can monitor account balances, certificates of deposit renewals, and other forms of cash transactions. Such customers can be easy prey for "friendly" bankers.

Commercial banks have become more aggressive in proactively seeking out their own customers for deferred annuity sales. Often, bank employees selling annuities have not received significant training from the insurance company underwriting the product. Consumers should be cautious in purchasing as complicated a product as an annuity from anyone who is not duly qualified and trained in all aspects of the instrument.

Some insurers have been sued regarding the bonus feature marketing in some deferred annuity products. *AIG, Lincoln National, and John Hancock* were all named as defendants in separate lawsuits in various jurisdictions for fraudulently representing first-year bonus products as guaranteeing the bonus permanently in the contract. The claims in those cases also allege the insurers had breached the annuity contracts by the fact they failed to disclose that they recapture the first-year bonus through secret fees or charges and interest rate spreads in years two through six of the contract.

Insurance companies are aware that deceptive marketing and

sales practices to induce seniors to purchase unsuitable deferred annuities are being employed by numerous sales agents throughout the nation. Indeed, many of the most powerful insurance companies actually sponsor or provide funding for training seminars that explicitly teach sales agents how to target seniors. In these seminars the agents are taught to discover if the seniors have assets that can be used to purchase an annuity product and how to convince the senior to purchase an annuity. Perhaps most telling, however, is that these companies encourage agents to sell unsuitable annuities to seniors by offering enormous sales incentives, commissions, and other promotions to maintain or increase market share from the sale of deferred annuities.

Most insurance companies completely ignore statutory requirements that agents must provide documentation that they have reviewed and verified the suitability of their deferred annuity products for the seniors who purchased the product. And due diligence by the agent to prevent misleading or incomplete sales presentations is absent.

Litigation concerning annuities continues to grow in the United States. The issues and related causes of action concerning annuity investments will continue as long as insurance companies and their agents target society's most vulnerable citizens. If you want more information relating to annuities litigation contact Jay Aughtman at 800-898-2034 or by email at [Jay.Aughtman@BeasleyAllen.com](mailto:Jay.Aughtman@BeasleyAllen.com).

#### **STATE FARM ORDERED TO REFUND \$120 MILLION IN FLORIDA**

The State of Florida has ordered State Farm Florida to issue refunds totaling \$120 million dollars to 100,000 current and former policyholders. In addition

to ordering the credits or refunds to customer accounts, State Insurance Commissioner Kevin McCarty demanded that State Farm Florida pay a \$1 million penalty to the state. The average payout per policyholder is \$1,225. This affects 98,000 customers who carried hurricane coverage and were not notified about or failed to receive discounts for making their homes more resistant to wind damage. To receive the refund they don't need to be current customers of State Farm Florida. A State Farm spokesman says the company discovered the problem, reported it to state regulators and agreed to the refunds and the credits. Nevertheless, this appears to be a victory for customers of the insurance giant and is good news.

Source: First Coast News

#### **INSURER NOT LIABLE FOR KATRINA LUMBER LOSS**

A federal appeals court says an insurer was not responsible for a loss of tons of lumber in Hurricane Katrina. Great Southern Wood Preserving Inc., whose YellaWood is promoted in television commercials by Jimmy Rane, better known as "Yella Fella," had two shiploads of lumber delivered to Gulfport, Mississippi, in August 2005. The wood was off-loaded and stored in a port warehouse for delivery to treatment facilities when the storm hit. Great Southern suffered a huge financial loss and filed suit against American Home Assurance Co. The insurer refused to pay the claim, saying the lumber was not "in transit" within the meaning of the insurance contract. The lower court ruled in favor of the insurance company. Great Southern appealed and the U.S. Court of Appeals for the Eleventh Circuit panel affirmed the ruling.

Source: Associated Press

## XIII. PREDATORY LENDING

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#### **BEAR STEARNS AGREES TO SETTLE CIVIL CHARGES**

The former Bear Stearns Co., absorbed by J.P. Morgan Chase & Co. following its Bear Stearns' near-collapse this year, has agreed to pay \$28 million to redress consumers who were harmed by the company's illegal home-mortgage loan practices. Under the settlement announced by the Federal Trade Commission, Bear Stearns and its mortgage unit, EMC Mortgage Corp., must establish and maintain a consumer-loan data-integrity program and bring in an independent agency to oversee the accuracy of the company's consumer-loan information every two years for the next eight years.

The action stems from the FTC's investigation into subprime-loan practices. The civil charges, filed in a Texas-based U.S. District Court, allege that during the mortgage boom, the company misrepresented the amounts borrowers owed on their loans, wrongfully charged extra fees for things such as property inspection, and also engaged in abusive collection practices. Lydia B. Parnes, director of the FTC's Bureau of Consumer Protection, observed: "Consumers have the right to expect accuracy from the company that collects their mortgage payments."

The FTC alleges that Bear Stearns employees made harassing phone calls to collect on debt, reported information about defaults to credit agencies and then failed to inform those credit agencies when customers disputed the claims. As you will recall, the subprime-mortgage housing crisis left Bear Stearns on the brink of collapse earlier this year as banks increasingly refused to do business with the firm. In March, J.P. Morgan Chase agreed to acquire the troubled firm for a fraction of its worth, with the Federal Reserve providing \$30 billion in funding. That acquisition was completed in May.

Source: Wall Street Journal

#### **CITIBANK TO PAY \$18 MILLION TO SETTLE CALIFORNIA CLAIMS**

Citibank Inc. will pay refunds and damages totaling \$18 million to settle charges that the financial services company emptied the dormant accounts of credit card customers. A three-year investigation concluded that Citibank used an "account sweeping" program between 1992 and 2003 that quietly shifted accrued money in the accounts of 53,000 cardholders to a company-controlled fund. Citibank's customers, who may have run a positive balance by returning a purchase for credit or accidentally making two payments, weren't told about the sweeps. Under terms of the settlement, Citibank agreed to return \$14 million to customers, who will receive a combined \$1.6 million plus 10% interest. Citibank will also pay the State of California \$3.5 million in damages and civil penalties. Attorney General Jerry Brown, in a prepared statement, observed: "The company knowingly stole from its customers, mostly poor people and the recently deceased."

A Citibank employee, Albert Mellon, discovered the account sweeps in 2001 and, after questioning the practice with his superiors and company auditors, was later fired, according to the Attorney General's office. In 2005, Mr. Mellon brought a whistleblower complaint against New York City-based Citibank to the state Department of Justice. The settlement requires Citibank to pay Mellon \$300,000. Dana Simas, a spokeswoman for the Attorney General stated: "Citibank had pretty much blackballed [Mellon] from the industry. When he came to our office, he was waiting tables."

In documents filed with the Sacramento County Superior Court in 2006, another Citibank employee—which a judge deemed credible—said in a declaration that a department head ordered him not to tell company lawyers about the account sweeps because, "**Stealing from our customers is a business decision, not a legal decision.**" (Emphasis added.) The Attorney General's office pursued Citibank for violations

under the California False Claims Act for three years. As you may already know, California has a very strong law that deals with this sort of fraud and it's very much consumer friendly. Alabama legislators should take a look at this law.

Source: *The Recorder*

#### **INDIANA SUES COUNTRYWIDE OVER LENDING PRACTICES**

Several weeks ago, Indiana sued Countrywide Financial Corp., thus becoming the latest state to take the mortgage lender to court over its lending practices. Indiana Attorney General Steve Carter said in a news release that a state investigation had uncovered a "pattern of misleading and questionable practices" by Countrywide Home Loans Inc. and its parent company. The investigation found that "homeowners were misled when they were told one thing about their loans while signing contracts that indicated other terms."

The suit alleges that Countrywide misrepresented or omitted terms on interest rates, the workings of adjustable rate loans and the loans' costs. It also alleges that borrowers were misled about prepayment penalties and that some borrowers' incomes were inflated on applications so that they would qualify for loans. The lawsuit asks the court to void the prepayment penalties and any part of the loans resulting from alleged deceptive acts. Attorneys General in California, Connecticut, Florida and Illinois also have sued the lender, which faces numerous other lawsuits related to its lending practices. As previously reported, Countrywide's shareholders approved a takeover by Charlotte, North Carolina-based Bank of America in June.

Source: *Associated Press*

#### **WOMAN ACCUSES MORTGAGE COMPANIES OF PREDATORY LENDING**

A Texas woman recently filed suit in federal court against Alpha Mortgage

USA, Inc., and American Home Mortgage Servicing, Inc., alleging she was targeted for a loan with onerous terms because she is African-American. Nanette Lewis refinanced her mortgage with Alpha Mortgage USA, the original lender, to get peace of mind. Instead, Ms. Lewis said that she received a bait-and-switch predatory loan accompanied with heartbreak.

Ms. Lewis' suit mirrors another suit filed by the City of Baltimore, and another by the Attorney General of Massachusetts. All three of the suits accuse the lenders of reverse-redlining, which is the act of targeting minority loan applicants for the worst possible mortgage deals. Instead of the loan she was promised, the mortgage was for more than \$175,000 on a home valued around \$156,000. Additionally, included was more than 10%, or \$17,654, in points and fees. When asked about the last-minute changes, loan officers told Ms. Lewis that they would just refinance her loan again in a few years and that she would be fine.

After Ms. Lewis was laid off from her job, she started to fear that she might miss a mortgage payment. As a result, Ms. Lewis went to see a lawyer with Lone Star Legal Aid to see how she could keep her home safe. It was the lawyer at Lone Star Legal Aid who discovered that the terms of her mortgage violated the federal Home Ownership and Equity Protection Act, which bars lenders from excessive points and fees as well as from certain changes in loan terms at closing. Ms. Lewis says she would have had no idea that her loan was questionable had she not seen a lawyer. It's believed that this is the first lawsuit of its kind in Texas. I included this story because I fear it's typical of how the sub-prime lenders have been operating in their dealings with low-income citizens.

Source: *Houston Chronicle*

## **XIV. PREMISES LIABILITY UPDATE**

#### **JURY FINDS SAN DIEGO GAS & ELECTRIC AT FAULT IN HELICOPTER CRASH**

A jury has found San Diego Gas & Electric negligent in the deaths of four Marines who were killed when their helicopter hit an unlit utility tower on Camp Pendleton in 2004. Jurors awarded more than \$15 million in economic damages in the wrongful-death lawsuit brought by the families of the Marines. The jury found the utility failed to install safety lights to prevent accidents and that two of SDG&E's representatives acted with malice by not ordering the installation of lights or markers on the tower. The parents of all four Marines should receive \$2.125 million each in damages in the wrongful-death case. Jurors also found the wife of one the Marines, 1<sup>st</sup> Lt. Michael S. Lawlor, was entitled to \$6.7 million. The accident occurred in January of 2004, when two helicopter crews were practicing nighttime maneuvers. The crews were using night-vision goggles. The four Marines were killed when one helicopter struck the 135-foot utility tower.

During the trial, lawyers for the families told jurors the accident would not have happened if lights or other markers had been installed on the tower. They said the utility company was negligent for operating under a policy where lights were only used on structures 200-feet or higher, even though company officials knew most collisions occurred at lower altitudes. SDG&E blamed everybody but itself in this case. Lawyers for SDG&E argued the crash was a result of pilot error, not the company's negligence. They told the jurors that Marines involved in the training knew the area and had been briefed about the power lines. One SDG&E lawyer contended the Marine Corps bore the blame because it was obligated to notify the utility of any hazardous obstacles. Jurors didn't buy any of this and awarded \$10.1 million

in punitive damages against SDG&E to each family in the second phase of the trial. This brought the total jury verdict in this important case to \$55.6 million.

Source: *Associated Press*

#### **SETTLEMENT REACHED IN ANOTHER TRAGIC POOL DRAIN CASE**

A golf club in Minneapolis has reached an \$8 million settlement with the family of a six-year-old girl who died after being injured in an incident at the club's swimming pool. The suction of the pool drain was the culprit. Abigail Taylor, who died in March at Nebraska Medical Center in Omaha where she had undergone triple organ transplant surgery, was injured last summer. All she did was sit on the drain of a wading pool at the Minneapolis Golf Club and the drain's powerful suction ripped out part of her intestinal tract. After Abigail died, her family was instrumental in persuading Congress and the Minnesota Legislature to pass safety laws that require entrapment-proof drain covers for new public pools. No public swimming pool owner has any excuse for not taking immediate action to do away with these known hazards.

Source: *Associated Press*

#### **LAST OF THE DEFENDANTS SETTLES RHODE ISLAND NIGHTCLUB FIRE LAWSUITS**

The final Defendants to settle lawsuits over a 2003 nightclub fire that killed 100 people have agreed to pay survivors and victims' relatives more than \$250,000. Seven insurance companies and the former owner of The Station nightclub in West Warwick, Rhode Island reached the settlement. The insurance companies will pay out \$262,500, and Howard Julian, accused of installing defective insulation material at the nightclub, will contribute \$3,000. As reported previously, more than \$176 million has been offered by the dozens of people and companies sued after the 2003 fire, which began when a pyrotechnics display from the 1980s rock band Great White set ablaze

cheap packaging foam used as sound-proofing around the stage.

All the settlements must be approved by the more than 300 Plaintiffs and the federal judge overseeing the case, among other conditions. A Duke University law professor has been appointed to develop a formula for how much money each of the Plaintiffs should receive. Several of the insurance companies involved in this last settlement were accused in the lawsuits of failing to thoroughly inspect the club for safety hazards before issuing insurance policies to its owners. Victims' lawyers and prosecutors have said the club was cluttered with building and fire code violations.

The Defendants include Essex Insurance Co.; Underwriter's at Lloyd's, London; Surplex Underwriters Inc.; V.B. Gifford & Company Inc.; Gresham & Associates of R.I. Inc.; Gresham & Associates of Rhode Island Inc.; and Anchor Solutions Company Inc. They were the last Defendants to settle, excluding those already dropped from the case or expected to be dismissed by the victims' lawyers. A judge had earlier dismissed the companies from the case, saying the companies did not owe any burden to the club's patrons. The victims' lawyers appealed that decision. The companies agreed to settle the matter while the appeal was pending.

Source: *Associated Press*

#### **RESIDENTS APPROVE \$6.6 MILLION PAINT FACTORY EXPLOSION SETTLEMENT**

Property owners in Danvers, Massachusetts, have approved the \$6.6 million settlement offer by the co-owners of a paint factory that exploded in 2006, causing major damage to their neighborhood. The settlement, overwhelmingly approved at a meeting of members of a neighborhood trust, would pay \$1.4 million to about 100 property owners and \$5.2 million to insurance carriers, who have paid out more than \$20 million in claims since the November 2006 blast. Jan Schlichtmann, a lawyer from Boston, Massachusetts, represented the trust. You may recall Jan from his case which was

made into a movie. If the proposal by factory co-owners CAI Inc. of Georgetown and Arnel Co. of Danvers also is approved by a probate court, a review panel will be established to divide the money. The pre-dawn blast registered 0.5 on the Richter scale and damaged 270 local homes and businesses. The blast was caused by a buildup of combustible gases that ignited. Amazingly, no one was killed or seriously injured, which is a miracle.

Source: *Insurance Journal*

#### **SIX FLAGS SUES RIDE MAKER OVER KENTUCKY INJURY ACCIDENT**

We have written extensively about the incident at Six Flags Kentucky Kingdom where a ride malfunction severed a teenage girl's feet. The owner of that amusement park has now filed suit against the manufacturer of the thrill ride. The suit claims the manufacturer, Intamin, should be held responsible for Kaitlin Lassiter's injuries. As you may recall, the teenager was among those riding the Superman Tower of Power in 2007 when a cable snapped. The resulting accident severed both of Kaitlin's feet. Doctors were able to reattach her right foot, but not her left one. She had to have some of her left leg amputated and had several subsequent surgeries.

The girl's family sued the park, claiming owners failed to maintain the ride and equipment and ensure riders' safety. Kentucky Kingdom denied liability. A trial is scheduled for January 5, 2010. In the lawsuit the park filed against three companies, Kentucky Kingdom claims the ride maker and those responsible for sending cable that was not correct are liable for "all or part of the injuries." It will be most interesting to see how all of this works out. This is another example of the consequences of no regulation of an industry.

Source: *Insurance Journal*

## **WOMAN WHO WAS RAPED AT AN APARTMENT SETTLES HER CLAIM**

A woman in New York, who was raped by a man who entered her apartment building through doors that were supposed to be locked, has received a \$1 million settlement. The woman contended that the doors were broken and open during the day of the assault and that the superintendent repeatedly failed to close the building's rear door. The Defense lawyers contended that the woman's assailant was a stalker and that, as such, locks would not have prevented the incident. The Defense also claimed the doors and locks worked properly. Nevertheless, the Defendant settled the case.

Source: Associated Press

## **\$14.9 MILLION JURY AWARD IN WELL EXPLOSION UPHELD**

A jury's award of \$14.9 million to the family of a man killed in a fiery explosion after he backed his vehicle into a gas well near Farmington, New Mexico has been upheld by the New Mexico Court of Appeals. The court rejected arguments by Energen Resources Corp. that the jury's award was excessive and therefore unconstitutional. The Santa Fe jury determined after a trial in 2006 that the oil and gas company was negligent and its conduct reckless in the death of John Everett Stapleton. Stapleton, who was 19 years of age, died on July 21, 2002, in an area popular with young people and off-road enthusiasts when he backed his car into an unfenced, unprotected natural gas wellhead. The wellhead exploded, and he burned to death. His family was awarded \$1.92 million in compensatory damages and \$13 million in punitive damages.

A three-judge panel of the appeals court said Energen's conduct was sufficiently reckless to support a substantial award of punitive damages. The court said Energen "knew that there was a hazard of someone colliding with the wellhead, knew that if that happened serious bodily harm or death could result, knew that the well site was in a

highly-traveled area, knew that erecting a barricade or fence would prevent the hazard, and still chose not to barricade the well site." From the time the company acquired the well—along with about 1,000 others in the San Juan Basin—in 1997 until the accident in 2002, it took no action to protect the wellheads, showing a reckless disregard for the safety of the public, the judges said. Punitive damages of \$13 million "are appropriate to achieve the dual goals of punishment and deterrence in this case," Judge Michael Vigil wrote in the opinion. The family of a second person killed in the accident, Cody Amezcua, 20, of Farmington, settled its lawsuit against Energen before trial for an undisclosed amount.

Source: Associated Press

## **PROPANE GAS EXPLOSION**

The U.S. Chemical Safety Board is blaming a fatal explosion at a West Virginia convenience store on a propane tank being located too close to the store building. Four people were killed and 6 more injured in the blast that happened in 2007. The investigators also found that there was too little training for the propane company's technicians and for emergency crews. The board's preliminary report says the 500-gallon tank was located next to the back wall of the store which violated the 10-foot rule. The escaping gas filled the store before exploding.

Source: Associated Press

## **XV. WORKPLACE HAZARDS**

### **ALABAMA JUDGE SAYS BENEFITS FOR SOME INJURED WORKERS TOO LOW**

A veteran and well-respected judge in Jefferson County has called on Alabama legislators to increase compensation for some workers severely injured on the job. Circuit Judge Scott Vowell says a benefits cap set 23 years ago "guarantees

poverty for them and their families." Alabama employees with permanent partial disabilities—serious on-the-job injuries that still allow the person to work after recovery—can receive pay of \$220 a week for up to 5 years, depending on the level of disability. But it's clear that \$220 now buys half of what it did when the benefits cap was set in 1985. It's inadequate, Judge Vowell wrote in a pretrial ruling in a lawsuit filed by an employee of Birmingham's Mid-South Control Systems. Judge Vowell wrote in his order:

*The trial courts see these workers leave our courtrooms week after week, without the ability to support themselves or their families. They leave our courthouses with relatively small 'lump sum' checks in their pockets. After that is spent for their necessities, who knows or cares what becomes of them?*

The claims for permanent partial disability benefits should definitely be increased. Lawrence King, who represents the employee in this case, had this to say:

*The \$220-a-week cap is half of the federal minimum wage and below the federal poverty level. It means prolonged starvation. And while they are not totally disabled, realistically their employment opportunities are none.*

The disability benefit under Alabama law hasn't increased since 1985, even though costs for food, housing, gasoline, transportation and other necessities doubled in that period. In contrast, an employee whose on-the-job injury results in temporary or permanent total disability can receive benefits equal to two-thirds of the average weekly wage in Alabama. That payment, now about \$455 a week, increases every year as the general wage index rises. Several attempts have been made in the Alabama Legislature to change the \$220 cap. The latest, introduced during the 2008 legislative session, called for linking benefits for permanent partial disabilities to the average-wage index.

All of the attempts thus far have failed.

I agree with Judge Vowell that the 23-year-old benefits cap “desperately” needs to be changed. The judge hit the nail on the head when he wrote:

*These injured workers have no effective lobbying group to speak for them. Perhaps if the public were made more aware of the unfairness of the present system, reform could be accomplished.*

A number of lawyers who represent employees in workers' compensation litigation along with the Alabama Labor Council have tried to lobby the legislators for changes in the laws, but they are no match for the Business Council of Alabama and others who oppose them. Hopefully, that will soon change and improvements in the current laws can be brought about.

Source: Birmingham News

#### **GEORGIA PLANT CITED FOR SAFETY VIOLATIONS**

The federal Occupational Safety and Health Administration has cited an Athens, Georgia manufacturing plant for 32 alleged safety violations and proposed \$137,000 in fines. OSHA, in citing Overhead Door Corp.'s Athens plant, says that in recent inspections it found machines operating without proper guards and a lack of switches that keep machinery from being turned on by accident. OSHA said employees at the plant were exposed to various hazards. It also found problems with the company's hazard alert system and the way the company stored flammable materials. Overhead Door is a manufacturer of garage doors. The company is based in Dallas, Texas.

Source: Insurance Journal

#### **OSHA PROPOSES FINE FOR AN ALABAMA COMPANY**

The Occupational Safety and Health Administration has proposed \$138,500 in penalties for a company located in Cullman, Alabama for 31 safety and health violations. AAR Summa Technol-

ogy, which fabricates metal container pallets for the U.S. military, has been singled out by the agency for 26 safety violations. OSHA said its inspectors found reactive chemicals, cryogenic tanks exposed to damage and the improper storage and handling of flammable liquids. Subsequent inspections found five serious health violations that included over-exposure to silica and zinc oxide fumes, and exposure to blood-borne pathogens.

Source: Associated Press

#### **ALABAMA-BASED SLOSS INDUSTRIES CITED FOR SAFETY VIOLATIONS**

Birmingham, Alabama-based Sloss Industries incurred \$182,500 in proposed penalties for exposing workers to safety hazards at its fiber divisions manufacturing plant. The Occupational Safety and Health Administration proposed the penalty. OSHA inspectors cited the company for four safety violations. The investigation was started after Sloss Industries failed to fix previous violations that would prevent unintended machine startup. Inspectors also cited the company for exposing employees to electrical hazards. Sloss operates the world's largest slag wool plant.

Source: Insurance Journal

#### **PROSECUTORS ASKED TO CONSIDER CHARGES IN UTAH MINE COLLAPSE**

Federal mining officials have asked prosecutors to decide whether criminal charges are warranted in the deaths of nine people in last year's collapse of the Crandall Canyon mine in Utah. The Mine Safety and Health Administration has been investigating two cave-ins in August 2007 at Crandall Canyon that killed six miners and three rescuers. MSHA already has fined Genwal Resources Inc., a subsidiary of Ohio-based Murray Energy Corp., \$1.34 million for alleged violations that directly contributed to the deaths of six miners. Agapito Associates Inc., a Grand Junction, Colo., mining engineering consultant, was fined \$220,000 for

an allegedly faulty analysis of the mine's design. These were the largest fines ever imposed on a U.S. coal mining operation. Six miners were trapped on August 6<sup>th</sup> in a cave-in and remain entombed more than 1,500 feet below ground. Three rescuers, including a government mine safety inspector, were killed in a second collapse on August 16<sup>th</sup> while trying to tunnel to the men. Richard E. Stickler, acting assistant secretary of labor for MSHA stated:

*Through its investigation of the tragic accidents last year at Crandall Canyon, MSHA determined that the operator and its engineering consultants demonstrated reckless disregard for safety. MSHA has referred this case for possible criminal charges.*

The U.S. Attorney in Utah has requested that the Labor Department, which oversees MSHA, halt its civil proceedings dealing with Crandall Canyon until its investigation is complete. A judge with the federal Mine Safety and Health Review Commission—which handles all MSHA citations, fines and cases—has yet to rule on the request. MSHA has said the mine was “destined to fail” because the mining company made critical miscalculations and didn't report early warning signs. In addition, MSHA itself was faulted by its parent agency, both for lax oversight before the collapse and for its handling of the fatal rescue effort.

In May, Rep. George Miller (D-CA), the chairman of the House Education and Labor Committee, made a criminal referral to the Justice Department on the Crandall Canyon disaster. Information from both Miller's committee and MSHA's report on the twin collapses will factor into decisions about possible criminal prosecution. Utah American Energy Inc., a subsidiary of Murray Energy, owns the mine.

Source: CNN and Associated Press

#### **THE BP PLANT EXPLOSION STATE LAWSUITS ARE OVER**

Victims of the explosion at the BP

PLC refinery in Texas have settled all but one of the more than 4,000 lawsuits that were filed in state court after the blast. Four of the five remaining lawsuits arising out of the March 2005 explosion that killed 15 people and injured more than 170 were settled. The one remaining case in state court was dismissed by the court, but there is another lawsuit pending in federal court. The terms of these last settlements are confidential. As previously reported, the explosion occurred after a blowdown drum was overfilled with highly flammable liquid hydrocarbons. They ignited at the startup of the isomerization unit—a device that boosts the octane in gasoline. Alarms and gauges that were supposed to warn of the overfilled equipment did not work properly. This has been a long fight for the victims of BP's wrongdoing. Hopefully, all of the litigation and related matters will soon be over.

Source: *Associated Press*

#### **OSHA CITES CONTRACTORS IN DEADLY NEW YORK CRANE COLLAPSE**

A federal agency levied fines totaling \$313,500 against three construction firms last month for safety violations that led to a tower crane collapse that killed seven people in March. The citations by the Occupational Safety and Health Administration named Reliance Contractors Group, the general contractor; Rapetti Rigging Services Inc., of Massapequa Park, New York, the crane erector; and Joy Contractors Inc., of Elizabeth, New Jersey, the concrete subcontractor on the project. The charges ranged from failure to properly train employees about job site hazards to allowing fire, falling and other hazards to exist. OSHA said Rapetti had failed to comply with the crane manufacturer's specifications when erecting and raising the steel tower and to provide for protection against workers falling. One of its employees was killed.

The 19-story tower crane broke away from a luxury apartment building under construction and fell like a tree across other buildings as far as a block away. A brownstone town house was

demolished, and some area residents later said they had been fearful that the crane was unstable. A city construction site inspector was later charged with falsely claiming he had inspected the crane 11 days before the mishap. Richard Mendelson, area director of the OSHA, said in a statement that "ultimately, the crane collapse was a failure to follow basic but essential construction safety processes."

The midtown Manhattan incident was one in a wave of fatal construction mishaps in the city dating to last year. On May 30<sup>th</sup>, another tower crane broke apart and fell on an apartment building, killing two workers. Other crane operations were suspended temporarily. "This case illustrates in stark terms that failure to follow required procedures can have wide-ranging and catastrophic consequences," according to Edwin G. Foulke Jr., Assistant Secretary of Labor for Occupational Safety and Health.

According to OSHA, Reliance Construction Group was issued 11 citations totaling \$19,500 in proposed penalties, Rapetti Rigging was issued three citations with penalties totaling \$220,000, and Joy Contractor was issued one repeat and 14 serious citations worth \$74,000. Rapetti was cited for improperly using slings recommended by the crane's manufacturer to stabilize the crane.

Source: *Insurance Journal*

#### **FORMER SHIPYARD WORKER WINS HIS MESOTHELIOMA TRIAL**

A former shipyard worker received a \$4.39 million jury verdict last month from an Illinois maker of asbestos-related parts that he contended gave him a terminal form of cancer. John O. Koonce, 59, a former worker at Norfolk Shipbuilding and Drydock Corp., was awarded \$4 million in compensatory damages and \$390,000 in medical expenses from John Crane Inc., a Morton Grove, Illinois-based company. The verdict came after a two-and-a-half week jury trial and a day of deliberations. Koonce, a resident of Norfolk, who was diagnosed with mesothelioma in

2006, worked with John Crane gaskets, packing material and other asbestos parts between 1967 and 1971 while repairing ships at the Norfolk dockyard. Koonce then went off to other jobs, including working for many years in operations at *The Virginian-Pilot*.

Since being diagnosed, Koonce had a lung removed, and suffers severe fatigue. He can't travel or help his neighbors as he once could. His cancer is in remission, but doctors say he is likely to die a painful death from the disease. Another company that Koonce sued, Garlock Sealing Technologies, settled its portion of the case out of court. The jurors had the chance to reduce the verdict against John Crane by what Garlock would have had to pay had that case gone forward. But it decided not to do so. The suit claimed John Crane knew or should have known that breathing asbestos fibers was dangerous, and was negligent in failing to test its products and warn workers. Bobby Hatten, who is with the firm of Patten, Wornom, Hatten & Diamondstein located in Newport News, Virginia, represented the Plaintiff.

Source: *Daily Press*

#### **FASTENAL CO. SETTLES CLASS ACTION LAWSUIT**

Fastenal Co. will pay \$10 million in a class action settlement to former employees who sued the company last year for unpaid overtime wages and work-break pay. It's unclear how many people will be paid as a result of the settlement, but according to estimates by a lawyer for the Plaintiffs more than 2,000 current and former employees of the Winona, Minnesota-based industrial supplies seller may be entitled to back pay from as far back as 2003. Two former assistant general managers of Fastenal stores in California and Pennsylvania filed the lawsuit last October in a federal court in California. Their classifications exempted them from state and federal overtime laws, but they claimed their actual, non-managerial work duties entitled them to overtime pay.

Source: *Law.com*

## XVI. TRANSPORTATION

### *LITIGATION INVOLVING AIRCRAFT CRASHES*

Our firm is almost always handling at least one case involving an aircraft crash. We have handled cases against Defendants who seek immunity as government contractors; cases against pilots who were at fault; cases for passengers involved in major airline crashes; and cases against corporations that manufactured parts of an airplane that failed during the operation of the flight. These cases can be challenging and require expertise in this specialized area of litigation.

Many of these product manufacturers hide behind GARA, the General Aviation Revitalization Act of 1994, wrongly implemented during the Clinton administration. GARA is a statute of repose designed to protect manufacturers of private aircraft from liability for accidents involving older airplanes and/or parts. Basically, GARA bars lawsuits against the manufacturer of an aircraft or component part once that product has been in service for 18 years. While GARA has provided significant liability coverage to manufacturers, there have been some limited successes in narrowing the scope of GARA. One way that a Plaintiff can avoid GARA's harsh result is to prove that a product manufacturer committed fraud.

For example, in one of the cases that we handled, we claimed and proved that the manufacturer of a component part knowingly misrepresented a material fact to the Federal Aviation Administration (FAA). Specifically, the manufacturer told the FAA that an oil tank was fireproof, when in fact it was merely fire resistant. Due to the location of the oil tank near potentially hot exhaust from a turbocharged engine, the manufacturer knew that the oil tank must be fireproof. However, in order to cut costs, the manufacturer chose to use an aluminum oil tank that had undergone a chemical process that made it fire resistant. Due to the

company's greedy decision, our clients died in a crash after the oil within the fire-resistant oil tank was ignited by extreme heat from the turbocharged engine.

Plane crash lawsuits often present more obstacles than other product liability lawsuits because of regulatory agencies and specific laws designed to protect manufacturers. Unfortunately, regulation and enforcement of maintenance and certification procedures are not nearly as rigorous for private aircraft. Additionally, identifying the possible causes of the plane crash can prove challenging. Private aircraft do not have "black boxes", which commercial planes do. Fortunately, after every civil aviation crash in the United States, the National Transportation Safety Board (NTSB) assigns a team to determine the cause of the crash.

The NTSB will usually do a thorough investigation. However, a lawyer for a plane crash victim should not rely upon the NTSB for any ultimate conclusions. For instance, we often discover the identity of witnesses who were not a part of the NTSB investigation. Further, much of the investigation material supplied by the NTSB to counsel is edited, which makes the NTSB investigation essentially ineffective for civil litigation. However, the NTSB is very good at maintaining evidence and capturing bits and pieces of evidence that can later be evaluated by aircraft experts hired by the parties. In the aircraft cases that we have filed, we have been able to determine the causes of the crashes. If you want additional information relating to aircraft litigation contact Cole Portis, Greg Allen or Ben Baker at 800-898-2034.

### ***MORE AIRLINES FAIL TO COMPLY WITH SAFETY MANDATES***

Federal aviation regulators have discovered 17 new cases of airlines failing to comply with critical safety mandates. This came from a review prompted by revelations this year of widespread maintenance violations. The Federal Aviation Administration is now reviewing whether to take

enforcement action in the cases, which involve 11 unnamed carriers. According to the FAA, the violations did not create a risk to airline passengers. The agency has conducted 5,618 audits of compliance at large and small airlines across the country and says it found 2% of cases involved violations.

The FAA airline reviews were begun in the spring after whistle-blowers revealed that FAA managers had allowed Southwest Airlines to fly 46 jets for months in violation of federal law. The FAA had mandated that the Boeing 737s be inspected for cracks in the skin that had previously caused accidents, but the inspections were not done even after the airline had discovered the problem and reported it to the FAA.

FAA officials released results from a second phase of audits in a news conference. However, officials did not release specifics about the 17 violations, saying the cases were under review for possible enforcement actions. Jim Ballough, who heads the FAA flight standards division, said the violations included cases in which wiring was not properly covered to protect against short circuits. The audit was an attempt to determine how well airlines had complied with so-called Airworthiness Directives. These mandatory maintenance actions are issued after accidents or incidents reveal critical problems with wiring or mechanical systems on aircraft.

*Source: USA Today*

### ***A REPORT ON DRUNKEN-DRIVING DEATHS NATIONALLY FOR 2007***

While drunken-driving deaths fell in 32 states in 2007, according to a government report, there is still a most serious problem nationwide. Nearly 13,000 people were killed in crashes in which the driver had a blood alcohol concentration of 0.08, the legal limit in the United States, or at higher levels. Overall, alcohol deaths were down nearly 4% compared with 2006, when nearly 13,500 people died on the highway. But alcohol-related fatalities increased among motorcycle riders in half the states. The increase in deaths

involving drunk motorcycle riders has to be of concern. A total of 1,621 motorcyclists were killed in alcohol-impaired crashes in 2007, an increase of 7.5%. We all saw that motorcycle riders were featured in the government's \$13 million advertising campaign surrounding the Labor Day holiday. Law enforcement agencies increased their enforcement against drunken driving during the end of the summer.

Among the states, California had 117 fewer alcohol-impaired driving deaths last year, the largest decrease in the nation. Texas had 108 fewer deaths and Arizona's fatalities dropped by 63 deaths. North Carolina had 66 more deaths, the most among states, followed by South Carolina with 44 more fatalities than in the previous year. In addition to North Carolina and South Carolina, alcohol-impaired deaths increased in Alabama, Alaska, Delaware, Maine, Massachusetts, Minnesota, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Virginia, West Virginia, Wisconsin and the District of Columbia.

The latest data followed requests from dozens of college presidents to consider lowering the drinking age from 21 to 18. They argue that the current laws lead to binge drinking on campus. Mark Rosenker, acting chairman of the National Transportation Safety Board, opposes these administrators' effort and I agree with him. Repealing these laws is a bad idea and seems to be pretty dumb. Mr. Rosenker says that "age 21 drinking laws have been proven time and again effective in preventing deaths and injuries." I believe he is 100% correct. I surely hope that the college presidents will back off their campaign to lower the drinking age to 18.

Source: *Associated Press*

#### **ALMOST HALF OF ALABAMA HIGHWAY DEATHS INVOLVE DRINKING**

Unfortunately, Alabama is one of the states mentioned above with an increase in alcohol-related deaths in 2007. Even though there is some improvement nationally, drunken

drivers are a real problem in Alabama. Of 1,110 highway deaths last year, 475—more than 42%—were alcohol-related and that's far too many. Col. Chris Murphy, director of the Alabama Department of Public Safety says DUIs are "fatalities waiting to happen." He observed further: "I hate that the number is that high, but drinking and driving is a dangerous combination. A car becomes a weapon."

According to the National Highway Traffic Safety Administration, Alabama ranked eighth in 2006 among states with the highest number of alcohol-related road deaths per 100 million vehicle miles traveled. The data include drunken pedestrians. The maximum legal blood-alcohol level under Alabama law is 0.08 grams per deciliter or above. The average blood-alcohol level of drunken drivers arrested by Alabama State Troopers is 1.4 to 1.5 with the highest being 2.2.

As reported last month, the Alabama Department of Public Safety has bought nine specialized vans called "BATmobiles" which are equipped to test the alcohol levels of drivers on the side of the road. Col. Murphy says those vehicles are timesavers because taking a suspected drunken driver for a breath test can cost troopers up to four hours. Using these vehicles will free up troopers to work the roads. The vehicles also ensure that troopers accurately capture the driver's condition while they're operating a vehicle. Two of the new BATmobiles were used at checkpoints during the "Take Back Our Highways" blitz prior to Labor Day. There were 77 DUI arrests as of August 21<sup>st</sup> during that campaign. Statistics reveal that most DUI arrests happen between midnight and 4 a.m. But troopers say they see drunken drivers from all walks of life on the roads at all hours of the day. This is unacceptable by anybody's standards and we must all get involved in an all out effort to put a stop to the carnage on our highways caused by drunk drivers.

Source: *Associated Press*

#### **PENNSYLVANIA JURY AWARDS \$2.2M TO ESTATE OF DUI CRASH VICTIM**

A jury has awarded more than \$2 million to the family of a Pennsylvania man who was killed by a drunken driver four years ago. The verdict was returned against Melissa Cummings of Pittsburgh, who ran a red light after leaving a Harrisburg bar. Tests showed her alcohol level was nearly three times the legal limit. The other Defendants were the club, its manager and the bartender. Unfortunately, the club had no liability insurance. No business license should be issued to any establishment which sells or serves alcoholic beverages that has no liability insurance. In this case, the victim and a friend were loading dogs into their car when he was struck. The impact severed the 55-year-old man's legs. The drunk driver was recently paroled after serving a relatively short state prison sentence.

Source: *Insurance Journal*

#### **MOTOR VEHICLE ACCIDENTS AFFECT YOUNG LIVES**

When young people are seriously injured or killed in a car accident, it falls to their parents to deal with the aftermath, including paying medical or funeral bills and handling the emotional toll. Those who survive their accidents but are severely injured will face a lifetime of medical bills, health problems and physical difficulties. Often parents wind up footing the bill for such things, and incur massive debt as a result. A prime example involved a family, whose son was hit by a drunk driver while he rode his bike. That family's medical bills are over \$100,000 and they have had to pay the bulk of that, with only \$20,000 coming from insurance. The boy suffered two skull fractures, a concussion, a collapsed lung and combative seizures in the accident. He is now at least three grades behind where he should be in school because of his traumatic brain injury.

Motor vehicle accidents can be very traumatic and when the victim is young, the accident can have a severe effect on his or her future. The injuries

and impairments also have an impact on the young person's future wages and put a financial burden on the victim's family. If you or someone you love has been involved in a car accident, don't just assume that the at-fault person's insurance will take care of all the bills. The lawyers in our firm who handle the bulk of the lawsuits involving motor vehicle accidents are Cole Portis, Mike Crow, Julia Beasley, LaBaron Boone, and Ben Baker. I assist when the need arises in cases. If you would like to have more information on motor vehicle accidents and the effects on victims and their families, feel free to contact one of these lawyers at 800-898-2034 or visit our Web site at [www.BeasleyAllen.com](http://www.BeasleyAllen.com).

#### **MORE ON THE STATEN ISLAND FERRY CRASH**

There have been two significant developments recently in the Staten Island ferry crash litigation. The first involved a wrongful death lawsuit filed by the family of ferry crash victim John Healy. That case was settled by New York City for \$8.7 million. Mr. Healy was killed in the 2003 Staten Island ferry crash. As previously reported, 11 people were killed and many others were injured in the crash. Kathy Healy, his widow, and her four children, will benefit from the settlement.

As you may recall from prior reports, John Healy was killed when the ferry crashed into a dock at full speed. A trial in his widow's lawsuit had been scheduled to start in federal court when the case was settled. Kathy Healy, whose husband had been a lawyer with Kemper Insurance Co., was very critical over the way the city played hardball in dealing with her claim and those of others. She said the city tried every legal maneuver to wear them down, and to keep them from being "fairly compensated." The only settlement that was larger was \$8.9 million in February 2007 paid to Paul Esposito, 27, who lost both legs when the *Andrew J. Barberi* slammed into a concrete pier. The boat's pilot, who was on painkillers and suffering from extreme fatigue, pleaded

guilty to negligent manslaughter and lying to investigators and was sentenced to 18 months in prison. The city's ferry director got a year in prison after pleading guilty to negligent manslaughter and admitting he failed to implement or enforce a safety rule.

The second important development involved a case filed by James McMillan. He was rendered a quadriplegic as a result of the crash. The city took the McMillan case into federal court in an effort to limit its damages to about \$14.4 million under maritime law. But, a federal judge ruled that the city, as owner of the ferry, couldn't limit its liability for the deaths and injuries caused by the criminal acts of the vessel pilot and the former director of the ferry service, as well as its own negligence.

An advisory jury in federal court heard the McMillan case last month and recommended that the 44-year-old passenger, crippled in the 2003 Staten Island Ferry crash, should get nearly \$23 million for his past and future medical needs, pain and suffering and other expenses. The special advisory panel spent about five hours deliberating over what McMillan should get after he was left a quadriplegic in the accident. Jurors determined that McMillan would need \$10.3 million in medical care for the nearly 25 years he is expected to live. The panel also said he should get \$7.36 million for his future pain and suffering from the accident. Jurors also said McMillan's past pain and suffering was worth \$4.6 million and that he was due \$685,000 in past medical expenses. The Judge will take the advisory verdict and decide how much should be awarded. A final judgment will be then entered. Thus far, the McMillan case is the only ferry case to go to trial on damages. All of the other cases are awaiting trial.

To date, the City of New York has paid out \$51.8 million on 129 claims with 42 remaining. This incident occurred almost five years ago. The victims have had to wait a very long time to be compensated in a case of clear liability. Some are still waiting and that's hard to understand. The City and its insurance carriers should bring this matter to a

conclusion as soon as possible.

Source: *Associated Press* and *NewsDay*

#### **JURY AWARDS CRASH VICTIM'S FAMILY \$29.4 MILLION**

A state Supreme Court jury in New Jersey awarded \$29.4 million in damages recently to the family of a New Jersey man who died in the aftermath of a 2002 car crash. This is said to be the largest civil damage verdict in Orange County's history. The crash occurred in 2002, when a freight container on a northbound flatbed trailer smashed into the bottom of a highway overpass. Denise Malkin swerved her SUV to avoid the wreckage of the exploding container and was broadsided by a tractor-trailer. The impact left Malkin's husband, Peter, suffering from serious internal injuries and brain damage that eventually claimed his life. His daughter, who was 15 at the time, also suffered injuries. The Malkins were on their way to Vermont to go skiing.

Mr. Malkin worked for CSC Corp., a large business technology company. The damages were awarded against Sebastian Tremblay of Montreal, who was at the wheel of the tractor-trailer, and two Canadian companies: Transport Expressway Inc., which owned the truck, and Finloc, a leasing company with insurance on the trailer. The driver of the truck got a ticket for driving an over-height vehicle. The defendants' lawyers say they will ask the trial judge to reduce the amount of the award. Robert Kelner, a lawyer with Kelner & Kelner located in New York City, represented the Malkin family and did an outstanding job.

Source: *Times Herald-Record*

#### **200 BUS COMPANIES ORDERED OFF TEXAS ROADS IN PAST TWO YEARS**

It was reported recently that two of every five Texas charter bus companies have been ordered off the road in the past two years. Presently, about 300 bus companies have permission to operate in Texas. But during the past 24 months, another 201 companies have

had their authorization revoked, according to Carol Davis, director of the Texas Department of Transportation's motor carrier division. However, some of those grounded companies have resurfaced under new names and state officials are trying to find out how many. Problems in the motor coach industry came to light after an August 8<sup>th</sup> crash that killed 17 people in Sherman, Texas.

The Houston-based owner of the bus had been shut down for safety violations but continued operating under a different company name. Since then, two other bus companies in Houston and Irving have been shut down for being affiliated with revoked companies. Although motor coach safety is governed mostly by federal law, the Texas Transportation Department wants to make it easier for the public to gain access to bus records. Church groups and other clubs often use motor coaches for long trips. State officials are posting complaints filed against bus companies on the Transportation Department's Web site, [www.txdot.gov](http://www.txdot.gov). Other helpful documents, including the results of investigations, also are posted.

Source: *Star Telegram*

### **NTSB REACTS TO SLEEP-RELATED CRASH INFORMATION**

The National Transportation Safety Board has recommended that trucking companies should work harder to ensure that their drivers get rest. The Board also says the government should move toward mandating the use of alarm systems to alert exhausted truckers. While drivers are ultimately responsible for getting enough rest, the Board believes trucking companies and the government should also make the nation's roads safer by studying fledgling technology that would keep drivers alert. A Board hearing, held in Washington, D.C., and streamed live on the Internet, was held in response to an early-morning crash in western Wisconsin three years ago in which a bus carrying a high school band slammed into an overturned semitrailer, killing five people. NTSB investigators concluded

that the truck driver fell asleep at the wheel and began to drift off the interstate's shoulder. When he swerved back onto the road, the rig overturned. The bus then plowed into the truck.

NTSB investigator Jana Price told the board some technology still in the early stages may eventually prevent such fatigue-induced crashes. For example, a dashboard-mounted camera that tracks a driver's eye and eyelid movements could alert a driver who appears to be falling asleep. The Board was told that the technology can be useful since drivers are often unaware of their own fatigue. Tiredness is a factor in about one in eight large-truck crashes, according to the Board.

Investigators also debated the use of technology designed to warn of impending collisions and automatically engage the brakes. They discussed concerns that automatic braking could interfere with the stability of large trucks. The board recommended that the National Highway Traffic Safety Administration study the technology and mandate its use if it proves effective. Technology was also discussed at the hearing that detects when a vehicle is veering from its lane and alerts the driver with a light or an alarm. Some drivers complain that the alerts can be distracting. Low-tech measures can be effective such as rumble strips. These are textured strips of pavement that produce vibrations when a driver passes over them. Studies show they reduce drift-off crashes by up to 60%. Hopefully, all of the safety recommendations will be put into effect by NHTSA.

Source: *Associated Press*

### **NEW INSPECTIONS FOUND NO PROBLEMS WITH ALABAMA BRIDGES**

Three deck truss bridges in Alabama have had another round of inspections because they are similar to the Interstate 35 bridge that collapsed in Minneapolis last summer. According to state highway officials, no problems were found. The inspections have already been completed on the Alabama 14 bridge that spans the Tallapoosa River in Tallassee and the

Alabama 22 bridge that spans the Coosa River in Chilton County. Crews were wrapping up the inspection of the Alabama 43 bridge that crosses the Tennessee River between Florence and Sheffield at press time. The Federal Highway Administration ordered more inspections after an investigation found some of the gusset plates on the Minneapolis bridge were too small. In Alabama, crews have been inspecting the size and thickness of the gusset plates, which hold the trusses together.

Source: *Associated Press*

## **XVII. NURSING HOME UPDATE**

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### **NURSING HOME INDUSTRY LAUNCHES CAMPAIGN OF DECEPTION**

The nursing home industry has gone all out to defeat legislation to help protect residents of nursing homes and assisted living facilities from abuse and neglect. The industry launched a campaign of deception about the legislation. The Senate Judiciary Committee is expected to mark up S. 2838, the Fairness in Nursing Home Arbitration Act, sponsored by Sens. Mel Martinez (R-FL) and Herbert Kohl (D-WI). If passed, the bill would make pre-dispute binding mandatory arbitration provisions unenforceable in nursing home contracts. The House Judiciary Committee approved the measure in July. Buried in the fine print of admissions contracts, these arbitration clauses strip elderly residents and their families of the right to take nursing homes to court in cases of abuse or neglect—a critical tool in prompting nursing homes to take better care of residents. Instead, any disputes must be brought in a private, expensive, secretive forum chosen by the nursing home, giving the arbitration firm an incentive to favor the nursing home company that brings it business. A 2007 Public Citizen study of 34,000 credit card arbitration cases showed that businesses won 94.7% of cases against consumers.

Most people are unaware of arbitration provisions in the fine print of nursing-home admissions documents and do not understand them. The clauses also are typically non-negotiable. For these reasons, businesses can use arbitration “agreements” to immunize themselves from accountability in court for their wrongdoing. A group led by the U.S. Chamber of Commerce wrote a letter last month opposing the legislation to Senator Patrick Leahy (D-VT), Judiciary Committee chairman, and Senator Arlen Specter (R-PA), ranking member of the committee. The letter is remarkable in the extent of its deception.

The authors claim to be a “diverse coalition of senior, caregiver, taxpayer, and business advocacy organizations” and claim they wish to protect consumers. But nearly all those listed as signers are business and professional associations whose goals are to maximize profits and limit corporate accountability for wrongdoing. The groups also misrepresent what the legislation would do. They erroneously claim that the Fairness in Nursing Home Arbitration Act would “eliminate or significantly limit the use of arbitration.” In fact, the bill would actually allow consumers to choose whether to go to arbitration or court to resolve disputes, meaning that businesses couldn’t force people into unfair arbitrations.

A truly broad coalition of groups that advocate on behalf of consumers, senior citizens and employees also sent a letter to the Senate Judiciary Committee, urging support for the bill. More than 100 organizations from 30 states, including Public Citizen, signed on to the letter to support protecting the rights of nursing home residents and their families. David Arkush, director of Public Citizen’s Congress Watch division, had this to say:

*It’s appalling that the nursing home industry is fighting against senior citizens under the banner of consumer protection. But the level of dishonesty reflects the disgrace in their position. It wouldn’t work if they told the truth. “We*

*corporate lobbyists oppose this bill because our multimillion-dollar corporate clients want immunity when they abuse or neglect some of America’s most vulnerable citizens.” If arbitration is good for consumers, then they will choose it. There is no justification for forcing it on people.*

Commonly-reported nursing home injuries include pressure sores that lead to infection and amputation of limbs, suffocation on bedrails and other restraining devices, physical and sexual assault, renal failure from dehydration, malnutrition, and death from fires in buildings lacking sprinkler systems. According to a 2007 report by the Government Accountability Office, almost half of states cited more than 20% of their nursing homes for serious deficiencies in 2006; six states cited 30% or more for dangerous conditions or harming residents.

Source: Public Citizen

#### ***NURSING HOME SUED OVER DEATH OF A YOUNG GIRL***

A lawsuit has been filed by the family of a young girl against the Aldercrest Health & Rehabilitation Center. Howard and Ardis Steele liked the Edmonds facility for their daughter, Lee Ann, who had suffered a stroke, which led to a tracheotomy. The Steeles had felt assured by the facility’s “promises of skilled, high quality care, and a tour that showcased a pleasant exercise room and a bedroom with a pretty comforter.” But less than 24 hours after their daughter was admitted, her tracheal tube clogged with mucous, causing oxygen loss and brain damage. Lee Ann Steele, 49, once a vibrant church secretary who had volunteered at a food bank, died a few months later, in January 2007. Kevin Coluccio, the lawyer representing the Steeles, who live in Seattle, says:

*Her parents were given certain representations about her care, and it was on the very first day,*

*due to lack of staffing, that her (tracheal tube) was never checked or cleared.*

The lawsuit was filed by Howard Steele against the home, its company—Extencicare Homes Inc.—and 14 other nursing facilities owned by the company in Washington State. The complaint alleges Milwaukee-based Extencicare of violating consumer-protection laws by advertising “quality standards above government regulations” and failing to deliver. Mr. Steele, who is seeking class action approval in his suit, says thousands of people have been affected.

On October 5, 2006, the day Lee Ann Steele was admitted, her family found her lying on a sheetless rubber mattress and her tracheal-tube equipment on the floor, unhooked, with no one attending to her for several hours. The next morning, the family received a call saying Lee Ann had suffered respiratory distress. The complaint referred to a four-year period, from 2004 to August 15, 2008. The lawsuit highlights problems long known by consumer advocates and health officials regarding Extencicare, one of the largest nursing-home chains in North America. The company operates 268 facilities for up to 30,000 residents.

Source: *Seattle PI*

## **XVIII. HEALTHCARE ISSUES**

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#### ***UNINSURED IN THIS COUNTRY PAY \$30 BILLION FOR HEALTH CARE***

Americans who go without health insurance for any part of 2008 will spend \$30 billion out of pocket for health care and they will get \$56 billion worth of free care, according to a report released recently. Government programs pay for about three-quarters, or roughly \$43 billion, of the bills for these uninsured people. Dr. Jack Hadley of George Mason University in Virginia and a team at the

Urban Institute performed the study. It was written in the report:

*Physicians' donated time and forgone profits amount to \$7.8 billion. After government payments to hospitals are subtracted, private philanthropy and profit margins are responsible for at least an additional \$6.3 billion.*

There are lots of misconceptions relating to the impact of having no health insurance. In fact, this study points out why insurance coverage for those who are not covered is a good thing. Dr. Hadley observed in a statement:

*From society's perspective, covering the uninsured is still a good investment. Failure to act in the near term will only make it more expensive to cover the uninsured in the future, while adding to the amount of lost productivity from not insuring all Americans. The uninsured receive a lot less care than the insured, and they pay a greater percentage of it out of pocket. Contrary to popular myth, they are not all free riders.*

On average, an uninsured American pays \$583 out of pocket toward average annual medical costs of \$1,686 per person, Dr. Hadley's team reported in the journal *Health Affairs*. The report found the annual medical costs of Americans with private insurance average far more—\$3,915, with \$681, or 17%, paid out of pocket. Current estimates show that 47 million Americans lack any health insurance, and 28 million have gone without for some part of the year. The U.S. Census bureau released new estimates on August 26<sup>th</sup>. If these people were better covered, they would spend more on health care, the researchers predicted. The report concluded:

*Adding the cost of the additional care to current spending by or for the uninsured, total medical care costs for newly insured people will be about \$208.6 billion (roughly \$3,800 per full-year-equivalent newly insured person), consisting of \$122.6 billion in new spending*

*on top of the \$86 billion already in the system.*

The report was published on the Internet at <http://www.healthaffairs.org/>.

Source: Reuters

### **FDA POSTS LIST OF POTENTIAL PROBLEM DRUGS**

The government has started posting a list of prescription drugs under investigation for potential safety problems. This is an effort to better inform doctors and patients. The first list is a bare-bones compilation naming 20 medications and the potential issue for each. However, the list provides no indication of how widespread or serious the problems might be, leading some consumer advocates to question the usefulness of the list. Food and Drug Administration officials are trying to walk a fine line in being more open to the public while avoiding needless scares. Congress, in a drug safety bill passed last year, ordered the agency to post quarterly listings of medications under investigation.

Drugs will be placed on the list based on reports the FDA receives regularly from hospitals, doctors and patients. The list is not just a reflection of raw data, but more like what a police officer would call "probable cause." Officials say a drug will only be listed if FDA safety reviewers determine that a reported problem deserves a closer look. Dr. Paul Seligman, who is responsible for the FDA's safety communications, observed:

*Our hope is that this list will serve not only as a means of communication to the public, but that it will also serve to encourage (medical) providers to provide us with additional reports should they see similar kinds of adverse events with the drugs that are on the list.*

Consumer advocates called the listing a positive step, but said it needs to be fleshed out. It appears that the effectiveness of the lists will depend on how much detailed information is con-

tained along with the drug name. Also, it would be helpful to know how many reports on a drug have been received and how many people died or were severely injured or damaged. Nor is it clear how drugs suspected of a problem will be removed from the list if later found safe.

The names of products and potential signals of serious risks/new safety information that were identified for these products during the period January—March 2008 can be found in the AERS database. The appearance of a drug on this list does not mean that FDA has concluded that the drug has the listed risk. It means that FDA has identified a **potential safety issue**, but does not mean that FDA has identified a causal relationship between the drug and the listed risk. If after further evaluation the FDA determines that the drug is associated with the risk, it may take a variety of actions including requiring changes to the labeling of the drug, requiring development of a Risk Evaluation and Mitigation Strategy (REMS), or gathering additional data to better characterize the risk.

FDA emphasizes that the listing of a drug and a potential safety issue on this Web site doesn't mean that FDA is suggesting prescribers should not prescribe the drug or that patients taking the drug should stop taking the medication. Patients who have questions about their use of the identified drug should contact their health care provider. The FDA will complete its evaluation of each potential signal/new safety information and issue additional public communications as appropriate. If you want the names of drugs on the list go to the FDA Web Site ([www.FDA.gov](http://www.FDA.gov)).

Source: Associated Press

### **WRONG DRUGS GIVEN TO ELDERLY PATIENTS**

The results of a nationwide study published in the *Journal of Hospital Medicine* revealed that nearly half (49%) of almost 500,000 hospital patients 65 and older have been prescribed one or more drugs known to be unsafe for older patients. That is a

scary thought and these results should have made health care professionals and regulators aware of the existence of a most serious problem. If you want more information on this matter contact Public Citizen at [www.citizen.org](http://www.citizen.org).  
Source: Public Citizen

### **FDA ORDERS STRONGER WARNINGS FOR FOUR ARTHRITIS DRUGS**

The Food and Drug Administration has ordered stronger warnings on four medications widely used to treat rheumatoid arthritis and other serious illnesses, saying they can raise the risk of possibly fatal fungal infections. The drugs—Enbrel, Remicade, Humira and Cimzia—work by suppressing the immune system to keep it from attacking the body. For patients with rheumatoid arthritis, the treatment provides relief from swollen and painful joints. The drugs also lower the body's defenses to various kinds of infections. According to Dr. Jeffrey Siegel, who heads the office for the FDA that oversees arthritis drugs, the agency became concerned after discovering that doctors seemed to be overlooking a particular kind of fungal infection called histoplasmosis. Of 240 cases reported to the FDA in which patients taking one of the four drugs developed this infection, a total of 45 died—about 20%.

The infection, which mimics the flu, is prevalent in much of the middle part of the country. It can have particularly grave consequences if it isn't caught early and spreads beyond the respiratory system to other organs of the body. Dr. Siegel said the investigation began with a single case of a woman taking one of the drugs who died of histoplasmosis. When looking into the case, doctors at the FDA found that the woman had been sick with the fungal infection for a long time. The case caused concerns that there may be other situations in which doctors "may not recognize histoplasmosis," according to Dr. Siegel.

FDA officials searched the agency's database and found the 240 cases of patients taking the medications who had also developed the fungal infection.

Of those, at least 21 appeared to involve a late diagnosis, and 12 of them—more than half—ultimately died. Dr. Siegel said the FDA's order means that the risk of histoplasmosis will be flagged in a "black box," the strongest warning information in a drug's prescribing literature. The four medications already have black box warnings about the risk of infections, but the language varies from drug to drug.

Patients should call their doctors if they develop persistent fever, cough, shortness of breath or fatigue, which can be signs of the fungal infection. And the FDA is also urging doctors to consider aggressive use of antifungal drugs in patients who develop such symptoms, even if the infection has not been confirmed by a laboratory test. Siegel said such a decision should not be taken lightly, since antifungal drugs can also have dangerous side effects. Doctors should consider stopping treatment with the immune-suppressing drugs if patients develop infections. The four drugs belong to a class known as TNF-alpha blockers, and are considered a mainstay for treating rheumatoid arthritis, a disabling disease in which the immune system attacks the joints. They are also used to treat Crohn's disease, juvenile arthritis, certain types of psoriasis, and other immune system disorders. All are taken by injection.

Separately, the FDA is investigating a possible link between the four medications and cancer in young patients. The agency said earlier this year it has received 30 reports of cancers, mainly lymphomas, in patients who began taking the medications when they were 18 or younger. That investigation is expected to take the rest of the year. Three of the drugs, Enbrel, Humira and Remicade, are considered blockbusters, with sales of over \$1 billion annually for each. Cimzia is newer and less widely used. Humira is sold by North Chicago, Illinois-based Abbott Laboratories Inc; Cimzia by Belgium-based UCB; Enbrel by Thousand Oaks, California-based Amgen Inc. and Madison, New Jersey-based Wyeth; and Remicade by Horsham, Pa.-based Centocor, a unit of

Johnson & Johnson; and Kenilworth, New Jersey-based Schering-Plough Inc.

Source: Associated Press

### **FDA TO REVAMP CRITERIA FOR CHILDREN'S COLD REMEDIES**

The Food and Drug Administration has announced plans to revise standards for over-the-counter cough and cold medications for children, a step that could lead to removing the popular products from the market. In response to rising concerns that the products are ineffective and could be unsafe, the agency says it will revamp the criteria that have allowed the products to remain on drugstore shelves for the first time in decades. Janet Woodcock, director of the FDA's Center for Drug Evaluation and Research, told the Washington Post:

*Modern science has advanced since, and this is an opportunity to apply modern science to evaluate these products. This is the beginning of getting drugs that are widely used in children in the over-the-counter world using the same modern approach we've started using for prescription drugs.*

As the first step in that process, the agency held a special hearing on October 2, 2007. The FDA then began to consider a series of questions, including:

- What types of studies should be done to evaluate the products?
- Should the products remain available without a prescription?
- How should the doses be determined?
- Should products that combine different ingredients remain available?

This is the latest response to a petition filed in March 2007 by a group of pediatricians asking the FDA to restrict the use of the products, citing a lack of evidence that they work and mounting evidence they can cause hallucinations,

seizures, trouble breathing, heart problems and other complications, including occasionally deaths. The petition contended that the products had been allowed to stay on the market because they were approved at a time when it was not considered appropriate to test medications directly in children. Instead, studies in adults were extrapolated to children, a practice now considered inadequate, according to the petition.

A week before the FDA convened a panel of experts to consider the petition in October 2007, drug makers voluntarily pulled all over-the-counter cough and cold products for children younger than two years old. The companies said, however, the problems were “overwhelmingly caused by parents accidentally giving overdoses.” After an exhaustive review, the panel concluded that there was little evidence the remedies worked for children younger than 12 years of age. They recommended that the products not be used at all in those younger than six and called for new research to establish their safety and effectiveness directly in children.

In January, the FDA issued a public health advisory formally warning against using the products on children younger than two, but it said the agency was still considering what to do about older children. This latest development was welcomed by critics, who predicted the process would eventually result in the products being pulled from the market. Baltimore Health Commissioner Joshua Sharfstein, who led the FDA petition, observed:

*It's a significant step forward. This is how the agency can take these products off the market. I think this signals the agency is going to apply a modern standard of safety and efficacy to these products, and that is a standard these products cannot pass.*

The industry, however, has vowed to keep the products on the market, saying they offer relief for older children as long as they are used according to directions. The drugmakers seem to

be confident that products would remain on the market. This matter will be watched closely.

Source: *Washington Post*

## XIX. ENVIRONMENTAL CONCERNS

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### **BUSH ADMINISTRATION RULE ON POLLUTION STRUCK DOWN**

A federal appeals court has struck down the ill-advised Bush Administration rule that prevented states and local governments from imposing stricter monitoring of pollution generated by power plants, factories and oil refineries than required by the federal government. In a 2 to 1 decision, a panel of the U.S. Court of Appeals for the District of Columbia Circuit found that the Environmental Protection Agency rule violated a provision of the Clean Air Act, which requires adequate monitoring of emissions to ensure compliance with pollution limits. Judge Thomas B. Griffith wrote for the majority that since federal standards often are not sufficient to ensure proper monitoring, states and local governments must be allowed to fill the gap. The judge wrote: “The question in this case is whether permitting authorities may supplement inadequate monitoring requirements when EPA has taken no action.”

This court ruling in the suit brought by environmental groups was a significant victory that will help ensure that pollution levels are accurately tracked and reported. Keri Powell, a lawyer with the environmental law firm Earthjustice, who argued the case for four environmental groups, including the Sierra Club and the Natural Resources Defense Council, observed:

*If the monitoring isn't good enough, the whole system falls apart. The ruling affects every major stationary air-pollution source in the country... This is a very important case, just in terms of the public's right to know and*

*guarding the public's opportunity to keep tabs on polluters.*

The events that led to this ruling go back years. In 1990, Congress amended the Clean Air Act in an effort to simplify the pollution permitting process for factories, power plants and other industries. The amendments gave state and local jurisdictions the task of issuing the pollution permits with EPA oversight. State and local governments have issued more than 16,000 pollution permits since then. But the local governments have faced questions of how to update monitoring requirements in the absence of clear guidance from federal regulators.

In 2002, the EPA proposed a regulation that would have required states and local governments to beef up monitoring in the absence of federal guidance or strong pollution-tracking standards. But industry groups challenged the proposed rule, and the EPA backed down. Instead, the agency adopted a rule that prohibited states and local governments from supplementing the monitoring efforts. That rule was struck down by the appeals court in 2004 because the EPA did not allow for a notice and comment period. In 2006, after a comment period, the EPA passed the identical rule. This resulted in the environmental groups filing suit. Judge Griffith wrote in his order:

*The Clean Air Act provision is a complex statute with a clear objective: it enlists EPA and state and local environmental authorities in a common effort to create a permit program for most stationary sources of air pollution. By its terms, this mandate means that a monitoring requirement insufficient to assure compliance with emission limits has no place in the permit unless and until it is supplemented by more rigorous standards.*

Judge Griffen was joined by the appellate court's chief judge, David B. Sentelle. Judge Brett M. Kavanaugh dissented, writing that the EPA has the legal authority “to determine whether

state and local permitting authorities can impose additional monitoring requirements.”

Source: *Washington Post*

### **LAWSUITS FILED IN BRAIN TUMOR CASES**

Two lawsuits have been filed on behalf of the people of Cameron, Missouri, a town hit by a series of brain tumors. Testing on environmental samples collected in Cameron revealed the presence of arsenic and lead at the old Rockwood Industries plant. Class action lawsuits were filed naming companies that operated on the sites where chemicals turned up. One lawsuit requests medical monitoring and the other lawsuit is for property damage. The value of the property owned by people in Cameron was alleged to have been adversely affected by the developments there. The Environmental Protection Agency says more testing is scheduled, including water sampling at a group of homes and at a nearby quarry. The EPA is also trying to pinpoint the site of an old city landfill for more testing. Also, samples will be taken in an area once used by rail cars.

Source: *Associated Press*

### **TIGHTER LEAD RULE TAKES EFFECT**

All children’s products must meet a new, tougher lead standard by February 10<sup>th</sup>, regardless of when they were made, according to a legal opinion released by the Consumer Product Safety Commission’s general counsel. The opinion, which represents the agency’s official guidance to businesses, allows companies to sell off their existing inventory of soon-to-be banned products through that deadline. The new lead limit is part of a sweeping product safety measure that became law on August 14<sup>th</sup>. The law stipulates that by February 10<sup>th</sup> children’s products can not have a total lead content above 600 parts per million. Six months later, that limit drops to 300 ppm and then to 100 ppm in three years if feasible. After February 10, 2009, manufacturers and

retailers will probably have to destroy products that don’t comply with the new limit.

The decision on whether the lead limit applies to existing inventory, written by CPSC General Counsel Cheryl Falvey, helps answer some of the questions that manufacturers and retailers have about what to do with products they made or purchased before August 14<sup>th</sup>. It also provides clarity for consumers who otherwise would have found it difficult to tell which toys met the new lower lead requirement and which did not. The decision won’t affect toys for sale this holiday shopping season.

In addition to setting a stricter lead limit, the product safety law also boosts funding and authority for the CPSC and bans certain types of phthalates, a chemical in plastic that has been linked to reproductive problems. Manufacturers have the same questions about whether the phthalate provisions apply retroactively. According to media reports, lawyers for businesses see the decision on lead as an indication of where the CPSC is likely to come down on phthalates.

Source: *Washington Post*

### **EXXONMOBIL FINED BY THE EPA OVER PCB RELEASE**

ExxonMobil will pay a fine of \$2.64 million to the Environmental Protection Agency for disposing of and improperly handling polychlorinated biphenyls (PCBs) on an offshore oil and gas platform in the Santa Barbara Channel, off the Southern California coast. This was a violation of the federal Toxic Substances Control Act. Wayne Nastri, administrator for the EPA’s Pacific Southwest region, observed:

*Today’s settlement sends a clear signal that companies must follow PCB regulations to protect communities and our environmental resources. The EPA will not hesitate to take enforcement actions against companies that fail to properly handle and dispose of PCBs.*

Between 2002 and 2005, two large electrical transformers located on Platform Hondo, part of Exxon’s Santa Ynez Unit, leaked nearly 400 gallons of PCB-contaminated fluid. It was reported that Exxon allowed one of the transformers to leak for almost two years before repairing it. The leaking from the transformers constitutes illegal disposal of PCBs, a violation of the Toxic Substances Control Act. Additionally, Exxon failed to ensure that workers who cleaned up the leaked fluid were provided protective clothing or equipment to protect against direct contact with and inhalation of PCBs. Exxon replaced the two transformers with non-PCB containing transformers in 2005.

We learned a great deal about PCBs, which are man-made organic chemicals, in our Monsanto case. PCBs are used in paints, industrial equipment, plastics, and cooling oil for electrical transformers. More than 1.5 billion pounds of PCBs were manufactured in the United States before the EPA banned the production of this chemical class in 1978, and many PCB-containing materials are still in use today. When released into the environment, PCBs remain for decades. Tests have shown that PCBs cause cancer in animals and are suspected carcinogens in humans. Acute PCB exposure can also adversely affect the nervous, immune, and endocrine systems as well as liver function. Concerns about human health and the extensive presence and lengthy persistence of PCBs in the environment led Congress to enact the Toxic Substances Control Act in 1976. For more information on PCB regulation and enforcement, as well as the Toxic Substances Control Act enforcement in general, you can visit the EPA’s website at: [www.epa.gov/region09/toxic/pcb/](http://www.epa.gov/region09/toxic/pcb/) or [www.epa.gov/compliance/civil/tsca/index.html](http://www.epa.gov/compliance/civil/tsca/index.html).

Source: EPA News Release

### **JUDGE RULES FOR POLLUTED KANSAS TOWN AND AGAINST BIG OIL**

At the conclusion of one of the longest jury trials ever held in Kansas, a

jury in January left residents in a southeast city stunned. The panel had decided that the city of Neodesha was not entitled to recover the costs of cleanup and damage from contamination caused by an oil refinery. However, the judge who presided over the 17-week trial recently gave the town new hope, when he overturned the jury verdict. The judge concluded that he had given the jury improper instructions.

Allen County District Judge Daniel Creitz said strict liability for the contamination was not a question of fact for the jury to decide, but instead was a question of law and that the city was entitled to judgment in its favor as a matter of law. As a result, the jury should only have been instructed to determine damages to be paid by oil giant BP Corp. North America and its predecessors. Judge Creitz ordered a new trial to consider only on the issue of damages. The original lawsuit was filed in 2004 on behalf of the 2,700 residents as well as government entities and businesses in the southeast Kansas city. The plaintiffs sought nearly \$478 million for cleanup costs and damages, plus interest, as well as punitive damages.

The contamination covers almost 70 percent of the town, including underneath City Hall, schools and hundreds of homes. Experts found groundwater pollution under 350 acres after the city spent \$1 million to hire its own experts and drill test wells. The refinery, which operated from 1897 until it was dismantled in 1970, generated wastes and byproducts include benzene, toluene, ethyl benzene and xylenes, polycyclic aromatic hydrocarbons and metals such as arsenic, chromium, lead and mercury. Although some of the contaminants are known to cause cancer and other diseases, the lawsuit was not a personal injury case but instead sought property damages.

At trial, the Defendants contended they were at least partly responsible for the groundwater contamination, but were actively cleaning up the pollution under the direction of the Kansas Department of Health and Environment. In his ruling, Judge Creitz said the

company's claimed cooperation with state health officials was not a defense to the claims of property owners for damages and other relief. The judge said in his order:

*Given the Defendants' admissions and the evidence here, no rational juror could return a verdict stating that Defendants were not guilty of contaminating the groundwater underneath Neodesha. The contaminants involved in this case are some of the most dangerous known to mankind.*

The judge noted that many defense experts conceded at trial that it was the Plaintiffs' expensive investigation, after the lawsuit was filed, that identified the refinery pollution spreading beyond the plume identified by the company's engineers and approved by state health officials. On September 22<sup>nd</sup>, the judge gave BP ten days to appeal his decision.

Source: *Insurance Journal*

## XX. THE CONSUMER CORNER

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### **PET-FOOD RECALL LEADS TO 6,000 CLAIMS AND COUNTING**

Almost 6,000 claims have been filed in the class action settlement arising out of last year's massive pet-food recall. As you will recall, Menu Foods, other pet-food makers and retailers in May agreed to set up a \$24 million cash fund to compensate pet owners whose cats and dogs became sick or died after eating food that had a contaminated ingredient from China. The filing period for claims began May 30<sup>th</sup> and will run until November 24<sup>th</sup>. The Food and Drug Administration never identified how many pets were affected, but it received more than 17,000 complaints.

Once a claim is filed, it will be reviewed by an independent claims administrator. Claimants may receive a 100% cash payment for all documented

expenses deemed reasonable, including veterinary bills and burial costs. They may receive up to \$900 for undocumented expenses. Under the terms of the settlement, most claims are likely to be paid next year. To be eligible, claimants must have bought or fed their pets one of the recalled pet foods. A federal judge in New Jersey gave the settlement preliminary approval in May. A hearing for final approval is scheduled for this month.

If the court approves the settlement as expected, it would resolve more than 100 lawsuits brought in the U.S. and a dozen in Canada. The \$24 million is in addition to \$8 million that pet-food makers have already paid to pet owners. The vast majority of the fund will go to pet owners whose pets were injured or died as a result of kidney failure, which was linked to the contaminant. The FDA determined that the pet-food ingredients, sold to pet-food makers as wheat gluten and rice protein concentrate, were adulterated in China with the industrial chemical melamine to make them appear richer in protein than they actually were. The recall was the largest ever for the pet-food industry. It began March 16, 2007, by Menu Foods, a large maker of wet pet food for many pet-food brands.

This recall grew to involve 12 pet-food makers and 180 brands of pet food and treats. Along with Menu, other defendants include Hill's Pet Nutrition, Iams and retailers such as Wal-Mart. Menu Foods, which supplied most of the recalled foods, has pegged its recall costs at \$55 million, some of which went to the settlement fund. If there is money remaining after claims have been processed, it will go to charities that promote the well-being of pets, according to the settlement terms. A website has been set up at [www.pet-foodsettlement.com](http://www.pet-foodsettlement.com). The claims administrator can be reached at 800-392-7785. Sherrie Savett, who is with the firm of Berger & Montague, located in Philadelphia, represented the plaintiffs and did a very good job.

Source: *USA Today*

## **SAFETY TIPS FOR TROPICAL STORM VICTIMS**

With the hurricane season in full swing, it's too late to prepare for those storms that have already hit. But, there is still time to get ready for any storms that may develop as the season winds down. The two major storms that hit the U.S. coast did tremendous damage. The last one—Ike—hit Texas and caused tremendous damages and losses in that state and in parts of Louisiana. The U.S. Consumer Product Safety Commission has warned consumers to take special precautions in the future.

One area of concern relating to storms generally deals with portable gas generators. These are often used by consumers to restore power to their homes and businesses in the aftermath of a storm. These generators produce high levels of deadly carbon monoxide (CO). The CPSC warns consumers that generators should be used outdoors only, far from doors, windows, and vents that could allow CO to come indoors. As most of us know, carbon monoxide is an odorless, colorless poison gas referred to as the “invisible killer.” While generators can come in handy after a storm, using one indoors can kill you and your family in minutes.

A Porter Novelli “Healthstyles” surveys of more than 10,000 adults found dangerous misconceptions about generator safety. The surveys found that 62% of respondents believe it's safe to run a generator in a garage as long as the garage door is open. Forty-seven percent believe it's safe to run a generator in a basement as long as a window is open. Unfortunately, both scenarios have caused deaths. CPSC records show that there were nearly 100 generator-related deaths due to CO poisoning in 2005. The Commission has provided these important life-saving tips:

- Read the label on the generator and the owner's manual, and follow the instructions.
- Install CO alarms with battery backup in the home outside each sleeping area.
- Get to fresh air immediately if you start to feel sick, weak or dizzy. CO

poisoning from exposure to generator exhaust can quickly lead to incapacitation and death.

- Never use charcoal indoors. Burning charcoal in an enclosed space can produce lethal levels of carbon monoxide.
- Use caution when burning candles. Use flashlights instead. If you must use candles, do not burn them on or near anything that can catch fire. Never leave burning candles unattended. Extinguish candles when you leave the room.
- Look for signs that your appliances have gotten wet. Discard electrical or gas appliances that have been wet because they pose electric shock and fire hazards.
- Before using your appliances, have a professional or your gas or electric company evaluate your home and replace all gas control valves, electrical wiring, circuit breakers, and fuses that have been under water.

Following these safety tips could save your life and those of your family members and friends.

Source: CPSC

## **TIPS ON HOW INDIVIDUALS CAN HELP FIGHT GLOBAL WARMING**

Our national government has failed miserably to deal with the issue of climate change. While the Bush record on this critically important issue is unbelievably bad, individual citizens also have the responsibility to get involved. Not all of us have recognized that we can do our part to fight global warming. The following are simple things that we can do to help out:

- Ask for paper bags when you check out at the grocery store instead of plastic.
- Recycle and buy minimally packed goods as much as possible.
- Wash clothes in cold or warm water—not hot water.

- Install low flow shower heads to use less water.
- Run the dishwasher only when full and don't use heat to dry dishes.
- Replace standard light bulbs with compact fluorescent bulbs.
- Plug air leaks in windows and doors to increase energy efficiency.
- Replace old appliances with energy-efficient models.
- Walk, bike, carpool or use public transportation whenever possible.
- Adjust your thermostat—lower in winter, higher in summer.

Share these simple steps with family, friends and co-workers and help to increase the awareness of the need to fight global warming. You might even take the time to pass the message on to your elected officials and especially to the man currently in the White House.

Source: Environmental Defense Fund, [www.edf.org](http://www.edf.org)

## **FIGHT LOOMS ON FEDERAL REGULATION OF COSMETICS**

The \$50 billion a year cosmetics industry is in for a battle royal. One side is led by companies like Procter & Gamble, Revlon, Unilever, Estee Lauder, and L'Oreal and their trade association—formerly known as The Cosmetic, Toiletry and Fragrance Association. The group changed its name last year to the Personal Care Products Council. On the other side is a consumer coalition—the Campaign for Safe Cosmetics. The issue involves federal regulation of the cosmetics industry. Presently, there is no real regulation and the industry enjoys self-regulation.

The campaigners want Congress to pass landmark legislation that will impose strict federal regulation on the industry. Stacy Malkan is a spokeswoman for the campaign. She is currently touring the country, promoting her new book “Not Just a Pretty Face: The Ugly Side of the Beauty Industry.” Ms. Malkan argues that personal care products like shampoo, conditioner,

aftershave, lotion and makeup are not regulated by the Food and Drug Administration or any other government agency. She says it's perfectly legal and very common for companies to use ingredients that are known or suspected to be carcinogens, mutagens or reproductive toxins in their products.

Ms. Malkan says legislation will be introduced by Congresswoman Jan Schakowsky (D-IL) that will, for the first time, impose federal regulation. She says in an interview with *Corporate Crime Reporter*:

*The details of the bill are being worked out. But the basics are—mandatory safety testing, full disclosure of ingredients, banning the worst chemicals, substituting safer alternatives, and giving the FDA real power and authority over the industry. We would like to see a safety panel with toxicologists and scientists who are accountable.*

Ms. Malkan says currently there is a regulatory body of sorts called the Cosmetics Ingredients Review Panel. She doesn't believe the panel is very effective. In this regard, Ms. Malkan says:

*They claim to be independent of the trade association. But they are funded by them and they do share office space. And their recommendations are voluntary. They screen ingredients for safety. They make recommendations to the industry. But often, their recommendations are just ignored. It's not much of a safety system. And they have looked only at about 11% of the chemicals used in cosmetics.*

The FDA admits it has little power over the industry. Currently, manufacturers may use any ingredient or raw material, except for color additives and a few prohibited substances, to market a product without a government review or approval. The European Union (EU) is far ahead of the United States when it comes to regulation of cosmetics. It is also asking cosmetics companies to sign the Compact for Safe Cosmetics, a

pledge to not use toxic chemicals and to make safer, reformulated products readily available in the U.S. and in every market they serve.

Ms. Malkan says that more than 1,000 companies have signed on so far, but these are mostly small natural product companies. And together they have a very small share of the market. None of the big companies have signed on to the compact. It appears that the industry will not accept federal regulation lightly. It will be a tough fight.

Source: *Corporate Crime Reporter*

### **CONSUMER GROUP SUES MILLER OVER NEW DRINK**

A consumer-advocacy group filed suit against MillerCoors LLC in an effort to have the company's Sparks beverage removed from the Washington, D.C., market. This is the latest in the campaign against the caffeinated alcoholic beverage. The nonprofit Center for Science in the Public Interest sued the second-largest U.S. beer maker in District of Columbia Superior Court, contending that Sparks contains unapproved ingredients and poses health and safety risks for consumers. Zuma Press MillerCoors is a joint venture of SABMiller PLC and Molson Coors Brewing Co. The Treasury Department's Alcohol and Tobacco Tax and Trade Bureau approved all formulas and labels for Sparks, Sparks Light and other versions of the drink.

The suit came amid probes of Sparks's marketing by various state attorneys general, who are concerned about the drink's appeal to minors. In June, MillerCoors's main rival, No. 1 beer maker Anheuser-Busch Cos., agreed to stop selling similar products in a settlement with 11 state attorneys general. But MillerCoors has dug in its heels and is taking a firm stance against moves by regulators and consumer groups to curtail Sparks. It should be noted that MillerCoors has more at stake with Sparks than Anheuser-Busch did with its Tilt and Bud Extra drinks, which Anheuser pledged to reformulate. Sparks is the No. 1 selling drink in the caffeinated alcoholic-beverage category, with 60% market share, and SAB-

Miller paid \$215 million to acquire the brand and other products from McKenzie River Corp. in 2006.

In its suit, the center says U.S. alcohol regulators are only supposed to permit the use of ingredients that the Federal Drug Administration has "affirmatively" determined to be generally recognized as safe. The center contends four of the food additives in Sparks—caffeine, guarana, taurine and ginseng—haven't met that threshold for use in alcoholic drinks. Any manufacturer can self-certify that an ingredient is generally recognized as safe under federal guidelines. The center's lawsuit accuses MillerCoors of irresponsibly marketing Sparks to young consumers. According to George A. Hacker, director of the center's alcohol-policies project, "Mix alcohol and stimulants with a young person's sense of invincibility and you have a recipe for disaster."

### **CPSC FOCUSES ON SAFETY DURING BABY SAFETY MONTH**

The CPSC is putting a special emphasis on safety for babies. The agency has issued some safety tips for parents and others who care for babies. One area of great concern for the CPSC is pillow use in cribs. The CPSC is urging all parents to forego putting any kind of pillows in the crib due to the high risk of suffocation and entrapment. The CPSC is aware of at least 47 infant deaths between January 2006 and May 2008 associated with pillow use in the sleeping environment. In the 16 years between January 1992 and May 2008, pillows and cushions have been associated with 531 infant deaths. The following recommendations deal with nursery safety:

- To reduce the risk of SIDS and suffocation, place baby to sleep on his or her back in a crib that meets current safety standards.
- To prevent suffocation never use a pillow as a mattress for baby to sleep on or to prop baby's head or neck.
- Infants can strangle to death if their bodies pass through gaps between

loose components, broken slats and other parts of the crib and their head and neck become entrapped in the space.

- Do not use old, broken or modified cribs.
- Regularly tighten hardware to keep sides firm.
- Infants can suffocate in spaces between the sides of the crib and an ill fitting mattress; never allow a gap larger than two finger widths at any point between the sides of the crib and the mattress.
- Never place a crib near a window with blind or curtain cords; infants can strangle on the cords.
- Safety around the house is the topic for the recommendations set out below:
- Properly set up play yards according to manufacturers' directions. Only use the mattress provided with the play yard. Do not add extra mattresses, pillows or cushions to the play yard, which can cause a suffocation hazard for infants.
- Look for a toy chest that has a support that will hold the hinged lid open in any position in which it is placed or buy one with a detached lid or doors.
- Small Parts—For children younger than age three, avoid toys with small parts, which can cause choking.
- Magnets—For children younger than age eight, avoid building sets with small magnets. If magnets or pieces with magnets are swallowed, serious injuries and/or death can occur.
- Select toys to suit the age, abilities, skills and interest level of the intended child. Look for sturdy construction, such as tightly-secured eyes, noses and other potential small parts.
- For all children younger than age eight, avoid toys that have sharp edges and points.

- Verify that furniture is stable on its own. For added security, anchor to the floor or attach to a wall.
- Use outlet covers and outlet plates to help prevent electrocution.

CPSC encourages parents to routinely check toys and nursery products against CPSC recall lists and remove recalled products from your home. Sign-up for automatic e-mail recall notifications at [www.cpsc.gov](http://www.cpsc.gov).

Source: CPSC

## XXI. RECALLS UPDATE

### ***NHTSA WARNS FORD OWNERS ABOUT RECALLED VEHICLES***

The federal government is urging owners of 5 million recalled Ford vehicles to bring them to dealerships to repair a cruise control switch system that has been tied to engine fires. The National Highway Traffic Safety Administration issued a second consumer advisory last month to owners of certain unrepaired Ford, Lincoln and Mercury sport utility vehicles, pickup trucks, vans and passenger cars who have not responded to previous recalls.

NHTSA said about 12 million vehicles have been part of the recall and nearly 5 million still have not been fixed. A similar warning was issued in February, but officials said the rate of the vehicles being repaired has declined. The recalls have affected Ford's popular F-Series pickup trucks and led to hundreds of complaints and dozens of lawsuits over engine fires. Ford says it supports the effort to communicate with owners. According to Ford, owners have received several recall notices but "the return rate has been lower than expected or hoped (for)."

Dealers have installed a fused wiring harness into the speed control electrical system as part of the recall, and the government said replacement parts are available. Owners can take their vehicle to a dealer to have the cruise control deactivated until the parts arrive.

NHTSA issued a lengthy list of older vehicles covered by the consumer advisory, including 1993-2004 Ford F150 trucks, 1994-2002 F250 through F550 Super Duty trucks with gasoline engines, and 1998-2001 Ford Explorer and Mercury Mountaineer SUVs, which were among the best-selling vehicles in the nation during those years. A complete list was available at <http://www.nhtsa.dot.gov/>.

Source: Associated Press

### ***GM RECALLS 857,735 VEHICLES FOR FIRE RISK***

General Motors Corp. is recalling 857,735 vehicles equipped with a heated windshield wiper fluid system for a potential short-circuit problem. A short-circuit in the system may cause other electrical features to malfunction, create an odor or cause smoke, increasing the risk of a fire. The recall, reported on NHTSA's Web site, involves the 2007-2008 model year Chevrolet Silverado, Tahoe, Avalanche and Suburban, Cadillac Escalade, Escalade ESV and Escalade EXT, GMC Acadia, Sierra, Yukon, Yukon XL and Saturn Outlook; 2006-2008 Hummer H2, Cadillac DTS and Buick Lucerne; and the 2008 Buick Enclave.

GM plans to install a wire harness with an in-line fuse free of charge to fix the problem, NHTSA said. Separately, the automaker is also recalling 88,809 2008-model year Buick Enclave, and 2007-2008 model year GMC Acadia and Saturn Outlook SUVs in 28 states and Washington, D.C. A build-up of snow or ice on the windshield or the wipers may restrict the movement of the wiper arm in the SUVs and could cause the wiper to detach from its motor, according to NHTSA.

### ***DEERE & COMPANY RECALLS GATOR XUV UTILITY VEHICLES DUE TO FIRE HAZARD***

Deere & Company, of Moline, Illinois, has recalled John Deere Gator XUV 620i Utility Vehicles. The fuel tank can leak from a gap in the seam at the base of the filler neck, posing a fire hazard. Deere & Company has received seven

reports of fuel tank leaks. No fires or injuries have been reported. The recalled utility vehicle is Model 620i. The model number is painted on the side of the vehicle. Consumers should stop using the recalled utility vehicles immediately and contact any John Deere dealer to schedule a free inspection and repair. Keep fuel tank below half full until the repair is made. Registered owners were sent direct mail notification of this recall. For additional information, contact Deere & Company at (800) 537-8233 or visit the firm's Web site at [www.johndeere.com](http://www.johndeere.com).

#### **IMS RECALLS CAR CHARGERS USED WITH HALOGEN SPOTLIGHTS**

International Merchandising Service Inc. (IMS), of Fullerton, California has recalled car chargers used with Power System Plus 3 Million Candlepower Spotlights. The car charger is incompatible with the spotlight's battery, which can cause it to overcharge inside of a vehicle and pose a fire or burn hazard to consumers. IMS has received two reports of incidents of spotlights overheating while being charged with the car charger. No injuries have been reported. According to IMS, the recalled 12V DC car charger was sold with the Power Systems Plus/UST 3 Million Candlepower Spotlight with model number HSLR30S.

The spotlight is black and blue and has a sticker on each side that reads "3 Million Candle Power." "HSLR30S" is printed on the instruction manual and on the packaging. Consumers should immediately stop using the recalled car charger and contact IMS for information on how to receive a free replacement car charger. Consumers can continue to use the spotlights without the car charger. For additional information, contact IMS toll-free at (866) 797-2738, visit the company's Web site at <http://usttools.com/recall>, or write to IMS Inc., 1927 W. Malvern Ave., Fullerton, CA 92833 ATTN: RECALL PROGRAM.

#### **PROGRESS LIGHTING RECALLS INDOOR LIGHT FIXTURES**

Progress Lighting, of Greenville, South Carolina has recalled about 6,000 pendant-style ceiling-mounted indoor light fixtures. The ceiling-mount assembly that supports the light fixture can fail, causing the fixture to unexpectedly fall and injure consumers. Progress Lighting has received three reports of incidents, including one report of a fixture falling from the ceiling. No injuries have been reported. The recall involves the following models of pendant-style ceiling-mounted light fixtures: P3601-09, P3602-09, P3603-09, P3603-09EXP, P3685-09, P3685-09EXP, P4260-09, P4261-09, P4261-09EXP and P4262-09. The product number is located inside the canopy located flush with the ceiling.

The fixtures have frosted white glass and a brushed aluminum finish. The light fixtures were sold by electrical/lighting distributors and select Home Depot and Expo Design Centers nationwide from January 2005 through May 2008 for between \$180 and \$1,000. Consumers should carefully remove the glass from the fixture and contact Progress Lighting to schedule a free inspection and replacement. For more information, contact Progress Lighting toll-free at (866) 418-5543 or visit the firm's Web site at [www.progresslighting.com](http://www.progresslighting.com).

#### **COFFEE MAKERS RECALLED BY SEARS DUE TO FIRE AND BURN HAZARDS**

About 145,000 Kenmore and Kenmore Elite Coffee Makers have been recalled. The wiring in the coffee maker can overheat, posing burn and fire hazards to consumers. Sears has received 20 reports of coffee makers overheating, including 12 fires, causing damage to counter tops, cabinet damage, and plastic melting on the floor. No injuries have been reported. This recall involves 12-cup Kenmore coffee makers sold in black, white, and red with the following model numbers: 100.80006 (black), 100.81006 (white), and 100.82006 (red). The recall also

involves 12-cup Kenmore Elite coffee makers with thermal carafe (model number 100.90007) and 14-cup Kenmore Elite coffee makers (model number 100.90006). The model number can be found on the bottom of the unit.

There is a Kenmore or Kenmore Elite logo on the front bottom of the maker. The coffee makers were sold at Sears, Sears Hardware, The Great Indoors, and Kmart stores nationwide, as well as Sears.com and Kmart.com, from August 2007 through April 2008 for between \$30 and \$100. Consumers should immediately stop using the coffee makers and take them to their nearest Sears or Kmart store to obtain a free replacement coffee maker. For additional information, contact Sears at (800) 978-7615, or visit the following Web sites: [www.sears.com](http://www.sears.com), [www.kmart.com](http://www.kmart.com), or [www.thegreatindoors.com](http://www.thegreatindoors.com).

#### **WARNING RELATING TO BASSINETS AFTER 2 BABIES ARE STRANGLER**

The U.S. Consumer Product Safety Commission has warned parents against using the most popular bassinets in the country after two babies were trapped and strangled to death in the product. The CPSC issued the warning after a five-month-old girl in Shawnee, Kansas, and a four-month-old in Noel, Missouri, became trapped between the product's metal bars and died. The five-month-old died on August 21<sup>st</sup> and the four-month-old died last September. The agency warned against use of the "close-sleeper/bedside sleeper" 3-in-1 and 4-in-1-convertibles, made by Simplicity Inc. of Reading, Pennsylvania. It said the two bassinets contain metal bars spaced farther apart than 2 3/8 inches, the maximum distance allowed under federal crib safety standards. Federal regulations make such standards voluntary for bassinets. According to the agency, the alert was issued because SFCA Inc., the company that purchased Simplicity in April, "has refused to cooperate with the government and recall the products."

SFCA, an affiliate of Blackstreet Capital Partners LLC, a private equity fund in Reading, maintains that it's not

responsible for products previously manufactured by Simplicity. The CPSC announcement did not identify any retailers selling the Simplicity products. Target and Babies R Us have carried the bassinets, but immediately removed them after the CPSC alert. For more information, consumers can call the CPSC hotline at 800-638-2772 or visit [cpsc.gov](http://cpsc.gov).

CPSC is aware that some bassinets in the Simplicity recall include the Graco logo and "Winnie the Pooh" motif licensed by Disney Consumer Products. Consumers are urged to check their bassinets to ensure they are not using one of the recalled Simplicity models, including those with the Graco logo or "Winnie the Pooh" motif. The Simplicity bassinets with the Graco logo were sold between 2001 and 2004. The Simplicity bassinets with the "Winnie the Pooh" motif were sold between 2002 and 2008.

Due to the serious hazard these bassinets pose to babies, CPSC urges all consumers to share this safety warning with day care centers, consignment stores, family and friends to ensure that no child is placed to sleep in a Simplicity convertible bassinet covered by this warning.

#### **WORLDWIDE INC. RECALLS RETRACTABLE DOG LEASHES**

Worldwise Inc., of San Rafael, California, has recalled about 223,000 SlyDog retractable Dog Leashes. The metal clasp connecting the leash to a dog's collar can bend or break while in use, causing the leash to recoil back unexpectedly. This poses a serious risk of injury to consumers. Worldwise has received five reports of injuries, including facial cuts, a broken tooth, displaced eye lens, and a bruised collar bone. This recall involves the SlyDog™ Retractable Dog Leash with a metal clasp. The leash has a handle composed of a blue plastic case with a black plastic grip.

The leash is made of a black woven strap and measures approximately one-half inch wide. The end of the leash has a metal clasp which connects to the

dog's collar. The SlyDog™ retractable leashes with a plastic clasp are not included in this recall. The leashes were sold by Dollar General Stores nationwide from September 2007 through August 2008 for about \$5. Consumers should stop using these leashes immediately and return them to Worldwide Inc. for a full refund, including shipping costs. For more information, contact Worldwide toll-free at (888) 296-3807 or visit the firm's Web site at [www.squareonesystem.com](http://www.squareonesystem.com).

#### **SONY RECALLS 440,000 VAIO LAPTOPS**

Sony says it is recalling 440,000 units of Vaio laptop computers worldwide due to faulty parts that could trigger overheating. Sony Corp. says that the recall involves 19 models in the Vaio TZ series manufactured between May 2007 and July 2008. The Tokyo-based consumer electronics company said improperly placed wires near the hinge connecting the body of the laptop and its display could wear quickly, causing a short circuit and overheating. A flaw in a circuit board inside the display could also overheat its rim. Sony has received 209 reports of overheating worldwide, including seven cases in which people received minor burns. The laptop problem comes two years after Sony had to engage in massive recalls of laptop batteries, which also caused overheating or even burst into flames.

#### **RAPID REEL® RECALLS PORTABLE GARDEN HOSE CARTS**

Eley Corporation, which does business as Rapid Reel of Lincoln, Nebraska, has recalled about 7,000 Portable Garden Hose Reel Carts and Wagons. The tires on the portable garden hose reel can explode while being inflated, posing an injury hazard to consumers. Rapid Reel® has received five reports of tires exploding while being inflated, resulting in lacerations to fingers, arms, and legs from flying pieces of plastic. This recall involves the Rapid Reel® portable garden hose reel carts and wagons. The cart has two tires and the

wagon has four. The tires have a white plastic rim and a steel ball bearing hub or a black plastic bearing hub.

The kits were sold by home repair retailers and distributors such as Ace Hardware, Amazon.com, and True Value Hardware nationwide from April 2005 through March 2006 for between \$190 and \$250. Consumers should not inflate tires on the portable hose carts and contact Rapid Reel® for free replacement tires. For more information, contact Rapid Reel® toll-free at (866) 523-2363 or visit the firm's Web site at [www.rapidreel.com](http://www.rapidreel.com).

#### **SOCCER GOALS RECALLED**

About 190,000 MacGregor and Mitre folding soccer goals are being recalled after the death of a young child. The Consumer Product Safety Commission says a 20-month-old boy from Texas was strangled when his head and arm became entangled in the net of one of the recalled goals. The agency has received one other report of a child's head becoming entangled in a net. The Chinese-made goals were distributed by Regent Sports Corporation and sold by sports and hardware stores nationwide, including Wal-Mart and Ace Hardware. They were available between May 2002 and May 2008. Parents and caregivers are advised to stop using the nets. They can be returned to Regent Sports in exchange for a free, safe replacement. For more information, call 877-516-9707.

## **XXII. FIRM ACTIVITIES**

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#### **OUR FIRM FINDS THAT OPERATING IN SECTIONS HELPS US REPRESENT OUR CLIENTS**

Over the years our firm has evolved from a one-man office into a national law firm. In 1979, I founded the firm and worked in a small office as a sole practitioner. Since that time the firm has grown. We represent only Plaintiffs

and Claimants in civil litigation. Currently, we employ 42 lawyers and about 250 support staff. I am told we are the largest Plaintiff's law firm in the country whose offices are located in one city. Our support staff includes full time investigators, nurses, computer specialists, a public relations department and a comprehensive graphic design department. To date the firm has represented hundreds of thousands of individuals and a number of corporations. However, we only represent corporations when they have claims against other companies. We do not defend any civil cases and do not get involved in criminal cases of any kind.

Several of our lawyers have been profiled in such national publications as *Forbes*, *Time Magazine*, *BusinessWeek*, *The New York Times*, *The Wall Street Journal*, *The National Law Journal*, *The ABA Journal*, and *Lawyers Weekly USA*. We have also appeared nationally on *Good Morning America*, *60 Minutes*, *The O'Reilly Factor*, *CNN*, *Fox*, *ABC Evening News*, *CBS Evening News*, *NBC Evening News*, and *National Public Radio* among others. We have developed a national reputation by being at the forefront of Consumer Litigation. In this regard, we publish this monthly consumer news report which is mailed to over 43,000 individuals. The report is also available on the firm's Web site.

While we have lawyers in the firm who are licensed to practice law in 19 states, we have associate lawyers in other states who work with us in cases. This combination allows us to handle civil cases all over the country. As a result, we have been able to successfully litigate cases nationwide. We represent Plaintiffs and Claimants in the following litigation areas: personal injury, products liability, consumer fraud, insurance, environmental, and pharmaceutical and business-related claims.

The firm is organized in four sections: Personal Injury, Toxic Torts, Mass Torts, and Consumer Fraud. Lawyers and support staff are assigned to these sections where they can specialize in specific areas of litigation. We believe this allows the firm to better represent our

clients and that's extremely important to all of us. We all strive to make our firm more responsive to the needs of the clients we are blessed to represent.

#### **EMPLOYEE SPOTLIGHTS**

##### **COLE PORTIS**

Cole Portis serves as Section Head of our Product Liability/Personal Injury Section. He represents mothers who lost their daughters, spouses who lost their life-long mates, and injured children who will never be able to care for themselves as they grow into adulthood. Unreasonably dangerous and defective products caused these unnecessary deaths and injuries. Instead of placing profits above safety, Cole's hope is that manufacturers of consumer products will carefully engineer and manufacture safe products so that innocent victims won't be hurt or killed. In order to encourage the safe engineering and manufacture of consumer products, Cole will continue to prosecute companies that manufacture defective automobiles, aircraft, ATVs, farm equipment, logging equipment, textile machines and other consumer products. Cole and the lawyers in his section have successfully handled over 40 cases that were tried or resolved for more than one million dollars. Our non-lawyer staff personnel have been involved in all of these cases. More importantly, Cole and all of the folks in his section are blessed to be able to counsel and care for our clients!

Cole believes it is important to use the gifts God has given him in our community. Thus, as a lawyer, he is compelled to participate in legal organizations. He is a past president of the Montgomery County Bar Association (2002). Additionally, he served as President of the Alabama Young Lawyers Association (2000-2001), President of the Montgomery County Trial Lawyers Association (1999), and President of the Auburn University Bar Association (1999). He is also an active member of the Trial Lawyers for Public Justice. Currently, Cole is a Bar Commissioner representing the 15<sup>th</sup> judicial circuit.

During his tenure as the President of the Montgomery County Bar Association some of his accomplishments included:

- establishing a Bench/Bar annual conference featuring judges from all courts located in Montgomery County;
- bringing financial stability to the Association; increasing the membership of the association;
- organizing a patriotic Law Day program featuring Gerry Izzo, a military officer involved in the Somalia conflict (and featured in the movie "Black Hawk Down");
- presenting the Liberty Bell Award, posthumously, to Sergeant Stephen Bryson, killed in action;
- securing computers for the MCBA library;
- offering excellent CLE programs;
- publishing "The Docket" on a monthly basis;
- creating a grievance committee that issued timely reports to the Alabama State Bar;
- obtaining photo ID access for attorneys to the Montgomery County Courthouse; and
- beginning the process of long range planning for the Association.

Cole is an active member of Morningview Baptist Church, where he serves as chairman of the Deacons. In addition, he teaches the Adult 1 Sunday School class and sings in the choir. Cole served as President of the Jimmy Hitchcock Award, a prestigious award honoring Christian student athletes in Montgomery. He is a member of the Advisory Board at Auburn University Montgomery. He recently completed a three-year term as a member of the board of directors for Trinity Presbyterian School. He serves on the board of directors for Character at Heart, an organization that implements character education in our schools, and the Fellowship of Christian Athletes. Finally,

Cole previously served on the Board of Directors for the Alabama Head Injury Foundation, a dedicated group established to raise money for those who suffer traumatic brain injuries.

Cole's mother is originally from Laurel, Mississippi. His father was raised in Lowndes County, Alabama. Cole is married to the former Joy Mikell of Millbrook, and they have four daughters and two sons. Their most recent additions to the family are a five-year-old boy adopted from China, an eight-year-old girl adopted from Ethiopia, and a one-year-old girl adopted from Ethiopia. More important than his legal career, legal accomplishments, community involvement or even his family, Cole recognizes that apart from Christ, he is absolutely nothing. We are blessed to have Cole in the firm.

#### **FRANK WOODSON**

Before joining our firm, Frank Woodson was a partner in the general litigation firm of Turner, Onderdonk, Kimbrough & Howell in Mobile, Alabama, where his practice focused on litigation, both Plaintiff and Defense. Examples of the type of Plaintiff's litigation he handled included: consumer fraud cases against car dealers, finance fraud involving door-to-door sales, personal injury litigation and obtaining landowners' just compensation when their property was taken in eminent domain proceedings.

Frank joined our firm in 2001, and his practice now focuses on Mass Torts related to pharmaceuticals. He brings seventeen years of litigation experience to the Mass Torts Section. Frank is heavily involved in the firm's COX-2 drug litigation. He spoke at the "Mass Torts Made Perfect" seminar in New York City; and the ATLA teleseminar entitled, "Pain Killers and the FDA"; and another Vioxx seminar in Jackson, Mississippi. In addition, he prepared video deposition cuts for several Vioxx trials as well as other aspects of a Vioxx MDL trial package. Frank was recently appointed to the Plaintiff Steering Committee for the Bextra/Celebrex MDL in San Francisco. He also served as the Vice Chairman of the sales and mar-

keting committee for the Vioxx MDL in New Orleans.

Frank was responsible for preparing the firm's first Rezulin case for trial that helped generate the first group settlement of Rezulin cases in the country. In the Spring of 2002 he was also involved in the additional group settlements of the firm's Rezulin cases in the Fall of 2002 and the Spring of 2003, culminating in all the firm's Rezulin cases being resolved in 2004. The amounts of the Rezulin settlements are all confidential.

As a part of the section's Baycol team, Frank was a frequent speaker on this litigation, having spoken at the 2002 ATLA Convention in Atlanta, the Baycol "Hot Doc's" Seminar in Phoenix and on the first live Internet seminar broadcast live for Plaintiffs attorneys held in Newark, New Jersey. Frank was responsible for taking several key depositions in this national litigation. He has worked on the settlement of some of the firm's Baycol cases resulting in settlements in excess of \$70 million.

Frank has enrolled all Propulsid claims in the MDL settlement program. Frank has filed a lawsuit alleging Neurontin caused the client to commit suicide and is investigating claims involving Plavix and drugs that cause Stevens Johnson Syndrome (SJS), having resolved claims for clients who were blinded by SJS. He has been instrumental in resolving other pharmaceutical litigation on a confidential basis, which were not mass torts.

Frank is a former president of Mobile County Young Lawyers and was also a member of Mobile County Bar Association Executive Committee and the State of Alabama Young Lawyers Committee. In addition, he serves as a Trustee on the Executive Committee of the Alabama Association for Justice. Frank is the author of "Pharmaceutical Drug Litigation—An Overview" and "The Bayer Criminal Convictions."

Frank is married to the former Marti Glaze of Tuscaloosa, Alabama, and they have four children. They are active members of Frazer United Methodist Church, where Frank serves on the Board of Stewards. To say that Frank is

an avid fan of the Alabama Crimson Tide is a gross understatement. Even our Auburn lawyers have to admit we are blessed to have Frank with the firm.

#### **CHERYL WELLS**

Cheryl Wells, who has been with the firm for twenty years, works in our Personal injury/Investigative and Mass Torts Sections. She is a clerical assistant/scanner. In this position, she processes incoming mail to include; entering, scanning and dropping in Prolaw. Prolaw is our database for all of our cases. Cheryl also drops closed files that are currently not in Prolaw. This helps us keep up with all our cases in one simple database. Her job is critically important to the firm.

Cheryl has been married to Terry for 17 years and they have three children, Dustin age ten, Garrett eight, and baby Justin who is in heaven. She loves spending time with her family and latest member, "Lulu," an English bulldog puppy. Cheryl also enjoys reading and watching movies and Alabama football with her boys. She is a very good employee and we are fortunate to have her with us.

#### **CHARLES MYRICK**

Charles Myrick has worked for the firm for seven years as a mail clerk. Charles and his co-worker, Fred Gamble, are responsible for sorting and delivering the mail for the whole firm. Because of the size of the firm, and the number of pieces of mail coming in and going out each day, this is a most challenging job. Charles is married to Shelia, who is a nurse in the neo-natal intensive care unit at Baptist Hospital South, and they have a 21-year-old son who is in the Army. In his spare time, Charles enjoys watching sports, mostly football. Currently, he serves as an usher at Christ Community Church in Montgomery. In 1990, Charles was in a real serious accident, suffering a severe head injury, and remained in a coma for over three weeks. This man has come a long way, made a remarkable recovery, and has overcome a great number of obstacles that were placed in his life. Charles is a most valuable employee and he does an outstanding job for the firm.

## **WILLIE FRED GAMBLE**

Willie Fred Gamble came to the firm in February 2005 to work primarily in our mailroom. As stated above, Fred works alongside Charles Myrick, sorting and delivering a tremendous volume of mail on a daily basis. Fred was born and raised in Montgomery and attended Lanier High School before going on to Oklahoma State University when he was an outstanding football player for the Cowboys. At Oklahoma State, Fred majored in Physical Education. After leaving Oklahoma State, Fred signed on to play professional football with the New York Giants. After his time in the NFL, Fred returned to Montgomery and spent several years working for the State of Alabama. He moved from that job to work at Henig Furs, where he worked in both sales and security. Fred has also run a lawn service for the past 18 years. He stays active in football, coaching children's teams. We are fortunate to have Fred with us. He—like Charles—does an outstanding job for the firm.

## ***BILL ROBERTSON ELECTED PRESIDENT OF THE MONTGOMERY COUNTY BAR YOUNG LAWYERS***

Bill Robertson was recently elected as President of the Young Lawyers Section of the Montgomery County Bar Association. The organization consists of approximately 250 young lawyers from the Montgomery area who are 36 years or younger, and who are members of the Montgomery County Bar Association.

Bill, who recently finished a two-year term as Secretary/Treasurer, is looking forward to serving a two-year term as President. As Secretary/Treasurer, he handled the record keeping and financial affairs of the organization along with numerous other responsibilities. Bill chaired the MCBA YLS Charity Golf Tournament this past July, which netted a \$6,500 donation to Brantwood Children's Home in Montgomery. As President, Bill will serve as the chief executive officer and preside at all meetings, and will perform such other duties as are by general usage per-

formed by the chief executive officer of the organization. In addition, he will also serve as chairman of the Board of Directors.

Bill, a 1995 graduate of The Lakeside School in Eufaula, graduated from Auburn University in 1999. Subsequently, he received his law degree from the Thomas Goode Jones School of Law in 2005. Bill is married to the former Leslie Gaither of Eufaula, and they have a son, Henry. We encourage all of our lawyers to be involved in activities in the community outside the firm and Bill has been one of the most active in this regard. He does excellent work on a number of fronts.

## ***CLAY BARNETT ELECTED TO BOARD OF THE MCBA YOUNG LAWYERS***

Clay Barnett was recently voted onto the Board of Directors of the Young Lawyers Section of the Montgomery County Bar Association. Turnout for the election was strong, as news spread that there were nearly twice as many candidates as there were open board slots. Clay will serve on the Board for a two year term, whereby he will likely chair one of the numerous fundraisers conducted by the YLS each year.

In addition to his recent election to the YLS Board of Directors, Clay is the 2008 United Way Campaign Chair for the River Region Attorneys Section. The Campaign is currently underway and Clay is working to secure a high level of participation in this most important fund raising event. Furthermore, Clay and two local district attorneys will once again co-coach a local high school mock trial team in the 2008 YMCA Alabama High School Mock Trial Competition. The coaches expect to return with the complete team from 2007, which consisted of all first year competitors, yet finished fourth in a field over thirty teams from around the state.

Clay received his undergraduate degree from the University of Alabama in 1997, and his law degree from the University in 2001. Clay recently moved to Montgomery from the neighboring town of Hope Hull. He joined the firm

in May of 2007 and has been a very good addition.

## ***MARK ENGLEHART ELECTED PRESIDENT OF THE HUGH MADDOX INN OF COURT***

Mark Englehart, a shareholder in the Toxic Torts Section, recently was elected president of the Hugh Maddox Inn of the American Inns of Court for 2008-09. Evolving out of discussions spurred by then-U.S. Supreme Court Chief Justice Warren Burger in the late 1970s, and formally organized in 1985, the American Inns of Court adopted the traditional English model of legal apprenticeship and modified it to fit the particular needs of the American legal system. The mission of the American Inns of Court is "to foster excellence in professionalism, ethics, civility, and legal skills." With more than 25,000 judges and lawyers actively participating in an Inn of Court, and an additional 50,000 who are alumni of an Inn, the American Inns of Court is one of the fastest-growing legal organizations in the country. Each local Inn meets once a month both to fellowship and to hold programs and discussions on matters of ethics, skills, and professionalism.

The Hugh Maddox Inn of Court, the local Inn in Montgomery, Alabama, is named after one of its founding members, now-retired Alabama Supreme Court Justice Hugh Maddox. Not incidentally, Justice Maddox, the third-longest tenured member in the history of the Alabama Supreme Court (with 31 years service, having been elected five times) and the author of 1,650 majority opinions, will receive this month the prestigious A. Sherman Christenson award. The award, one of the American Inns' three top national honors, is bestowed upon a member of an American Inn of Court "who has provided distinguished, exceptional, and significant leadership to the American Inns of Court movement"—a description that fits Justice Maddox "to a T."

Justice Maddox co-founded the Inn now bearing his name in 1989. The Hugh Maddox Inn counts among its over 100 active and alumni members

numerous federal and state judges, at both trial and appellate levels; lawyers of varying experience levels, from one to 40 years in the profession; lawyers from divergent types of practice—attorneys in private practice (from solo practitioners to large firm lawyers), criminal defense lawyers, civil lawyers from both sides of the bar, state and federal prosecutors, and lawyers from a variety of other government practice backgrounds; and lawyers of varied ages, race, gender, and ethnicity.

The Inn seeks to help lawyers to become more effective advocates and counselors with a keener sense of ethical awareness, and to foster civility among widely-diverse segments of the bar that might not otherwise meet and interact. Younger members learn side-by-side with, and are mentored by, some of the most experienced judges and lawyers in the local bar. Six lawyers from our firm presently belong to the Hugh Maddox Inn, including Mark, who has been a member for about 12 years. All have counted it a valuable experience. We are honored to have Mark selected to head this fine organization. I am sure he will do an outstanding job!

## XXIII. SPECIAL RECOGNITIONS

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### **NAT BRYAN WILL BE MISSED**

John Nathanael “Nat” Bryan, Sr., who was only 48 years of age, died on August 25, 2008. His loving survivors include his wife Ashley Butler Bryan; his children, Jack Bryan and Kate Bryan; his parents, Circuit Judge John Newton Bryan, retired, and Susan Baarcke Bryan; and his sister, Sandra Bryan Vitalis. Nat’s death came as a shock to all of us who knew him. It was a reminder of how fragile our existence on earth really is.

Nat graduated from W.A. Berry High School in 1978, lettered in three sports, and was a member of the Berry 1977 State Championship football team. Nat

was also a proud graduate of Auburn University. One of his greatest passions was following Auburn’s football program. Nat was devoted to his family. He adored Ashley, his wife of 17 years. Just as Nat learned to hunt and fish from his father, Nat passed on his love of the outdoors to his 14-year-old son, Jack. Nat took great delight in his 12-year-old daughter Kate’s spunky nature.

Nat graduated from the Cumberland School of Law at Samford University in 1985, and practiced law for 23 years. He was a partner at the law firm of Marsh, Richard, & Bryan, P.C. His partners and colleagues at the law firm will miss him dearly. Nat was fiercely devoted to his clients and to being an advocate for people hurt on the job or on our state’s highways. He will be sorely missed by his many friends and fellow lawyers. Our prayers have been with Nat’s family and with members of his law firm.

### **A MESSAGE FROM CLIENTS**

Ben Baker represented Terri and Jerry Holderman, who are from Georgia, in a lawsuit against Ford Motor Co. This couple lost a child in a tragic motor vehicle accident involving a Bronco II and Ben filed a products liability lawsuit on their behalf. The case was resolved by way of a settlement with Ford. Recently, Ben received a letter from his clients and after reading it, I asked their permission for the letter to be included in this issue. This is what they had to say to Ben:

*Thank you so much for your hard work and diligence in representing Justin and us in seeking justice against Ford Motor Company. We know that you, Laurie Weldon and others put in many hours building this case. Hopefully our lawsuit was another reminder to Ford Motor Company that they made an extremely unethical decision when they marketed a known dangerous commodity to an unsuspecting public market. We would never desire that anyone experience the loss of a child as we*

*have, but there are moments when we wish that the “decision-makers” at Ford could spend one day in our shoes. Their perspective would be forever changed. Thank you again and may God bless you and your family.*

*Sincerely,  
Terri and Jerry Holdeman.*

This message was a reminder why we must continue our fight to preserve the jury system in the U.S. It’s critically important to folks like Mr. and Mrs. Holdeman and others who are victimized by Corporate America, who without the courts would have no place to go for redress of wrongs.

### **FIRM LAWYERS ASSIST STATE BAR IN RECEIVING NATIONAL AWARD**

Our firm is involved with many community service projects. One way that we participate in worthy causes is by encouraging our lawyers to be active members in various legal organizations, such as the Alabama State Bar’s Young Lawyers Section (YLS). Recently, members of the firm were key in the YLS receiving national recognition from the American Bar Association for a project that introduces minority 11<sup>th</sup> and 12<sup>th</sup> grade students to the American civil and criminal justice systems.

The state bar’s YLS received a First Place Award of Achievement for its Minority Pre-Law Conference program designed to address the shortage of minorities in the legal profession and increase diversity in the bar. The conferences are held in Birmingham and Montgomery in April each year. Students have an opportunity to view a simulated trial which provides them with a better understanding of how U.S. courts resolve legal conflicts and roles that judges, lawyers, juries, and witnesses play in the system. By participating in the mock trial as jurors, students gain an “insiders” perspective on courtroom procedure.

The goal of this program is building confidence in our system of justice, in our judiciary, and in the lawyers and

judges who provide legal service to all Americans, despite barriers of language and culture. If lawyers and judges can achieve diversity, citizens will have more confidence in the ability of the legal and judicial system to help solve their problems. The pre-law conferences feature a panel of minority lawyers from both cities representing various areas of law practice. The lawyers on the panel explained their day-to-day work experiences and answered questions. For students who were interested in attending college and/or law school, the conferences sponsored a college preparation speaker. The format of the program allowed students to attend breakout sessions where they are paired with minority lawyers to discuss specific questions and concerns regarding the practice of law. Finally, the program offers a luncheon for the students with a prominent keynote speaker giving words of encouragement.

With more than 400 students attending the program, the events are a successful outreach because it demonstrated that lawyers have a strong commitment to diversity and to interacting with the community. The 4700-member YLS is composed of all lawyers who are 36 years of age and under or who have been admitted to the bar for three years or less. The section conducts various seminars and also sponsors service projects designed to aid the public in its understanding of the law and assist in solving legal problems. Our firm has several lawyers who hold leadership roles in the YLS and assist with the planning and the successful execution of many of these YLS programs. Navan Ward, Roman Shaul, Leslie Ellis, Bill Robertson, and Larry Golston from our firm worked on this project.

#### **WETUMPKA MAN NAMED MARINE OF THE YEAR**

There are 38,000 active Marines, but only one holds the title of "Marine of the Year," and I am proud to say that Marine lives in Alabama. Recently, Governor Bob Riley held a special ceremony to honor this Marine, presenting

Sgt. Peyton Williams with an official proclamation. Governor Riley told Sgt. Williams he made the state and nation a better place for everyone. This was Sgt. Williams' second ceremony. The Top Commander in Iraq, General David Petraeus, had previously recognized the Alabama Marine for his exceptional service. His family is very proud of Sgt. Williams and justifiably so. In this regard, his Grandfather Bill Davis told WSFA 12 News: "We love our country and we are proud of him."

The 22-year-old Wetumpka native joined the Marines after the September 11, 2001 terrorist attacks. Since enlisting, his service has taken him to at least twenty countries in Africa, Europe and the Middle East. Now, he says he just wants to sit at home and relax for a while. Sgt. Williams' service with the Marines ended on September 26<sup>th</sup>, though he still has four years of inactive service. He was also deployed to Mississippi and Louisiana to help with the Hurricane Katrina relief efforts. We commend Sgt. Peyton Williams for his service to our country and we are extremely proud of him.

#### **WHEELCHAIR ACCESSIBLE APARTMENTS OPENING SOON IN MOBILE**

*Anderson-Fischer Apartments*, a new, wheelchair accessible, affordable apartment community in Mobile is in the final stages of construction and will soon provide nineteen wheelchair accessible apartments to very low income households with qualifying disabilities. The project is sponsored by the Alabama Head Injury Foundation (AHIF) and Mobile-based Accessible Space, Inc. (ASI). The one and two-bedroom apartments will be subsidized by the U.S. Department of Housing and Urban Development (HUD), and qualifying households will pay approximately 30% of their monthly income for rent. The apartments are currently under construction and anticipated to be completed this November 2008.

The apartments are designed with an open floor plan and meet Americans with Disabilities Act (ADA) guidelines for wheelchair accessibility. Apartments

include a full kitchen with roll-under counters and accessible ovens and range tops, and also provide an accessible bathroom with roll-in showers and grab bars. Other features include raised electrical outlets, lowered light switches and lever-action handles on the doors. One-bedroom apartments provide approximately 540 square feet of living space, and two-bedrooms provide approximately 800 square feet. Primary funding and rental assistance for *Anderson-Fischer Apartments* was provided by the HUD Section 811 Program, Federal Home Loan Bank (FHLB) of Atlanta's Affordable Housing Program/Regions Bank

If you want more information, you can call ASI at 1-800-466-7722. More information about ASI is available on its website at [www.accessiblespace.org](http://www.accessiblespace.org). I am pleased to include information on this project in the *Report*. AHIF does a tremendous job helping folks and is to be commended for all it does. Additional information regarding the Alabama Head Injury Foundation can be found at [www.ahif.org](http://www.ahif.org).

Source: News Release on project

## **XXIV. SOME CLOSING OBSERVATIONS**

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#### **GEMS OF WISDOM FROM THE PAST**

Over the past 15 years or so, the American jury system has been under constant attack and it has been a very tough battle. The attacks, interestingly enough, were financed by the giants of Corporate America which were trying to get immunity from lawsuits arising out of their wrongdoing. Fortunately, the system has survived and in the long run because of these attacks the system may actually wind up being stronger. Over the years, a great deal has been written about the jury system and the right to trial by jury guaranteed to all U.S. citizens by the Constitution. The following are a few of those words of wisdom.

*The friends and adversaries of the plan of the constitutional convention, if they agree on nothing else, concur at least in the value they set upon trial by jury; the former regard it as a valuable safe guard to liberty; the latter represent it as the palladium of free Government.*

Alexander Hamilton (1788)

*I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.*

Thomas Jefferson (1788)

*Trial by jury in civil cases is as essential to secure the liberty of the people as any of the pre-existent rights of nature.*

James Madison (1789)

*Without the trial by jury we have no way to keep us from being ridden like horses, fleeced like sheep, fed like swine and clothed like hounds.*

John Adams

*Woe to those who enact unjust statutes and who write oppressive decrees, depriving the needy of judgment and robbing my people's poor of their rights, making widows their plunder and orphans their prey.*

Isaiah 10:1-2

The powerful forces at work in this county, which are dedicated to the task of destroying the American jury system, haven't given up. These forces are financed by corporate giants led by their top officials who could care less about their victims and the problems caused to them. A former U.S. president warned us about the consequences of giving corporations too much power in this country. This is what he had to say:

*I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. . . . Corporations have been enthroned and*

*an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed.*

President Abraham Lincoln  
November 21, 1864

Interestingly, President Lincoln also had a great deal to say about financial institutions—their power and influence—and how he saw them as being bad news for the United States unless they were regulated and controlled. Based on all of the corruption and wrongdoing in all too many of the corporate board rooms of America, the American people are now seeing first hand why the right to trial by jury must be preserved. Hopefully, there also are millions of people in this country who will fight hard as necessary to preserve this right. I am convinced there are and as long as I have breath in me I will be a foot-soldier in that fight!

#### **CITIZENS SPEAK OUT ON EXXONMOBIL**

Recently, I read a letter to the editor of the Mobile Press Register that laid it on ExxonMobil pretty hard. Having learned first-hand how this giant and politically powerful oil company operates, I read the opinions set out in this letter with great interest. Since our readers might get some insight into how this company operates, I am setting out the letter below.

#### **Fat Cats Just Getting Fatter**

*Start the clock: \$1,300. That's more than a lot of Alabamians make in a month, but that's the kind of profits ExxonMobil makes, every second, all day long. So while most Alabamians are draining their wallets just to fill up their cars, Exxon's fat cats are just getting fatter at our expense. Enough is enough. Let us not forget that we, the taxpayers, are giving these greedy, price-gouging*

*oil companies tax breaks and tax incentives to make these world record profits. Across the country, families are barely scraping enough money to put gas in the family car so they can go to work or take their kids to school. Parents have to go to work and children have to go to school. Occasional drops in fuel prices don't last, but the hardships for American families do. What is really fascinating, if not downright insulting and laughable, is the fact that oil companies defend themselves by claiming that they are merely reaping the benefits of good old "capitalism."*

*They are claiming that they should be able to charge us whatever they want as long as we are willing to pay it. They are claiming that any attempt to put a cap on their profits would defeat the principles of a free-world market. Well, I don't know about you, but in my "free-world market," the government does not give me a tax break for going to work and doing what I choose to do for a living. The worst part is that, not only are they not paying taxes like you and I are, and not only are they gouging us into a recession, but ExxonMobil wasn't even punished for intentionally stealing taxpayer dollars from every Alabamian in the state. When someone steals, they ought to be held accountable for it.*

*Now, stop the clock: If it took you one minute to read this letter, Exxon just made nearly \$80,000 in that time. If it took you two minutes, Exxon made more than \$150,000 profit. During your lunch break today, Exxon will make nearly \$4.7 million. Do the math. It doesn't take long to see that oil companies' price-gouging adds up, and Americans are footing the bill.*

EATON G. BARNARD  
Mobile Press Register  
August 24, 2008

## TEN PRINCIPLES THAT SERVE WELL AS A GUIDE FOR LIVING

Walter Albritton, who is one of the pastors at my church, has ten principles that he says serve him as a guide for living. Walter tells me these principles are neither new nor profound and that lots of folks have been living by some or all of them for generations. He has found these principles to be helpful in his life and I believe all ten are worthy of our consideration as a means of finding peace and harmony in our lives. Here they are as compiled by my friend, Walter Albritton:

- Live your life in chapters.
- Make progress, not perfection, your goal.
- Learn to celebrate “excellent” mistakes.
- Eliminate “if only” from your vocabulary.
- Refuse to blame other people for your problems.
- Accept the imperfections of other people.
- Live no day without laughter.
- Smile and move on when people rain on your parade.
- If you are prone to fuss a lot, stop complaining.
- When the bottom falls out of your life, pray for spring.

So there you have it—I believe these are ten principles that can help you live a good life and as Walter says, “squeeze more joy out of every day.” However, they are not easy principles to live by, but Walter says he knows they can help because they have helped him daily for years and still do. The only way we can follow these principles, however, is through the presence of the Holy Spirit and Jesus Christ in our daily walk through this life. That’s really what makes the difference and allows Walter’s ten principles to help us daily.

## LAST WORDS OF A REAL AMERICAN HERO

No thinking person can deny that history will record Dr. Martin Luther King as having had a tremendous impact on this country. Many believe his full impact is unparalleled by any one person in U.S. history. During his lifetime, this man was both loved and hated. There was very little middle ground. In fact, on the haters’ side, J. Edgar Hoover, head man at the FBI, was said to be obsessed with Dr. King and set out to destroy him. In his last speech, made prior to his being shot and killed in Memphis, Dr. King had this to say:

*And, He’s allowed me to go up to the mountain. And, I’ve looked over, and I have seen the Promised Land. I may not get there with you. But I want you to know tonight, that we, as a people, will get to the Promised Land.*

*Dr. Martin Luther King, Jr.  
April 3, 1968*

Today, we are a nation deeply divided—torn apart by discord even in the halls of power in our Nation’s Capitol—and that is a sad commentary on our times. Injustice, inequality, and oppression—based on race, religion, ethnicity, and gender—are unfortunately very much a part of our daily existence. I have often wondered what America would be like today had Dr. King lived out his full life expectancy. Even those, who during his life on earth disagreed with the views and tactics of Dr. King, now will have to admit they were wrong. Dr. Martin Luther King, Jr.,—a great American—left his indelible mark on this country. Hopefully, all people will eventually get to the Promised Land foreseen by this man and that’s my prayer today for the United States of America!

### FAVORITE BIBLE VERSES

Bea Walton, a retired school principal from Lafayette, Alabama, and who now

lives in Montgomery, says there are so many Bible verses that she loves, it’s hard for her to pick out just one or two for special mention. However, she says these are two of her favorites.

*For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.*

*John 3:16*

*But seek ye first the kingdom of God and his righteousness; and all these things shall be added to you.*

*Matt. 6:33*

Bea attends St. James United Methodist Church where she is a member of the Frazier Sunday school class and sings in the choir. This very special lady loves people and is actively involved on a daily basis in helping folks who need help. Bea also loves her Lord and Savior and truly puts Him first in her life. If you want to meet a person who lives life to the fullest and is a joy to be around, you might want to drop by St. James United Methodist Church on a Sunday morning at 9:30 and visit the Frazier class.

## XXV. SOME PARTING WORDS

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### THE LESSON LEARNED FROM JESUS’ SERMON ON THE MOUNT

I had to teach a Sunday School lesson recently to the “Old Coggers Class” at my church and the subject was Jesus’ message to his disciples referred to as the Sermon on the Mount. That experience made me realize how the message found in Chapters 5–7 of Matthew’s account of this sermon applied to folks of that day as Jesus started His ministry. He was speaking to His 12 disciples and the crowd of people who came to hear His words as He taught. What

Jesus said then certainly applies to us today in modern times and it speaks clearly to all of us. The Beatitudes are included in Matthew 5: 1-12.

Now when he saw the crowds, he went up on a mountainside and sat down. His disciples came to him, and he began to teach them saying:

*Blessed are the poor in spirit, for theirs is the kingdom of heaven.  
Blessed are those who mourn, for they will be comforted.  
Blessed are the meek, for they will inherit the earth.  
Blessed are those who hunger and thirst for righteousness, for they will be filled.  
Blessed are the merciful, for they will be shown mercy.  
Blessed are the pure in heart, for they will see God.  
Blessed are the peacemakers, for they will be called sons of God.  
Blessed are those who are persecuted because of righteousness, for theirs is the kingdom of heaven.  
Blessed are you when people insult you, persecute you and*

*falsely say all kinds of evil against you because of me.  
Rejoice and be glad, because great is your reward in heaven, for in the same way they persecuted the prophets who were before you.*

The Beatitudes are all about Jesus. It must be understood. They aren't a call to a rigid set of rules. It's said that they aren't a call to "law," but to grace. That grace is freely available to all who are simply willing to seek first the kingdom of God. The Beatitudes are a reflection of Jesus or really a self-portrait of the Messiah. The Sermon on the Mount doesn't tell us how to become a follower of Jesus, but rather describes the ideal characters of a disciple. Only Jesus fully achieved this high ideal which sets goals for every Christian to pursue. The sermon isn't a prescription for salvation by "works," but rather is a description of the possibilities that God's grace opens to those who surrender completely to the rule of God. In substance, these are not set rules that must be met. Instead they are guidelines for a Christian to follow.

Jesus also taught his disciples and those in attendance on that day how to pray. It's the prayer that most Christians put up more than any other.

*In this manner, therefore, pray:  
Our Father in heaven, Hallowed be Your name. Your kingdom come. Your will be done On earth as it is in heaven. Give us this day our daily bread. And forgive us our debts, As we forgive our debtors. And do not lead us into temptation, But deliver us from the evil one. For Yours is the kingdom and the power and the glory forever. Amen.*

*Matthew 6: 9-13*

As we approach Election Day in our nation, it would be good to reflect on those words of Jesus both in the Beatitudes and in the Lord's Prayer. May God bless the United States of America and all of its people.

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