



THE  
**JERE BEASLEY REPORT** DECEMBER 2008

## Beasley Allen

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# I. CAPITOL OBSERVATIONS

## **A NEW AND BETTER DAY FOR THE UNITED STATES OF AMERICA**

The historic election of Barack Obama as President of the United States brings about a new day in America. It's my belief that it will be a better day for all Americans. The Obama presidency will help bring our nation together at a time when unity is so badly needed. The President-Elect will bring the very best of America into his Cabinet and into all key positions in his Administration and he will be a president for all Americans. That will be essential to his success. As we know all too well, the Obama Administration will inherit the most serious set of problems our nation has seen in years. It will take a bipartisan approach to governing to solve these problems. Such an approach can only come from a person with the ability, the desire and the courage required for times like these. May God bless the new President—his family, our nation, and all of our people.

## **LAWSUIT IN MOBILE SETTLED**

We recently settled a case that arose out of a highway collision on behalf of a Mobile man whose case had been pending in Mobile County Circuit Court. The motor vehicle accident occurred on the evening of October 19, 2006 when a large Budweiser truck slammed into the rear of the Saturn automobile in which our client was riding as a back-seat passenger. The driver of the Saturn had to stop for a Ford Explorer that was disabled in the left lane of the approach to the Wallace Tunnel on I-10 in Mobile. The Budweiser truck was traveling at about 60 to 65 mph and was unable to stop before slamming into the Saturn. The posted speed limit on the highway was 55 mph. Also, there was a sign that required trucks to use the right lane of traffic.

Our client was severely injured in the collision and suffered what is referred to as a burst compression fracture of his back. As a result, he had to have a

decompression and fusion of his spine. This man was fortunate to have survived the crash since the Saturn was rendered a total loss with the rear end literally crushed. As a result of his injuries, he can no longer perform his duties as a warehouse supervisor at a local business establishment. Our client will go back to school so that he can be retrained for a job that he can do. At present—two years post accident—he still has to use a wheelchair, a walker or a four-prong cane in order to ambulate. Our client will require future medical treatment therapy and rehabilitation. His life care plan was most conservative and the cost of the plan, reduced to present value, and other damages, including medical expenses and loss of earnings, was \$2.36 Million.

A few days after mediation, the case was settled for \$6.5 million. The case had been scheduled for trial in about ten days. LaBarron Boone was the lead lawyer from our firm in the case. Greg Allen and I, along with Wesley Pitters, a Montgomery lawyer, were also involved in handling the case. Fortunately, we obtained a very good settlement for our client and his wife. Now they—along with their two fine children—can get on with their lives.

## **ALABAMA'S BUSINESS CLIMATE RANKS NUMBER THREE AMONG STATES**

Alabama is still a good place for business. This ranking was acknowledged when, according to a new ranking from Site Selection magazine, Alabama tied with Texas for third place among the states with the top business climates. North Carolina and Tennessee ranked first and second, respectively, and Indiana took the fifth spot. The top ten was rounded out with Florida, Ohio, Virginia, Illinois and Georgia. The economic development publication's annual business climate rankings are determined by considering the state's performance in Conway Data's "New Plant Database," which tracks new and expanded business facility activity and a survey of corporate site seekers across the country.

Site selectors also ranked the most important factors when determining a location for a new facility. The three

leading factors were ease of permitting and regulatory procedures, transportation infrastructure and existing workforce skills. The rankings were published in the magazine's November issue. This is another indication that the naysayers in Alabama, who have their own agenda, haven't been able to tarnish our state's reputation as a good place for business.

Source: *Birmingham News*

## IN THIS ISSUE

I.	Capitol Observations . . . . .	2
II.	Drug Manufacturer Fraud Litigation	3
III.	Political Observations . . . . .	5
IV.	Legislative Happenings . . . . .	6
V.	Court Watch . . . . .	7
VI.	The National Scene . . . . .	9
VII.	The Corporate World . . . . .	10
VIII.	Campaign Finance Reform . . . . .	12
IX.	Congressional Update . . . . .	13
X.	Product Liability Update . . . . .	14
XI.	Mass Torts Update. . . . .	16
XII.	Business Litigation . . . . .	18
XIII.	Insurance and Finance Update . . .	20
XIV.	Predatory Lending. . . . .	21
XV.	Premises Liability Update . . . . .	22
XVI.	Workplace Hazards. . . . .	25
XVII.	Transportation . . . . .	28
XVIII.	Arbitration Update . . . . .	29
XIX.	Nursing Home Update. . . . .	30
XX.	Healthcare Issues . . . . .	30
XXI.	Environmental Concerns. . . . .	32
XXII.	The Consumer Corner. . . . .	35
XXIII.	Recalls Update . . . . .	36
XXIV.	Firm Activities . . . . .	40
XXV.	Special Recognitions. . . . .	43
XXVI.	Some Closing Observations . . . . .	45
XXVII.	My Parting Words . . . . .	46

## **ALABAMA VOTERS APPROVE AMENDMENT ONE**

On November 4<sup>th</sup>, Alabamians approved Amendment One, which I hope was the right thing to do. Its passage will give Gov. Riley authority to borrow as much as \$625 million from the Alabama Trust Fund. However, the borrowed money will have to be repaid. The Governor says this vote was needed to balance this year's education and general fund budgets. But, even with the borrowed money from Amendment One, I believe other revenue measures will be needed during next year's legislative session to keep government afloat. Amendment One allows state officials to borrow money from a state savings account called the Alabama Trust Fund and pay it back in future years. I had mixed emotions about this amendment and voted against it. I just don't like the concept of borrowing from the trust fund. Hopefully, I was wrong. We seem inclined to keep using the patchwork approach to funding state services and dealing with problems facing our state. While politically it may make sense to borrow this money, this approach just puts off making some tough fiscal decisions that eventually will have to be made.

Source: Associated Press

## **ALABAMA OFFICIALS ANNOUNCE AUTISM PROGRAM**

The leaders of the Alabama Autism Task Force, along with Lt. Governor Jim Folsom Jr. and state Rep. Cam Ward, recently announced an initiative for training Alabama teachers regarding autism and other developmental disabilities. The announcement was made in Montgomery by Dr. Mabrey Whetstone of the state Department of Education. The American Autism Society says one out of every 150 children is diagnosed with autism or autism-related disorders.

## **ALABAMA PORT CITY WINS \$1.6 BILLION SHIP CONTRACT**

Senator Richard Shelby made an important announcement last month that was very good news for our state. The Navy awarded Austal USA a \$1.6

billion contract to build ten high-speed military transport ships in Mobile. The work will be a boon to Austal's shipyard on the Mobile River, which has about 1,000 employees. The company was competing with two other shipbuilders for the job and Alabama was the winner. Senator Shelby said in a news release:

*I am pleased that the Navy continues to recognize Austal's tremendous shipbuilding capabilities. This award enhances south Alabama's defense community and complements our state's service to our armed forces.*

Austal Ltd. is an Australian-based ship maker specializing in high-speed ferries and transport vessels. It opened its U.S. facility in Mobile in 1999. The Navy's current acquisition plan calls for building ten vessels between fiscal years 2010 and 2015. The transport ship is designed to quickly move troops and cargo. It will include a flight deck for helicopters and a ramp allowing vehicles to drive quickly off the ship.

Source: Associated Press

## **STATE BAR REQUESTS ATTORNEY GENERAL TO INVESTIGATE ILLEGAL CONDUCT**

The Alabama State Bar has requested Attorney General Troy King to investigate the conduct of third parties in the recent Supreme Court election. It appears there were numerous complaints from voters and members of the state bar that prompted President Mark White of Birmingham to contact the Attorney General. The false identification of the State Bar as a "rating agency" for judicial candidates was used by one of the campaigns and third-party groups and definitely had an effect on the outcome of this race.

The Attorney General has the sole authority to prosecute violations of the Fair Campaign Practices Act. The Bar Association president asked the Attorney General to investigate whether such third-party interests have violated the laws of the State of Alabama, including the Fair Campaign Practices Act. Those running the false ads and making the false calls were made aware of the falsity of that information. Never-

theless, paid advertising continued to be run right up to and including Election Day.

The State Bar has been working to eliminate judicial campaign activities that undermine public trust and confidence in the judiciary. Everybody's goal should be a fair, impartial and independent judiciary. During the last two Supreme Court races in Alabama, the State Bar Association took a strong stand against negative attack ads. Unfortunately, that effort had no real effect as evidenced by this year's Supreme Court race. It will be interesting to see what the Attorney General does with the Bar's request.

Source: Associated Press

## **II. DRUG MANUFACTURER FRAUD LITIGATION**

### **THE FEDERAL GOVERNMENT MUST BE STOPPED FROM TAKING DRUG AWARDS**

The State of Alabama has filed a lawsuit to prevent the federal government from taking half of the \$282 million the state has been awarded in damages in the Medicaid fraud lawsuits. The pharmaceutical companies cheated the state by overpricing Medicaid drugs and the state filed suit. Attorney General Troy King said at a news conference that state Medicaid officials had received a letter from their federal counterparts asking the state to immediately pay the federal government \$140 million from the jury awards and settlements in the cases. The Attorney General filed the lawsuit in federal court in Montgomery in an attempt to stop the federal government from collecting the money by cutting its payments to the state Medicaid program. Cutting the federal allotment would mean Alabama's cash-strapped program would have to cut medical services to children, low-income Alabama residents and the elderly. The federal government is flat wrong and has no right to the funds.

For the last twenty years, states that administer Medicaid programs have

been compelled to follow reimbursement formulas that exist within guidelines established by the Centers for Medicare and Medicaid Services (CMS). The states have lacked the information and the flexibility to adequately audit or control those expenditures. As a result, those systems have been abused and manipulated by the drug companies at a cost to the states' programs of hundreds of millions of dollars.

Because of the fiduciary duty owed to those who depend upon Medicaid and its scarce resources for their medicines and treatments the Attorney General acted to stop CMS from taking Alabama's money. Alabama commenced litigation against 79 pharmaceutical companies for stealing these funds through the systemic abuse juries have seen uncovered in the trials thus far. CMS is trying to take the funds from the very neediest and most vulnerable of all our citizens—our poor, our disabled, our children, and our elderly.

The attempt by CMS to take the state's money flies in the face of the United States Constitution and well-established federal law. The Attorney General called on President Bush to put an immediate stop to this illegal power grab by the Federal Government. He also asked for the assistance of our two U.S. Senators, Richard Shelby and Jeff Sessions, and all of our Congressional delegation, as well as Governor Bob Riley, in the battle to protect Alabama taxpayers. This is a battle that affects every Alabamian and one that must be won.

Source: *Associated Press*

### **KANSAS SUES 13 DRUG MAKERS OVER MEDICAID FRAUD**

Attorney General Steve Six has filed suit against 13 drug makers on behalf of the State of Kansas, alleging they unlawfully inflated drug costs paid by taxpayers through the state's Medicaid program. The drug makers deliberately misreported pricing information in order to increase reimbursement from the state. The scheme was identical to what the companies have done in Alabama and other states. Attorney General Six had this to say about the lawsuit:

*We believe Kansas has lost millions of dollars as a result of these drug companies' fraudulent pricing schemes. We allege that the drug manufacturers deliberately inflated the reported average wholesale prices and other wholesale prices for their drugs in order to increase market share for their products. This is a disturbing abuse of the Medicaid reimbursement system. Because of the drug companies' inaccurate pricing, the Kansas' Medicaid program has spent millions of dollars more for prescription drugs than it should have. The companies' false price reporting is all the more offensive because it undercuts Medicaid, the publicly-funded health program created to assist our state's most vulnerable citizens.*

The media in Kansas like the idea of an Attorney General standing up for the people of his state. The following is typical of what is being said in Kansas about this lawsuit and about the Attorney General who filed it:

*It's encouraging to know that the Attorney General's office is keeping an eye out for the state's best interests, which in turn benefits taxpayers. It's a duty of the Attorney General's office that has been placed on the back burner the past several years. And Kansans should take some small measure of satisfaction in knowing that we finally have an Attorney General who is keeping an eye out for Kansas taxpayers.*

The Kansas Medicaid program spent \$160 million more on prescription drugs last year than it should have. The suit alleges the price for a drug paid by the state, based on a fraudulently-reported Average Wholesale Price (AWP) and other price indicators, bears no relationship to the true price and can exceed 100% to 200% of the actual price. One example cited in the complaint involved Dey. The company reported an AWP of \$44.10 for Ipratropium Bromide, yet the drug maker sold the same drug to retail pharmacists for \$8.35—a 355% difference! Another involved GSK which reported

an AWP of \$128.24 for Zofran, but charged \$22.61- a 450% difference. I, along with Dee Miles, and Clint Carter from our firm, and the law firm of Bartimus, Frickleton, Robertson & Gory, P.C. of Kansas City, represent the Attorney General and the State of Kansas in this lawsuit.

### **DRUG COMPANIES SETTLE WITH MISSOURI IN ANOTHER MEDICAID FRAUD LAWSUIT**

Three pharmaceutical companies that cheated Missouri's Medicaid system have agreed to pay \$31 million to settle that state's Medicaid fraud lawsuit. The settlement came at the conclusion of a trial in the case filed by Missouri. A St. Louis Circuit Court jury found that the companies, Warrick Pharmaceutical, Schering Corp. and Schering-Plough Corp., fraudulently overcharged Medicaid for prescription drugs in Missouri. The jury awarded \$7.3 million in compensatory damages in the first phase of the trial. Jurors said the State of Missouri proved there was "clear and convincing evidence of outrageous conduct" by the Defendants.

After the first phase, the jury had to decide if punitive damages should be awarded. While the jury was out in the second phase, the companies settled with Attorney General Jay Nixon, who by the way was elected Governor of his state on November 4<sup>th</sup>. The settlement was agreed to before the jury returned to the court room with a punitive award. The jurors had awarded \$100 million in punitive damages and had their verdict ready to be returned to the trial judge. However, the case had already been settled and the companies will now pay \$31 million immediately without an appeal. This was a good result for the state and there is now a clear trend in these cases. All of the other companies should now come to the table and settle the remaining cases that are pending in several states, including Alabama.

Source: *St. Louis Post Dispatch*

### **LILLY SETTLES ZYPREXA CLAIM**

Eli Lilly and Co., the Indianapolis drug maker, will settle an investigation by federal and state authorities over the

antipsychotic Zyprexa. The government's investigation is related to past marketing and promotional practices for Zyprexa, which has been one of Lilly's biggest-selling drugs since its introduction in 1996. You will recall that recently the company paid \$15 million to settle a single lawsuit with the state of Alaska. Also, in October, Lilly resolved a 32-state claim over sales, marketing and promotion of Zyprexa for \$62 million. That was a very good and relatively cheap settlement—considering the conduct and damages—and one that Lilly had to like. The government's investigation of Zyprexa has been ongoing for five years. The latest settlement brings that inquiry to a close.

Source: *Indianapolis Star*

### III. POLITICAL OBSERVATIONS

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#### **A LOOK TOWARD 2010 BY ARTUR DAVIS**

Based on media reports, and information received from good sources, Artur Davis is being considered by the political pundits as a leading candidate for Governor in 2010. However, lots of folks outside his Congressional district don't know that much about the Montgomery native. Those who have followed Artur's career closely like what they have seen. The following are Artur's views on some key issues—as reported by the *Associated Press*—that could arise if he decides to run. I am printing this information since I believe it will give our readers a good indication of what to expect from a Davis Administration if Artur runs and is elected:

- **EDUCATION:** Artur wants to keep expanding the Alabama Reading Initiative and the voluntary pre-kindergarten for four-year-olds. He says: "There may be a challenge to universal pre-K, but we can certainly do it in a lot of communities that aren't getting it now."
- **TAX RATES:** He says he is not interested in raising the taxes of ordinary

wage earners in Alabama or the majority of folks in this state. Neither is he looking to revisit individual tax rates in Alabama at this point, even upper income. His focus, if there were any revisiting, would be the corporate tax rate.

- **LOW WAGE EARNERS:** Artur advocates raising the threshold where a family of four starts paying state income taxes from \$12,600. He would like to see it at least equal half of the state's median income, which is \$38,160 annually. His view is that putting a tax burden on someone making less than half the state's median income makes no sense, particularly in a state that values low taxes.
- **PROPERTY TAXES:** He is not interested in changing the tax burden on individual property owners in this state. Going back to four-year appraisals instead of having annual appraisals appeals to Artur. He observed: "We do have to look at the question of what companies pay, particularly out-of-state companies, because they are getting a pretty generous deal right now. They are getting a better deal than any other states require of them."
- **USE OF ANY NEW TAXES:** If new taxes were required, Artur would use them to sustain an education system and create a better education system than we have now. He believes that would pay for itself. "Every company in this state that is dependent on our work force would be better off having a higher quality of worker in the next five years—a smarter, better-educated quality of worker than having their taxes remain exactly where they are now. I think most companies in this state get that," he says.
- **CAMPAIGN CONTRIBUTIONS:** Artur favors placing limits on campaign contributions, which is certainly good news.
- **CONSTITUTIONAL REVISION:** The Montgomery native supports constitutional reform. He prefers a convention rather than having the Legislature perform the task. His

view is that a convention might have public servants who don't necessarily want a political career and don't worry about getting re-elected.

Many are convinced that Artur will make the race for Governor in 2010. If he elects to do so, I believe he will be a very strong candidate. However, many political observers believe that race is still a strong negative factor in Alabama politics and that it would be an issue in the 2010 Governor's race if Artur makes the race. The outcome of the presidential race in Alabama on November 4<sup>th</sup> indicated that the issue may still be alive and well in our state. Hopefully, I will see the day in Alabama when the color of a person's skin is no longer a factor in politics or in life generally!

#### **OTHER POTENTIAL CANDIDATES WAITING IN THE WINGS**

There are two things that really get Alabamians riled up and one is football at any level. The other, of course, is a Governor's race. Folks are already asking who all will run for Governor in Alabama in 2010. In addition to Rep. Artur Davis, who is mentioned above, there are a number of others who reportedly are considering making the race even though it's still a long way off. It seems like we just elected Bob Riley to his second term.

On the GOP side, Troy University Chancellor Dr. Jack Hawkins Jr., State Treasurer Kay Ivey, Congressman Jo Bonner, Attorney General Troy King, businessman Jimmy Rane and Chancellor Bradley Byrne certainly appear to have more than just a passing interest in becoming Governor. It's being said that Rane, better known as "Yella Fella," will finance his own campaign if he runs. Of course Tim James, who definitely wants the job, has already announced and is running hard.

Other than Rep. Davis, the following Democrats are being discussed as potential candidates: Lt. Governor Jim Folsom, Agriculture Commissioner Ron Sparks and House Speaker Seth Hammett. Some are saying Dr. Hawkins would be better suited as a Democratic candidate. In addition to those listed, it's possible that other Democrats will develop an interest after the regular

session of the Legislature ends next year. However, that session could end some ambitions for higher office.

While he hasn't personally given any indication that he wants to run, I still hear lots of folks say Dr. David Bronner needs to make the race. They all believe that the financial wizard would make a great Governor and I share that belief. Stan Pate—who could run as either a Democrat or Republican—is more likely to make the race. However, he may elect to support another candidate such as Tim James and become a power-broker of sorts. In any event, it will be interesting to see what develops during the next year. There is one thing for certain—there is a great deal of interest around the state in who will follow Bob Riley in the Governor's office.

#### **SPECULATION CONCERNING GOVERNOR RILEY'S FUTURE PLANS**

There are all kinds of rumors floating around concerning the political future of Governor Bob Riley. Even his detractors have to admit that the Clay County native is very popular around the state and most of them will tell you privately that he has done an outstanding job as Governor. But nobody really seems to know what his future political plans are. Personally, I don't believe he would challenge Senator Richard Shelby, which is one of the most discussed rumors. First, they are very good friends and more importantly, nobody could beat Shelby in Alabama.

Another rumor is that the Governor would take over as Chancellor of The Troy University System after backing his friend Dr. Jack Hawkins Jr. for Governor in 2010. It's my opinion that this is just another Goat Hill rumor. In any event, I guess we will just have to wait for a while to see if Governor Riley can find something to run for. I really can't see him retiring from public life and going back to Clay County.

#### **RICHARD SHELBY IS GOOD FOR ALABAMA**

I have known Richard Shelby for years, and while we are in different political parties, we have remained close friends. The Senator has been a

tremendous public servant and has done more for Alabama than any office holder in my memory. He will definitely seek another term in 2010 and in my opinion will be reelected with little difficulty. It would be next to impossible for any person to run a strong race in Alabama against this man. Importantly, Senator Shelby has the ability to cross the aisle in the U.S. Senate and work with Democrats. In the past, that has proved to be very good for Alabama and it will be good for Alabama citizens during the next four years. It's my belief that the Tuscaloosa Senator's relationship with Senate Democrats will serve him well during the Obama Administration.

## **IV. LEGISLATIVE HAPPENINGS**

#### **SEVERE MONEY PROBLEMS AWAIT ALABAMA LEGISLATORS**

When Alabama legislators report for the regular session next year they will be facing some most serious financial problems. As has been reported, the turmoil on Wall Street has created a tremendous hole in the operating budget for state government. It was estimated to be about \$120 million a few weeks back. As a result, the state will be facing spending cuts later this year. The budget hole developed when Alabama's investments on Wall Street lost money. Governor Bob Riley planned the state's \$2 billion General Fund budget in anticipation of getting \$117 million in capital gains from the investments, but there have been none. I believe the state will have to deal with the budget-cutting process known as "proration" before the fiscal year ends. Some believe the revenue projections—by any standard—were overly optimistic.

Most state employees have never experienced proration of the General Fund budget in the middle of a fiscal year. The last time a Governor had to make those cuts to the General Fund budget was in fiscal 1993 when spending was cut 3.2%. The Special Education

Trust Fund budget will be in proration unless the economy turns around in a big hurry and nobody believes that will happen. The state has an obligation to fund public schools and colleges and it will be a real test this time to meet all of the needs. State officials are watching the education budget's two main ingredients—income and sales taxes—to see how that budget will hold up during the economic slowdown. Things don't look very promising at this juncture. The Governor and legislative leaders will have a difficult time keeping existing state programs' funding at current levels without new revenues. The educational programs will face significant cuts and that will be most difficult to deal with. Most observers say 2009 won't be a good time to be in the Legislature.

*Source: Associated Press*

#### **ALABAMA TAXES THE HIGHEST AT THE POVERTY LINE**

A new national study shows Alabama levies more income tax than any other state on a family of four living at the federal poverty line. A couple with two children making \$21,203 annually in Alabama pays \$423 in state income tax. An Associated Press article pointed out that if the same family moved across the state line to Mississippi, they would pay \$48. The study by the nonpartisan Center on Budget and Policy Priorities in Washington also says Alabama still has one of the nation's lowest thresholds for paying income taxes, despite raising the threshold significantly in 2007 to help the working poor.

The Alabama Citizens' Policy Project, a Montgomery group that works on behalf of Alabama's poor, said the study raises concerns that Alabama's tax structure is sending the poor even deeper into poverty. Kimble Forrister, the project's executive director, said:

*Alabama is still requiring hundreds of dollars a year from families who are struggling to keep their heads above water.*

The study, based on 2007 numbers, says Alabama was one of 18 states that levied an income tax on a family of four making less than the federal poverty

level. In Alabama, the family of four paid \$423, followed by \$409 in Hawaii, \$325 in Oregon and \$258 in West Virginia. Illinois, Indiana, Iowa, Michigan and Montana also required a family of four living at the poverty line to pay more than \$200 in state income tax, the study said. Alabama used to have the nation's lowest threshold for requiring a family of four to start paying state income taxes. But in 2006, the Governor and Legislature worked together to raise the threshold from \$4,600 to \$12,600, starting with the 2007 tax year. That dropped Alabama to third, behind West Virginia and Montana.

Alabama was one of 13 states that took steps in 2007 to reduce its taxes on the poor. "Progress is occurring slowly, but states increasingly realize that taxing people deeper into poverty is counter-productive," according to study co-author Jason Levitis. In the regular session this year, the Alabama Legislature fell one vote shy of passing more tax cuts for low-income citizens and removing the state sales tax on groceries. The proposal passed the House, but failed in the Senate. Many Democrats wanted to replace the lost income tax revenue by eliminating Alabama's income tax deduction for federal income taxes paid. That deduction primarily benefits higher income taxpayers. The sponsor of the tax plan, Rep. John Knight, D-Montgomery, who plans on trying again when the Legislature returns in February, had this to say:

*It is just morally wrong to have basically the lowest income tax threshold and the highest tax on poor people in the nation.*

I totally agree with those at Alabama Arise and with Rep. Knight on their assessment of our current tax structure. I believe strongly that it's time for Alabama to change the way we tax folks. The Governor and the Legislature should make tax reform a top priority in 2009. Hopefully, that will happen. If you agree, let Gov. Riley, Lt. Gov. Folsom and your legislators know how you feel.

Source: Associated Press

## V. COURT WATCH

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### **BUSH ADMINISTRATION'S PREEMPTION CLAIMS BLASTED IN REPORT**

Federal preemption is finally showing up on the radar screen of Democrat lawmakers in our Nation's Capitol. A recent report issued by the House Oversight and Government Reform Committee is proof positive that the Bush Administration has pulled out all stops to shield drug companies from liability for dangerous drugs while leaving patients out in the cold. The report, based on documents obtained from the Food and Drug Administration, concludes that the agency's efforts to protect drug companies delayed the dissemination of important safety information to the public. The documents reveal that top FDA officials who deal with drug safety on a day-to-day basis don't believe that lawsuits undermine consumer safety. But their views were overridden by President Bush's political appointees, who lacked any empirical support for their views.

The Bush Administration has been very unfriendly to consumers over the last eight years and will go down as having had the worst consumer record in history. It's bad enough that politics consistently trumps science with this Administration, but there is now clear documentation of how the White House hijacked the FDA and forced the agency to undermine its own mission, which is to protect American citizens.

The Bush Administration argued before the U.S. Supreme Court last month when the Justices heard the appeal in the *Wyeth v. Levine* case that civil suits arising from defective and mislabeled prescription drugs are preempted by approval by the FDA of the drug's label. The report clearly shows that the Bush Administration's pro-preemption position in the *Wyeth* case is motivated by politics and not expertise in drug regulation. Top-ranking FDA career officials with deep expertise in drug safety said that the Bush Administration's efforts to amend drug labeling regulations to preempt state liability lawsuits were deeply flawed. The Administration's justifications for the

regulations were "false and misleading," according to these officials.

As we have reported in previous issues, the Bush Administration has not limited its preemption push to prescription drugs. The preemption clauses are being inserted in a wide array of regulations. The White House takes the position that victims are not entitled to anything—no matter how negligent or irresponsible a company was in designing, testing, labeling or marketing its products—and that's morally and legally wrong. This effort to prevent injured citizens from having access to the courts and holding negligent companies accountable must be defeated. If the courts don't follow the law and do the right thing, it will be up to Congress to protect the American people.

Source: Public Citizen

### **MORE ON PREEMPTION FROM THE MEDICAL COMMUNITY**

It is universally recognized that the medical community in the United States has an obligation to look out for the best interests of the public on health and safety issues. That obligation includes being concerned about anything that would jeopardize the health and safety of the American people. A recent editorial by the Editor in Chief and Executive Deputy Editor of the *Journal of the American Medical Association* entitled "Prescription Drugs, Products Liability, and Preemption of Tort Litigation" indicates a real concern in the medical community about the effects of federal preemption. This is what the editorial writers of this most prestigious publication had to say about preemption in light of the case currently before the U.S. Supreme Court:

*The Wyeth v. Levine ruling will have far-reaching and profound implications for patients and drug safety. If the Court rules in favor of Wyeth, endorsing preemption, patients will lose an irreplaceable method for seeking remedies for injuries resulting from pharmaceutical agents that were approved by FDA. As with the medical device preemption*

ruling, such a decision would likely result in thousands of lawyers defending drug manufacturers to file motions in state courts to dismiss plaintiffs' claims under preemption. In a recent products liability lawsuit, a Philadelphia judge ruled that the federal National Childhood Vaccine Injury Act preempts tort claims of design defects and failure to warn, effectively immunizing vaccine manufacturers against liability claims. As shown in the study by Giezen et al., many safety problems are identified only after drug approval. The human body is in a constant state of change and the effects of some drugs will manifest only after exposure over time. Furthermore, some serious adverse drug effects are quite uncommon and require use of the drug in large numbers of patients to become evident. The safety of drugs in a clinical trial, the study type used for FDA approval, is based on specific participant types, numbers, and design that cannot ensure the true safety of a drug. In addition, manipulation of study results by the drug manufacturers (who almost always sponsor studies used for decisions about drug approval) can obscure the true safety profile of a drug.

*If the Court rules for preemption in Wyeth v. Levine, Congressional action will be necessary to remove preemption of state tort litigation involving claims of products liability for prescription drugs. Otherwise, the current system of FDA approval of drugs would have to be changed to preserve the health of the public. Under this alternative approach, no drug could be fully approved until long-term studies with large numbers of participants had been completed and marketing would have to be greatly limited until full FDA approval is achieved. Surely, the drug manufacturers would not be pleased with such a system; however, without such safeguards, patient safety would be jeopardized. Either way, Con-*

*gress, not the Supreme Court, seems better suited to decide public policy on patient safety, and it is telling that many members of Congress have joined amici briefs to remind the Court that Congress already has decided not to grant preemption to drug manufacturers.*

*One of the most important ways to ensure the health of the nation is to be certain that medical devices and pharmaceutical agents are safe. The FDA is not infallible and the recently increased resources do not include a crystal ball. Therefore, unless and until the FDA drug approval process and the postmarketing surveillance system improve significantly, patients must have a means to seek recourse through tort litigation against product manufacturers. Anything less may well preempt the well-being and safety of the public.*

I have to wonder if those in the Bush Administration who are pushing preemption so hard have read this editorial. Sadly, I seriously doubt it. Even if they did, with Dick Cheney and Karl Rove calling the shots on preemption, it would do no good.

Source: *Journal of the American Medical Association*

#### **THE FDA DOCUMENTS FAIL TO SUPPORT FEDERAL PREEMPTION**

The U.S. Supreme Court heard oral argument in the Wyeth vs. Levine case on November 3<sup>rd</sup> and will be making a decision by April of 2009 according to court watchers. There have been some interesting developments that should have a bearing on what the Court does in this important case. Documents released in late October by the FDA in a Congressional investigation reveal that career officials at the agency don't believe the FDA's approval of drug labeling should block consumer lawsuits.

The *Wall Street Journal* reported that internal memos contradict the FDA's current position as stated in the Wyeth case. The FDA said—in its briefs to the Supreme Court in contradiction to its prior position—that federal drug approval and warning label standards

prohibit state laws. However, two FDA officials said in the memoranda that were uncovered that it's wrong to assume that FDA-approved drug labels are adequate or that they fully disclose the safety risks of the drugs. One of the memos, written in 2003 by Dr. John Jenkins, the top official in the drug approval section, states:

*Much of the argument for why we are proposing to invoke pre-emption seems to be based on a false assumption that the FDA-approved labeling is fully accurate and up to date in a real time basis. We know that such an assumption is false.*

As we previously reported, preemption language inserted into the rules by persons at the FDA was never published to the public or allowed to be debated in public forums as is required by law. Unfortunately for American citizens, the Bush Administration is not limiting its preemption push to the FDA. It has inserted preemption language in over fifty federal agencies' rules without making the pre-emption language subject to public hearings. This is nothing but a blatant payback to political buddies by a lame duck Administration and is believed to be the work of Dick Cheney and his gang.

Top scientists and career employees at the Food and Drug Administration have in the past consistently opposed agency regulations that would take away consumers' ability to sue drug makers. As we have reported, at issue is language included in a drug-labeling rule in 2006 at the request of the Bush White House that effectively limits when people can sue in state court over injury claims involving medications. The FDA now contends federal regulations prevail when there is a conflict with state law. This change in position is contrary to what the FDA has consistently said over the years.

Internal agency documents reveal that career officials opposed this approach, according to a report released by Rep. Henry Waxman, chairman of the House Oversight and Government Reform Committee. In the past, the agency had viewed private suits as an additional layer of protection against unsafe drugs, the report said. Patients injured by drugs have

won suits against drug manufacturers for failing to warn against certain dangers. I have great difficulty understanding how any Justice on the High Court would have any problem rejecting Wyeth's argument in this case. Wyeth's claim that it was protected from lawsuits in state court is without any legal basis.

Public Citizen, the strongest consumer advocacy group around today, correctly says the Bush Administration is pushing preemption clauses in a wide array of regulations. Brian Wolfman, director of Public Citizen's litigation group, says: "This effort to prevent injured citizens from using the courts and holding negligent companies accountable must be stopped."

The report said the FDA has yet to provide a complete set of documents that would show communications between the White House and the agency, but some documents suggested the agency and the White House would not go forward with a rule on labeling until the preemption changes were included.

Source: *Wall Street Journal* and Public Citizen

### **NHTSA'S SEAT BELT RULE IS BAD NEWS FOR CONSUMERS**

As I stated above, it's not just the FDA that the Bush gang is using to sneak federal preemption into the system. Now, the National Highway Traffic Safety Administration has inserted a preemption provision into the new rule governing seat belt safety. The final rule, issued on October 9<sup>th</sup>, contains language that will preempt state regulation of seat belt positioning, including state-based tort claims arising from injuries related to seat belt placement. The action by NHTSA is bad news for consumers. In layman's language this simply means state laws will be banned regardless of how bad the conduct of a manufacturer happens to be. The rule, known as the "designated seating position" rule, sets the standard for the appropriate number of seat belts required in vehicles. NHTSA claims its action is designed to provide the optimum level of crash protection.

A preamble to the revised rule also

contains language barring state law claims related to seat belt positions. If this is upheld in the federal courts, the language will prevent consumers who were injured in accidents from seeking redress if they were unable to wear a seatbelt because of lack of sufficient number of belts or a belt's location in the vehicle. NHTSA has been little more than an extension of the automobile manufacturing industry for years and its recent action is just another example of how the agency has "shafted" consumers.

Consumers have a basic right to hold vehicle manufacturers accountable when they have made a defective product. Unfortunately, the regulatory agency puts manufacturer costs and profits ahead of consumer protections. In this case, NHTSA's seatbelt rule takes away the basic constitutional right of a consumer to have access to the civil justice system. In its comments to the revised rule, NHTSA defended the use of preemptive language, saying that the U.S. Supreme Court has recognized the need for such language to ensure effective and uniform application of regulatory standards. That is—without question—incorrect. Also, and most importantly, Congress never authorized NHTSA to create federal preemption in its rule-making authority. It's pretty basic that the agency gets its powers and authority from Congress.

The amendments take effect on December 8, 2008, but compliance with the new rule is not required until September 1, 2010. If the U.S. Supreme Court allows federal preemption, it will be up to Congress to protect the American people. Hopefully, correcting a bad Court decision—if that becomes necessary—will be a top priority for the President and Congress next year. I believe that it will be.

Source: *Lawyers USA*

## VI. THE NATIONAL SCENE

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### **HOPEFULLY BUSH'S BAILOUT WON'T TOTALLY DESTROY OUR ECONOMY**

In my opinion, President Bush and Treasury Secretary Henry Paulson have lots of explaining to do concerning the bailout passed by Congress. The Bush Administration's financial rescue package, while originally thought to have a \$700 billion cost, now looks like it will cost much more. Even at a higher cost, it won't be enough to stop the economic woes facing our nation unless strong controls are put in place. Interestingly, half of the money has already been spent—going to banks—and not to rescue folks whose homes were foreclosed. That wasn't what I thought Congress had authorized. American taxpayers need some real answers from Secretary Paulson. They also need to know how this now-powerful man will spend the \$350 billion that remains in the Troubled Assets Relief Program (TARP).

There don't appear to be any clear and definitive guidelines as to who will actually get the rest of this money or what exact purpose it will serve. As part of the bailout bill passed in October, Congress set up TARP, which gives the Treasury Secretary broad authority "to purchase, and to make and fund commitments to purchase troubled assets from any financial institution." Congress gave the Treasury \$250 billion in the first installment, which is known as the Capital Purchase Program. Apparently, that was made available to banks, savings associations and certain bank and savings and loan holding companies.

I understand that President Bush has now requested an additional \$100 billion. At least \$40 billion is being used to purchase American International Group stock. In return, AIG is supposed to comply with strict limits on executive compensation, corporate expenses and lobbying. I am told the remaining \$350 billion will go out with strings attached. The President can ask for the balance, but thank goodness Congress

has the right to say no or at least I hope it has that authority. Frankly, I'm not real sure why the government is bailing out AIG, an insurer, which lost more than \$24 billion in the most recent quarter. AIG certainly doesn't seem to be in a position to lend any money. The American people need to know how TARP will reopen lending by banks and how much more money will be needed to get the job done.

I'm concerned the bailout will wind up being a bad deal for the American people. Hopefully, I am wrong and the bailout will eventually work. At present, however, it appears not to be working, and more corporate executives are getting in line for a hand-out. We can't afford for the bailout to wind up being little more than corporate welfare.

Source: *Forbes*

#### **WHISTLE-BLOWERS SHOULD BE HELPED— NOT PUNISHED—BY THE FEDERAL GOVERNMENT**

Whistle-blowers generally are not the most popular folks with their bosses when they report improper or illegal conduct by their employers. That is especially true when it comes to military whistle-blowers. They don't get much help at all from the Pentagon Inspector General, the internal watchdog for the Defense Department. In fact, according to reports, the Inspector General hardly ever sides with service members who complain that they were punished for reporting wrongdoing. A review of cases by *The Associated Press* revealed how tough it has been for federal whistle-blowers.

The Inspector General's office rejected claims of retaliation and stood by the military in more than 90% of nearly 3,000 cases during the past six years. More than 73% were closed after only a preliminary review that relied on available documents and sources—often from the military itself—to determine whether a full inquiry was warranted. If you took this at face value it would indicate the high rejection rates suggest scores of complaints aren't valid. But critics, including a Republican senator, wonder whether many valid cases are dismissed before being carefully examined because of

negative attitudes in the Inspector General's office.

We learned from the *Associated Press* study that whistle-blower reprisal cases are handled by a small team in the Inspector General's office called Military Reprisal Investigations (MRI). They perform the investigation or make sure the military department in charge does it properly. Nine out of ten cases come from soldiers, airmen, sailors and Marines. The rest come from defense contractors and Pentagon workers who aren't considered regular federal employees.

Military whistle-blowers aren't the only federal employees who have a difficult time. According to statistics from the Office of Special Counsel, an independent federal agency that reviews most of the reprisal cases filed by civilian government employees, the situation in other federal agencies is about the same. Between 2002 and 2007—the latest statistics available—the Special Counsel received nearly 4,500 reprisal complaints. In 334 of them, or 7.4%, the office ruled in favor of the whistle-blower.

Military reprisal complaints are supposed to be settled within 180 days. Yet over the past ten years, the number of employees assigned to investigate such cases has dropped from 22 to 19 people while the workload has increased by 68%, according to a report to Congress. According to the report, meeting the 180-day requirement will remain an elusive goal without more employees. The government survey obtained by the AP was conducted in June by the Corporate Leadership Council, a business research company in Arlington, Virginia. More than half of the nearly 1,500 employees in the Inspector General's office responded. I believe whistle-blowers must be protected and not punished when they report wrongful acts.

Source: *Associated Press*

#### **HIGH COST OF FEMA ADVISORS IS OUTRAGEOUS**

FEMA is spending millions each month for so-called advisors whose job is supposed to be keeping up with Katrina evacuees. Those evacuees, num-

bering over 4,000, are still living in what's called "temporary housing." Not only is the federal government paying for the housing but there is another major expense each month and that is the cost of the evacuees' advisors. The monthly cost is in the millions and FEMA won't say what the total costs are. I'm not sure all of this is a waste of taxpayers' money, but I suspect there is lots of waste here. The question is, what are these folks doing to earn their money?

Source: *Associated Press*

## VII. THE CORPORATE WORLD

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#### **AIG IS NOT THE ONLY BAD APPLE IN THE CORPORATE BARREL**

Thousands of Public Citizen's supporters signed a petition recently demanding that AIG return the \$534,000 executives spent to pamper themselves. The petition was sent to the bosses at AIG. As pointed out by Public Citizen, AIG isn't the only culprit when it comes to spending lavishly while receiving a taxpayer bailout. There are several others that have done some pretty bad things. Clearly, AIG isn't the only bad apple in the corporate barrel.

While Lehman Bros., the investment bank, faced bankruptcy and asked the federal government for a bailout, it arranged to pay executives millions of dollars in bonuses. *The New York Times* and *Washington Post* reported that in September, the bank arranged to approve \$18.2 million in payments for two fired executives and another \$5 million payment for an executive who was leaving voluntarily. Four days later, Lehman went bankrupt, one of many financial shocks that led to the bailout which is costing taxpayers at least \$700 billion and most likely much more.

In October, former Lehman CEO Richard S. Fuld Jr. contended that a compensation system that paid him about \$350 million between 2000 and 2007 was "appropriate" despite the company's severe financial woes.

Public Citizen is to be commended for continuing its campaign against wasteful corporate spending. We must all continue to fight corporate greed and protect the rights of all taxpayers. Our law firm has been doing this for years and we have no intention of slowing down our efforts.

Source: Public Citizen

### **JUDGE SAYS LOSS IN AIG SCHEME EXCEEDS \$500 MILLION**

A federal judge has ruled that shareholders of American International Group Inc. lost more than \$500 million as a result of a scheme to manipulate the financial statements of the world's largest insurance company. The ruling by Judge Christopher Droney means five former insurance executives convicted of the scheme could face up to life in prison under advisory sentencing guidelines. Four former executives of General Re Corp. and a former executive of AIG were convicted in February of conspiracy, securities fraud, mail fraud and making false statements to the Securities and Exchange Commission.

Prosecutors furnished the court with a study by an expert, concluding that the fraud-related losses to AIG shareholders totaled \$1.2 billion to \$1.4 billion. Another methodology by the same expert put the losses at \$544 million to \$597 million. Judge Droney rejected the higher estimate, but said the lower range was reasonable. That finding and a determination that the fraud affected more than 250 victims will increase the advisory guideline sentence range.

The guideline range and a sentencing date have not been set yet. The Defendants challenged the estimate, saying there was no loss to investors. The Defendants are Christopher Garand, Ronald Ferguson, Elizabeth Monrad, Robert Graham and Christian Milton. Prosecutors are asking that the Defendants receive a "substantial" prison sentence.

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. General Re is part of Berkshire Hathaway Inc.

Source: *Associated Press*

### **SETTLEMENT WITH FORMER AIG EXECUTIVES APPROVED**

A Delaware court has given preliminary approval to a \$115 million settlement in a shareholder derivative action brought by the Teachers' Retirement System of Louisiana against four former AIG executives and C.V. Starr & Co. The Defendants from AIG included former CEO Hank Greenberg, former CFO Howard Smith, former director Edward E. Matthews and former Senior Vice Chairman Thomas Tizzio. Of the \$115 million settlement, Greenberg, Smith and Matthews and their directors' and officers' liability insurers will pay \$85.5 million; \$28.25 million will be paid by C.V. Starr & Co., Inc.; and Tizzio will pay \$1.25 million. As you may know, Greenberg is now chairman of C.V. Starr. When he left AIG there were lots of questions over corporate accounting methods.

It was alleged in the Louisiana pension fund lawsuit, which was filed in 2002 that the AIG executives engaged in self-dealing in certain transactions with C.V. Starr. The teachers' fund alleged that the former directors and executive officers of AIG breached their fiduciary duties to the company and to its shareholders, and that defendant C.V. Starr & Co., Inc. aided and abetted those alleged breaches of fiduciary duty. Defendants continue to deny all allegations of wrongdoing and liability. A final hearing on the settlement will be held on December 17<sup>th</sup> in Delaware.

Source: *Insurance Journal*

### **BUSINESS GROUP'S GUILTY PLEA IS A HUGE VICTORY FOR TEXAS VOTERS**

The criminal justice system sent a clear message to political operatives, lobbyists and fundraisers recently: "Don't mess with Texas elections." The

Texas Association of Business, the state's largest business organization, pleaded guilty to illegally funneling corporate money into the 2002 campaign. That was to help elect a slate of state Republican lawmakers. As its punishment, the association will have to pay a \$10,000 fine. Hopefully, this was a lesson to the association and those who fund it. It may also be a lesson that others who would usurp the will of the people will get and understand.

These types of campaign finance violations cannot continue to go unpunished. In this case, Common Cause joined Public Citizen in filing the complaint that led to the guilty plea. Credit also should go to Texans for Public Justice and Campaigns for People for helping research the complaint. Of course, none of this would have been possible without Ronnie Earle, a local District Attorney who was not afraid to take on the bad guys. The District Attorney did his job and he should be commended.

Unfortunately, the people of Texas must deal with the consequences of what was considered a "stolen election" in 2002. The Congressional redistricting after the election would not have occurred without the support of the candidates illegally backed by the Texas Association of Business. What happened in Texas underscores the need for substantial reform of our election laws. If a system to provide effective public financing of elections had been in place, it most likely would have kept this group from illegally working in an election. Certainly, in the future it will be more difficult for groups such as the Texas Association of Business to illegally influence the outcome of elections. We need a reform of the existing election laws in all states and on the federal level. At least, the criminal conviction in Texas is a step in the right direction.

Source: Public Citizen

### **INSPECTOR GENERAL KOTZ SHAKES UP THE SEC**

When H. David Kotz took over as Inspector General (IG) at the Securities and Exchange Commission in December 2007, he saw a need to restore cred-

ibility to the office. His predecessor had just been criticized by a Senate report over the SEC's handling of the Pequot Capital Management insider trading matter. The IG's office was criticized for failing to effectively hold the SEC's feet to the fire. Kotz made a pledge to shake up the SEC. Since then the new IG has been tough and has been harshly critical of the SEC—and in particular when it comes to its Enforcement Division and its director, Linda Thomsen—for cutting deals with white collar defense lawyers while at the same time overriding the recommendations of line SEC enforcement staff.

It's high time that the SEC did the job it is supposed to be doing. Enforcement decisions by the SEC, and disclosures of information about them, should be based on the merits of a case. Access to senior officials of the SEC by influential representatives of power brokers on Wall Street should not be tolerated. It certainly appears that things need changing at the SEC. Kotz told *Corporate Crime Reporter* that he has about 30 cases under investigation. He has a staff of about 14 full time auditors and investigators. He stated during an interview:

*When I first came here, given the criticism the office took from Congress and the Senate report, I pledged to restore the credibility of the office, to ensure that the office was aggressive, viable and vibrant, and looked into important matters and issue important reports that don't pull any punches. And I believe that I have to a large extent achieved that with the issuance of these reports. Internally, it is very clear that the Office of Inspector General is an important office in the SEC. It's going to be scrutinizing the SEC's operations carefully. And where it deems appropriate will criticize the agency.*

The SEC has been critical of Kotz for the reports he has issued. Hopefully, that won't slow him down. It's high time somebody got the SEC's attention and made the agency do its job.

Source: *Corporate Crime Reporter*

### **3 LCD FIRMS PLEAD GUILTY IN PRICE-FIXING SCHEME**

Three electronics firms have agreed to plead guilty and pay \$585 million in fines for conspiring to drive up prices for people buying computers, television sets, and other LCD screens. LG Display Co. Ltd., Sharp Corp., and Chunghwa Picture Tubes Ltd. agreed in a plea agreement to cooperate in an antitrust investigation by the Justice Department. The agreement was filed in federal court in San Francisco. LCDs, or liquid crystal display monitors, are the glass display screens on most laptop computers, cellphones and new television sets. According to Deputy Assistant Attorney General Scott D. Hammond, the scheme hurt not only consumers, but also retailers including Apple, Dell and Motorola. At press time, the government didn't have a cost value for the losses, but the investigation is continuing. Hammond announced the plea deal at a Justice Department briefing, stating:

*These price-fixing conspiracies affected millions of American consumers who use computers, cellphones and numerous other household electronics every day. By conspiring to drive up the price of LCD panels, consumers were forced to pay more for these products. And consumers were not the only ones affected by these conspiracies.*

LCD screens are a \$70 billion worldwide market. This is just another example of corporate corruption that badly hurts consumers. The sad truth is that we really don't know how deep corporate corruption has been and who all is involved. But we do know that greed results in corruption and that the corruption must be dealt with and stopped.

Source: *Associated Press*

## **VIII. CAMPAIGN FINANCE REFORM**

### **CHAMBER OF COMMERCE FINANCED UNSUCCESSFUL GOP CANDIDATES**

It's well-documented that the nation's largest business lobby, the U.S. Chamber of Commerce, has devised a political agenda that is totally anti-consumer and favors corporate wrongdoers. The group poured millions of dollars into advertising in the recent election cycle in an attempt to prevent the Democratic Party from winning dominance in the Senate. The Chamber—which developed into an anti-consumer outfit—raised enough money from large corporations to spend well over \$35 million on the election. This was double the Chamber's budget for House and Senate races in the 2006 election.

The politically-motivated group supported Republican pro-business candidates in all of the contested Senate races. The Chamber has become little more than an extension of the GOP. Fortunately for the American people its political efforts this year—in spite of all the spending—were a dismal failure. Many are now saying it's time for local chambers of commerce—who claim not to be involved with the national group—to let the public know this sort of thing by the U.S. Chamber won't be tolerated. I fully agree with that position.

Source: *Wall Street Journal*

### **U.S. SUPREME COURT REFUSES TO HEAR CHALLENGE TO NORTH CAROLINA'S CAMPAIGN FINANCE LAW**

The U.S. Supreme Court refused—prior to November 4<sup>th</sup>—to hear a challenge over a provision in North Carolina's system of publicly financed judicial campaigns for additional funds in expensive races. The Justices declined, without comment, to consider the constitutionality of a voluntary program passed by the North Carolina Legislature that took effect in 2004. The program provides campaign money for state Supreme Court and Court of Appeals candidates if they

agree to fundraising restrictions leading up to the general election. The decision came on the eve of an election in which all but two of the 13 candidates for those seats on the November 4<sup>th</sup> ballot participated in the program. The decision left a federal lower court ruling in effect that upheld the law, which has been a model for other states. Paul Ryan, a lawyer with the Washington-based Campaign Legal Center, whose group earlier filed a friend-of-the-court brief in support of the law, stated:

*This gives supporters of judicial public financing and public financing in general confidence and assurance that the long line of decisions (supporting) public financing...are still the law of the land.*

A former Supreme Court candidate and the North Carolina Right to Life Committee filed suit over the law in 2005, arguing it restricted free speech rights in cases where outside groups or nonparticipating candidates exceeded spending thresholds. The qualifying candidates receive matching “rescue funds” to counter such injections of money. The U.S. Court of Appeals for the Fourth Circuit ruled with North Carolina in May. Lawyers for the Plaintiff and the committee asked the appellate court unsuccessfully to consider the case in part because interest in public financing has expanded nationwide.

Under the North Carolina program, qualifying candidates for Supreme Court received \$223,625 and candidates for the Court of Appeals received \$160,000 this year. The program is funded largely by a \$50 annual fee that all North Carolina lawyers must pay and a voluntary check-off on state income tax returns. The program reduces the appearance that judicial candidates could treat lawyers or their clients who gave to their campaigns differently when cases come to the courtroom. Hopefully, laws like this one in North Carolina will continue to be upheld. In fact, all states need to pass even tougher laws to help clean up a broken system that exists in all too many states.

Source: Associated Press

## IX. CONGRESSIONAL UPDATE

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### LAME DUCK SESSIONS

As a general rule, legislative sessions that come after Election Day, when a good number of the legislators have been “retired” by the voters, aren’t very productive. In fact, most of those sessions are totally unproductive. Unfortunately, there are a number of critical problems today—mostly economic in nature—that Congress must deal with now. Hopefully, all of our Senators and House members in Washington will put our nation’s interest first and do the right thing.

### LAWMAKERS MUST ENACT TOUGHER FINANCE RULES

Members of Congress must figure out how to overhaul the regulatory structure overseeing the U.S. financial system. Stricter rules governing risky financial products are long overdue. Avoiding a repeat of the current financial mess, which had its roots in tremendous excesses in the subprime mortgage market and rapidly eroding value of widely-held mortgage-backed financial products, is an absolute necessity. The bailout package that the Bush Administration got Congress to approve—with some changes—isn’t the answer.

Democrats are in control of Congress and now they must work hard to strengthen the current regulatory framework. The regulatory system—as it exists today—has been a gigantic failure. Both Democratic and Republican members of Congress must surely know that a strong, effective supervisory system is badly needed and long overdue. The Republicans in the White House and Congress have been “deregulators” and that is one of the main causes of the economic crisis that is causing severe problems to American citizens. Depending on “the markets” to solve economic problems, without strong and effective regulation, will never be the answer. That approach simply won’t work. You can’t allow any

industry to regulate itself and the GOP has learned that lesson the hard way. We can’t allow the “foxes” to be in charge of the “hen house” any longer. We are paying for that approach dearly today!

Source: Associated Press

### SOME PRIORITIES FOR THE NEXT CONGRESS

When the new Congress comes to town next year, more serious problems will be waiting for them than at any time in recent memory. There are a number of items that must be dealt with and some of them are set out below.

- The wars in Iraq and Afghanistan must be ended.
- Our nation’s economy must be put back in shape.
- Green jobs must be created and the economy stabilized with clean, sustainable and renewable energy.
- Putting homeowners ahead of big bosses in the massive Wall Street/auto industry bailout must happen.
- Boosting wages, insuring import safety and protecting the environment by replacing the failed NAFTA/WTO trade model must be a priority.
- The safety of toys, pharmaceuticals and other products must be ensured.
- The right to trial by jury—guaranteed by the U.S. Constitution—must be preserved.
- Mandatory, binding arbitration in all consumer contracts and transactions must be banned.
- Arbitration in all nursing home admission agreements must also be banned.
- Passing tough and effective campaign finance reform measures is a necessity.
- Government must be cleaned up and ties between lawmakers and big corporate dollars and lobbyists broken.
- Strong restrictions on lobbyists must be passed.

- Our military must be made strong again.
- All of the bad stuff the Bush gang did in their last days must be reversed.

Obviously, there are many more issues that should be addressed as soon as possible. President-elect Obama and leaders in Congress from both parties must have their list of priorities in order and workable plans made long before the first of the year. Without a doubt, the economy has to be the first order of business. If you could set the agenda for Congress, what would your top priorities be?

## X. PRODUCT LIABILITY UPDATE

### **GOVERNMENT PROBES OFF-ROAD VEHICLES AFTER NUMEROUS ACCIDENTS**

We have written in previous issues about how dangerous the Yamaha Rhino is and now federal safety regulators are investigating the Rhino. This comes after reports of some 30 deaths involving the Rhino, including those of two young girls in November. Our product liability lawyers are convinced that the Rhino's design is unsafe and that the vehicle is very dangerous. Currently, Yamaha faces more than 200 lawsuits in state and federal courts. Yamaha has settled some lawsuits, but recently said it may start to fight rather than settle cases. Yamaha stands behind the design of the Rhino, a two-seat vehicle that looks sort of like a cross between a golf cart and all-terrain vehicle.

According to the Consumer Product Safety Commission, its investigation of this type of vehicle, which it calls a utility terrain vehicle (UTV), was prompted by various factors, including the high number of accident reports and lawsuits. In any event, the Rhino is at the center of its investigation. There are no regulatory standards for this new breed of off-road vehicles. They aren't subject to ATV safety standards because of design differences such as having a steering wheel, in contrast to an ATVs' handlebars. Neither are these

new off-road vehicles subject to the safety standards for cars. Owners of UTVs don't have to register them. Jay Howell, acting assistant executive director of the CPSC's Office of Hazard Identification and Reduction, made this interesting statement:

*When there is no standard in place, we have to basically determine if there's a substantial risk of injury and death, and there's a burden there that has to be met.*

This is how consumer regulation often works: products hit the market governed by no particular safety standards. If injury reports later arise concerning a product, these gradually get the attention of both manufacturers and regulators. Many times lawsuits bring about a belated movement on the part of the federal government to look into safety hazards. It's uncertain what will come from the CPSC inquiry.

The first Rhino came out in 2003. Yamaha designed the vehicles, now costing about \$11,000, to offer aging ATV owners something with the comfort of a golf cart or minicar but the excitement of an ATV. The vehicles have bucket seats. Until this year, doors weren't standard equipment on them. At 54.4 inches wide, the Rhino is narrower than all but one major competitor. The Rhino's combination of design factors, including its narrowness and height, raises its risk of tipping over. Interestingly, one competitor markets a model by saying it has a lower center of gravity than the Rhino. If you want more information relating to Rhino problems, contact Mike Andrews or Cole Portis with our firm at 800-898-2034.

Source: *Wall Street Journal*

### **UPDATE ON 15-PASSENGER VANS**

If asked, what would you say is one of the most dangerous vehicles on the road—in terms of rollover—today? You may be surprised to learn it's a vehicle commonly used by schools, day care centers, Scout troops, churches, and hotels—just to name a few. It's the 15-passenger van. These vans look like any other van except they have been lengthened to accommodate more pas-

sengers. The problem is, when the van is fully loaded, it's three times more likely to roll over in an emergency. All of the American car makers build a version of the van, and Ford sells the most.

Step off a plane and an airport hotel is likely to pick you up in a 15-passenger van. Back home at the day care center, children are climbing aboard this type van. Often it's the shuttle for the parking lot, a ride to the university. The YMCA drives them, as does the post office. In fact, these vans seem to be everywhere. There are over 500,000 of them on the road. Millions of Americans who ride in them don't give them a thought until the unique character of the van is suddenly and tragically revealed. That's what happened to the First Baptist Church of Piedmont, South Carolina when it sent its children on a Bible retreat. Its 15-passenger van rolled over on the highway. Joshua Wood was among those inside and he never regained consciousness after the accident. Since 1990, over 500 people have been killed and hundreds seriously injured in 15-passenger van rollovers. The accident involving Joshua Wood is just an example of many. The van owned by the First Assembly of God church in Burkburnette, Texas, rolled over on a shopping trip, killing four church members. Four athletes from Prairie View A&M University were killed when the driver of their van swerved to miss a car. College sports teams have been hit hard. The Kenyon College swim team lost a swimmer. Three people were injured when DePaul University's women's track team van rolled over. Two swimmers were seriously injured when the University of Wisconsin Oshkosh's van rolled over.

This series of crashes has caught the attention of the National Highway Traffic Safety Administration. The agency investigated the van's record and issued a rare warning concerning the Ford, Dodge, Chevrolet, and GMC vans. The warning said "The risk of rollover increases dramatically as the number of occupants increases..." The agency studied single-vehicle accidents in which at least one person was killed. It found that with ten or more passengers, 85% of the crashes involved a rollover. It's hard to believe, but the

government doesn't require any rollover standards.

Ford builds the most 15-passenger vans, followed by Dodge. GM has the smaller percent of the market and even a smaller percent of the fatal rollovers. The GM van is a different design. The wheel base is longer. Engineers say that lowers the chance the van will skid sideways. But when loaded, the GM van is still top-heavy, much like the Ford and Dodge. Ford calls its van the E350. It started building them about 30 years ago. And, according to a former Ford engineer, there was reason to question the van's stability from the start.

Safety experts say that to drive a 15-passenger van with greater safety, it must be loaded with no more than ten passengers. Also, those passengers should be seated toward the front of the van and the use of seatbelts is essential. Additionally, it's very important to maintain the tires on the van. In the words of one engineer, "the tires on a 15-passenger van must never fail." Because the auto manufacturers continue to sell these vans, the responsibility for safety has fallen on the owners and insurers.

Guide One, the nation's leading insurer of churches, has stopped writing any new policies on 15-passenger vans. This insurer will consider renewing policies for its existing customers only if drivers attend and pass special driver training courses that teach advanced techniques in operating the 15-passenger vans.

Guide One recommends that all churches, day care centers, schools and other groups immediately consider safer transportation alternatives and are banning the use of 15-passenger vans. Jeff Hanna, Executive Director of Guide One Center for Risk Management observed:

*It would be very easy to base our decision purely on business. But we have the claims and stories about people who are being killed in these vehicles. . . Often, 8-15 people dying at once, and the impact on a ministry is phenomenal. Many ministries have never recovered from these.*

Most van users are unaware that these vehicles don't have to pass the passen-

ger test from NHTSA that other passenger vehicles do. Neither are drivers currently required to have a commercial driver's license. Jim Swedenburg, Coordinator of Annuity and Insurance Services with the Alabama Baptist State Board of Missions, strongly recommends that churches allow no person to drive a 15-passenger van unless they have a commercial driver's license. All of these factors increase dangers to passengers riding in these vans.

As recently as May of 2008, NHTSA Administrator, Nicole R. Mason, urged all 15-passenger van users to take appropriate safety precautions when taking to the road during the busy summer travel season. To encourage churches to buy mini-busses instead of vans, Guide One offers discounts for buying the "safer transportation." These vehicles still impose a safety risk to occupants, claiming the lives of 58 people in accidents in 2006. To say that 15-passenger vans are unreasonably dangerous is as true a statement as I could possibly make when it comes to safety.

#### **HEAVY TRUCK POST-COLLISION FIRES**

The litigation involving post-collision fuel-fed fires usually involves passenger cars. However, heavy truck crashworthiness litigation, including post-collision fuel-fed fires, doesn't receive nearly the attention the issue deserves. Heavy truck operators are entitled to the same safety benefits that passenger car manufacturers are required to extend to their customers. In the past, much attention has been focused on the location of fuel tanks in passenger cars. At times auto manufacturers have placed fuel tanks outside the frame rails as in the case of the side-saddle gas tanks of the GM pickup trucks. At other times fuel tanks have been placed too far rearward in passenger cars, as in the example of the Ford Pinto. As with cars, failure to properly design a fuel system in heavy trucks for the inevitability of wrecks places passengers and operators at severe risk of injury or death.

When it comes to heavy trucks, the fuel tanks needed are often extremely large and manufacturers argue that it is not feasible to place the tanks within the vehicle frame rails. Therefore, nearly

every heavy truck has large fuel tanks strapped to the side of the vehicle readily exposed to impacts by passenger cars, trucks and other heavy trucks. As a result, fuel spillage in heavy truck wrecks is not only likely but probable. Since heavy truck manufacturers are resistant to moving fuel tanks from their exposed location, an alternative is to reduce the likely sources of ignition in the event of a collision.

In most cases, heavy truck manufacturers place the battery box within inches of the fuel tank or have battery cables running over or on the fuel tanks. In the event of a crash, such close proximity of the battery to the fuel tank increases the likelihood that when a fuel spill occurs there will also be an ignition source in the battery compartment. The major three elements needed to create a fire are air, fuel and an ignition source. Clearly, if you remove one of these elements, the likelihood of a post-collision fuel-fed fire is substantially reduced.

An alternative design to help reduce the likelihood of a post-collision fuel-fed fire in a heavy truck is to move the battery box between the frame rails along with all associated cables attached to the battery box. This relocation will substantially reduce the opportunity for damage to occur to the battery box or its associated cables thereby reducing the likelihood of an ignition source that could spark a post-collision fuel-fed fire in a heavy truck.

Moving the battery boxes to a position inside the frame rails is not a new or novel approach but is one that is rarely followed by heavy truck manufacturers. In fact, Freightliner Corporation included this alternative design in trucks at least as early as 1996. However, if heavy truck manufacturers had conducted a proper risk/hazard analysis this alternative design concept could have been employed much earlier. While relocation of the battery boxes in a heavy truck does not resolve the larger issue related to the size and placement of the external fuel tanks, it does provide a serious opportunity to reduce the likelihood that fuel spillage will be ignited by damage done to the battery boxes. If you want more information on this subject of fuel-fed fires contact Ben Baker in our firm at 800-898-2034.

# XI. MASS TORTS UPDATE

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## **JURY AWARDS \$16.6 MILLION IN SKIN PATCH CASE**

An Illinois state court jury returned a verdict requiring two units of Johnson & Johnson to pay \$16.6 million to the family of a Chicago-area woman who died after using a Duragesic pain-patch. This dealt the company its fourth defeat in as many trials since 2006. Janice DiCosolo, who was only 38 year old, died in February 2004 because the patch she was wearing delivered a fatal dose of the narcotic fentanyl, the device's main ingredient.

The Duragesic-brand patch is made by Alza Corp., a Mountain View, California, company owned by Johnson & Johnson, the world's largest maker of medical devices. The product was distributed by another Johnson & Johnson unit, Janssen Pharmaceutica. The patches generated \$1.16 billion in sales last year for Johnson & Johnson, making them the company's seventh best-selling product, according to data compiled by Bloomberg. The lawsuit was filed by Mrs. DiCosolo's husband, John. The couple had three children.

Source: Bloomberg

## **FENTANYL PAIN PATCH VERDICT IN FLORIDA**

A \$13 million verdict was returned recently in Florida for the family of a woman who died from an overdose of pain killers delivered by a pain patch made by Janssen Pharmaceutical Products and Alza, subsidiaries of Johnson & Johnson. The company knew the manufacturing defects caused the production of flawed patches, yet it sold the devices anyway. The victim was a 34-year-old mother of five who died from an overdose of Fentanyl, a pain killer more powerful than morphine that is delivered by the patches.

The patches generated \$1.6 billion in global sales last year ranking seventh on Johnson & Johnson's list of best selling products. The jury also concluded that the death in this case was tied to bad advice the woman got from

a physician's assistant whom she called the night before she died, complaining of nausea and vomiting. Evidence in the case revealed the assistant told her to take anti-nausea medicine rather than to go to the emergency room.

The jurors concluded that Johnson & Johnson was 80% responsible for her death while the doctor's assistant was 20% liable for mishandling her call. Johnson & Johnson's officials said in an August 2008 filing with the Securities & Exchange Commission that Janssen and Alza still face sixty lawsuits over the Duragesic patches. Joe Taraska, an Orlando, Florida lawyer, represented the victim's family and did a very good job. If you want more information on Fentanyl contact Frank Woodson in our firm at 800-898-2034 or e-mail at Frank.Woodson@beasleyallen.com.

Source: Bloomberg

## **LAWSUITS INVOLVING THE HEART SURGERY DRUG TRASYLOL BEING FILED**

The drug TrasyloL, used during open-heart surgery to reduce blood loss, has become the subject of a growing number of lawsuits. In these suits, it's alleged that the drug, manufactured by Bayer, causes renal failure and other risks, including heart failure and stroke. As we have previously reported, the FDA suspended sales of TrasyloL in November 2007 after it had been on the market for 14 years. The number of people affected could be most significant because the drug was used quite often during open-heart surgery.

TrasyloL was used in surgery and not prescribed. Most patients wouldn't know at the time of their surgery that it was being used. It's estimated that 4.5 million patients worldwide have been given TrasyloL, including 1.5 million patients in this country. Thus far, there have been about 150 cases filed nationwide against Bayer this year. A multidistrict litigation panel was set up in June 2008 in the Southern District of Florida. The first trial in the MDL has been set for January 2010.

A closer look at this drug is in order. TrasyloL, the brand name for aprotinin, reduces blood loss during open-heart surgery, thereby decreasing the amount of blood needed for transfusion. In

1993, it was approved for use in high-risk cardiac surgeries and was widely used in all cardiac surgeries in subsequent years. In January 2006, a study by Dr. Dennis Mangano published in the *New England Journal of Medicine* concluded that the drug more than doubled the risk of renal failure. In September 2006, the FDA met with Bayer and voted to keep TrasyloL on the market. However, in about one week, Bayer disclosed its own study confirming the Mangano results and the FDA issued a public health advisory. In December 2006, the drug's label was changed to warn of potential renal dysfunction. The signature injury of this drug is kidney failure, which isn't a common occurrence as a result of heart failure.

The FDA suspended sales of TrasyloL after a Canadian BART (Blood Conservation Using Antifibrinolytics Trial) study was halted in October 2007 because patients were dying within 30 days of being given aprotinin. The final results of that study were published in May 2008, and Bayer pulled the remaining stock of TrasyloL from the market. If you want more information on this drug, call Frank Woodson at 800-898-2034 or e-mail him at Frank.Woodson@beasleyallen.com.

## **AVANDIA MAY NOW BE PULLED FROM THE MARKET**

Since a meta-analysis was made public in May 2007, Avandia, Glaxo-SmithKline's diabetes drug, has come under fire. The meta-analysis showed the medicine was increasing the risk of heart attacks for those taking the medication. A black box warning was required to be placed on the drug's label. Now Avandia-induced liver failures have been seen and a black box warning has been placed on the label for this particular adverse event.

As a result of these updated warnings, a couple of well known physician associations have made recommendations against the use of this drug. Guidelines issued recently by the American Diabetes Association and the European Association for the Study of Diabetes said members of a joint medical panel "unanimously advised against using

Avandia.” After this recommendation, on October 30<sup>th</sup> Public Citizen asked the FDA to ban the drug. FDA officials have indicated that there is a split within the agency about whether to pull Avandia off the market or allow it to stay with stronger warnings.

Public Citizen believes the government should ban the diabetes drug Avandia because of a wide variety of life-threatening risks, including heart and liver damage. The consumer group filed a petition with the Food and Drug Administration to have Avandia taken off the market. Public Citizen said in the petition:

*The FDA is in possession of clear, unequivocal evidence that (Avandia) causes a wide variety of toxicities. Many of these are life-threatening, such as heart attacks, heart failure (and) liver failure.*

Avandia’s heart risks were brought to light two years ago in a medical journal article that reported a 43% higher risk of heart attacks among Avandia patients when compared with those taking other diabetes drugs. Although scientists are still debating a link between the drug and heart attacks, concerns about the medical evidence led to stronger warnings. As a result, Avandia use dropped sharply, but about a million U.S. patients still take it. Public Citizen’s own research has found 14 cases of liver failure associated with Avandia, 12 of which led to death. The petition also said Avandia predisposes some patients to eye problems, anemia and bone fractures.

Glaxo still says it doesn’t believe Avandia causes liver failure. The company said its own data shows the drug has a good safety record when it comes to liver problems. The company claims the data on heart attacks is inconclusive and that Avandia is safe and effective when used according to directions. Avandia sales have fallen sharply since the May 2007 report which appeared in the *New England Journal of Medicine*. However, approximately ten thousand prescriptions are still being filled daily for Avandia according to Public Citizen. With other safer and similar treatments on the market, why is the FDA waiting to act? Hopefully, the new administration in

power will step in and allow federal agencies to return to their job of protecting consumers rather than protecting the interests of big business as has been done under the Bush Administration. If you want more information on Avandia contact Frank Woodson at 800-898-2034 or e-mail at Frank.Woodson@beasleyallen.com.

Source: *Wall Street Journal* and *Associated Press*

#### **NEW STUDY IS BAD NEWS FOR MEDTRONIC**

Device maker Medtronic got some bad news recently when a study showed that its new drug-coated stent was associated with more heart attacks and blood clots than a rival stent made by Johnson & Johnson. Results from the study, which included more than 2,000 patients, showed that heart patients who received the Medtronic device, called Endeavor, had more heart attacks and blood clots and needed repeat procedures more often than those treated with the J&J stent, known as Cypher.

As you know, drug-coated stents are tiny wire mesh tubular devices that are implanted in diseased vessels to prop them open. The drug coating is designed to keep vessels from reclogging. Interestingly, this study was sponsored by J&J. It showed there was no difference in death rates. The study, called Sort Out III, was presented at the Transcatheter Cardiovascular Therapeutics meeting in Washington D.C. Medtronic says the J&J study is at odds with every other study that has been done. In any event, the release of the study wasn’t good news for Medtronic.

Source: *Reuters*

#### **PAIN DRUGS DOUBLE RISK OF SECOND HEART ATTACK AND DEATH IN STUDY**

A Danish study, released last month, found that heart attack and heart failure patients have a higher risk of a second heart attack or death if they take painkillers, including Celebrex and the generic drug ibuprofen. The risk doubled within the first 90 days on the painkillers Celebrex or Vioxx in those who had survived a heart attack or heart failure, compared with those who

didn’t take the medications, according to research presented recently at the American Heart Association meeting in New Orleans. Other common painkillers, such as the generics diclofenac and ibuprofen, increased the risk between 2.1 and 1.3 times. I’m sure this study will cause a great deal of concern and debate.

Source: *Bloomberg*

#### **FDA CONTINUES TO IGNORE EVIDENCE ON BPA**

The Food and Drug Administration ignored evidence when concluding that a chemical in plastic baby bottles is safe, according to an expert panel asked to review the agency’s handling of the controversial substance. Studies that the FDA ignored show that bisphenol A (BPA) could cause harm at levels at least ten times lower than the amount that the agency says is safe for babies, according to the panel’s report. The expert panel says the FDA was wrong to base its August safety decision on three industry-funded studies. Another government agency, the National Toxicology Program, had found that many other independent studies deserved consideration. That obviously bothered the panel members. Based on those independent studies, the toxicology program concluded in September that there is “some concern” that BPA alters development of the brain, prostate and behavior in children and fetuses.

The panel’s report concludes that excluding valuable scientific studies “creates a false sense of security” about BPA and “overlooks a wide range of potentially serious findings.” The FDA made other significant mistakes that have caused it to underestimate BPA’s potential dangers. The panel says in this regard:

- When measuring BPA levels in infant formula, for example, the FDA used only 14 cans of liquid formula, all purchased at the same time. Then, the FDA used the average BPA level found in these cans, which are lined with BPA. The panel notes that some babies whose formula comes from cans with above-average BPA levels may be exposed to far more of the chemical than others.

- The FDA also failed to consider the cumulative effect of being exposed to BPA from dozens of products. The FDA may have underestimated the true amount of BPA to which babies are exposed.

The new report was written by a subcommittee of the agency's outside science board, a large group of experts that advises the FDA on complex issues. That larger board may decide to issue its own report to the FDA. The FDA said the new report "raises important questions" and that it's planning to do additional research on BPA.

Critics have long contended that BPA, which acts like the hormone estrogen, can cause harm at extremely low doses. For example, the Environmental Working Group says BPA could cause brain, behavior and prostate damage at levels 500 times lower than the FDA's proposed exposure limit. An advocacy group, the Natural Resources Defense Council, believes BPA is too toxic to use in baby products at all. The group has formally asked the FDA to remove BPA from food and beverage containers. Canada this month declared BPA to be toxic and announced plans to ban it in baby bottles.

Source: *USA Today*

#### **MORE LAWSUITS INVOLVING VYTORIN ARE BEING FILED**

There have several lawsuits filed against Merck & Co. and partner Schering-Plough Corp., related to their marketing of cholesterol drug Vytorin. Also, the U.S. Department of Justice is investigating the drug makers' conduct, according to a regulatory filing. The Justice Department's Civil Division notified Merck by way of a September 10<sup>th</sup> letter that the Department is investigating whether the drug makers' promotion of Vytorin resulted in false claims to federal health care programs. If so, federal health programs could seek to recover money they have spent on the drug.

A group of 35 state attorneys general are jointly investigating whether the partners violated state consumer protection laws in their marketing of Vytorin, Merck reported. And, since January, Merck has been served with or

become aware of about 140 civil class action lawsuits alleging consumer fraud claims in connection with two cholesterol drugs sold and promoted by the partners' joint venture. Some lawsuits allege personal injuries or seek medical monitoring for people who used the drugs.

Vytorin and one of its components, Zetia, have been blockbusters in the lucrative cholesterol market, with a combined \$5.2 billion in 2007 revenue. But repeated bad news about the drugs this year has cut revenue by about 15% since last fall—they brought in only a combined \$1.1 billion in the third quarter—contributing to new rounds of layoffs at both Merck and Schering-Plough. In January, under pressure from Congressional investigators, the companies released results of a long-delayed study showing that the very expensive Vytorin was no better at reducing plaque buildup than its second component, a generic cholesterol drug called Zocor costing about one-third as much.

Those revelations led to the investigations by Congressional committees as to whether the companies deliberately delayed releasing the study's results to boost sales of Vytorin and Zetia. The companies have denied the charge. The investigations are being conducted by the Senate Finance Committee and the House Committee on Energy and Commerce's Subcommittee on Oversight and Investigations. They have sought witness interviews, documents and information related to the companies' promotion of Vytorin, the delayed release of results on the patient study, called ENHANCE, and stock sales by officers of the companies.

The Oversight and Investigations subcommittee has also made requests for documents and information related to another patient study, called SEAS, that linked Vytorin to a possible increased risk of various cancers and showed it didn't prevent deterioration, surgery or death in patients with diseased heart valves, as the companies had hoped. If you need more information on Vytorin issues, contact Frank Woodson at 800-898-2034.

Source: *Forbes*

#### **WOMAN AWARDED \$3.6 MILLION IN ASBESTOS CASE**

A jury in Florida has awarded a \$3.6 million verdict to a woman suffering from a terminal disease caused by second-hand contact with asbestos. The 57-year-old woman, Lynda Daly, was diagnosed with mesothelioma last year. She contended that the disease was caused by the asbestos-filled brakes at a Wisconsin Ford dealership where she worked during the 1970s. She also may have ingested the asbestos because her husband, Michael, did brake-repair jobs at their home. However, Michael Daly has had no complications from asbestos despite being in direct contact with asbestos brakes.

The jurors concluded Ford Motor Co. was responsible for Mrs. Daly's condition, which is being treated by chemotherapy. Mesothelioma usually kills its victims within two years of its detection. The case is likely to be appealed. Juan Bauta, a lawyer from Coral Gables, Florida, represented the Daly family and did a very good job.

Source: *Miami Herald*

## **XII. BUSINESS LITIGATION**

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#### **DISCOVER REACHES \$2.75 BILLION SETTLEMENT WITH VISA AND MASTERCARD**

Discover Financial Services has settled its lawsuit filed against Visa Inc. and MasterCard Inc. The lawsuit sought damages for practices that suppressed third-party issuing on the Discover Network and the acceptance of its cards. Under the terms of the settlement agreement, Discover will receive up to \$2.75 billion from Visa and MasterCard. Discover will receive approximately \$862 million of the settlement in the current fiscal quarter and up to approximately \$472 million per quarter in 2009.

Visa is responsible for \$1.8875 billion of the settlement amount. MasterCard will pay \$862.5 million reflecting the terms of a judgment-sharing agreement with Visa that was finalized in July,

2008. In addition, in connection with the settlement, Morgan Stanley, Discover's former parent company, agreed to pay MasterCard \$35 million.

Discover says the settlement will further "strengthen its capital base in this challenging economy" and also will "support continued investment" in growing its business, including broadening global acceptance, expanding network volume and growing its "deposit franchise." This litigation had been around for a while and is finally over with a win for Discover. Lloyd Constantine, a New York lawyer, handled this litigation and did a tremendous job.

Source: *Payments News*

### **JURY RETURNS VERDICT IN TRADE SECRETS CASE**

A chemical expert who created a method of transforming certain hazardous industrial wastes into lucrative manufacturing ingredients, only to have his idea stolen, was awarded a \$192 million verdict recently by a Mobile County jury. The compensatory damages verdict was in favor of Dr. Sven Peter Mannsfeld and against Ineos Americas LLC and Ineos Phenol. Ineos Americas LLC, a German-based company owned by Ineos Phenol, owns a chemical plant in Theodore. The \$192 million award was the projected profit the Theodore plant alone is expected make into the year 2025.

The Plaintiff developed a concept in the late 1990s, not long before he retired from the chemical field, through which hazardous waste materials are used as building products in the manufacture of items such as tires. In 2004, Dr. Mannsfeld learned that the Defendants were using his idea and had even devised patents for the process in Germany, Belgium, the European Union and the United States. He filed suit in June 2006. Skip Finkbonner and Bobo Cunningham, who are very good lawyers from Mobile, represented the Plaintiff and did an outstanding job.

Source: *Mobile Press Register*

### **HEALTHSOUTH LAWSUIT WITH INVESTMENT BANK SETTLED**

HealthSouth Corp. has settled its case against an investment bank and will receive \$133 million. The investment bank is accused of aiding a massive corporate fraud at the Birmingham-based company. UBS, an investment bank that sold shares and bonds of the physical therapy company to investors, will pay \$100 million cash and forgive \$33 million it was owed by HealthSouth. The agreement settles the UBS portion of a lawsuit filed against the bank, other HealthSouth advisers and Richard Scrushy. It was alleged in the suit that UBS investment bankers knew HealthSouth faked its books to the tune of \$2.6 billion from 1996 through 2002 to boost profits and trigger performance bonuses for top executives. UBS analysts enthusiastically recommended that investors buy HealthSouth shares with knowledge that the stock was being propped up by phony numbers.

The case began in 2002, when shareholder Wade Tucker sued Scrushy, UBS, auditor Ernst & Young and others, claiming their actions harmed the company. The action was a derivative lawsuit filed by the Plaintiff on behalf of HealthSouth. The claims against Scrushy are set for trial in January and the portion of the case against Ernst & Young is still pending. More than a dozen former HealthSouth employees and executives pleaded guilty to faking profits, assets and cash balances after prosecutors closed in. The HealthSouth fraud cut the company's shares by more than 90%, to less than 10 cents each, after it was publicized. The company acknowledged bankruptcy was a threat, and tens of millions of dollars were spent to reconstruct the financial books. The \$133 million recovery represents about 20% of HealthSouth's 2007 profit, which was \$653 million.

Under the terms of an earlier settlement HealthSouth reached with investors who filed a class action lawsuit, 25% of the UBS settlement proceeds will go to the class members. The rest will go to pay down HealthSouth debt. Much of that debt was taken out under Scrushy to pay for acquisitions. Those acquisitions, the government

said during the criminal trial, were merely smokescreens designed to hide the fraud. Former Supreme Court Justice Ralph Cook, assisted by John Haley, both from the Hare, Wynn firm in Birmingham, represented HealthSouth in this case and did a very good job.

Source: *Birmingham News*

### **AUTHORS AND PUBLISHERS SETTLE SUIT AGAINST GOOGLE**

A settlement has been reached in a lawsuit against Google over the Internet search engine's use of copyrighted material. According to a statement by the Authors Guild, the Association of American Publishers and Google, the agreement "will expand online access to millions of in-copyright books and other written materials in the U.S. from the collections of a number of major U.S. libraries participating in Google Book Search." If approved by a federal court in Manhattan, the settlement will end the lawsuit filed against Google two years ago. This litigation has been closely followed by the publishing industry as it debates how copyright law should work online.

Under the Google Print Library Project, millions of copyrighted books are to be indexed on the Internet. Google has called the project an invaluable chance for books to receive increased exposure. But in the lawsuit filed in 2005 in U.S. District Court in Manhattan, the publishers association cited the "continuing, irreparable and imminent harm publishers are suffering ... due to Google's willful (copyright) infringement to further its own commercial purposes."

Source: *Associated Press*

### **JURY SAYS BOEING MUST PAY \$370 MILLION IN LAWSUIT**

A jury has ordered Boeing Co.'s satellite division to pay at least \$370 million for breaching a contract to build and launch satellites for a communications company headed by cellular phone pioneer Craig McCaw. The decision came after a four-week trial in which ICO Global Communications Holdings Ltd. accused the aerospace giant of

trying to hurt its proposed satellite network by fraudulently raising prices for the project. The jury ordered the satellite subsidiary to pay \$370.6 million to ICO, while the parent company was ordered to pay \$91.6 million. The initial award didn't include punitive damages. Boeing will appeal the verdict.

The lawsuit, filed in 2004 in Los Angeles County Superior Court, stems from ICO's decade-old plan to launch a fleet of satellites that would provide mobile telephone and Internet service. ICO, based in Reston, VA, contracted with El Segundo-based Hughes Electronics Corp. in the mid-1990s to build and launch 12 satellites. Boeing acquired Hughes in 2000 and inherited the contract with ICO, but only two satellites were finished—one of which was lost due to a failure aboard a Boeing Sea Launch rocket the same year.

ICO sued Boeing and its satellite division four years later for breach of contract after Boeing allegedly demanded ICO pay another \$400 million to finish the job. Costs of producing the satellites increased as ICO tried to delay the project during a major slump in the telecommunications sector. ICO sought unspecified punitive damages and around \$1.5 billion in actual damages, plus interest. ICO contended that once Boeing got into the satellite communications business, its former customer became a competitor. Boeing claimed it attempted to keep the deal alive and accused ICO of canceling the contract for convenience. The jury found that ICO was the good guy in this business-related battle.

Source: Associated Press

## XIII. INSURANCE AND FINANCE UPDATE

### **FDIC COULD BECOME FEDERAL INSURANCE REGULATOR**

The powers of the Federal Deposit Insurance Corp. could be expanded if Congress sees fit to shift insurance companies from state regulation to federal regulation. The FDIC could then

start providing guarantees for insurance companies, much like it already guarantees the deposits of most U.S. banks. However, it would take putting the insurance industry under federal regulation. As we all know, insurance companies are currently regulated by individual states.

Source: Reuters

### **VERMONT FINALLY GETS \$205 MILLION FROM FAILED AMBASSADOR INSURANCE**

The state of Vermont has received \$205 million in a lawsuit against accounts for an insurance company that went bankrupt a quarter century ago leaving about 20,000 people in several states with outstanding claims. This payment will bring to a close a long-running battle by state regulators to collect from PriceWaterhouseCoopers, the accounting firm for the defunct Ambassador Insurance Co. Paulette Thabault, commissioner of Vermont's Department of Banking, Insurance, Securities and Health Care Administration, observed:

*Claimants should know that the long wait is nearly over, and that we expect to be able to fully pay claims by insureds and policyholders, with interest.*

Ambassador, which was incorporated in Vermont but headquartered in New Jersey, operated in seven states. It had about 7,000 policyholders in Vermont when it went bankrupt in 1983. Vermonters paid \$3.5 million in premiums to Ambassador in 2002, its last full year in business. It's not clear how many individual Vermonters will share in the \$205 million, but the number will be small. Claimants already have received 86% of the money they were owed under settlements reached several years ago, with other Defendants. Some of the \$205 million will go to guaranty and reinsurance funds.

Source: Insurance Journal

### **NORTHWESTERN MUTUAL SETTLES LAWSUIT**

Northwestern Mutual Life Insurance Co. has agreed to settle a class action lawsuit for up to \$92 million. The

lawsuit accused Northwestern Mutual of failing to pay dividends on certain term life policies and using improper sales and marketing practices. The lawsuit was filed four years ago by a customer in California who said the insurer's sales materials misled him about whether dividends would be paid on term life and disability insurance. The proposed settlement covers about 1.3 million current and 1.6 million former policy owners who have purchased term life or disability coverage since 1981.

Source: Associated Press

### **AVIVA SETTLES ANNUITY LAWSUIT**

AvivaUSA has settled a lawsuit brought by the Minnesota Attorney General that alleged the company sold unsuitable long-term deferred annuities to senior citizens. AmerUs Life Insurance Co. and American Investors Life Insurance Co., which were bought by AvivaUSA in 2006, were charged by Minnesota Attorney General Lori Swanson with misrepresenting or failing to disclose terms of these annuities. Des Moines-based AvivaUSA is the nation's largest seller of equity-indexed deferred annuities.

The settlement, which has been approved by a Minnesota state court judge, requires Aviva to refund about 4,500 policies made to Minnesota seniors. The policies have an estimated value of \$250 million. The Minnesota Attorney General previously reached similar settlements with Allianz Life Insurance Co. and American Equity Investment Life Insurance Co. of West Des Moines. There is a fourth lawsuit against Midland National Life Insurance Co. pending in a Minnesota court.

Minnesota consumers who were age 65 or older and had bought a deferred annuity from Aviva/AmerUs between January 1, 2001 and October 22, 2008, can file a claim for a full refund, including interest, without penalty. Relating to the settlement, Attorney General Swanson said in a statement:

*I am pleased that...we have been able to obtain refunds for Aviva's policyholders, especially during these tough economic times where many seniors on a fixed*

*income are seeing their expenses skyrocket.*

Under the settlement, Aviva agreed to “request and obtain additional information from consumers that is necessary to make a suitability determination.” This will include collecting monthly income, living expenses and disposable income, as well as liquid assets and anticipated changes in any of these areas. Aviva will also conduct an additional review of the suitability of the products for consumers 65 years of age or older. As part of the settlement, AvivaUSA also agreed to pay the state of Minnesota \$375,000 to reimburse expenses. If you want more information on the Aviva litigation contact Jay Aughtman at 800-898-2034 or by e-mail at Jay.Aughtman@beasleyallen.com.

Source: *Des Moines Register*

## XIV. PREDATORY LENDING

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### **DECEPTIVE TACTICS AND PREDATORY PRACTICES REJECTED IN OHIO AND ARIZONA**

Fortunately, Ohio and Arizona voters saw through the deception of the payday lending industry at the ballot box on November 4<sup>th</sup> and voted to reject payday lending in their states. The trade group for the payday lenders used dirty tricks and misleading advertising trying to keep predatory 391% annual interest rates legal for payday loans. Ballot propositions initiated by the industry, supported by over \$30 million from its trade group, and featuring measures that would make legal its predatory practices, suffered defeats in both states. Fortunately, voters recognized the deception in the industry and its advertising. Payday lending is an \$85 billion industry and it is politically powerful.

Payday lenders outspent the Ohio grassroots coalition by over 60 to one, and still lost by a two to one margin in the vote. In Arizona, the grassroots campaign was outspent about 90 to one. Uriah King, policy associate for Center for Responsible Lending, observed:

*These two citizens ballots are really a mandate for cracking down on payday lending throughout the nation. You can get no clearer message than a huge majority of voters rejecting 400% interest loans. A reasonable two-digit cap is sensible, fair, and it works to keep bad apples out of the consumer lending arena.*

Combating millions of dollars of deceptive advertising, spirited grassroots campaigns in each state took on a national industry that depends on making high-interest loans repeatedly to customers who cannot afford to pay them off for good. Payday loans are systematically converted into long-term, high-cost debt for working families. The average payday borrower has more than eight transactions per year, costing them more in interest than the original loan. Congress passed a 36% cap protecting military families from this practice, and 15 states and the District of Columbia have chosen to control predatory lending by enforcing interest rates in that range.

The failure of the payday industry to circumvent the efforts of state lawmakers in Ohio and Arizona is clear evidence that citizens will crack down on irresponsible lending practices, if given the opportunity. It also says that people are catching on to the deceptive practices of the industry. That's good news!

Payday lending is illegal in 15 states thanks in part to a wave of lending laws passed since 2001. The federal government has capped interest rates on loans made to military families, but everybody else is fair game for these vultures. Several cities have used zoning changes to limit the number of lenders, especially in low-income neighborhoods. Payday lenders fought back with the ballot measures.

Payday industry lenders prey on the same low-income and moderate-income families that took out subprime home loans. Once these loan sharks get a hold on a customer they never let go. Folks are still paying off the principal on their loans, plus hundreds of dollars in fees, years after taking out their loans.

Source: [IrresponsibleLending.com](http://IrresponsibleLending.com)

### **GOVERNMENTS AT EVERY LEVEL SHOULD FIGHT PREDATORY LENDERS**

A nationwide coalition of consumer groups recently handed out its grades on how well states protect consumers. Unfortunately, Alabama received three Fs on the Small Dollar Loan Products Scorecard issued by the Consumers Union, National Consumer Law Center and the Consumer Federation of America. The report card places Alabama near the bottom of all states in protecting citizens from predatory lending practices and that's totally unacceptable.

Alabama's low marks reflect our extreme interest rates on a variety of loan products. A 2003 law allows fees on payday lending that can reach an annualized percentage rate of 455%. Under the Alabama Pawnshop Act, lenders can charge an APR of 300% on a short-term auto title loan. The state comparisons in the report card are eye-opening. While Alabama lets fringe lending proliferate, Arkansas is boldly curtailing such financial exploitation. Neighboring Georgia has also been praised for 2003 action by its legislature to crack down on payday lenders.

Instead of sinking to the bottom of consumer protection report cards, Alabama should take legislative action to get rid of these shady operations. Alabama Arise made a good point when it asked: “Why has our long-running statewide conversation about economic growth not led to substantial curbs on shady loan practices?” Amid all the strategic talk about helping the economy, too few of Alabama's leaders have been willing to acknowledge that abusive lending and excessive loan fees cause consumers to be trapped in debt cycles, reducing resources that could be spent on real goods, saved, or invested.

Ambitious proposals for boosting Alabama's economy are being undermined by the crushing impact of debt on thousands of consumers saddled with high-interest loans. It is also perplexing that many of our leaders, who say the Bible guides their views on public policy, haven't raised moral objections to the usury of predatory lending. A person need not be labeled “anti-business” for supporting reason-

able ground rules and restrictions on lending practices that exploit low-income workers. What these lenders are doing is morally wrong. It should also be illegal to exploit the poor in this manner.

Alabamians are also strong backers of the military. Yet why did Congress have to step in to protect service members in our state from the payday loan industry? Surely most Alabamians would agree that enacting this policy was a good and necessary step, needed to protect members of our military from financial exploitation. Alabama Arise asks: "Don't civilians deserve the same protection?" If an interest rate cap is good for active-duty service members, it ought to be good for everyone else as well. It's time for the Alabama Legislature to get involved in this fight. The Legislature should pursue the baseline reforms being passed in other states:

- a ban on renewals;
- caps on the number of loans that can be outstanding at any one time;
- mandatory and controlled payment plans; and
- interoperable databases to make sure that consumers aren't simultaneously taking on excessive debt from multiple loan providers.

Although evidence shows that these reforms may be limited in effectiveness, they are certainly better than our current no-holds-barred policy. The most important reform of all would be to cap the maximum possible interest rate on these loans.

In its "Springing the Debt Trap" report, the Center for Responsible Lending estimates that residents of the 12 states (plus the District of Columbia) that have outlawed triple-digit interest save nearly \$1.5 billion each year in predatory lending fees. That figure represents serious money that could stimulate our economy in more useful ways. With the economy in deep trouble, now is the perfect time for Alabamians to take a stand against triple-digit interest rates, colossal fees and other unsavory industry practices. Alabama should confront the powerful predatory loan industry because it's the right thing to do and because it will

result in a more prosperous population—a development that would greatly benefit us all.

Source: Alabama Association For Justice

## XV. PREMISES LIABILITY UPDATE

### **DEATHS ON BRIDGE PROJECT IN LOUISIANA**

Construction of the \$803 million Interstate 10 bridges that span Lake Pontchartrain in eastern New Orleans was called off after a concrete beam fell, dumping ten men into the water, killing one of them. The Louisiana Department of Transportation and Development stopped the work until the department receives a safety plan from Boh Brothers, the contractor for the project. Boh Brothers is working with various regulatory agencies to determine what caused the accident. The company told the *Associated Press* that its initial assessment indicates that proper safety procedures were followed. The man killed was the foreman of the crew, an 11-year employee from Selma, Alabama.

Source: *Associated Press*

### **CONCRETE-TESTING FIRM IS ACCUSED OF WRONGDOING ON TESTS**

Concrete that was poured over the past decade at more than 100 construction projects around New York City, including the Freedom Tower, the new Yankee Stadium and the Jet Blue Terminal at Kennedy Airport, has been or will be re-examined because a testing company did not do its job, according to state prosecutors. An indictment has been returned for a concrete-testing company. All of the structures are believed to be safe, according to city officials, although they might deteriorate sooner than expected if the concrete is below standards.

The testing company, Testwell Laboratories, the city's leading concrete-testing firm, and several of its officials were indicted on charges that they failed to perform strength tests and

billed clients, including a number of public agencies, for work that was never performed. The indictment charged Testwell, which is based in Ossining, New York, and its owner, V. Reddy Kancharla, with several crimes, including enterprise corruption, grand larceny and falsifying business records. Testwell's vice-president, its director for concrete and masonry testing, and four other employees were also charged with enterprise corruption. That is the state equivalent of federal racketeering charges—a felony punishable by up to 25 years in prison. Five other Testwell employees were indicted on lesser charges.

As a precautionary measure, city officials have begun meeting with the owners of the buildings identified in the indictment to develop procedures to assess the structural integrity of these buildings. Prosecutors accused Testwell of cutting corners in evaluating the strength of concrete in various building projects. Testers, for instance, are supposed to put various types of concrete through an eight-week analysis that involves making several batches of concrete and storing them in controlled environments before recommending one formula for a project. But Testwell, on hundreds of occasions, skipped these tests, instead relying on strength estimates tabulated in a computer program, prosecutors said.

Many Testwell inspectors lacked certifications for their jobs, according to the prosecutors. The inspectors never conducted the majority of their field tests, instead falsifying results in their reports, prosecutors said. Prosecutors also accused Testwell of billing for work it never performed.

Source: *New York Times*

### **GAS COMPANY MUST PAY WORKERS \$12.3 MILLION**

A jury in California awarded \$12.3 million to two men working as plumbers who were injured in an explosion three years ago when they tried to ignite a water-heater pilot light. The men, who were on the job, didn't smell gas and their attempt to purge the line of air flooded a small water-heater closet with gas. The men suf-

ferred second-degree burns and were out of work for months. The suit stemmed from the absence of natural-gas odor prior to the November 2005 explosion at Porterville Adult School. Liquid odorant is put into natural gas so its presence can be detected, but the odor fades in new steel pipes such as those used in the adult school's construction. It was proved that Southern California Gas was aware of "odor fade" for decades, but had failed to warn the public about it. Apparently, no gas company in the nation warns about this hazard because of the cost. When the pilot didn't light the men purged air from the line. The attempt to light the pilot resulted in the room bursting into flames.

In addition to their burns, both men now also suffer from methicillin-resistant *Staphylococcus aureus* (MRSA), a staph infection. It's a strain that's resistant to the broad-spectrum antibiotics commonly used to treat it and can be fatal. Their most common symptom is periodic boils. The water heater, manufactured by the Bradford-White Corp, was inside a water-heater closet with a solid door and no ventilation. When the men entered, they did not smell gas.

Experts concluded there must have been a gas leak or that the cap was left off for more than three minutes in order for enough gas to have accumulated to cause an explosion of the magnitude that occurred. The two men were blown backward and the door shut behind them. The force of the explosion blew the ceiling tiles off the roof above the closet and two adjacent restrooms. The school was evacuated. Experts with years of plumbing and engineering experience were brought in and most said the phenomenon of odor fade was unknown to them. Ken Fitzgerald, a lawyer from San Diego, California, represented the two Plaintiffs and did a very good job.

Source: *Visalia Times-Delta*

### **SUITS FILED OVER ARKANSAS RAIL EXPLOSION**

A good number of lawsuits have been filed in Arkansas over a 2005 Union Pacific derailment, explosion and chemical leak in Texarkana. A train

from Chicago struck another train, from Pine Bluff, in the Union Pacific yard on the south side of Texarkana. Some of the cars derailed in an accordion effect, piercing a propylene tanker that leaked part of its flammable cargo. A small propane tank also exploded. One resident, Pearlie Mae Marshall, died when the explosion destroyed her home. A wrongful death suit, filed over her death, was settled for \$2 million.

Other residents complained of respiratory problems and hundreds of homes and a jail were evacuated. A second wrongful death suit was filed by the family of Norma Sims. It is alleged that Ms. Sims died ten days after the collision because of the fumes she inhaled. A third lawsuit naming about 18 first responders as Plaintiffs was among eight more suits filed recently.

The National Transportation Safety Board found the probable cause of the collision to be "the failure of the crew of the train to remain attentive and alert and thereby able to stop short of an observable standing train." A toxic chemical plume quickly formed after the incident and hovered above the Texarkana vicinity for hours. Thousands of residents were awakened, startled, and promptly forced to evacuate their homes and businesses.

A suit on behalf of 1,200 Plaintiffs who either lived within a one-mile radius of the blast or were exposed to the noxious vapors, also was filed. That suit names Union Pacific, as well as the train's conductor and engineer, as Defendants. The explosions resulted in the total destruction and incineration of multiple homes and personal property in the surrounding areas and properties. The propylene and other dangerous and toxic substances subsequently ignited, causing multiple violent and deadly explosions.

Still another suit, which has 1,400 Plaintiffs, says victims are suffering continued physical and emotional effects from the accident. In addition to a tanker car filled with propylene that leaked and then ignited, a trestle bridge said to be treated with creosote, houses, cars and transformers also burned and released various substances into the air. Federal officials estimated the damage caused by the derailment at \$2.4 million. Union Pacific has already settled

numerous suits by evacuees and says that it wants to settle more.

One suit seeks class status for 160 people who fall into "the personal injury class, the evacuation class, the property damage class and/or the economic loss/business loss class." From all accounts it will take a pretty good while to get all of the claims resolved.

Source: *Insurance Journal*

### **LAWSUIT FILED OVER ELEVATOR DEATH**

A lawsuit has been filed by a student who observed another student killed in an elevator accident. Andy Polakowski, a freshman in college, was killed in a dormitory elevator accident that happened two years ago today at Ohio State University. Miles B. Morris, the student who has sued the university over the accident that killed Polakowski, was in the elevator when the 18-year-old was crushed between the ceiling of the elevator and the third-floor lobby of a school dormitory in October of 2006. Polakowski was trying to get off the overloaded elevator when it unexpectedly descended with its doors open.

Ohio State, Otis Elevator and Abell/Irvin Elevator Service, as well as companies affiliated with Otis and Abell, were named as Defendants in the suit. It was alleged that defective design and construction caused the incident. It was alleged in the suit that the mental and emotional distress of seeing the student die has required the Plaintiff to undergo counseling.

The student killed was in the front of the elevator and tried to jump out but made it only halfway before he was crushed with his legs hanging inside the elevator. The Ohio Department of Commerce, which monitors the safety of Columbus elevators, concluded that the brakes failed in the Stradley elevator that killed the student. Tests after the accident found that the elevator would not hold the amount of weight it was supposed to, which was 3,125 pounds. Otis manufactured the elevator and had the contract to service it until October 1, 2006. Abell/Irwin, now known as Oracle Elevator Co., has had the OSU elevator-service contract since then. Thus far, no wrongful death

lawsuit has been filed by the victim's family and I believe the statute of limitations has run.

Source: *Columbus Dispatch*

### **FRATERNITY MUST PAY \$16.2 MILLION IN HAZING DEATH**

A state district judge in Texas has ordered the national and University of Texas chapters of a fraternity to pay \$16.2 million to the parents of a freshman pledge who fell to his death two years ago after he was subjected to hazing. The Sigma Alpha Epsilon fraternity must pay each of the parents of Tyler Cross, who was from Marietta, Georgia, \$2.5 million for mental anguish and nearly \$81,000 for funeral expenses, as well as additional damages. A default judgment was entered by Judge John Dietz. The judge issued the order when the national and local SAE chapters failed to respond to a lawsuit filed by the Cross family in September. State law allows the chapters to seek a new trial, which could be granted if they are able to explain why they didn't respond to the suit. They must also prove a defense to the allegations against them can be made.

A civil case against the SAE alumni board and the housing corporation is still pending. Family members of another University of Texas pledge, Jack Phoummarath, settled a case in July with Lambda Phi Epsilon for \$4.2 million. The student, a Houston freshman, died in 2005 after drinking a fatal amount of alcohol during a pledge party.

The Cross family tried to mediate and settle the case out of court, but got no response from chapter lawyers. Travis County prosecutors began an investigation into the fraternity after Tyler fell from his fifth-floor balcony of an off-campus dormitory in November 2006. Investigators have said that the night before his body was discovered, he and other pledges were given half-gallon liquor bottles to drink. An autopsy report revealed that Tyler had a blood alcohol level of more than twice the legal limit for driving in Texas. Earlier this year, two former pledge trainers pleaded no contest to hazing and furnishing alcohol to minors and were sentenced to four days in jail and two

years of deferred adjudication, which is a form of probation. The former president of Sigma Alpha Epsilon's Texas chapter also pleaded no contest to the charges and received one year of deferred adjudication, and a fourth member pleaded no contest to failure to report hazing and also received one year of deferred adjudication.

The fraternity reached an agreement with University officials that allows the organization to keep operating if it changes some of its pledging and social activities. Under the agreement, the group must give advance notice of large parties, limit the attendance of guests to those named on a pre-party guest list, hire off-duty police officers to provide security and limit parties or events to Fridays and Saturdays with an ending time of 2 a.m., among other provisions.

The Cross family said in its lawsuit that, in the days before their son died, he was subjected to hazing that included beatings with large sticks of bamboo and paddles, being forced to drink large amounts of alcohol, sleep deprivation and "other acts of assault or battery." The family wanted to use the lawsuit to voice its wishes about changes it wanted the fraternity to make. Robby Alden, a lawyer from Austin, Texas, represented the Cross family. If this sort of thing continues to go on at colleges and universities, those fraternities that condone "stupidity" of the sort set out above should be banned on campus.

Source: *Austin American-Statesman*

### **TEXAS A&M SETTLES DECADE-OLD BONFIRE LAWSUIT**

Texas A&M University has settled the lawsuit that has been in court for years over the bonfire collapse that killed 12 people and injured dozens of others nearly a decade ago. The settlement requires engineering supervision for any future campus bonfire. Apparently, A&M officials haven't made a decision on whether future bonfires will be allowed. The university was sued by several people who were injured and by relatives of those killed in the November 1999 collapse. The huge structure of logs fell apart while it was

being assembled for the school's annual festivities preceding a football game with the rival University of Texas. Twelve people were killed and 27 more injured. The University will pay \$2.1 million to settle the lawsuit.

It's the first time the University has paid money in the bonfire litigation. The families of four students who died and three who were hurt had sued the University, school officials and construction contractors hired to help build the 59-foot-high stack of logs that roughly resembled a wedding cake. The agreement, filed in state District Court in Brazos County, resolves all remaining claims against current and former A&M employees, including Ray Bowen, who was president at the time of the collapse. Claims against the contractors are pending, and the University is a third-party Defendant in those matters.

According to media reports, the University had not participated in any of the previous settlements. Plaintiffs had reached a settlement totaling about \$6 million in 2004 against student bonfire leaders known as "Red Pots" for their painted hard hats. Those claims were paid through the homeowner's insurance policies of the parents of the Red Pots. Of the \$2.1 million paid in the latest settlement, the University will pay \$500,000, and insurance will cover the rest.

An investigative commission underwritten by A&M stopped short of assigning blame in its 2000 report but denounced the lack of University supervision of the student-run project, and criticized "tunnel vision in decision making" and a cultural bias that allowed safety problems to go uncorrected. In 2002, A&M signed an agreement with the Texas Board of Professional Engineers in which it promised to ensure that any bonfire on campus would have direct University supervision, including oversight by a licensed professional engineer, if warranted.

The settlement comes after a state appeals court ruled in May that A&M administrators were not immune from lawsuits. The administrators had argued that they were shielded by sovereign immunity, a doctrine that bars suits against government agencies and officials. But the State Court of Appeals in Waco said the Defendants were being

sued as individuals. Besides Bowen, the former A&M president, the Defendants included J. Malon Southerland, William L. Kibler, Russell W. Thompson and other current and former officials. Claims against H.B. Zachry Co., a construction firm, and Scott-Macon Ltd., a crane company, are pending.

Source: *Associated Press*

### **MDC HOLDINGS SUED OVER RADON PROBLEMS**

A lawsuit has been filed by 152 West Virginia residents, who have radon-related problems in their homes, against Richmond American and its parent company, Denver-based MDC Holdings Inc. High levels of dangerous radon were found in the Plaintiffs' homes which were built by Richmond American Homes of West Virginia. It's alleged that the companies failed to install functioning radon-removal systems in the homes that are involved in the suit.

Inhaled radon is the second-leading cause of lung cancer, after smoking, killing 21,000 Americans a year, according to the Environmental Protection Agency. But people poisoned by radon do not display symptoms immediately. Instead, the lung cancer incubates for years. West Virginia, which has radon-gas levels higher than the national average, requires radon-removal systems to be installed in newly-constructed homes. I do know that Colorado has high levels of radon. It appears Alabama has nothing similar to the West Virginia law. Andrew Skinner, a local lawyer, represents the West Virginia Plaintiffs in this lawsuit.

Source: *Denver Post*

### **CONNECTICUT FAMILY SUES PARTY HOSTS IN DRUNKEN DRIVING DEATH**

The family of Kirsten Meyer, a 19-year-old who died in an alcohol-related motor vehicle accident after a 2007 house party, has filed suit against the party host and his parents. The driver who caused the crash had been furnished alcohol at the party. The wrongful death suit seeks damages for the death of the teenager and emotional

distress for her parents. The party host, who had been accused of providing alcohol to minors at the house party, pleaded guilty to reckless endangerment in April. The party guest who caused the accident was sentenced to five years in prison for drunken driving. The teenaged victim was a passenger in his car.

Source: *Insurance Journal*

## **XVI. WORKPLACE HAZARDS**

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### **VALERO SETTLES ONE WRONGFUL DEATH LAWSUIT**

Valero Energy has settled one of two wrongful death cases filed against the company after two men suffocated inside a reactor tower at the Delaware City refinery in 2005. The settlement agreement was filed in the U.S. District Court for the Eastern District of Pennsylvania. The agreement, the terms of which were not disclosed, affected only the case filed by survivors of boilermaker John A. Lattanzi. Pre-trial activities are continuing in the case of another boilermaker John Ferguson, who died in the incident.

The families of both men accused the company of failing to provide the workers with warnings that they would be working on top of a refining tower filled with nitrogen gas. There have been similar problems at other Valero refineries. The company was accused of neglecting safety while rushing the refining system back into service to take advantage of high fuel prices.

Investigators with the U.S. Chemical Safety and Hazard Investigation Board concluded that Ferguson was overcome by the gas while attempting to fish a roll of duct tape from the reactor using a length of wire. Lattanzi died while trying to aid his co-worker. Valero had taken control of the refinery from Premcor only a few weeks before the accident. A CSB report blamed the deaths in part on "inadequate" warnings and barriers around an opening in the tank where the men died. The investigation also concluded

that managers failed to give the workers adequate written notice of the suffocation hazard.

There have been destruction of evidence claims against Valero and disputes over expert testimony. Valero filed suit in state and federal court earlier seeking access to tens of millions of dollars in compensatory and punitive damage insurance coverage in connection with the two claims. The disappearance of critical evidence and delays in production of other requested discovery items were also questioned.

Source: (Delaware) News Journal

### **MASSEY SETTLES LAWSUIT OVER WEST VIRGINIA MINE DEATHS**

Massey Energy Co. has settled a wrongful death lawsuit involving the asphyxiation of two men in a West Virginia mine fire. The matter is also under federal criminal investigation. The settlement came during a trial that began on November 10<sup>th</sup>. The terms of the settlement weren't disclosed. The two miners died after the fire broke out in January of 2006, in Massey's Aracoma Coal mine near Stollings, West Virginia. The men's widows sued the company, Chief Executive Officer Don Blankenship, and the company's A.T. Massey and Aracoma Coal subsidiaries, claiming they pushed production at the expense of worker safety.

There was a \$1.5 million fine against Massey last year by federal regulators citing 25 violations that contributed to the deaths. The company claimed there were conditions that didn't meet its standards. The settlement came five days after eight current and former Massey supervisors at the mine declined to testify, citing their constitutional right against self-incrimination. The settlement ends claims against all Defendants, pending court approval. A federal grand jury is investigating the incident for possible criminal charges. Aracoma is a unit of Elk Run Coal, which in turn is a subsidiary of A.T. Massey. A.T. Massey is a unit of Massey Energy.

Source: *Bloomberg*

## **WORKPLACE INJURY CASE SETTLED FOR \$4.9 MILLION**

A worker whose career ended when tons of concrete and wire mesh crashed down on him in a building in Buffalo, New York, has settled his lawsuit for \$4.9 million. The settlement came during a trial of the 43-year-old Plaintiff's lawsuit. The Plaintiff, a member of a five-man demolition crew, was buried by falling concrete and wire mesh on the sixth floor of a long-vacant hotel building on September 9, 2003. The Plaintiff, who was working for a subcontractor, suffered severe back injuries and requires assistance to walk. The hotel building was constructed in 1897 and it was being converted into luxury apartments. Stephen R. Foley, a Buffalo, New York lawyer, represented the Plaintiff and did a very good job.

Source: *Buffalo News*

## **LAWSUIT FILED IN CHEERLEADER'S DEATH**

Ashley Burns died from a ruptured spleen suffered while performing a cheerleading stunt. Ruth Burns, the mother of the teenager, has filed a wrongful death lawsuit against the East Elite Cheer Gym, a facility in Tewksbury, MA where Ashley was receiving instruction with the Medford High School cheerleading team. The U.S. All Star Federation for Cheer and Dance Teams and the American Association of Cheerleading Coaches and Administrators, which are accrediting organizations, also were named in the lawsuit, among other Defendants. Mrs. Burns in filing the lawsuit hopes it will lead to national standards for cheerleading safety to prevent further deaths or injuries. The cheerleading industry is a \$2 billion industry nationwide.

Ashley was a "flyer" who was "popped" up by two cheerleaders serving as bases and attempted to perform an arabesque double-twist dismount, but fell. Cheerleaders are at risk of serious injury and even death because of the stunts they perform. There have been a tremendous number of serious injuries and some deaths in the United States involving cheerleaders.

For high school girls and college women, cheerleading is far more dan-

gerous than any other sport, according to a new report that adds several previously unreported cases of serious injuries to a growing list. High school cheerleading accounted for 65.1% of all catastrophic sports injuries among high school females over the past 25 years, according to an annual report released in August by the National Center for Catastrophic Sports Injury Research. The new estimate is up from 55% in last year's study. The researchers say that the true number of cheerleading injuries appears to be higher than they had previously thought. The report counts only fatal, disabling and serious injuries.

The statistics are equally grim in college, where cheerleading accounted for 66.7% of all female sports catastrophic injuries, compared to the past estimate of 59.4%. Catastrophic injuries to female athletes have increased over the years, since the first report was published in 1982. A major factor in this increase has been the change in cheerleading activity, which now involves "gymnastic-type stunts," according to Dr. Frederick O. Mueller, lead researcher on the new report and a professor of exercise and sports science at the University of North Carolina at Chapel Hill. Dr. Mueller observed:

*If these cheerleading activities are not taught by a competent coach and keep increasing in difficulty, catastrophic injuries will continue to be a part of cheerleading.*

Less than catastrophic injuries are vastly more common and they occur at much younger ages, too. Children ages five to 18 admitted to hospitals for cheerleading injuries in the United States jumped from 10,900 in 1990 to 22,900 in 2002, according to research published in the journal *Pediatrics* in 2006. The new report found that between 1982 and 2007, there were 103 fatal, disabling or serious injuries recorded among female high school athletes, with 67 occurring in cheerleading. The next most dangerous sports were gymnastics with nine such injuries and track with seven. Among college athletes, there have been 39 of these severe injuries: 26 in cheerleading, followed by three in

field hockey and two each in lacrosse and gymnastics. The report also notes that according to the NCAA's insurance program, 25% of money spent on student athlete injuries in 2005 resulted from cheerleading.

In 2007, however, only two catastrophic injuries to female high school cheerleaders were reported, down from ten in the previous season and the lowest number since 2001. Yet there were three catastrophic injuries to college-level participants, up from one in 2006. According to the report referred to above, almost 95,200 female students take part in high school cheerleading annually, along with about 2,150 males. College participation numbers are hard to find since cheerleading is not an NCAA sport. Hopefully, the lawsuit filed by Ashley's mother will help bring attention to a most serious area of concern.

Source: *Boston Herald* and *Associated Press*

## **SUPPLIER OF UNIFORMS IS ACCUSED OF MORE SAFETY VIOLATIONS**

In March 2007, Eleazar Torres-Gomez fell into a 300-degree industrial dryer at a Cintas Corp. laundry and died. Instead of shutting off the machinery the seven-year employee climbed onto a slow-moving conveyor to clear a jam of wet laundry. He then jumped up and down on the clump of laundry and fell in. Twenty minutes later, another employee heard Torres-Gomez's burned body banging around in the dryer and discovered what had happened. Afterward, Cintas—North America's largest uniform supplier—was hit with a \$2.78 million fine by the federal Occupational Safety and Health Administration for unsafe practices and inadequate worker training. The company also announced it was posting safety monitors at every laundry where automatic equipment was used.

Unfortunately, this wasn't the first rodeo for Cintas. In the year and a half after the tragedy in Tulsa, according to *Associated Press*, at least eight Cintas plants in six states were cited by OSHA and state authorities for hazards similar to those that led to Torres-Gomez's death. In interviews with *Associated Press*, some current or former employ-

ees told *Associated Press* that the workers who serve as safety monitors are sometimes pulled from their jobs and assigned to other duties. They also said that employees still risk life and limb to clear laundry tangles at the Cintas plants.

Cincinnati-based Cintas employs 34,000 people and had sales of nearly \$4 billion in fiscal 2008. The company supplies and launders uniforms for restaurant and hotel employees and other workers. Cintas disputed the employee allegations, claiming the company has made several safety improvements, including reinforcing training every week and installing devices around the conveyors that sense when someone has gotten too close and shut the system down. Some labor experts believe Cintas needs to go further and say that the company has long regarded fines as just a “cost of doing business.” Kate Bronfenbrenner, an expert at Cornell University on labor-management issues, made this observation: “These fines are parking tickets, and these companies can afford to pay parking tickets.”

Many of the incidents at other Cintas’ plants involved the same type safety problems. It certainly appears that the company’s employees are at risk for serious injury or death. Hopefully, somebody will soon be able to get management’s attention!

Source: *Associated Press*

#### **WEST VIRGINIA COAL OPERATION FINED OVER DUST HAZARD**

The federal Mine Safety and Health Administration (MSHA) has fined an Alpha Natural Resources subsidiary more than \$763,000 for repeated safety violations at a West Virginia coal operation. Alpha’s Kingwood Mining Co. was cited 13 times in a one-year period for allowing coal dust to accumulate along conveyor belts at its Whitetail Kittanning mine. Five of the citations were assessed as flagrant violations, which can carry fines as high as \$220,000. MSHA director Richard Stickler said in a prepared statement:

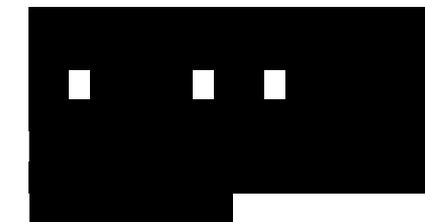
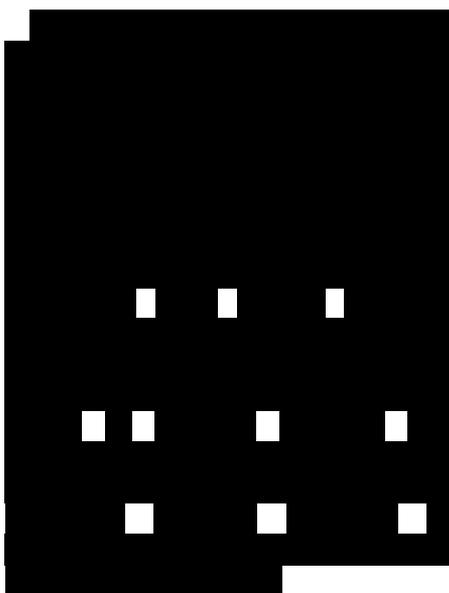
*The result of coal dust accumulating underground could have been a catastrophic fire or explo-*

*sion. It is especially troublesome that the mine operator failed to take any corrective action, despite its own records and prior notice from MSHA that clearly indicated the need for corrective actions to protect the safety of miners.*

Coal dust along conveyer belts is a common cause of coal mine fires, including a high-profile blaze that killed two miners at a West Virginia mine in January 2006.

Source: *Associated Press*

#### **SEVEN COMPANIES CITED AT FLORIDA HOTEL RENOVATION SITE**



#### **IOWA MEATPACKER FINED NEARLY \$10 MILLION FOR VIOLATIONS**

Iowa has fined a kosher meatpacking plant nearly \$10 million for alleged wage violations. Agriprocessors in Pottsville, Iowa, was targeted in May in an immigration raid and has also been accused of child-labor violations. Labor Commissioner Dave Neil assessed the civil penalties against Agriprocessors in Pottsville for what he calls repeated violations of Iowa’s wage laws from January 2006 to June 2008. The alleged violations include illegally deducting sales tax and miscellaneous costs, and failing to pay dozens of workers their last paycheck after the May raid by federal immigration agents. The civil penalties total more than \$9.9 million.

Source: *Associated Press*

#### **ORAL ROBERTS UNIVERSITY SETTLES WRONGFUL FIRING LAWSUIT**

Oral Roberts University has reached a settlement with two former professors who sued last year, claiming they were forced out after uncovering financial and ethical wrongdoing by the school’s former president and family. The confidential settlement with Tim and Paulita Brooker came at the end of a court-ordered mediation session. It will bring to a close—at least from a legal perspective—the scandal that engulfed the evangelical school, founded in the 1960s by televangelist Oral Roberts, and led to the resignation of his son, Richard, as president.

Richard Roberts and his wife, Lindsay, were accused of using University money for shopping sprees, home improvements and a stable of horses for their daughters at a time when the University was more than \$50 million in debt. Both have repeatedly denied wrongdoing. The Brookers also had named as Defendants the Robertses, former school regents and officials in the October 2007 wrongful termination lawsuit. In January, the school settled out of court with professor John Swails, who brought the lawsuit along with the Brookers. That confidential settlement resulted in Swails’ reinstatement at ORU.

Source: *Associated Press*

## XVII. TRANSPORTATION

### **INVESTIGATION FINDS ENGINES WITH DAMAGED AND MISSING PARTS**

After finding several passenger aircraft engines with damaged and missing parts, safety officials have urged the Federal Aviation Administration to order inspections of similar engines, particularly those long in service. The PW2037 engines currently are used in 725 Boeing 757 jetliners, according to Pratt & Whitney, their manufacturer. The National Transportation Safety Board, in a letter to the FAA seeking the inspections, cited concerns that pieces of the engine could penetrate fuel tanks, causing a leak and fire. The safety board wrote Robert Sturgell, the FAA's acting administrator, saying that "Information gathered to date has raised serious concerns that warrant immediate action by the FAA."

The safety board began examining the engines after Delta Air Lines pilots reported hearing a loud bang during a takeoff roll at Las Vegas' McCarran International Airport on August 6<sup>th</sup>. The board said the pilots noticed one engine lost power before they slowed the plane and returned to the parking area. Fortunately, there were no reported injuries to the 166 passengers or six crew members. An investigation turned up several broken, cracked or missing lugs that hold turbine blades, as well as damaged blades in the jet's engine, according to the NTSB letter. The board found similar problems in an American Airlines jetliner with the same PW2037 engine. The NTSB has learned that damaged lugs also have been found in four other PW2037 engines.

According to the FAA, the agency was aware of the problem and was working with Pratt & Whitney. However, at press time no decision had been made about whether to order inspections of PW2037 engines. Apparently, the FAA is trying to figure out if it needs to order the inspections of all PW2037 engines, or only engines made during a specific time period. Pratt & Whitney says it is "involved in the investigation" and that it is "fully coop-

erating with the NTSB and Delta Air Lines." The Boeing 757 is a twin-engine short-to-medium-range jetliner manufactured for 23 years until November 2005. There are still more than 1,030 of the airliners in service, according to Boeing's website.

Source: *Associated Press*

### **SAFETY BOARD TARGETS MEDICAL HELICOPTER CRASHES**

A federal safety panel says aviation officials are not acting quickly enough on proposals to prevent crashes of emergency medical helicopters. As we reported previously, the National Transportation Safety Board urged the Federal Aviation Administration in January 2006 to take steps to improve the safety of emergency medical helicopter flights. The safety board wanted the FAA to improve procedures for medical helicopters, to evaluate flight risks, require onboard crash-warning technology, and set policies for securing weather updates. At a recent meeting, the safety board acknowledged that the FAA is working on the proposals, but not quickly enough. Over the past 11 months, nine emergency medical helicopters have crashed, killing 35 people. This is a safety issue that must be handled and without delay.

Source: *Associated Press*

### **JURY VERDICT FOR NEW JERSEY CRASH VICTIM IN GUARDRAIL CASE**

A \$31 million dollar verdict was awarded by a jury to a man who sued after being injured by an unsafe guardrail. The jury ruled in favor of 22-year-old Nicholas Anderson, who was severely injured in a 2004 accident. The Plaintiff swerved to avoid another car and slammed into a guardrail that was said to be not crash-worthy. The guardrail did not stop the vehicle, but punctured the Plaintiff's driver side door, causing multiple, lasting injuries, including severing his leg below the knee. The award was said to be the largest in the history of Camden County for a motor vehicle accident. The county will appeal.

### **SUIT FILED IN CRASH THAT KILLED CHICAGO STUDENT**

A wrongful-death lawsuit has been filed by the parents of a Chicago woman killed on an interstate highway when a driver employed by the VH1 cable network apparently fell asleep, crossed the median and crashed into the vehicle in which she was riding. Kevetta Davis, 19, died in September after being struck by a truck driven by Dennis Hernandez, who was hauling sound equipment for "Rock of Love With Bret Michaels." The crash also killed Yasmin Jackson, 19, Davis' friend and a fellow student at Southern Illinois University. The lawsuit, filed in Cook County Circuit Court, names Viacom Inc., VH-1 Music First, 51 Minds Entertainment LLC and Hernandez as Defendants.

Source: *Chicago Tribune*

### **\$11 MILLION SETTLEMENTS IN CHICAGO TRAIN DEATHS**

The Metra transit system will pay \$11 million to settle two wrongful death lawsuits in Chicago arising from a deadly 2005 train derailment. A college student and a research technician were killed in September 2005. A commuter train from Joliet to Chicago derailed while changing tracks. More than 80 others were injured in the derailment which was blamed on human error. The train's engineer was fired in 2006. Engineer training has been instituted by Metra since the accident. A Cook County judge approved the settlement on November 12<sup>th</sup>.

Source: *Associated Press*

### **JURY AWARDS \$5 MILLION IN DRUNK DRIVING ACCIDENT**

The 99 Restaurant chain has been ordered to pay \$5 million to a Quincy, Massachusetts woman who lost in her arm in a drunk driving accident. The Essex Superior Court jury found that the chain's North Andover facility served the equivalent of eleven 12-ounce beers to an off-duty employee who later drove the car in which Laurie Clifford was a passenger. Clifford's right arm was nearly severed in the May 2003

crash and was eventually amputated. The verdict includes \$3.2 million in damages and \$1.8 million in interest. The drunk driver served 90 days in jail after pleading guilty to drunken driving.

Source: *Insurance Journal*

### **RESTAURANT SUED AFTER TEENS KILLED IN CRASH**

The mother of a teenager killed in a crash in Texas is suing a restaurant where the other driver allegedly drank too much before the head-on collision. The Plaintiff in her wrongful death and negligence lawsuit filed against Wingsport LP, doing business as Buffalo Wild Wings Grill & Bar, is asking for damages. Two high school students were killed when the car they were riding in collided with a pickup truck traveling in their lane. Their friend driving the car was critically injured. The drunk driver in the pickup was killed in the crash on the narrow rural road near Electra, Texas.

Tests results reveal that the drunk driver's blood-alcohol level was nearly 0.27% at the time of the crash. That is more than three times the state's legal limit of 0.08%. The lawsuit claims employees of Buffalo Wild Wings in Wichita Falls, which is about 25 miles southeast of Electra, served the drunk driver too many alcoholic beverages in the restaurant that night prior to the crash. The suit also alleges that employees failed to have the proper Texas Alcoholic Beverage Commission training and current certification cards. The suit contends the company had an established policy encouraging employees to ignore guidelines for serving alcohol to intoxicated customers and then to allow them to drive home, endangering lives.

The suit alleges that the mother suffered past and future mental anguish, loss of companionship, funeral expenses and other damages. The suit also names the estate of the drunk driver, Nason Holding Co., Nason Operating Co. and Nason Services as Defendants.

Source: *Associated Press*

## **XVIII. ARBITRATION UPDATE**

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### **ARKANSAS SUPREME COURT OUTLAWS PAYDAY LENDING**

The Arkansas Supreme Court has ruled that the Arkansas Check-Cashers Act, a payday lending law, is unconstitutional. Interestingly, the Act was found by the Court to be unconstitutional in its entirety. This was a tremendous victory for consumers in Arkansas and hopefully was a fatal blow to the payday loan sharks who prey on folks in that state.

### **BIG COMPANIES DODGE ARBITRATION FOR THEIR CLAIMS AGAINST OTHER BIG COMPANIES**

Corporate executives like arbitration when it comes to disputes with the holders of credit cards and with other consumers. As we all know, arbitration is used by Corporate America to bar consumers from going to court in the event of a dispute. That involves a consumer contract of most every sort. This is what more than a dozen business trade groups wrote in a letter to Congress in May about the use of arbitration:

*Arbitration is an efficient, effective, and less expensive means of resolving disputes for consumers, employers, investors, employees and franchisees, in addition to the many businesses that use the same system to resolve business disputes.*

But, according to a recent study, corporations are far less likely to use arbitration clauses in contracts with each other than they are in contracts with consumers. That surely seems to be inconsistent with what was told to Congress. Theodore Eisenberg, a law professor at Cornell, believes companies use arbitration in disputes with consumers to avoid class action lawsuits. The findings by Professor Eisenberg, whose co-authors on the most recent study are Geoffrey P. Miller of New York University School of Law and

Emily Sherwin of Cornell Law School, are not surprising. Their study, which was described in an article this summer in the University of Michigan *Journal of Law Reform*, included contracts by 21 different telecommunications and financial services companies. The researchers found that companies included mandatory arbitration clauses in 75% of consumer agreements, but in just 24% of contracts over all. Every consumer contract they found with an arbitration clause also waived possible group, or class, arbitration.

In prior studies, it was discovered that companies used arbitration clauses in just 11% of contracts with other companies. Professor Eisenberg asks if arbitration is such "a fair and cost-saving process," why don't they (big companies) use it "across the board," and "why don't they insist on it when they contract with each other?" My experience has been that unless a large company has the upper hand in a contract—such as in a contract with a consumer—they prefer the courts as the place for their disputes. Hopefully, Congress will act next year to ban mandatory, binding arbitration in all consumer contracts and disputes.

Source: *Lawyers USA*

### **COURT SAYS BLACKWATER SUIT WILL STAY IN ARBITRATION**

A federal court has ordered a hearing on the deaths of four Blackwater Worldwide guards in Iraq back to private arbitration. This will shield the contractor from a public investigation into the bloody 2004 ambush. The U.S. Court of Appeals for the Fourth Circuit dismissed a petition by the families of the Blackwater guards to move the case into public courts. Blackwater contended that the men signed contracts that required disputes to be resolved by confidential arbitration. The court's ruling will result in the dispute being settled by a three-person panel.

The court's ruling will benefit Blackwater and other contractors. The confidential hearings will keep the public from knowing how bad Blackwater really is. Private contractors profiting in Iraq should be liable for employee injuries and deaths if these contractors

are a fault. They don't want their employees to have access to courts. Four Blackwater guards—Stephen Helvenston, Mike Teague, Jerko Zovko and Wesley Batalona—were ambushed and killed in Fallujah, west of Baghdad, in March 2004. The images of their mutilated bodies hanging from a bridge sparked a massive offensive by U.S. troops in the city.

A representative for the families of the four men sued the company in January 2005, claiming Blackwater broke its contract by failing to provide proper equipment and security while the men were in hostile territory. The case was ordered into arbitration in April 2007. Lawyers for the families appealed a month later. A three-judge panel from the Court of Appeals ruled the court did not have jurisdiction over the appeal of the case. Unless the families appeal, the confidential arbitration panel will keep the case. When it comes to access to the courts by a victim of wrongdoing this is a very sad ending to this matter.

Source: *The Virginian-Pilot*

#### **ARBITRATION DENIED IN CREDIT CARD ANTITRUST CASE**

Plaintiffs who claim a conspiracy by American Express to cover up an antitrust plot with other major credit card companies on foreign currency transactions have won a victory in their lawsuit. A federal appeals court said they cannot be compelled to arbitrate. The U.S. Court of Appeals for the Second Circuit ruled the plaintiffs could not be forced into arbitration because American Express was not a signatory to the MasterCard, Visa and Diners Club credit card agreements that included the arbitration clauses.

Source: *New York Law Journal*

## **XIX. NURSING HOME UPDATE**

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#### **NURSING HOME REPORT FINDS WIDESPREAD VIOLATIONS**

A new report has found that over

91% of nursing homes were deficient in quality of care and other services in each of the past three years. The report also found that a higher percentage of for-profit nursing homes were deficient than were non-profit nursing homes. According to U.S. Census Bureau statistics, 38.7 million Americans are 65 or older. By 2030, that age group will represent 20% of the population.

Many nursing homes have a history of abuse and neglect of residents. Inadequate staffing and medical errors are quite common. The study, which was conducted by the Office of the Inspector General of the Department of Health and Human Services, found that the most common categories where nursing homes fell short were quality of care, resident assessment and quality of life.

Almost 74% of nursing homes in the survey were cited for quality-of-care deficiencies in 2007. Accident hazards were one of the most common issues. About 58% of nursing homes were cited for resident assessment problems involving professional standards and the qualifications of service personnel. Over 43% of facilities were cited for quality-of-life deficiencies, such as loss of dignity. In addition, almost 43% of homes were cited for dietary service violations. The report found that 17% of nursing homes in 2007 were cited for causing actual harm or immediate jeopardy, and that there is a trend toward violations that are more severe and broader in scope than in the previous two years. The report also gives a breakdown of how each state fared.

Source: *Lawyers USA*

#### **WRONGFUL DEATH CLAIMS NOT SUBJECT TO ARBITRATION**

The Missouri Court of Appeals has ruled that wrongful death claims brought against a nursing home were not subject to an arbitration agreement signed by a resident's son when his mother was admitted to the home. The son signed the nursing home's jury trial waiver and dispute resolution procedure document on the line for a "legal representative." The document contained a two-page arbitration agreement, which said that the parties agreed to resolve "all disputes and

claims by small claims court judicial proceedings or binding arbitration."

After the resident died, her three children—including the son that signed the agreement—filed a wrongful death lawsuit. The nursing home tried to enforce the arbitration clause, but the trial judge said that the wrongful death claim wasn't subject to the arbitration agreement.

Source: *Lawyers USA*

## **XX. HEALTHCARE ISSUES**

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#### **NEARLY 21,000 CASES—INCLUDING 4,800 DEATHS—WERE REPORTED TO THE FDA IN 1ST QUARTER OF 2008**

The number of serious problems and deaths linked to medications reported to the government set a record in the first three months of this year, according to a health industry watchdog group. The Food and Drug Administration received nearly 21,000 reports of serious drug reactions, including over 4,800 deaths, according to an analysis of federal data by the nonprofit Institute for Safe Medication Practices, which scrutinized data going back to 2004, and yearly totals dating to the 1990s. Two drugs accounted for a disproportionately large share of the latest reports. One was heparin, the tainted blood thinner from China that caused an international safety scandal.

The other was Chantix, a new kind of anti-smoking drug from Pfizer. Chantix, which had the most reports of any medication, works directly in a smoker's brain to ease withdrawal symptoms. It also blocks the pleasurable effects of nicotine if the patient tries to light up again. But earlier this year, the FDA warned that Chantix may be linked to psychiatric problems, including suicidal behavior and vivid dreams. The government banned it for pilots. Pfizer still says it stands by Chantix.

The watchdog group, known as ISMP, has served hospitals and pharmacists for years as a clearinghouse for information on drug safety and medication errors. ISMP is now reaching out to consumers with regular reports on drug

safety trends, drawn from FDA records. Thomas J. Moore, a senior scientist with the group, made this statement:

*We believe that one of the most important tools to promote is to monitor trends on a regular basis. Knowing which drugs are causing injuries and how many people are being hurt is the raw material we need to fashion sound measures to promote patient safety.*

The FDA defines serious drug reactions as those that cause hospitalization, require medical intervention, or place a life in jeopardy. The agency's monitoring system relies on voluntary reports from doctors and is only believed to capture a fraction of overall problems. The total of 20,745 cases reported in the first quarter (January—March) was 38% higher than the average for the previous four calendar quarters. It also was the highest for any quarter, and that's most disturbing.

Fatalities accounted for 23% of the cases. The total number of deaths, 4,824, was an increase of nearly 3% from the last calendar quarter of 2007. Previous research from ISMP had revealed that serious drug safety problems reported to the FDA increased markedly from 1998-2005. The FDA case reports provide a signal of possible problems with a drug, but a cause-and-effect connection can only be established through painstaking investigation.

The ISMP study found that heparin accounted for 779 reports of serious problems, including 102 deaths. The FDA, using data that covers a longer time period has reported 238 deaths possibly linked to heparin. The report found that Heparin "illustrates an example of a significant drug safety problem that was promptly and effectively resolved by the drug manufacturers and the FDA once the issue was detected and understood." But, it concluded that was not the case with Chantix.

The FDA should forcefully warn patients taking Chantix that they may have blackouts and other problems that could lead to accidents, the report said. The current warnings say that patients may be too impaired to drive or operate heavy machinery, but such language is standard for many medica-

tions. That type warning is not adequate. The report found 15 cases of Chantix patients who appeared to have been involved in traffic accidents, and 52 additional cases involving blackouts or loss of consciousness. The FDA received 1,001 reports of serious injuries possibly linked to Chantix, more than for the ten best-selling brand name drugs combined.

Chantix "continued to provide a striking signal of safety issues that require investigation and action," according to the report. The authors acknowledged Pfizer's concern that publicity may be driving up the number of reports, but nonetheless concluded that there are enough to warrant further action by the FDA. Pfizer says that the benefits of Chantix benefits clearly outweigh the risks. If you would like more information on this matter, call Frank Woodson at 800-898-2034 or e-mail at Frank.Woodson@beasleyallen.com.

Source: Associated Press

#### **DENTISTS BACK QUESTIONABLE SEALANTS**

We have written about the chemical bisphenol-A (BPA) in previous issues. Now another question arises relating to BPA: should BPA be used by dentists? That's the dilemma for parents worried about this controversial substance found in the popular sealants that are painted on children's molars to prevent decay. The chemical, which is widely used in the making of the hard, clear plastic called polycarbonate, is also found in the linings of food and soft-drink cans. Most human exposure to the chemical clearly comes from the food supply. But traces have also been found in dental sealants.

Although the Food and Drug Administration has reassured consumers that the chemical appears to be safe, it has received increasing scrutiny in recent months from health officials in the United States and Canada. The National Toxicology Program, part of the Department of Health and Human Services, has raised concerns about BPA, particularly over childhood exposure to the traces that leach from polycarbonate baby bottles and the linings of infant formula cans. The 2003-4

National Health and Nutrition Examination Survey by the Centers for Disease Control and Prevention found detectable levels of BPA in 93% of urine samples collected from more than 2,500 adults and children over six. This survey was done in 2003 and 2004.

BPA has estrogen-like effects, and animal studies have suggested that exposure may accelerate puberty and raise a potential risk of cancer. The journal *Environmental Health Perspectives* reported in October that the chemical might interfere with chemotherapy treatment. And *The Journal of the American Medical Association* reported that adults with higher levels of BPA in their urine were more likely to have heart disease or diabetes.

Despite these concerns, the American Dental Association remains strongly in favor of sealants. Dentists note that numerous studies show that any exposure they cause is negligible and temporary, lasting no more than three hours after the initial application. And other studies have found no detectable levels of BPA in most American-made sealants. Meanwhile, sealants have been shown to offer years of protection against cavities. So the bottom line is simply cavities versus the safety risks of BPA. Parents concerned about BPA exposure should ask their dentists what type of sealant they use and whether it has been tested for BPA.

Source: New York Times

#### **FDA WARNS BAYER OVER CLAIMS ON TWO ASPIRIN PRODUCTS**

The Food and Drug Administration says Bayer is marketing some aspirin medicines with unproven health claims. In a pair of warning letters, the agency jumped the company for never submitting proof that the pills are effective in fighting heart disease and osteoporosis. The drugs are Bayer Women's Low Dose Aspirin plus Calcium and Bayer Aspirin with Health Advantage. The FDA says treatments for heart disease and osteoporosis must be reviewed by government scientists and can't be sold over-the-counter. The agency says, however, that no major negative reactions have been reported with the drugs. Bayer says it stands

behind the claims on both products, saying that they aren't intended to replace professional medical advice.

Source: Associated Press

### **JURY AWARD UPHELD IN TAINTED TUNA CASE**

An appeals court has upheld a \$3.2 million award to a woman who suffered permanent nerve damage after eating tainted sushi. Alexis Sarti was awarded the money from a jury more than two years ago, but the trial judge in her case overturned the award. On appeal, the Fourth Circuit Court of Appeals reversed that decision. Ms. Sarti became ill after eating raw ahi tuna at a local café in Dana Point, CA in April 2005. Her lawsuit contended that the tuna was contaminated by bacteria from raw poultry.

It was proved at trial that Ms. Sarti was temporarily paralyzed, spent 49 days in the hospital and afterward lost much of her endurance. She used a walker for eight months, often had to use a wheelchair and had to drop out of college for 18 months to undergo treatment and therapy. She continues to have muscle spasms and cramps almost daily. Ms. Sarti's medical bills totaled about \$1 million and her future expenses will be about \$1 million.

Source: Associated Press

### **ALABAMA GETS BAD GRADE ON PRETERM-BIRTH RANKINGS**

Alabama earned an F on a March of Dimes report card ranking states on the number of babies born prematurely. The nonprofit group said Alabama had a preterm-birth rate of 16.7% in 2005, according to the most recent data available. That's compared to 12.7% nationally, which was also a D grade. No state earned an A on the report card released last month. To earn that grade, the March of Dimes said a state would need a 7.6% premature-birth rate or lower. Maternal smoking and lack of health insurance were cited as the two largest contributors to preterm births. The March of Dimes works to prevent birth defects, premature births and infant mortality. We need to work hard

to do a better job in this area of concern.

Source: Associated Press

### **MANY BELIEVE ALL STATES SHOULD PASS AUTISM INSURANCE LAWS**

As all too many parents know, the cost of behavior therapy for children with autism is very high. I understand it can be as much as \$1,000 per week. I believe that health insurance should be available and affordable if at all possible. If autism advocates get their way, the states will require health insurers to cover intensive and costly behavior therapy for autism. In the past two years, six states—Texas, Pennsylvania, Arizona, Florida, South Carolina, Louisiana—passed laws requiring such coverage, costing in some cases up to \$50,000 a year per child. Indiana passed a poorly written law in 2001.

The powerful advocacy group Autism Speaks has endorsed bills in New Jersey, Virginia and Michigan and is targeting at least ten more states in 2009, including New York, California and Ohio. Other states, including Illinois, have similar bills in the works, but those states aren't working directly with Autism Speaks. I am not aware of Alabama being a target state, but in my opinion, it should be.

Behavior therapy for children with autism is a necessity and many parents simply can't afford it. Trained therapists, using principles of applied behavior analysis (ABA), can certainly be helpful. Health insurance that covers the needed therapy is a necessity. It's no longer acceptable to allow blatant discrimination against people with autism.

Autism is a range of disorders that hinder the ability to communicate and interact. Unfortunately, most doctors believe there is no cure. An estimated one in 150 American children is diagnosed with it. Supporters say behavior therapy has decades of research behind it and can save money in the long run by keeping people out of institutions. Researchers agree, but say much remains unknown about which therapy works best for children with autism, whether long-term gains may be attained, and whether it works with older children. Some states require

behavior therapy coverage up to age 18 or 21. But the scientific evidence for ABA is strongest for the youngest, ages two to five. Some researchers have reported on individual children with autism who no longer appear disabled when they reach school age. The most rigorous studies, however, show mixed results. In my opinion, this is an issue that should be addressed by all states' legislative bodies next year. If you agree, contact the governor of your state and also your legislators.

Source: Associated Press

## **XXI. ENVIRONMENTAL CONCERNS**

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### **EPA PLACES STRICTER REGULATIONS ON AIRBORNE LEAD**

The Environmental Protection Agency has finally tightened the regulatory limit on airborne lead, lowering the legal maximum to a tenth of what it was, on grounds that it poses a more serious threat to young children than officials had realized. The change, the first in 30 years, was required under a litigation-forced settlement. It came despite a last-minute lobbying effort by battery recyclers and the Bush White House to weaken the final rule. The lawsuit that brought about the change was filed by the Missouri Coalition for the Environment.

The current standard of 1.5 micrograms per cubic meter of air is being lowered to 0.15 micrograms per cubic meter. That figure was in keeping with the recommendations of both the EPA staff and the agency's independent Clean Air Scientific Advisory Committee, but the EPA's Children's Health Protection Advisory Committee had urged a sharply lower limit of 0.02 micrograms.

Environmentalists hailed the decision as a significant public health advance, but questioned some aspects of the EPA's plans for measuring lead pollution under the new rule. The vast majority of airborne lead, a neurotoxin that reduces young children's IQ, comes from lead smelters. The lead in the air eventually falls to the ground,

and most of children's exposure comes from indoor dust and soil.

Since 1990, 6,000 scientific studies have shown that young children suffer harm at much lower blood lead levels than was recognized when the old standard was set in 1978. The American Academy of Pediatrics issued a statement praising the EPA for the new standard, but continued: "There is no safe level of lead exposure for children." Dr. Gina Solomon, a senior scientist with the advocacy group Natural Resources Defense Council, made this statement:

*We commend EPA for taking a giant step in the right direction, but they need to greatly expand the lead-monitoring network if they hope to enforce this new standard. However, this Administration has dismantled half of the air-monitoring stations across the country. With less than 200 air lead monitors nationwide, scientists don't even know how much lead is in the air in most communities.*

The EPA says it will expand its network to monitor any source that emits one ton of lead or more a year into the air, along with urban areas with populations of more than 500,000. I wasn't surprised to learn that the Bush White House had pressured the EPA to scale back the monitoring so it would apply only to large population centers. According to the EPA, there are 16,000 sources across the country emitting 1,300 tons of lead into the air each year.

In the United States, lead has been banned from gasoline and paint since the 1970s, and between 1980 and 2005, the average amount of lead in the air plummeted by nearly 97%. But the neurotoxin does not break down in the environment, and lead exposure is elevated in urban areas, especially in minority and low-income communities. More than 300,000 American children display adverse effects from lead poisoning, and elevated lead exposure can result in increased blood pressure and decreased kidney function in adults.

The new restrictions will take full effect in 2017. The Institute of Clean Air Companies, which represents pollution-control manufacturers, has said

that it could work to apply technology currently used in other operations to battery recycling plants. The EPA has a clear duty "to protect public health with an adequate margin of safety." Environmental groups criticized the EPA's decision to measure lead pollution levels over three-month averages rather than the one-month averages the agency's scientific advisers recommended. The groups say averaging the readings over three months would obscure spikes in pollution that could threaten children and adults. At least this action by the EPA—realizing that the Bush crowd was against any change—is a step in the right direction.

Source: *Washington Post*

### **THE BUSH ADMINISTRATION SHOULD BE HELD ACCOUNTABLE**

The Bush White House has done more to endanger the health and safety of the American people than most folks realize. In fact, I have never seen a worse Administration when it comes to protecting the health and safety of the American people. They have worked openly in many cases and behind the scene in others to make the air and water more risky; the workplace less safe; products more dangerous; drugs more expensive—and the list goes on during the final days of the Administration. The President and his gang are doing everything within their power to pay back their corporate buddies. Hopefully, there are enough good people in the regulatory agencies and the various departments of the federal government to at least slow down what the Bush crowd is trying to do. It will be up to the Obama Administration and the new Congress to reverse all of the bad stuff the Bush White House has done.

Source: *Sacramento Bee*

### **EPA OVERSTATING ENFORCEMENT RECORD**

Accounting practices at the Environmental Protection Agency have helped to hide how much the Bush Administration has slashed penalties against polluters, according to Congressional investigators. A Government Accountability Office report says the EPA has

overstated its enforcement of environmental violations to the public and to Congress by including fines that may never be paid when it tallies penalties. EPA officials claim that's the way the agency has always reported fines.

Fines levied against polluters by the EPA decreased from \$240.6 million in 1998 to \$137.7 million in 2007. The levied fines in 2004, 2005 and 2006 included a total of \$227.2 million in so-called default judgments. The agency admitted these hard-to-collect fines were larger in those years, but said they are unlikely to be collected. Removing those penalties "results in a significant reduction in the overall level of penalties reported," according to the GAO. House Energy and Commerce Committee Chairman Rep. John Dingell (D-MI), who requested the GAO investigation, accused the EPA of trying to cover up its enforcement record. The lawmaker says, "the bottom line is that environmental enforcement has significantly declined since the Bush Administration took office."

Source: *Associated Press*

### **SETTLEMENT REACHED OVER CHEMICAL STENCH**

In June, 2006, chemicals from a plant owned by Philip Services Corp., where wastewater was treated and sent to Fulton County, Georgia, began causing a chemical stench. About 2,000 residents claimed the odor and chemicals caused health problems and made their lives unbearable. At issue were water shipments from Alabama containing the agricultural pesticide ethoprop and an odorizer additive called propyl mercaptan. Ethoprop, also known as Mocap, is lethal to humans and wildlife in large quantities and is a known human carcinogen. The propyl mercaptan, commonly added to pesticides and natural gas as a warning agent, can cause headaches, nausea, dizziness and skin irritation.

Texas-based Philip Services has agreed to a \$4 million settlement which is scheduled to be finalized in April. Despite the settlement, many of those who live closest to the plant are not satisfied. Some say the chemicals that caused the smell also caused

serious health problems that have been either ignored or covered up by local, state and federal officials. Many residents want the plant shut down. The plant is being blamed for the rapid deterioration in the health of residents. Many believe they are being poisoned, according to media accounts. However, state and federal health officials have reported that the odor was not caused by hazardous levels of the chemicals. That report was released in March.

In late June 2006, Philip Services received more than 30 shipments of waste water for treatment from Alabama. The waste water contained the ethoprop and propyl mercaptan. On June 29<sup>th</sup>, PSC received another four shipments that it rejected after tests showed high concentrations of the chemicals. By then, the noxious onion aroma was already in the air of this residential area. Some residents said they sent their children away for the summer, because they believed the chemicals could harm them. Others said they were afraid to mow their lawns and to engage in outside activities. County officials investigated.

Philip Services withdrew its request for a new discharge permit after Fulton County announced it would not renew the permit. Philip Services also agreed not to seek a discharge permit for six years. There have been other changes at the plant. For example, chemicals are no longer treated at the plant. Philip Services, under the guidance of the Georgia Environmental Protection Division, is closing the pit where substances like restaurant grease are converted into solids.

Source: *Atlanta Journal Constitution*

### **CONSTELLATION SETTLES FLY-ASH SUIT**

A group of residents of Anne Arundel County, MD, whose drinking water was contaminated with coal ash, have reached a multimillion-dollar settlement in a class action lawsuit against Constellation Energy Group. The settlement, estimated at \$45 million, gives about 600 residents living near a former Gambrills sand and gravel mine financial compensation and environmental remediation. For 12 years until last fall, Constellation worked with a contractor to dump billions of tons of

waste ash from its Brandon Shores coal-fired power plant into an unlined former gravel mine pit. County tests found that 23 wells in the area tested positive for metals such as arsenic, cadmium and thallium, all components of waste ash from smokestacks, also called “fly ash.”

A suit seeking to represent local residents was filed in November 2007 in Baltimore Circuit Court to make Constellation pay unspecified damages for personal injuries and loss of property values. Hassan Murphy, managing partner of The Murphy Firm in Baltimore, which worked with Peter G. Angelos’ law firm to resolve the lawsuit, had this to say:

*This community has really suffered, and this is the first step in the healing process for them. It really provides that people could drink water safely, and they’ll be drawing from public water. The children and families can continue to live in their homes safely.*

Under the settlement, 84 homes—previously connected to private wells, some of which tested positive for contaminants—will be hooked up to a public water system at a cost of \$7.5 million paid for by Constellation, Murphy said. Residents of those households also will have access to a \$9.5 million trust fund for claims and to provide site enhancements. A second fund, for \$500,000, will be established for adjoining property owners. The settlement also covers an unspecified amount for remediation and restoration of the former quarry site and a commitment to cease future deliveries of coal ash. The settlement is subject to approval by the circuit court.

Source: *Baltimore Sun*

### **PIPELINE FIRM TO PAY FINE FOR SPILLS**

Plantation Pipe Line has agreed to pay a \$725,000 civil penalty for spills of jet fuel and gasoline in Virginia, Georgia and North Carolina. The company also agreed to \$1.3 million in new spill prevention safeguards to settle a lawsuit over Clean Water Act violations. The lawsuit cited the company’s failure to have a spill prevention, control and countermeasure plan for a 420,000-

gallon oil storage tank at Newington, Virginia. Officials said that on January 10, 2000, at least 100 barrels of jet fuel leaked from a pipeline in Newington, and some went into Accotink Creek. Also cited were spills affecting streams in Alexandria, VA, in 2002; Hull, GA, in 2003; and Charlotte, NC, two years ago.

Source: *Associated Press*

### **HIGH LEVELS OF C-8 DISCOVERED IN DUPONT’S CHINESE WORKERS**

According to reports filed by DuPont with the United States Environmental Protection Agency, Chinese workers at their new Changshu plant have dramatically increased blood levels of ammonium perfluorooctanoate, also known as PFOA or C-8. The company opened the facility last year. In May of last year, DuPont reported levels among workers were just less than 50 parts per billion (ppb). One year later, those levels had risen dramatically to 2,250 ppb. This increase is surprising considering DuPont’s promise to make major reductions in emissions and worker exposure to C-8.

Though regulators have not yet set a federal workplace exposure standard for C-8, scientific evidence is mounting as to the dangerous effects of the chemical. The reports on the Chinese workers have Americans worried that they too are at risk. DuPont currently operates plants that manufacture, handle, or use C-8 in Deepwater, NJ; Parkersburg, WV; Parlin, NJ; and Fayetteville, NC. Workers at these American facilities have reported C-8 levels as high as 1,600 ppb.

When DuPont built the facility in Changshu, the company installed its new Echelon technology allowing the company to produce “low-PFOA” products and controls to limit the C-8 emissions and worker exposure to the chemical. Yet this “state of the art” equipment has failed to protect the workers from exposure. The company is already working to improve the ventilation at the facility; however, since DuPont’s Chinese workers have an average of 2,250 ppb of PFOA in their blood, it’s clear that DuPont will have to improve a lot more at the Changshu plant than just its ventilation system.

Source: *The Charleston Gazette*

## XXII. THE CONSUMER CORNER

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### **FDA Will Establish An Office In China**

It's being reported that the Food and Drug Administration will establish its first office in China before the end of the year. It's part of a broader plan to assure the safety of imports from the developing world. Commissioner Andrew von Eschenbach says the FDA plans to place more than 60 food and drug regulators worldwide over the next year. The main focus will be on India, Latin America and the Middle East. The plan for permanent outposts marks a break from the agency's current practice of sending inspectors abroad on individual assignments. The FDA has been criticized for lax oversight for a good reason after a string of safety problems with imported products, including contaminated blood-thinning drugs. Many health and safety experts—as well as numerous consumer advocates—believe the FDA needs a major overhaul and hopefully that will happen next year.

Source: *Associated Press*

### **1,500 Dogs In China Die From Tainted Feed**

Some 1,500 dogs bred for their raccoon-like fur have died after eating feed tainted with melamine, raising questions about how widespread the industrial chemical is in China's food chain. The revelation comes amid a crisis over dairy products tainted with melamine that has caused kidney stones in tens of thousands of Chinese children and has been linked to the deaths of four infants. The raccoon dogs—a breed native to East Asia whose fur is used to trim coats and other clothing—died of kidney failure after eating the tainted feed. A veterinary professor reported that melamine was found in the dogs' feed. Also, it was reported that 25% of the stones in the dogs' kidneys were made up of melamine. A necropsy—an animal autopsy—was performed on about a dozen dogs.

The animal deaths were a reminder of last year's scandal over a Chinese-made pet food ingredient containing melamine that was linked to the deaths of dozens of dogs and cats in the United States. As you know, this resulted in a massive pet food recall. Raccoon dogs are not the only animals in China that have fallen victim to melamine-tainted products—a lion cub and two baby orangutans developed kidney stones recently at a zoo near Shanghai. The three baby animals had been nursed for more than a year with milk powder made by the Sanlu Group Co., which is at the center of the tainted milk crisis. Melamine has been found in a wide range of Chinese-made dairy products over the past several months. The Chinese government is still trying to win back consumer confidence after tainted products turned up on store shelves around the world.

When ingested by humans, melamine—which is used in plastics and fertilizers—can cause kidney stones as the body tries to eliminate it, and in extreme cases can lead to kidney failure. Babies are particularly vulnerable. The company that produces the animal feed put pressure on the dogs' breeders not to talk to the media. They also were trying to quietly settle by paying compensation to the breeders.

Source: *Associated Press* and *ABC News*

### **Lawsuit Filed After Costume Catches Fire**

Hopefully, the Halloween weekend passed with no serious problems from a health and safety perspective. While many parents worried about candy and strangers at Halloween, they really should be aware of something else—flammable costumes. An incident in Jacksonville, Florida, got a great deal of attention. A mother there said her son has burns all over his body after his costume caught fire. The boy's mother purchased the costume at a Wal-Mart, not realizing the outfit would catch fire easily. As it turns out, most Halloween costumes have the same flammability standards as a piece of newspaper. Firefighters have demonstrated how a costume can go up in flames in a matter of seconds.

Most costumes sold in stores are made in China with fabric that is flammable and hazardous. The four-year-old Florida boy accidentally lit himself on fire while wearing his Halloween costume last year. The fabric was not flame-resistant, and nearly 40% of his body was burned. The costume, which was made by Disguise Inc. and sold at Wal-Mart, had no warning label.

The child's mother filed suit and she wants tougher regulations making each and every costume flame-resistant. Parents should look for labels stating that costumes are made from flame-resistant fabric or flame-retardant materials. This is a matter of safety. The costumes should be made out of flame-resistant materials.

Source: *New4Jax.com*

### **Florida Sues Imperial Majesty For Refund Of Surcharge**

Florida Attorney General Bill McCollum has filed a lawsuit against Imperial Majesty Cruise Line. The company is accused of making about \$4 million in the past two years by hiding a surcharge in its customers' bills. The Broward County cruising company, known for two-night trips to the Bahamas, has added fuel surcharges of \$20 to \$30 onto bills since late 2006 without adequately disclosing the fees to its customers.

Imperial Majesty either did not include information about the fees in its brochures and on its website or indicated that the charges were government taxes or fees. The lawsuit demands that Imperial Majesty refund the approximately \$4 million collected through retroactive surcharges and revise its advertising practices to be upfront about all charges. The Attorney General's office looked into the cruise line's surcharges after receiving complaints from customers, many of whom learned about the extra fees when arriving for their cruise. The lawsuit was filed about six months after the Attorney General reached multimillion-dollar settlements with Carnival, Royal Caribbean and Celebrity Cruises over the same issue.

Source: *Miami Herald*

### **ADVICE TO PARENTS ON THE USE OF CRIBS**

There have been a number of crib recalls in the U.S. Recently, the CPSC urged both parents and caregivers to closely inspect the hardware and stability of their cribs to ensure all parts are in place and secure. Here are some safety tips for all cribs:

- Parents should not use any crib with missing, broken or loose parts.
- Hardware should be inspected from time to time and tightened to keep the crib sturdy.
- When using a drop-side crib, parents should check to make sure the drop side or any other moving part operates smoothly.
- Always check all sides and corners of the crib for disengagement. Any disengagement can create a gap and entrap a child.
- Do not try to repair any side of the crib with additional hardware, tape, wire or rope.
- Putting a broken side up against the wall does not solve the problem and can often make it worse.

Since the creation of the CPSC Early Warning System in fall of 2007, the agency has conducted five crib recalls where the hardware was broken, missing or otherwise failed to function.

Cribs with drop sides are most likely to experience hardware problems due to the moving parts and non-rigid connections. Drop-side corners can disengage from the tracks located on the crib ends and safety stops may become nonfunctional, permitting the drop side to detach from the crib. These types of defects are often undetected by parents or caregivers and can worsen when the baby pushes or leans against the side of the crib.

Source: CPSC

### **CAR SURFING IS DUMB AND DANGEROUS**

Teenagers are getting injured or killed by riding on the outside of a moving vehicle—an activity known as car surfing—according to a Centers for Disease Control and Prevention (CDC) review of newspaper articles. The infor-

mation was released in the *Morbidity and Mortality Weekly Report*. The report also noted that car surfing injuries and deaths were reported at a wide range of vehicle speeds, from as low as 5 mph up to 80 mph. CDC researchers examined 18 years of news reports from January 1990 to August 2008 using a newspaper article database. The researchers found 99 reported incidents of car surfing, 58% of which were fatal. The following conclusions were reached by the researchers:

- In the news stories reviewed, the average age of those injured or killed was 17.6, with males accounting for 70% of the victims.
- The largest number of car surfing injuries and deaths reported in U.S. newspapers occurred in August. Most (74%) of the news stories involved incidents in the Midwest and the South.
- Three out of four of the news stories reported car surfing deaths were caused by a bump or blow to the head.
- The news stories also suggest that car surfing may be both seasonal and regional in nature.

The media analysis also found that in 29% of incidents, a sudden movement or maneuver was mentioned, such as an abrupt turn or sudden braking, which caused the person car surfing to fall off the vehicle. These types of falls can result in serious injuries or death, even at slow speeds. Car surfing is not only a dumb thing to do—it's also very dangerous.

Source: WRDW

## **XXIII. RECALLS UPDATE**

There have been a very large number of product recalls lately covering a broad range of products. I am including a few of the recalls in this issue. It's a good idea to check on recalls to make sure none are missed that affect you or any of your family.

### **CHRYSLER RECALLS 20,000 DODGE POLICE CARS**

Chrysler is recalling 20,283 2006-'09 Dodge Charger and Magnum vehicles built with the police package equipped with a column shifter. The National Highway Traffic Safety Administration says the gearshift cable may become disengaged from the steering column mounting bracket and cause an incorrect transmission gearshift position display. "This could allow the vehicle to move inadvertently and cause a crash without warning," said NHTSA in its recall summary of the problem. Chrysler said it is not aware of any crashes, injuries or fatalities related to the safety recall. The recall comes after nine customer complaints and 55 field reports of problems with 2007 Dodge Charger and Magnum police vehicles, said NHTSA.

The problem was first reported in September 2008 by the Montgomery County, Md., Police Department. The department indicated it was possible for the police vehicles to appear as though they were in "park" gear but were actually in "drive." Chrysler dealers will add a redundant locking mechanism to the gearshift cable at the mounting bracket to "ensure proper retention and shift linkage function." The recall was expected to begin sometime in November, but at press time we didn't have an exact date. Owners may contact Chrysler at 800-853-1403.

### **HEART DEVICE MAKER RECALLS IMPLANT AFTER 5 DEATHS**

A medical device company has recalled certain batches of a small mechanical heart pump after five people died while using the device. Thoratec Corp. urged patients to have their implants checked after confirming 27 reports of cases in which wear and fatigue to an electrical wire required the devices to be

replaced. The reports occurred over five years of clinical experience with 1,972 implants, according to the company. In five cases, the device could not be replaced and the patients died. The recall affects devices with catalog numbers 1355 and 102139, which have been distributed to 153 hospitals and distributors throughout the United States and other countries since the beginning of clinical studies in November 2003. The HeartMate II pump was approved in April as a temporary treatment for patients awaiting heart transplants, but analysts had said the larger market for the product is in “destination therapy,” or patients with end-stage heart failure who are too ill for a transplant.

#### **HOMELITE CONSUMER PRODUCTS RECALL CHAIN SAWS**

Homelite Consumer Products Inc., of Anderson, S.C. has recalled Homelite Chain Saws. The chain brake can fail to stop the chain on its first application, posing a risk of laceration to consumers. This recall involves Homelite brand chain saws with the following model numbers: UT10514, UT10516, UT10517, UT10518, UT10520, UT10540, UT10560 and UT10918. Affected chain saws have a manufacture date between November 2007 and August 2008. Both the model number and the date of manufacture appear on the chain saw’s data plate, located beneath the rear handle of the saw. Products with a green “dot” sticker under the bottom side of the handle area and on the outside of the package are not subject to this recall.

The chain saws were sold at Home Depot stores nationwide between December 2007 and October 2008 for between \$110 and \$200. Consumers should immediately stop using the chain saws and contact Homelite Consumer Products to locate the nearest authorized service center to schedule a free repair. For additional information,

contact Homelite Consumer Products Inc. (800) 242-4672 or visit the firm’s Web site at [www.homelite.com](http://www.homelite.com).

#### **NEARLY 1.6 MILLION CRIBS RECALLED AFTER 2 DEATHS**

Delta Enterprises has recalled nearly 1.6 million older versions of its drop-side cribs after two infant deaths. Both infants suffocated in their cribs. Missing or broken safety pegs, which were blamed in one death, were installed in 985,000 of the drop-side cribs. They can pose an entrapment and suffocation risk to infants and toddlers. A defective spring peg in an additional 600,000 drop-side cribs can also cause an entrapment and suffocation risk. When the safety pegs are missing from the lower track at the base of each leg of the crib, the crib locks can disengage and detach if lowered below the peg hole and create a hazardous gap.

The Consumer Product Safety Commission is aware of two entrapments and nine disengagement incidents in cribs in which the safety pegs were missing. The recalled cribs were manufactured in either Taiwan or Indonesia and were built with the “Crib Trigger Lock with Safety Peg” drop-side hardware design. Model numbers and country of origin can be located on the mattress support board. The cribs were sold at major retailers, including Wal-Mart, Kmart and Target.com, from January 1995 through September 2007 for about \$100. These cribs have been sold secondhand, also.

The CPSC and Delta urged parents and caregivers to immediately stop using cribs that are missing a safety peg on any leg of the crib and to contact Delta to receive a free, easy-to-install repair kit. Consumers with cribs that have all safety pegs installed may continue to use the cribs; however, the CPSC recommends that these consumers contact Delta for the repair kit for future assembly pur-

poses. The kit includes bold-colored safety pegs and warning labels to be affixed to the mattress board. Kits can be obtained by calling Delta toll-free at 800-816-5304 or by logging on to [www.cribrecallcenter.com](http://www.cribrecallcenter.com) to order the free replacement kit.

Dysfunctional spring pegs—blamed in the second death—can become nonfunctional. This can cause the drop side to detach from the crib and create a gap that can entrap an infant or toddler. The CPSC is also aware of one child entrapment and one incident in which the drop side detached due to a disengaged spring peg. This recall involves all Delta drop-side cribs manufactured prior to 2006 that use “Crib Trigger Lock with Spring Peg” drop side hardware design. The recalled cribs have Delta’s name and address on the mattress support boards and Delta’s logo on the tether rail. The model number and manufacture dates are located on top of the mattress support board. The cribs were made in China and were sold at major retailers nationwide from January 2000 through January 2007 for between \$33 and \$200. CPSC and Delta urge parents and caregivers to immediately stop using these cribs and contact Delta to receive a free, easy-to-install repair kit. Kits can be obtained by calling 800-816-5304 or by logging on to [www.cribrecallcenter.com](http://www.cribrecallcenter.com) to order the free replacement kit.

#### **2,000 CRIBS RECALLED AFTER INFANT’S DEATH**

About 2,000 convertible cribs are being recalled after an infant died by suffocation after becoming trapped in one of the cribs. The sides of the convertible crib made by Playkids USA are made of a mesh that expands, creating a gap between the mattress and the side through which an infant can slip. This poses suffocation and entrapment hazards for young children.

The Consumer Product Safety Commission said it is aware of the August 31<sup>st</sup> death of a five-month-old child in Brooklyn, N.Y. The child became entrapped between the mattress and the drop side rail of the convertible crib and suffocated. This recall involves the Playkids USA convertible crib/playpen/bassinet/bed with model number PLK-909. "Playkids U.S.A." can be found on the packaging and on a label sewn into the side of the crib. The model number can be found on the packaging.

The convertible cribs have a drop side rail, a stationary side rail, a canopy assembly and a bassinet. The sides of the convertible crib, the mattress support, the bassinet, the canopy and the bedskirt are covered in fabric and mesh. The fabric and the mesh come in a variety of colors and patterns. The convertible cribs, which were made in China, were sold in juvenile product retailers in New York from March 2007 through September 2008 for about \$100. Consumers should stop using the recalled convertible cribs immediately and contact Playkids USA at 718-797-0302 to receive a full refund. To see more pictures of the recalled cribs, consumers can visit the CPSC's Web site at [www.cpsc.gov](http://www.cpsc.gov).

#### ***BABY WALKERS RECALLED DUE TO STAIRWAY FALL HAZARD***

My Way Corp., of San Juan, Puerto Rico, has recalled about 800 Baby Walkers. The walkers violate the baby walker voluntary standard and can fit through a standard doorway and are not designed to stop at the edge of a step. Babies using these walkers can be seriously injured or killed. The recalled walkers were sold for babies six months and older. The walkers were sold in the following colors: pink, red, green, blue, and ivory. The walkers have an activity tray with a steering wheel and other toys. "My Way Corp" is printed on a sticker

on the front of the walker. Independent discount stores in Puerto Rico sold the walkers from November 2004 through March 2008 for between \$18 and \$25. Consumers should stop using these walkers immediately and return them to the store where purchased for a full refund. For additional information, consumers can contact My Way Corp. collect at (787) 758-5848.

#### ***TOY BOATS RECALLED DUE TO BURN HAZARD***

Dollar General Merchandising Inc., has recalled about 200,000 battery operated toy "Speed Boats." The two battery terminals can come into contact with each other, causing the battery to overheat, posing a burn hazard to consumers. Dollar General has received two reports of the batteries overheating. Thus far, no injuries have been reported. The recalled toy speed boats are lightweight plastic toy boats supported by an inflatable hull with "outboard" motors on them.

The motor uses two AA batteries. The toy boat measures about 12 inches long by 8 inches wide and comes in various colors and designs. Dollar General stores nationwide sold the speed boats from March 2008 through July 2008 for \$3 each. Consumers should take these toys away from young children and return them to the store where purchased for a refund or replacement product. For additional information, contact Dollar General at (800) 678-9258 or visit the firm's Web site at [www.dollargeneral.com](http://www.dollargeneral.com).

#### ***SERTA INTERNATIONAL MATTRESSES RECALLED DUE TO FIRE HAZARD***

Serta International Mattress Co., of Hoffman Estates, Illinois, has recalled over 6,000 Serta Zipper-Covered Foam Core Mattresses. The mattresses fail to meet the mandatory federal open flame stan-

dard for mattresses, posing a fire hazard to consumers. The recalled mattresses have a zipper cover over a foam core. The mattresses were sold in twin, full, queen, king and California king sizes. They were manufactured between November 30, 2007 and May 20, 2008. The mattress name, date of manufacture, model, and serial numbers are located on a label attached to the mattress. Only specific serial numbers are included in the recall.

Consumers should immediately contact Serta to determine if their mattress is included in the recall, and if it is, to receive a free replacement mattress cover. Consumers can install the cover themselves or request free installation by a qualified repair technician. For additional information, contact Serta toll-free at (866) 675-3853 or visit the firm's Web site at [www.serta.com](http://www.serta.com).

#### ***CYBEX INTERNATIONAL RECALLS TREADMILLS DUE TO FALL HAZARD***

About 19,000 Cybex Treadmills have been recalled. The treadmills can speed up unexpectedly while in use due to a malfunction with the lower control board, posing a fall hazard to consumers. Cybex International has received 24 reports of incidents involving the treadmill unexpectedly increasing speed, including six reports of consumers falling. Three of those incidents resulted in minor injuries. The recall involves the Cybex 445T, 455T, 530T, 450T, 500T, 515T, and 520T treadmill models.

The treadmills are black and gray with rectangular uprights. The 530T style treadmill is 81 inches long by 32 inches wide. The 445T style treadmill is 72 inches long by 32 inches wide. The treadmills have a display panel on a console as wide as the treadmill. "Cybex" and the model number are written on the console. Consumers should immediately unplug and stop using the recalled treadmills. Contact

Cybox to receive a free replacement fuse. If requested, a Cybox technician can install the fuse free of charge. Cybox is directly contacting known purchasers. For additional information, contact Cybox toll free at (866) 897-9199 or visit the firm's Web site at [www.Cyboxintl.com](http://www.Cyboxintl.com).

#### **SHERWIN-WILLIAMS Co. RECALLS KRYLON UV FABRIC PROTECTOR**

The Sherwin-Williams Co. has recalled about 75,000 cans of Krylon "Outdoor Spaces" UV Fabric Protector. Overexposure to fumes, vapor or spray mist from the product can pose a serious respiratory hazard to consumers. Sherwin-Williams has received one report of an incident involving a consumer who experienced coughing and difficulty breathing requiring overnight hospitalization. The recall involves Krylon "Outdoor Spaces" UV Fabric Protector, which is an aerosol coating used to protect fabric.

The part number (#2900) is printed above the UPC (72450 4029007) on the side of the can. The front of the 11-ounce aerosol can is tan with a picture of a patio containing outdoor furniture. "UV Fabric Protector" and "Outdoor Spaces" are also printed on the front of the can. Consumers should immediately stop using the product and return it to the store where purchased for a full refund. For additional information, call Sherwin-Williams toll-free at (888) 304-3769 or visit the firm's Web site at [www.sherwin-williams.com](http://www.sherwin-williams.com) or [www.krylon.com](http://www.krylon.com).

#### **CLAIRE'S RECALLS CHILDREN'S METAL NECKLACES**

Claire's Boutiques Inc., of Hoffman Estates, Illinois has recalled about 67,000 Best Friends Yin Yang Necklaces Sets. The recalled necklaces contain high levels of lead. As we have all learned, lead is toxic if

ingested by young children and can cause adverse health effects. This recall involves a set of two necklaces that have a silver-colored metal bead type chain and a lobster-claw clasp. One of the necklaces has a single, metal pendant with the word "Best" attached to a black, yin metal pendant. The other necklace has the word "Friends" attached to a white, yang metal pendant.

The necklaces were sold at Claire's stores nationwide from April 2007 through August 2008 for about \$8. Consumers should immediately take these recalled products away from children and return them to any Claire's store for a full refund. For additional information, call Claire's at (866) 859-9281 or visit the firm's Web sites at [www.claire.com](http://www.claire.com). CPSC was alerted to this hazard by the Illinois Attorney General.

#### **COVIDIEN RECALLS SYRINGES POSING RISK TO DIABETICS**

U.S. health officials have warned doctors and patients that Covidien Ltd. is recalling nearly half a million single-use syringes that could pose a serious risk to diabetics. The Food and Drug Administration said the possibly mislabeled ReliOn syringes could lead to patients receiving an insulin overdose of as much as 2.5 times the intended dose, leading to low blood sugar levels and serious health consequences, including death. During the packaging process, some syringes labeled for use with U-40 insulin were mixed with syringes labeled for use with U-100 insulin.

Wal-Mart Stores Inc. sold the syringes at Wal-Mart stores and Sam's Clubs from August 1<sup>st</sup> until October 8<sup>th</sup>. Covidien voluntarily recalled the syringes on October 9<sup>th</sup>, asking that any units of the affected product be removed from inventory and placed in quarantine. Wal-Mart posted the recall announcement in Wal-Mart stores and Sam's Clubs, as well as on its website and sent letters to more

than 16,500 customers notifying them of the recall. The manufacturer has received one adverse report related to a syringe from the lot numbered 813900 according to the FDA. Consumers and health care professionals who suspect they have the recalled product may contact Covidien at 866-780-5436 or [www.relion.com/recall](http://www.relion.com/recall) for more information.

#### **MAINE FIRM RECALLS FROZEN STUFFED CHICKEN PRODUCTS**

Barber Foods Company, a Portland, Maine, establishment, is recalling approximately 41,415 pounds of frozen stuffed chicken products that may contain foreign materials. The U.S. Department of Agriculture's Food Safety and Inspection Service made this public on November 10<sup>th</sup>.

The products labeled Schwan's Stuffed Chicken Kiev, were produced on May 17<sup>th</sup>, June 2<sup>nd</sup> and August 4<sup>th</sup>, and were made available for catalog or internet purchase from the Schwan's Home Service, Inc. by consumers nationwide. The problem was discovered after the Schwan's Home Service, Inc. received consumer complaints of finding pieces of rubber in the product. FSIS says it has not received any reports of injury at this time. Anyone concerned about an injury from consumption of the products should contact a physician.

#### **ALABAMA FIRM RECALLS HOT DOG PRODUCTS FOR POSSIBLE LISTERIA CONTAMINATION**

R. L. Zeigler Co., Inc., a Selma, Alabama, firm, has recalled approximately 28,610 pounds of hot dog products that may be contaminated with *Listeria monocytogenes*. The following products are subject to recall:

- 12-ounce packages of "ZEIGLER WIENERS MADE WITH CHICKEN AND PORK, ARTIFICIALLY COLORED."

Each package bears the use-by date of “November 26, 2008” and the establishment number “P-9156S” inside the USDA mark of inspection.

- 12-ounce packages of “VACUUM PACKED PAR-TI PUPS.” Each package bears the use-by date of “November 26, 2008” and the establishment number “P-9156S” inside the USDA mark of inspection.
- 12-ounce packages of “ZEIGLER Original Recipe WIENERS, artificially colored.” Each package bears the use-by date of “November 26, 2008” and the establishment number “EST. 9156S” inside the USDA mark of inspection.
- 16-ounce packages of “Zeigler Jumbo Franks.” Each package bears the use-by date of “November 21, 2008” and the establishment number “P-9156S” inside the USDA mark of inspection.
- 12-ounce packages of “Zeigler Hot Dogs.” Each package bears the use-by date of “November 26, 2008” and the establishment number “P-9156S” inside the USDA mark of inspection.
- 10-pound bulk boxes of “SKINLESS WIENERS, 8 WIENERS PER LB.” Each box bears the package code “PK 092208A” and the establishment number “EST. 9156S” inside the USDA mark of inspection.
- 10-pound bulk boxes of “SKINLESS WIENERS, ARTIFICIALLY COLORED, 10 WIENERS PER LB.” Each box bears the package code “PK 092208A” and the establishment number “EST. 9156S” inside the USDA mark of inspection.
- 10-pound bulk boxes of “SKINLESS WIENERS, 10 WIENERS PER LB.” Each box bears the package code “PK 092208A” and the establishment number “EST. 9156S” inside the USDA mark of inspection.
- 10-pound bulk boxes of “SKINLESS WIENERS, 12 WIENERS PER LB.” Each box bears the package code “PK 092208A” and establishment number “EST. 9156S” inside the USDA mark of inspection.

The hot dog products were produced on September 22<sup>nd</sup>, and were sent to food service institutions and retail establishments in Alabama, Florida, Georgia, Mississippi, and Tennessee. The problem was discovered by the Georgia State Department of Agriculture through microbiological testing. FSIS has received no reports of illnesses associated with consumption of this product. Consumption of food contaminated with *Listeria monocytogenes* can cause listeriosis, an uncommon but potentially fatal disease. Healthy people rarely contract listeriosis. However, listeriosis can cause high fever, severe headache, neck stiffness and nausea. Listeriosis can also cause miscarriages and stillbirths, as well as serious and sometimes fatal infections in those with weakened immune systems, such as infants, the elderly and persons with HIV infection or undergoing chemotherapy.

Consumers with questions about the recall should contact company Controller Ken Fitzgerald at (800) 392-6328. Consumers with food safety questions can “Ask Karen,” the FSIS virtual representative available 24 hours a day at AskKaren.gov. The toll-free USDA Meat and Poultry Hotline can be reached at 1-888-MPHotline (1-888-674-6854) and is available in English and Spanish.

## XXIV. FIRM ACTIVITIES

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### **CLAY BARNETT HEADS UP UNITED WAY EFFORTS FOR LAWYERS**

One of our lawyers, Clay Barnett, is heading up the 2008 River Region United Way Attorney Campaign. Considering the economic challenges we are all facing this year, the United Way is concentrating its efforts on upping the participation numbers. They want to offset the potential for smaller contributions by bringing in lawyers and personnel staff who have not historically contributed to the campaign. The United Way does outstanding work and

deserves to be supported. Lots of folks depend on them. Clay is working hard to make sure all of the lawyers in the area step up to the plate and do their part in the campaign.

### **JULIA BEASLEY NAMED TO ADVISORY BOARD OF THE UAB HEALTH CENTER**

Another of our lawyers, Julia Beasley, is involved in another worthy undertaking outside the firm. She has been appointed to the Advisory Board of The UAB Health Center Montgomery. The appointment of six new board members was announced recently. In addition to Julia, the other new members include: Kenneth E. Coleman—Vice President, Southern Division of Alabama Power Company; J. Michael Horsley—CEO of the Alabama Hospital Association; Quentin Riggins—Senior Vice President for Governmental Affairs, Business Council of Alabama; Rabbi Elliot Stevens—Temple Beth Or, and J. Sidney Stubbs, PhD—Vice President for Academic Affairs, Huntingdon College.

The Advisory Board members are advocates for the program in the community. The Board provides counsel and advice to the program. They support the sponsoring institutions, the School of Medicine at UAB and Baptist Health. Alan Worrell, Chairperson of the Board and President of Sterling Bank, observed:

*On behalf of the Advisory Board, I wish to thank those individuals past and present who have given dedicated and loyal service. We look forward to the opportunity to work with these outstanding community leaders as we strive together to achieve the vision of the UAB Health Center Montgomery—to become a recognized center of excellence in medical education and patient care.*

The Advisory Board can certainly be an asset to good healthcare—available to all citizens in our area—and that is a most worthwhile undertaking. We are pleased to have one of our lawyers serving on this important board.

## EMPLOYEE SPOTLIGHTS

### PARKER MILLER

Parker Miller joined the firm as an Associate in October. He is working in the Environmental Law Section. Parker is a member of the Hot Fuel multidistrict litigation team, which is litigating against some of the world's largest oil companies. We are seeking to recover billions of dollars consumers lost as a result of thermal expansion in gasoline. Additionally, Parker represents clients who have sustained significant damage to their homes as a result of mine subsidence in North Alabama. Prior to becoming an associate, Parker worked as a law clerk in the firm's Fraud Section, assisting lawyers in FLSA, business and securities fraud litigation.

Parker received his B.S. degree in Business Administration from Auburn University. While at Auburn, Parker was named Risk Management Director of the Interfraternity Council and held numerous offices in his social fraternity, Phi Kappa Tau. Parker received his Juris Doctor degree from Thomas Goode Jones School of Law in 2008.

While attending law school, Parker was recognized as one of the nation's finest student advocates when he received the Lewis F. Powell Jr. American College of Trial Lawyers Medal for Excellence in Advocacy. Parker's team finished as a national semifinalist in the Buffalo-Niagara Mock Trial Competition and the prestigious National Trial Competition—a competition with nearly 1000 participating student advocates and 300 teams. Additionally, while in school Parker studied international law abroad in the Netherlands, was on the Dean's List at Jones, and was a charter member of the Jones School of Law Board of Advocates.

Parker was born and raised on a farm in Faunsdale, Alabama, and graduated with honors from Marengo Academy. He is married to the former Ashley Brownsberger of Tampa, Florida. Ashley is an interior consultant and works at Lee Ann's interiors in Montgomery. We are pleased to have Parker as an Associate with the firm.

### ALYCE ROBERTSON

Alyce Robertson joined the firm in August of 2006. She is currently

working on several environmental cases involving issues such as leaking Underground Storage Tanks (USTs), and contamination from facilities emitting substances such as mercury and fly ash. Alyce also helped to obtain class certification and settlement approval in a significant case involving property contamination in Birmingham, Alabama.

Before coming to the firm, Alyce had most recently worked as an Assistant Attorney General in the Alabama Attorney General's Office. While there, over a period of seven years, she handled civil litigation involving state agencies and employees. Her trial practice included civil rights, personal injury and constitutional litigation on behalf of the state. She also practiced administrative law and served as counsel for state licensing boards.

Alyce graduated from Birmingham Southern College with a Bachelor of Arts degree in history/political science. In 1995, she graduated from the University of Alabama School of Law. While at Alabama, Alyce served as Student Works Editor for the Law and Psychology Review. Alyce was also a member of the Bench and Bar Legal Honor Society while in law school.

Currently, Alyce is serving as the Director of Education and Training for the Junior League of Montgomery and is a Barrister in the Hugh Maddox Inns of Court. She is also a member of the Board of Managers of the Downtown YMCA. Alyce attends Immanuel Presbyterian Church, where she is an elder and PYC leader. Alyce is a very hard worker in a most challenging field of law. She does excellent work, is a tremendous asset to the firm, and we are fortunate to have her with us.

### JANET PAIR

Janet Pair, who has 26 years experience in the legal field, joined the firm this past March. She currently serves as a Legal Assistant to Navan Ward, Jr. in our Mass Torts Section. She works on Celebrex/Bextra litigation and Permax/Dostinex litigation. Janet, who grew up in Montgomery, moved away in 1990. She has lived in various cities including Kansas City, Missouri; Cincinnati, Ohio; Augusta, Georgia; Navarre, Florida; and most recently, Biloxi, Mississippi. She

moved back to Montgomery in May 2007.

Janet graduated from Jefferson Davis High School in Montgomery. She then earned her Bachelor of Science in Criminal Justice from Troy University. Janet enjoys running and working out. In February 2007 she ran her first marathon at the Mardi Gras Marathon in New Orleans and qualified for the Boston Marathon, where she ran on April 21, 2008. She is currently training for some upcoming half marathons and possibly the Boston Marathon in April 2009. Janet is a very good and valuable employee. We are fortunate to have Janet working in a very important section of the firm.

### CARLTON AVERY

Carlton Avery works in our Mass Torts Section as a staff assistant for Benjamin L. Locklar. He is currently a student at Troy University Montgomery campus, pursuing a degree in Economics. Carlton, who is a Montgomery native, enjoys helping others, playing sports, spending time with family and friends, and learning new things. He does a very good job and we are fortunate to have him with the firm.

### GARY SPIGNER

Gary Spigner, who currently serves as a Staff Assistant in the Mass Torts Section, has been working hard on Vioxx lawsuits. He spends a good amount of time reviewing case files and working on matters relating to pending cases. Gary has been married to Janna for 22 years. They have one son, Brett, who just turned 16. Gary previously served 15 years in the Alabama Army National Guard with two and a half years active duty in the War on Terror. He served seven months in Afghanistan from 2004 to 2005. Gary, who is a native of Texas, is a very good employee and we are fortunate to have him with us.

### *CHRISTMAS GIVING IS A BLESSING FOR ALL OF US AT BEASLEY ALLEN*

Our firm has always reached out to folks in our community and we have consistently worked hard to help others during the Christmas season especially. This Christmas season will

be no different. Listed below are several opportunities our employees have had during this important time of the year to share with others who are less fortunate in our community.

#### **FAMILY SUNSHINE CENTER FOOD DRIVE**

The firm sponsored five families from The Family Sunshine Center by giving them enough food to feed their families from Thanksgiving to Christmas. We found that this was a great way to help folks. This is God speaking to the hearts of our employees. Words can't adequately describe the joy and relief this effort brings to these families who are in need. Angela Talley and Tina Blue headed up this charity for the firm.

#### **CHISHOLM MINISTRY CENTER**

Employees were able to donate new toys for children ages infant to 18 years of age to the Chisholm Ministry Center. The gifts were placed in their Toy Store which is designed to help low income families who cannot afford to pay retail prices for these items. The gifts were marked down to a reduced rate, the lowest being 50 cents and highest being \$3.00. The Toy Store ministry was established to help place dignity and respect back into the home by affording the parents the opportunity to provide a Christmas for their children. Please keep in mind that because there is a price tag does not mean people who cannot afford to pay are turned away. Those who cannot afford to pay are allowed to shop for their children at no cost. Also, any money made on the gifts sold at the Toy Store goes back to the Ministry to provide financial assistance, purchase food, clothing, and other items for the needy. Sherry McHenry headed up this charity for the firm.

#### **OPERATION CHRISTMAS CHILD**

Operation Christmas Child has touched millions of children. It is a unique project of the Christian relief and evangelism organization Samaritan's Purse. Employees were able to take a "shoebox" and fill it full of small gifts for a child. These shoeboxes were delivered around the world to children. This is a tremendous ministry. Kelli Flanagan headed up this charity for the firm.

#### **FRIENDSHIP MISSIONS**

Friendship Mission is a PCA Presbyterian church and shelter located on the western side of town. The church and shelter provides: two worship services every day except Saturday; hot meals for all homeless and poor who attend; and counseling and Bible study on weeknights for about 50 men living in the shelter. Donated items such as blankets, all sizes clothes, non-prescription drugs and personal hygiene items were passed out to homeless and poor people inside and outside the shelter. Willa Carpenter headed up this charity for the firm.

#### **CAPITOL HILL NURSING HOME**

Capitol Hill is a nursing home in the Capitol Heights area. Each Christmas they put up an Angel Tree for the residents. Each Angel contains a resident's Christmas wish list. There are usually not more than one or two small items on the list, like lotion and/or slippers. Our employees "adopted" an angel and filled the resident's wish list. Many residents don't ever receive visitors and these gifts may be the only one they receive for Christmas. Tina Blue headed up this charity for the firm.

#### **SOLDIER MINISTRY**

In an effort to show support and rally morale for our troops, our firm sent Christmas packages to some of the soldiers that have been deployed to fight in the war. This year we sent 55 care packages to soldiers who have been deployed to fight in the War on Terror. With extensive deployed operations expected to continue for the foreseeable future, our troops will require, and deserve, continued support from those of us for whom they are fighting. Regardless of their position on any particular mission, these men and women are doing their duty to you and our country, going in harm's way and sometimes making the ultimate sacrifice. They deserve our unwavering support. Please keep our troops in your daily prayers. This event was headed up by Tabitha McGuire, for the firm.

#### **BEASLEY ALLEN WEBSITE WINS TOP HONORS**

The Beasley Allen website, [www.BeasleyAllen.com](http://www.BeasleyAllen.com), was recently selected by Interactive Media Awards™ for Outstanding Achievement in the Legal Field. This is the second consecutive year for the firm's primary website to be selected for this honor. IMA competition is open to individuals and organizations involved in designing, developing, managing, supporting and promoting websites. Award winners are selected by judges who are distinguished professionals in the field of web development, and members of the Interactive Media Council, Inc. (IMC). IMC is a non-profit organization dedicated to evaluating the standards of excellence on the internet. Sites selected for IMAs are judged on criteria including design, content, feature functionality, usability, standards compliance and cross-browser compatibility.

Scott Thomas is the Director of Internet Services for Beasley Allen and does an excellent job. It's an incredible honor to be recognized for a second straight year. It takes a tremendous team effort to maintain a website of this size and complexity. We have an exceptionally dedicated team of professionals working very hard at the firm to maintain these high standards. The firm's mesothelioma awareness blog, [www.myMeso.org](http://www.myMeso.org), also received an Interactive Media Award earlier this year. All of the employees in our Web Department do outstanding work and we are proud of them and their achievements.

#### **TOM METHVIN NAMED PRESIDENT OF BRANTWOOD BOARD OF DIRECTORS**

Tom Methvin, Beasley Allen's managing shareholder, was recently named President of the Board of Directors for Brantwood Children's Home. Brantwood has been serving children in Montgomery and the River Region for more than 90 years, helping neglected and abused children by providing them a home and supervising their education, health and social adjustment into the community. Brantwood currently serves children ranging in age from ten to 21, including transitional programs

to help older youths move from dependent care to independent living situations. More than just a roof over their heads, Brantwood provides a place to belong to youngsters torn from their traditional family, often through traumatic circumstances.

Toms says he just feels “special about working at Brantwood with these children,” and that it “just gives me a good feeling to help.” An institution like this is so vital to our community, and there are so many hurting young folks out there. Through no fault of their own, many don’t have the same chance that others have. Without places like Brantwood, they’d have no place to turn.

#### **BEASLEY ALLEN SUPPORTS OUR MILITARY**

All of us at Beasley Allen support the military and try to help the military personnel. Recently, the firm sent some technical running shirts to a number of soldiers in Iraq. We feel strongly about our obligation to support the military and it’s good to know that help from back home is both needed and appreciated. We received this letter from Jeffrey W. Talley, Brigadier General, U.S. Army, concerning our gifts:

*It is with my utmost gratitude that I thank you and your law firm for your generosity in donating technical running shirts for our Sapper Series runs here in Baghdad. The shirts were a great reward for each soldier’s dedication and time put forth in training for the series. Your extraordinary efforts are in keeping with the finest traditions of military support and reflect distinct credit upon you, Beasley, Allen, Crow, Methvin, Portis & Miles P.C., and the citizens of the United States.*

This letter was certainly appreciated and it makes all of us at the firm realize that helping our military personnel is very important. I encourage others to take on projects that will help those in our military who are on foreign soil during the holidays.

## **XXV. SPECIAL RECOGNITIONS**

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#### **THE TIME FOR CHANGE EXPRESSED IN A GOOD AND MEANINGFUL WAY**

Peggy Wallace Kennedy, one of the daughters of George C. Wallace and Lurleen Wallace, both of whom were governors of Alabama, is married to my very good friend, Mark Kennedy, a retired state Supreme Court Justice. The Kennedy’s have two sons, Leigh, a decorated veteran of the Iraq war, and Burns, a college sophomore. I have known Peggy for years and really appreciate the observations she made in a recent interview with a reporter for CNN. I am including Peggy’s comments from the interview in this issue because of their historical significance. It’s a great testimony and I am proud of Peggy.

#### **MY FATHER, GEORGE WALLACE, AND BARACK OBAMA**

*I heard a car door slam behind me and turned to see an elderly but spry woman heading my way. The night before, a gang of vandals had swept through the cemetery desecrating graves, crushing headstones and stealing funereal objects. My parents’ graves, situated on a wind-swept hill overlooking the cemetery, had not been spared. A large marble urn that stood between two granite columns had been pried loose and spirited away, leaving faded silk flowers strewn on the ground. I was holding a bouquet of them in my arms when the woman walked up and gave me a crushing hug. “Honey,” she said, “you don’t know me, but when I saw you standing up here on this hill, I knew that you must be one of the girls and I couldn’t help myself but to drive up here and let you know how much me and my whole family loved both of your parents. They were real special people.”*

*I thanked her for her kind words as we stood side by side gazing down at the graves of Govs. George Wallace and Lurleen Wallace. After a few moments, the woman leaned into me and spoke almost in a conspiratorial whisper. “I never thought I would live to see the day when a black would be running for president. I know your daddy must be rolling over in his grave.” Not having the heart or the energy to respond, I gave her bony arm a slight squeeze, turned and walked away. As I put the remnants of the graveyard spray in the trunk of my car; I assumed that she had not bothered to notice the Barack Obama sticker on my bumper.*

*When I was a young voter and had little interest in politics, my father would mark my ballot for me. As I thought about the woman in the cemetery, I mused that if he were alive and I had made the same request for this election, there would be a substantial chance, though not a certainty, that he would put an “X” by Obama’s name. Perhaps it would be the last chapter in his search for inner peace that became so important to him after becoming a victim of hatred and violence himself when he was shot and gravely injured in a Laurel, Maryland, shopping center parking lot. Perhaps it would be a way of reconciling in his own mind that what he once stood for did not prevent freedom of opportunity and self-advancement from coming full circle; his final absolution.*

*George Wallace and other Southern governors of his ilk stood defiantly in the 1950s and ‘60s in support of racial segregation, a culture of repression, violence and denial of basic human rights. Their actions and the stark images of their consequences that spread across the world galvanized the nation and gave rise to a cry for an end to the American apartheid. The firestorms that were lit in Birmingham, Oxford,*

*Memphis, Tuscaloosa, Montgomery, Little Rock and Selma were a call to arms to which the people responded. And now a new call to arms has sounded as Americans face another assault on freedom. For if the stand in the schoolhouse door was a defining moment for George Wallace, then surely the aftermath of Katrina and the invasion of Iraq will be the same for George W. Bush. The trampling of individual freedoms and his blatant contempt for the rights of the average American may not have been as obvious as an ax-handle-wielding governor; but Bush's insidiousness and piety have made him much more dangerous.*

*Healing must come, hope will be our lodestar, humility will reshape the American conscience, and honesty in both word and deed will refresh and invigorate America, and having Barack Obama to lead will give us back our power to heal. My father lived long enough to come to an understanding of the injustices borne by his deeds and the legacy of suffering that they left behind. History will teach future generations that he was a man who used his political power to promote a philosophy of exclusion. As his daughter, who witnessed his suffering in the twilight of his years and who witnessed his deeds and heard his words, I am one who believes that the man who, on March 7, 1965, listened to the reports of brutality as they streamed into the Governor's Mansion from Selma, Alabama, was not the same man who, in March of 1995, was welcomed with open arms as he was rolled through a sea of African-American men, women and children who gathered with him to welcome another generation of marchers, retracing in honor and remembrance the historic steps from Selma to Montgomery.*

*Four years ago, the young Illinois senator who spoke at the Democratic National Convention mes-*

*merized me. I hoped even then that he would one day be my president. Today, Barack Obama is hope for a better tomorrow for all Americans. He stands on the shoulders of all those people who have incessantly prayed for a day when "justice will run down like waters and righteousness as a mighty stream" (Amos 5:24). Perhaps one day, my two sons and I will have the opportunity to meet Barack Obama in person to express our gratitude to him for bringing our family full circle. And today, the day after the election, I am going to ride to the cemetery so that if asked, I can vouch for the fact that the world is still spinning but my father lies at peace.*

*The opinions expressed in this commentary are solely those of Peggy Wallace Kennedy.*

#### **ALABAMA LAWYERS OFFER TOLL-FREE HOTLINE**

Starting on November 12<sup>th</sup>, Alabama lawyers will answer a toll-free hotline to assist homeowners faced with foreclosure, according to the Alabama State Bar and Legal Services Alabama, two organizations that partnered to provide the service. The hotline number is 1-877-393-2333, according to Brad Carr, director of communications for the State Bar in Montgomery. Help is free to anyone. "You can own a McMansion or a modest home; it doesn't matter," he said. Lawyers from all over the state will staff the hotline. "There are foreclosure procedures as simple as writing a letter to your lender, and the attorneys can do that," Carr said. "Or they can help in a mediation with your lender."

If the matter is already in litigation and the homeowner needs representation in court, the homeowner will be charged a fee, with the amount based on the person's income, he said. Alabama has two kinds of foreclosure proceedings, judicial and non-judicial, according to Tom Methvin, our Managing Shareholder, who is president-elect of the State Bar. Tom says non-judicial foreclosures are most common and can occur within 21 days and that's why it

is crucial for homeowners who have missed making even one monthly mortgage payment to call the hotline immediately.

The nonprofit Legal Services Alabama, which provides legal assistance to low-income Alabamians, pays the lawyers to man the hotline. The cost is covered by a grant from the Alabama Civil Justice Foundation and Access to Justice Commission. For more information on foreclosures, go to the State Bar's web site at [www.alabar.org](http://www.alabar.org).

#### **A PERSONAL STORY ABOUT CYSTIC FIBROSIS**

The following is from a speech given by Mary Lindsey Hannahan at the "Breathe for Life" gala in benefit of the **Cystic Fibrosis Foundation**. Mary Lindsey, who has Cystic Fibrosis, is Tom Methvin's niece. Mary Lindsey, who lives in Mobile with her parents, has been working hard in the campaign to find a cure for Cystic Fibrosis. This is her story:

*Hello, everyone! My name is Mary Lindsey Hannahan. And I have Cystic Fibrosis, the common cause of which we are all here for. I would like to thank each and every one of you for coming, and helping make CF stand for "Cure Found". Cystic Fibrosis gets no federal funding, so it is because of caring people like you that new treatments are funded. Only about 30,000 children and adults in the U.S. have CF. CF affects mainly the lung and digestive systems. My body produces way more mucus than it should. This clogs the airways in my lungs and prevents the white blood cells from coming out and doing their job, which is fighting the multitude of extra germs that get stuck in all the mucus. In my digestive system, the mucus blocks the digestive enzymes from doing what they should do, digest my food. I take about 50 pills every day, and I have to take pills every single time I touch any sort of substance that even closely resembles food to my mouth. This is because I want to be able to*

*digest the food, so before I eat I have to take digestive enzymes. Otherwise, I might be extremely malnourished.*

*I go in the hospital about once a year. I have had sinus surgery three times, because Cystic Fibrosis not only affects my lungs and digestive system, no no, that would be much to easy to deal with. It also affects my sinuses. I was in the hospital last week for my sinuses and my lungs, actually. Then I had to be on two weeks worth of IV antibiotics. I'm actually on IV antibiotics right now. Most people with CF have to go into the hospital multiple times in a year. I'm a lucky one, as ironic as that sounds. Because of people like you, everyone with CF's quality of life is so much improved. We don't get sick as often and the infections are easier to treat. The average life span of someone with CF goes up a year, every year. Right now it's at 38. This seems really young, and it is. But it's practically ancient compared to what the life span was about fifteen years ago.*

*The reason this means so much to me is because it would grant me my wish that I have consistently wished for on every birthday cake and in every night time prayer since I was diagnosed with this disease at two years old. I try as hard as I can to remain positive and upbeat every day. But as I get older, and the disease progresses, it proves extremely difficult to do so. But I try because, to be honest, this is an unpredictable disease, and who knows when I won't have that chance anymore? My one single wish is to wake up one morning and not think, "would it be most convenient to do my treatments or take my pills before breakfast?" I don't want to skip them because I want to, and have the guilty thought of "I shouldn't have skipped those today" in the back of my mind. I want to skip them because I don't need them anymore. I want to be free from the confining barriers of this*

*disease. I want to be able to be like all my friends, and not make them sit for an hour every morning and night I stay with them so I can stay somewhat healthy. I want to be able to laugh wholeheartedly and not have a coughing fit afterwards. I want to be able to run and not cough and be out of breath after a short time.*

*I thank you from the bottom of my heart for helping to grant my biggest, and every other person's with Cystic Fibrosis's wish. So thank you, once again, for everything you have done to aid me and others with this disease in making this dream a reality.*

*- Mary Lindsey Hannaban*

#### **ALABAMA WINS ANOTHER NATIONAL TOURISM AWARD**

The Year of Alabama Arts promotion by the Alabama Tourism Department has won another national award. The Travel Industry Association has presented Alabama with its "Discover America" award. The Year of Alabama Arts promotion was previously named best state promotion by the National Council of State Tourism Directors and received Travel Weekly's Magellan award for promotion of culture and the arts. Tourism leaders were honored recently at the Capitol for their work on the promotion.

National awards like these are helping redefine the image of Alabama and erase stereotypes that have been around for 50 years. The Year of Alabama Arts promotion put a spotlight on the arts throughout the state. It promoted everything from the Alabama Symphony Orchestra to folk artists like Lonnie Holley and Mose Tolliver. Lee Sentell, who heads up the Department, does an outstanding job for Alabama and its citizens. Without a doubt, Lee is a "super salesman" for our state.

#### **ALABAMA LAWYER WINS NATIONAL AWARD**

Alabama lawyer Stephen Black has been selected as one of ten people

nationwide to receive the Community Health Leaders Award from the Robert Wood Johnson Foundation. The \$125,000 award honors people who are tackling some of American's most challenging health problems. Stephen was selected for starting FocusFirst in 2004. The program has provided eye screenings for more than 40,000 preschoolers in low-income areas throughout Alabama. About 5,000 children have failed the vision screenings and been referred to follow-up care. Award manager Janice Ford Griffin says that Stephen's innovative work is having a major impact on the well-being of youngsters. Currently, he is director of the Center for Ethics and Social Responsibility at the University of Alabama.

Source: Associated Press

## **XXVI. SOME CLOSING OBSERVATIONS**

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### **PRAYER THAT WORKS AT OUR FIRM**

The following is a prayer that works in the workplace when difficult issues and problems have to be dealt with. I recommend it.

*Lord, forgive me for trying to put square pegs into round holes and help me to see my work as a calling from You, regardless of the type of work I am in. Help me to fulfill Your purpose for me here in my workplace. Amen.*

### **THE INCREASE IN PROFANITY ON TELEVISION SHOULD NOT BE PERMITTED**

In its latest ground-breaking study, the Parents Television Council has found that profanity on prime-time broadcast television not only has increased since 1998, but that harsher profanity has also become more common. More than a quarter of the expletives children hear unbleeped or partially-bleeped on broadcast television today are some form of the "f-word," the "s-word," or the "b-word." This study shows that after an expletive is

first used on television, usage of the word becomes commonplace in fairly short order. It appears that the broadcast networks then feel the need to up the ante with even more profanity. The result is that there has been a huge increase in the overall use of profanity on the public airwaves, and an escalation in the offensiveness of the words used. Most parents don't want the airwaves filled with filthy language during hours when children are most likely to be in the audience. But the networks don't appear to care and continue with programming that gets worse on a weekly basis.

On November 4<sup>th</sup>, the Supreme Court heard arguments in the so-called "fleeting" profanity case involving Fox, which will decide whether the Federal Communications Commission can fine broadcasters for airing the "f-word" and "s-word" in prime time. If the networks are successful in claiming a legal "right" to air expletives at any time of day, the FTC study shows that profanities will increase even more on broadcast television—even when millions of children are in the audience. In 1972, the late comedian George Carlin said in a comedy routine that there were "Seven Words You Can Never Say on Television." Today, six of those seven words have aired unedited on broadcast TV during prime-time viewing hours.

Parents and concerned citizens must speak out to their representatives in Congress and urge them to give the FCC the power to enforce broadcast decency laws. Until Congress acts, we will continue to see even more, and harsher, foul language on prime-time broadcast TV in the years to come. Please take the time to contact your House member and U.S. Senators and let them know that television broadcasting must be cleaned up.

Source: FTC News Release

#### **FAVORITE BIBLE VERSE**

The verse set out below came from Barbara Fowler, a retired school teacher from Montgomery, a strong Christian, who lives out her faith on a daily basis.

*If we confess our sins, he is faithful and just to forgive us our sins,*

*and to cleanse us from all unrighteousness.*

*1 John 1:9*

My cousin, G.B. Beasley, who was an outstanding football coach in North Alabama, and who later served as principal at Fort Payne High School, sent in his favorite verse.

*That if thou shalt confess with thy mouth the Lord Jesus, and shalt believe in thine heart that God hath raised him from the dead, thou shalt be saved. For with the heart man believeth unto righteousness; and with the mouth confession is made unto salvation.*

*Romans 10:9-10*

The following verse comes from Angela Talley, who serves as Mike Crow's legal secretary in our Personal Injury Section.

*The thief cometh not, but for to steal, and to kill, and to destroy: I am come so that they might have life and have it more abundantly.*

*John 10:10*

My longtime friend Ed Massey, a very good Mobile lawyer, sent in his favorite verse:

*Let not mercy and truth forsake you; Bind them around your neck, Write them on the tablet of your heart, And so find favor and high esteem In the sight of God and man.*

*Proverbs 3:3-4*

#### **PLAY TO WIN IS A WINNER**

Jerry Glover, whose son Chris is a lawyer in our firm, was the head football manager during his time at the University of Alabama and Coach Paul Bryant was his boss. Jerry has a great book on the market, *Play To Win*, which is his life story. It's a story that all folks who are searching for real meaning in their lives or who are struggling with tough problems should read. I recommend it.

## **XXVII. MY PARTING WORDS**

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As we approach the Christmas season, I can think of no better way to make ourselves ready and to put the season in the proper perspective than to emphasize the real Christmas story in family settings during the weeks leading up to Christmas Day. A few folks are prone to repeat—without really understanding its true meaning—that "Jesus is the reason for the season." As a matter of fact, there can be no truer statement. We always need Jesus, but the needs may be greater this year at Christmas than ever before. Our nation's economy is in shambles, folks are really hurting and Americans as a whole are greatly concerned. By putting our complete trust and dependence in our Lord and Savior we can handle whatever comes our way. A good way to spend the days of this month leading up to Christmas Day is to give honor to Jesus and continually praise His name. I am including for your convenience the real Christmas story.

#### **THE CHRISTMAS STORY LUKE 2:1-20**

*In those days Caesar Augustus issued a decree that a census should be taken of the entire Roman world. (This was the first census that took place while Quirinius was governor of Syria.) And everyone went to his own town to register. So Joseph also went up from the town of Nazareth in Galilee to Judea, to Bethlehem the town of David, because he belonged to the house and line of David. He went there to register with Mary, who was pledged to be married to him and was expecting a child. While they were there, the time came for the baby to be born, and she gave birth to her firstborn, a son. She wrapped him in cloths and placed him in a manger, because there was no room for them in the inn.*

*And there were shepherds living out in the fields nearby, keeping watch over their flocks at night. An angel of the Lord appeared to them, and the glory of the Lord shone around them, and they were terrified. But the angel said to them, "Do not be afraid. I bring you good news of great joy that will be for all the people. Today in the town of David a Savior has been born to you; he is Christ the Lord. This will be a sign to you: You will find a baby wrapped in cloths and lying in a manger." Suddenly a great company of the heavenly host appeared with the*

*angel, praising God and saying, "Glory to God in the highest, and on earth peace to men on whom his favor rests." When the angels had left them and gone into heaven, the shepherds said to one another, "Let's go to Bethlehem and see this thing that has happened, which the Lord has told us about."*

*So they hurried off and found Mary and Joseph, and the baby, who was lying in the manger. When they had seen him, they spread the word concerning what had been told them about this child, and all who heard it were*

*amazed at what the shepherds said to them. But Mary treasured up all these things and pondered them in her heart. The shepherds returned, glorifying and praising God for all the things they had heard and seen, which were just as they had been told.*

With all of the doom and gloom that folks are being hit with these days, it will be difficult to get through the holidays without the strong hand of Jesus Christ leading us. My prayer is for each of you and your families to have a joyous Christmas and a truly blessed New Year.

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