



THE
JERE BEASLEY REPORT FEBRUARY 2009

Beasley Allen

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I. CAPITOL OBSERVATIONS

THE OBAMA ADMINISTRATION

To be perfectly honest, I never thought I would see the day when a black man would be sworn in as President of the United States. January 20th was not only a historical first, but it was a great day for the people of the United States. The Constitutional guarantee of “Liberty and Justice for All” has finally become a reality for the American people. Anybody who witnessed the inaugural activities last month had to feel a renewed spirit of unity, something that has been sorely missing in this country for the last eight years. There is hope for both the present and the future and that is great news!

Unfortunately, President Obama has inherited a worse mess than even I thought possible. His Administration will not have any breathing room as it gets down to the job of running our government. The American people are ready for a change in direction and I believe that things will get better much sooner than anticipated. My prayer is that this man—who is highly capable and tremendously talented—will unite our people and lead our Nation back to the greatness we once enjoyed. With God’s hand involved, I am convinced that President Barack Obama will meet all challenges!

STATUS OF AWP APPEALS

In 2008, the State of Alabama completed its first two trials in the Average Wholesale Price litigation. The first trial, in February, ended with a \$215 million jury verdict against the pharmaceutical company AstraZeneca LP. In June, the second trial involved pharmaceutical giants Novartis and Glaxo-SmithKline. The consolidated trial concluded with jury verdicts against Novartis and GSK with damages awarded against both companies in the amount of \$33 million and \$81 million,

respectively.

Shortly after their trials, all three Defendants filed a motion with the trial court requesting a new trial. Montgomery County Circuit Court Judge Charles Price summarily denied all three motions. Subsequently, each company filed a notice of appeal to the Alabama Supreme Court.

While the AstraZeneca trial ended four months before the trial against Novartis and GSK, all three Defendants filed their appellate briefs together last month. The appeals are in the briefing phase before the Alabama Supreme Court. The State of Alabama is currently preparing its responsive brief. Hopefully, the Court will recognize the massive fraud that these Defendants committed and will rule in the State’s favor. Each case was very strong and the law is certainly on the State’s side.

LILLY SETTLES ZYPREXA SUIT FOR \$1.42 BILLION

Eli Lilly & Co. has entered a guilty plea to a charge that it illegally marketed the anti-psychotic drug Zyprexa for an unapproved use and will pay \$1.42 billion to settle civil suits and end the criminal investigation. The Indianapolis-based company said it will pay \$800 million to settle civil suits, including \$438 million to the federal government and \$362 million to states. In addition, the company will pay \$615 million to resolve the criminal probe, and plead guilty to a misdemeanor violation of the Food, Drug and Cosmetic Act for promoting Zyprexa as a dementia treatment. Even though it paid so much, the company did not acknowledge any wrongdoing in the civil cases.

The misdemeanor plea resolves charges related to Lilly’s marketing of Zyprexa between September 1999 and March 2001. It states that Lilly marketed the drug for the treatment of dementia, including Alzheimer’s-related dementia, even though the drug is not approved for that use. Zyprexa is approved to treat schizophrenia and bipolar disorder. While doctors are allowed to prescribe it for other uses,

Lilly is not allowed to market the drug for any other illnesses because it lacks Food and Drug Administration approval. The case began in 2004 and was led by the U.S. Attorney for the Eastern District of Pennsylvania and the Office of Consumer Litigation of the Department of Justice.

Laurie Magid, U.S. Attorney for the Eastern District of Pennsylvania, said the government hopes cases like this put an end to a pharmaceutical practice known as “off-label” marketing. “The company made hundreds of millions of dollars by trying to convince

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health care providers that Zyprexa was safe for unapproved uses,” Magid said, noting that they hold the drug maker “responsible for putting thousands and thousands of patients at risk.” She added that off-label marketing circumvents “the very process put in place to protect the public.” Lilly also said it agreed to resolve civil investigations brought by the Medicaid fraud-control units of the states involved in the settlement. The states were looking into rebate agreements between Lilly and pharmacy benefits managers related to Zyprexa and other drugs.

Zyprexa was approved in 1996 and has been Lilly’s top seller for years. It brought in \$3.5 billion in revenue through the first three quarters of 2008, or roughly \$1.5 billion more than the company’s second-best seller, the antidepressant Cymbalta. It should be noted that the company has spent roughly \$1.2 billion to resolve 32,000 civil lawsuits involving Zyprexa product liability. Currently, there are about 125 cases still pending. For instance, a group of insurance companies, unions and others have suits pending against Lilly alleging the company broke marketing laws and overcharged for the drug. In October, Lilly agreed to pay \$62 million to 32 states and the District of Columbia to resolve accusations it marketed Zyprexa for pediatric care, for use in high doses and for dementia.

Source: Associated Press

DRUG MAKER PAYS \$425 MILLION OVER OFF-LABEL MARKETING

Drug maker Cephalon has paid \$425 million to the states to settle allegations of off-label marketing of three pharmaceutical products. The settlement resolves allegations that Cephalon marketed drugs for uses not approved by the Federal Drug Administration. The drugs are Actiq, a highly addictive painkiller; the anti-seizure drug Gabitril; and the sleep-disorder drug Provigil. The national settlement relates to Cephalon’s dealings with state Medicaid programs.

The settlement reimburses the federal government and the participating states for excessive amounts paid by the Medicaid program alleged to have resulted from Cephalon’s off-label marketing campaign. While a physician is allowed to prescribe drugs for off-label uses, the law prohibits pharmaceutical manufacturers from marketing their products for off-label uses. Therefore, claims to the Medicaid programs as a result of the off-label marketing are improper.

Provigil is a drug used for improving wakefulness in patients with excessive sleepiness. Gabitril is an antiepilepsy drug. Actiq is intended to be used only in the care of cancer patients to treat pain. Cephalon has also entered into a Corporate Integrity Agreement with the Department of Health and Human Services, Office of the Inspector General, requiring strict scrutiny of its future marketing and sales practices.

In addition to the civil investigation and settlement, the U.S. Attorney for the Eastern District of Pennsylvania filed criminal charges against the company, alleging a violation of the Food, Drug and Cosmetic Act. In a plea agreement with the United States, Cephalon has agreed to pay \$50 million to resolve those charges. The national settlement resolves a number of state- and federally-filed whistleblower lawsuits. All 50 states, including Alabama, and the District of Columbia, have approved the agreement.

Source: Associated Press

NATIONAL DRUG COMPANY SETTLES IMPROPER DRUG PRICING ALLEGATIONS

On January 5th, Massachusetts Attorney General Martha Coakley’s office reached a settlement agreement with Teva Pharmaceutical USA, Inc. (Teva), a North Wales, Penn.-based pharmaceutical manufacturer to settle a False Claims Act case pending in United States District Court in Boston. Pursuant to the settlement, Teva has paid \$7 million to the Massachusetts Medicaid Program. Teva, and its wholly-owned subsidiary Ivax Corporation, are two of

13 drug manufacturers the Commonwealth sued in 2003 for falsely inflating the prices they reported to national pharmaceutical price reporting services.

The Commonwealth’s Medicaid program, MassHealth, like all other state Medicaid programs, and many private medical plans, uses prices reported by national price reporting services to determine what they will pay to pharmacies for ingredient costs in connection with prescription drugs. By reporting the false and inflated prices, the pharmaceutical companies caused the Medicaid program to pay inflated amounts for ingredient costs for prescriptions for Medicaid recipients. As we all know, Medicaid is a joint federal-state program which provides health-care services, including prescription drugs, to low income and disabled persons. That’s a group that should never be cheated and those who cheat them must be dealt with harshly.

The settlement resolves the Commonwealth’s claims related to the drugs that Teva and Ivax manufactured and sold during the years 1997 to 2003, including Acetaminophen with Codeine, Amiodarone, Carbamazepine, Cephalexin, Clonazepam, Naproxen, Sulfamethoxazole/Trimethoprim, Albuterol, Baclofen and Clozapine. Teva is a subsidiary of Teva Pharmaceutical Industries, Ltd, an Israeli firm that is the world’s largest generic drug manufacturer. At the time of the conduct alleged in the case, Ivax was an independent drug manufacturer headquartered in Miami, FL.

The Commonwealth had previously settled with five other Defendants: Dey, Inc.; Barr Laboratories, Inc.; Duramed Pharmaceuticals, Inc.; Ethex Corporation; and Roxane Laboratories, Inc. It recovered a total of \$7.475 million from those five companies. The case against the remaining six Defendants is still pending. Attorney General Coakley had this to say:

This is a national and industry-wide problem that the Commonwealth, other states and the federal government continue to address. Our office will continue

to work with the state's Medicaid program, other law enforcement agencies and the federal government to implement a pharmaceutical reimbursement program that is fair to all parties and ensures continued coverage for our citizens.

As we have detailed in prior issues of the Report, our firm currently has lawsuits pending against this same pharmaceutical pricing litigation on behalf of Alabama and six other states across the nation. We are pleased to see Teva agree to compensate Massachusetts for the injury suffered by its Medicaid program and commend Attorney General Coakley and her staff for securing this impressive settlement.

Source: Massachusetts Attorney General's Press Office

BIRMINGHAM HOSPICE COMPANY TO PAY \$24.7 MILLION MEDICARE FRAUD SETTLEMENT

SouthernCare Inc., the Birmingham-based hospice company, has agreed to pay the federal government \$24.7 million to settle Medicare fraud charges, according to a U.S. Department of Justice statement. The charges stem from two lawsuits that were filed in federal court in Birmingham by two former employees of SouthernCare, a private company with 95 offices in 15 states. The fraud involved SouthernCare enrolling ineligible patients for hospice care, which is restricted to patients who have less than six months to live.

Interestingly, the company is still eligible to participate in the Medicare and Medicaid programs. They reached a five-year corporate integrity agreement that hopefully will give the federal government greater oversight of SouthernCare's operations. This is just another example of a corporation cheating the government and taxpayers, who certainly don't need any more corporate cheating.

Source: Birmingham News

THE CAPITAL CITY NEWSPAPER SUPPORTS ALABAMA'S LITIGATION AGAINST THE DRUG COMPANIES

A great deal has been said by the tort reformers in Alabama in defense of the drug industry's bad conduct involving Medicaid fraud. Considering how short the Alabama Medicaid program is on operating funds, and how clear the liability is in these cases, it's impossible to understand how AVALA and similar groups can say the drug manufacturers should be able to commit fraud and get away with it. The following is a timely and well-written editorial that appeared in the Montgomery Independent last month that speaks to this subject.

Two days before Christmas Attorney General Troy King played Santa to Alabamians, announcing that the state has recovered nearly \$35 million from drug companies who cheated the state's Medicaid Program for 14 years from 1991-2005. The lawsuits filed by the state's attorneys alleged massive overcharging by drug manufacturers by misreporting and inflating prices for drugs for the poorest people in our state.

The State contends that more than 70 drug manufacturers falsely inflated the price of drugs and reported these fictitious prices to a reporting service called First Databank. The manufacturers submitted prices called Wholesale Acquisition Cost (WAC) and average wholesale prices (AWP) to these reporting services, knowing those prices bore no relation at all to real marketplace prices, but would be used by state Medicaid programs to reimburse them. King and the state settled with seven drug manufacturers last month for a total of \$34.75 million. Despite the federal share and the lawyer fees, the State of Alabama collected over \$10.3 million for use in the general fund from the recent settlements.

Other verdicts totaling over \$250 million in favor of the State have been reached in Montgomery Circuit Court against three other big drug companies. However, these funds have yet to be recovered because the manufacturers have appealed all three verdicts to the Alabama Supreme Court. Says King: "Alabamians need to know that my office will not sit idly by and allow companies such as these to steal from the less fortunate." The Attorney General says the lawsuits were not brought to make up for budget shortfalls, but "because it is the right moral and legal thing to do...to protect the scarce resources for Alabama's children, elderly and disabled." The Attorney General has now appropriately placed these multi-billion dollar corporations in the same barrel as those "food stamp cheaters" the state so vigorously prosecutes.

Attorney General King probably thinks he will be criticized for going after the big boys of corporate fleecing by hiring outside counsel to prosecute these cases against the drug makers. He won't from these pages, and can rest easy because most of us have seen how big corporations have trashed our economy, cheating millions of hard-working Americans out of their savings. King has hired two of the state's most eminent law firms, Beasley Allen of Montgomery, a Plaintiff's firm, and Hand Arendall of Mobile, primarily a Defense firm, to represent the state and they have done well. Even the usually dependable corporate defender, the Press-Register in Mobile, said King was right to sue the drug makers and right to hire the outside law firms to handle the cases.

Why hire private law firms, some might say, because the state has hundreds of lawyers on the payroll? There are several reasons. First, these state employee lawyers

presumably have jobs to perform on a daily basis. If they don't, they shouldn't be on the payroll. Second, they likely do not have the expertise to handle complicated trials. Third, the expense of litigating such high profile cases against corporate giants and their armies of lawyers is enormous.

The fact that Beasley Allen and Hand Arendall fronted the expenses, which totaled \$4 million, and charged a fee of only 14% (the usual being between 30-50), all on a contingency of winning, meant the state did not have to gamble a dime on the outcome. The nation's state Attorneys General, for their part, defend the practice of hiring outside counsel as the only way to finance these type lawsuits without asking the state's taxpayers either to risk losing a large amount of state resources in an unsuccessful suit or to reduce expenditures on other state priorities in order to provide additional funding to the Attorney General.

Oklahoma's Attorney General, Drew Edmondson, in an interview with The New York Times recently, argued that "We simply lack the resources in the Attorney General's offices to handle these type cases. Our adversaries would like us to ask the legislature to choose between this litigation and increased funding for education, for mental health or for corrections. This way the outside firms bear the risk." On February 9, 2009, the State of Alabama will try a jury case and assert the same fraudulent conduct against an additional drug manufacturer, Sandoz, Inc. (headquartered in Princeton, New Jersey). Trials against more than 60 remaining Defendants will be scheduled later.

The editorial appearing in the Mobile

Press Register that was mentioned in the Independent was right on point. Considering how ultra-conservative the Mobile paper is, this editorial was most significant. This is what the writer of that editorial had to say:

STATE TOOK DRUG COMPANIES TO WOODSHED FOR A REASON

ALABAMA OFFICIALS were right to sue major drug companies for charging Medicaid too much, and as a result the state has raked in millions of dollars. Alabama, working with two private law firms, including Hand Arendall of Mobile, filed more than 70 lawsuits beginning in 2005. The state accused prescription drug companies of charging Alabama's Medicaid program too much for drugs. So far, the state has won, and won, and won.

Earlier this month, Alabama officials settled ten lawsuits through negotiation. In February and June, juries found in favor of Alabama in three other cases, all of which are now being appealed to the Alabama Supreme Court. This month's settlements brought \$35 million into the state, though almost \$9 million will go to Hand Arendall and Beasley Allen of Montgomery for expenses and legal fees. More than \$10 million will go into the General Fund, and \$4.9 million will go to the state's Medicaid program. The federal Medicaid program will get more than \$10 million, and the Attorney General's office will get \$750,000.

Jury awards after trials have totaled more than \$400 million, though appeals may reduce or even erase that amount. And at least one more trial will take place. The state made a good move by bringing in the private law firms. Granted, each made millions that could have gone to

the state had the Attorney General's office handled the cases. But the state might have spent as much or more building up the Attorney General's office to provide the type of legal work necessary to fight these lawsuits.

In addition, the private firms covered the expenses. For the ten cases settled last week, the expenses were nearly \$4 million, which the state didn't have to pay out. It's a shame the state had to sue the pharmaceutical companies. But having done so, it's nice that Alabama is on the winning side.

*Mobile Press Register
December 30, 2008*

EIGHT PERSONS KILLED IN LOUISIANA HELICOPTER CRASH

A helicopter crashed in a southern Louisiana marsh resulting in eight people being killed. They were bound for an offshore oil platform being killed. The helicopter, operated by PHI Inc., crashed on January 4th shortly after taking off. Two pilots and seven passengers were aboard when the helicopter went down in rural Terrebonne Parish, about 100 miles southwest of New Orleans. The passengers worked for two Shell Oil Co. contractors. The helicopter was enroute to the company's Gulf of Mexico platform. One of the passengers was injured, but survived and was in critical condition at press time.

Ted Lopatkiewicz, spokesman for the National Transportation Safety Board, says the helicopter is believed to have crashed about seven minutes after it took off at 3:02 p.m. EDT. According to reports, there were scattered clouds and visibility was ten miles at the time of the crash. A short time after the crash, the Air Force Rescue Coordination Center in Panama City, Florida, received an electronic distress signal from the helicopter with the aircraft's tail number and GPS coordinates. The Center contacted PHI, which confirmed

it couldn't locate the chopper.

The helicopter, a Sikorsky S-76C, would have had a voice recorder aboard and hopefully a flight data recorder. NTSB investigators and local authorities should be able to locate the recorder and other material from the crash. An NTSB investigator has gone to PHI's offices to go through maintenance and crew records. Lafayette-based PHI is a primary provider of helicopter services to oil and gas platforms off the coast of Louisiana. It also flies medical helicopters. Workers typically are flown to and from their worksites from coastal flight bases.

In June, a PHI Air Medical helicopter crashed in Texas, killing four people. The accident in the Sam Houston National Forest killed the pilot, paramedic, nurse and a patient who was being transported from Huntsville to Houston. That crew agreed to transport the patient after another helicopter company abandoned the mission, saying cloud cover was too low, making visibility poor in the early morning darkness. Our firm has already been hired by the family of one of the men who was killed in the crash and a wrongful death suit will be filed. We are currently discussing the potential representation with a second family.

Source: Associated Press

ALABAMA WINS A PRELIMINARY ROUND IN WATER CASE

The U.S. Supreme Court will let stand a lower court ruling that threatens Georgia's long-term water use plans for the Atlanta region, giving Alabama and Florida a pivotal victory in the states' long-running water wars. The court's decision raises fundamental questions about Georgia's rights to Lake Lanier, a huge federal reservoir outside Atlanta, that serves as the city's main water source. The ruling could also play a key role in deciding related water-rights disputes in lower courts.

The decision involves a 2003 water-sharing agreement with the Army Corps of Engineers that would have allowed Georgia to take far more water

from Lanier for its drinking supply over the coming decades. The agreement would have allowed Georgia's withdrawals to jump from about 13% of the lake's capacity to about 22%. Alabama and Florida contested the pact, arguing that larger withdrawals would cripple downstream flows into their states. The two states said the lake was initially built for hydropower and providing water to Georgia was not an authorized use.

While a federal district court ruled with Georgia, the U.S. Court of Appeals in Washington overturned that decision and invalidated the agreement. Georgia then appealed to the U.S. Supreme Court. Other states were watching the case closely because the legal questions involved could strongly influence several other pending cases. As you probably know, Alabama, Florida, and Georgia have been in a legal and political battle over water rights since the early 1990s. The fight intensified in the past year as extreme drought has gripped our region of the country. The Governors of the three states began new negotiations last year attempting to reach a settlement. But the talks failed, and it appears the courts will have to decide the issue.

Source: Associated Press

POLICE OFFICER DEATHS DROP IN 2008

Two law enforcement support groups reported recently that 140 officers nationwide died on the job last year. While that number is down 41 from a year ago, a reversal attributed to better training and tactics, these were still too many deaths. But the good news is that the trend is headed in the right direction. There were 41 gunfire deaths in 2008, compared to 68 in 2007. Texas led the nation with 14 police officers killed. There were four Alabama police officers killed in the line of duty last year. The report was released by the National Law Enforcement Officers Memorial Fund and Concerns of Police Survivors. The Memorial Fund's chairman said more than 70% of policemen use bullet-resistant vests, sig-

nificantly more than just half a decade ago. That's apparently paying off insofar as safety is concerned.

While the report is good news considering that the number of deaths is much less than in 2007, the number is still too high. Men and women in law enforcement put their lives on the line on a daily basis for all of us. Law enforcement officers deserve and are entitled to full support from the people they serve and that should result in better pay and benefits and the very best in training and equipment. Total support from elected officials at every level is badly needed. It's one thing for politicians to say they support law enforcement, but their words must be followed by positive action for them to have real meaning. Law enforcement needs must be a very high priority in budgets at the national and local levels, even in difficult economic times.

Source: Associated Press

II. RECENT SETTLEMENTS IN THE FIRM

ALABAMA ATTORNEY GENERAL ANNOUNCES \$26 MILLION IN AWP SETTLEMENTS

On December 23, 2008 Attorney General Troy King announced that the State of Alabama had reached \$26 million in new settlements in the Average Wholesale Price (AWP) litigation currently pending in the Circuit Court of Montgomery County, Alabama, before Circuit Judge Charles Price. Our firm, along with the Hand Arendall firm, is handling this litigation for the State and assisted the State in reaching these settlements. To date, Alabama has secured over \$35 million in settlements as a result of this litigation. But the settlements reached thus far have only disposed of seven of the 72 Defendants originally named in the complaint filed back in January 2005. For the most part, these seven defendants - Takeda, Ethex, Dey L.P., Bristol-Myers Squibb,

Amgen, Bayer Pharmaceuticals and Roxane Laboratories – are considered to be smaller damage Defendants, with more than of 60 Defendants with larger damages remaining in the overall litigation.

In the AWP litigation, more than 72 drug manufacturers falsely inflated the prices of drugs and reported these fictitious prices to a reporting service called First Data Bank during the period from January 1991 through the time of filing the lawsuit in January 2005. The drug manufacturers submitted prices called Wholesale Acquisition Cost (WAC) and AWP to these reporting services, knowing that those prices bore no relation at all to the real marketplace prices. The companies knew the State Medicaid Program would rely on the false prices in reimbursements to Alabama pharmacists. Alabama Medicaid, like most other states, reimburses pharmacies and doctors based on prices submitted by the manufacturers and published by First Data Bank.

In addition to the seven defendants settling in excess of \$35 million, the State has already tried three of the 72 defendants before juries and jury verdicts were awarded in all these cases totaling over \$274 million. AstraZeneca's verdict of \$215 million was reduced to \$160 million by Judge Price. The GlaxoSmithKline verdict was for \$81 million and Novartis Pharmaceuticals was \$33 million. These Defendants have all appealed to the Alabama Supreme Court and the parties are currently preparing legal briefs in those appeals.

Medicaid funds are designed to protect Alabama's children, elderly and disabled. Attorney General King was initially criticized by the tort reform forces in this state for filing these lawsuits against the pharmaceutical industry. But in response, the Attorney General stated:

"I made a pledge to place Alabama's interest first and to do the right thing no matter the political cost for doing so. Bringing these cases made good on that promise. Alabamians need to know, now more than ever, that

my office will not sit idly by and allow companies, such as these, to steal from the less fortunate. No one in this state or in the country deserves to be robbed of their financial well being, to be placed on a waiting list because we lack the resources to care for them, or suffer at the greed of those in the very business of caring for the suffering, especially in these already difficult times."

On the 9th of this month, we will try another jury case on behalf of the State of Alabama in the Circuit Court of Montgomery County, Alabama. We will assert the same type fraudulent conduct allegations against the drug company Sandoz, Inc. (headquartered in Princeton, New Jersey) that previous juries have heard. On June 22, 2009, Alabama will try another case against Abbott Laboratories, Inc., Forest Pharmaceuticals, Watson Pharmaceuticals, Inc., Watson Laboratories, and Forest Laboratories for the same type fraudulent conduct allegations. Trials against some 60 remaining Defendants will be scheduled for later dates.

ALFA FOUND GUILTY OF INSURANCE FRAUD

Back in January of 2005, our law firm tried a case in Escambia County, Alabama, for Willie Hudson and Betty Jo Phillips against Alfa Mutual Insurance Company. We were fortunate enough to receive a \$500,000 verdict for these Plaintiffs. The thrust of the fraud allegation was that Alfa denied a total loss fire claim on the home of Mr. Hudson, a fire that was believed to have been caused by lightning. Alfa took the position in this case that Mr. Hudson had misrepresented information on his application for the policy of insurance and used that so-called reason as a basis for denying the total fire loss claim. Alfa appealed the jury's decision and the case has been pending in the Alabama Supreme Court since January of 2005.

Some four years later, on January 9, 2009, the Alabama Supreme Court affirmed the Escambia County jury verdict of \$500,000. By law, verdicts

that are appealed and later affirmed by the Alabama Supreme Court are to receive 12% simple interest per year while the case is pending. Therefore, the Plaintiffs in this case, Willie Hudson and Betty Jo Phillips, will now receive over \$740,000 from Alfa.

Alfa's assertion concerned a petty crime conviction that occurred over 30 years ago against Mr. Hudson, a fact he disclosed to the agent, in response to the Alfa agents' inquiry – "Have you ever been arrested?"—on the homeowners policy application. The agent told Mr. Hudson that the arrest was "too long ago" and "did not matter." The agent then marked the application "no." There were approximately seven other errors contained on the application that Mr. Hudson was asked to sign.

Approximately a year after Mr. Hudson purchased the Alfa homeowners insurance policy, he experienced a total loss fire of his home, but Alfa denied his claim and accused its policyholder of lying on his application about his 30-year-old arrest. In April 2001, Alfa sued Mr. Hudson asking for the Court to declare that his policy be rescinded and that they, Alfa, be declared to have no obligation to pay any of the fire claim. In response, our law firm, on behalf of Mr. Hudson, filed a counterclaim alleging fraud against Alfa because its own agent had misrepresented the information on the Alfa application. Since November 2001, Mr. Hudson and his companion, Ms. Phillips, have been forced to live in a "converted barn" that was located next to the home that had burned in the fire.

During the three-day trial, several witnesses were called by the Plaintiff to testify that their Alfa agent had also failed to either ask the same "arrest" question on the application or that Alfa provided them coverage despite their own prior arrest, with two witnesses having convictions over 25 years old. As Mr. Hudson's lawyers, we were able to prove to the jury that Alfa had a flawed system of underwriting which allowed agents to abuse the application process with those same abuses subsequently used to deny large claims when

losses occurred. A jury deliberated approximately two hours before returning with the \$500,000 verdict. It took the Supreme Court much longer to come down with their decision. I might add that it was the correct result without any question.

While it's unfortunate that Mr. Hudson and Ms. Phillips had to wait almost eight years after experiencing a fire to the home, they finally received justice. Fortunately, they stayed the course—never gave up—and ultimately received the justice that was deserved. Hopefully, Alfa has learned its lesson from this case and changed its agents' sales practices regarding the application process.

INSURANCE FRAUD SETTLEMENT INVOLVING LIBERTY LIFE INSURANCE CO.

Our firm recently settled a case that arose out of fraud involving the sale of a life insurance policy. Our client, Annie Vickery, along with her late husband, had purchased a \$50,000 life insurance policy with Liberty Life Insurance Company in 1986. They continuously paid the premiums on the policy in order to keep it in force. Over the life of the policy, the couple eventually paid Liberty Life more in monthly premiums than the face value of the policy.

About 20 years after purchasing the policy, the insurance company began sending the couple notices stating that their premiums were not high enough to sustain the benefit and that the policy would be cancelled if they did not pay the higher amount. However, these notices were contrary to the previous written agreement that outlined a much lower set monthly premium. Despite numerous efforts by the couple to get the issues resolved and the policy kept in force, the insurance company eventually cancelled the policy in January of 2006. That happened just a few months before our client's husband died—an event that would have required the company to pay the policy's face value.

After extensive discovery and several

rounds of settlement negotiations, our firm was able to secure a good settlement for our client before the case went to trial. Mrs. Vickery can now concentrate on moving forward with her life and have a little more peace of mind in knowing that some good did come from the premiums that she and her late husband had paid for so many years. Bill Robertson from our firm, along with William Holmes of the Greensboro firm of Seale, Holmes & Ryan, LLC, represented Mrs. Vickery and did a very good job for her. We were pleased to have been able to settle the case in a satisfactory manner for our client.

III. THE COAL ASH RETENTION POND LITIGATION

FIRM FILES CLASS ACTION LAWSUIT IN TENNESSEE DISASTER

Our firm has filed a class action lawsuit on behalf of property owners damaged by the Tennessee Valley Authority (TVA) spill in December at the Kingston Fossil Plant located 40 miles west of Knoxville, Tennessee. The plant released over a billion gallons of toxin-laden sludge into a rural neighborhood when a waste storage pond retaining wall failed. The suit was filed in federal court against the TVA, the nation's largest public utility, over what appears to be the most significant environmental disaster since the Exxon Valdez oil spill.

On December 22nd, an earthen dike at a coal-fired electric plant failed, releasing thousands of pounds of ash and other plant byproducts, flooding more than 300 acres in East Tennessee. The plant produced more than 2.2 million pounds of toxic materials each year. It is estimated that more than a billion gallons of coal fly ash was spilled. This is one of the largest spills of its kind in the United States, and presents an environmental disaster.

Initially, authorities from the plant denied that the spill was toxic, despite the fact that coal ash resulting from this type of energy production contains such metals as arsenic, lead, barium, chromium and manganese. These types of heavy metals have been shown to cause cancer, liver damage, and neurological complications, according to news reports.

Our firm will be working with Gary Davis and Mary Parker, two very good lawyers in Tennessee, each of whom has environmental experience. Our firm has its own Environmental department to handle cases such as the one arising from this disaster. We have handled previous environmental claims including a \$700 million settlement with Monsanto/Solutia in Anniston, Alabama, over PCB contamination. This was the largest environmental settlement in American history. More recently, the firm obtained a \$20.7 million verdict against manufacturers of carbon black for nearby property owners, in Columbus, Georgia, a verdict that was upheld by the United States Supreme Court.

It was reported that the Kingston Fossil Plant supplies electricity for 670,000 households, using 14,000 tons of coal per day. When the earthen dike broke, sludge covered 300 acres and knocked a nearby home off its foundation. Rhon Jones, David Byrne, and I, along with the Tennessee lawyers, will be working on this most important case.

THE COAL ASH RETENTION PONDS PRESENT A MOST SERIOUS PROBLEM

As folks are beginning to learn, coal-fired power plants produce coal ash and other toxic waste byproducts. The material is usually stored on site in retention ponds or dams. A failure in the retaining wall, or an overflow, can result in an environmental disaster contaminating surrounding waterways, soil, and wildlife, and endangering human health and life. There is an ongoing debate about how coal ash is stored and regulated. Currently, the U.S.

Environmental Protection Agency does not regulate these types of retention ponds or the materials contained in them. Surprisingly, it appears that the EPA does not consider the coal ash to be hazardous material.

There is a great deal of debate over whether state regulations are sufficient for these retention ponds, as evidenced by this most recent disaster in Tennessee. It is absolutely incredible that there is no real oversight for the storage and safe disposal of this toxic waste. We have found that most of these retention ponds are not lined or reinforced. As a result, it's inevitable that potentially hazardous material will leak out. It's quite evident these retention ponds are not a long-term solution. It's only a matter of time before the next disaster happens. These facilities are everywhere. Communities are living under a cloud, uncertain of their safety. Contact Rhon Jones at 800-898-2034 for more information on this matter.

ASH SPILL WARNING SIGNS IGNORED

According to a former federal regulator, TVA utility ignored two small leaks that could have provided a warning years before the coal ash pond collapsed. Jack Spadaro, a retired mining engineer who investigated a 1972 coal waste dam break that killed 125 people in West Virginia, says that states have done a poor job monitoring huge ponds of coal ash. You may be surprised to learn that these ponds aren't regulated by the federal government.

Tennessee uses solid waste landfill regulations for ash ponds, even though the substance in them—a mix of water and fly ash, a byproduct of coal-fired power plants—behaves more like a liquid when it spills. Spadaro, who contends the ponds should be regulated like dams, says: "State regulation has failed obviously. I think there needs to be federal regulation of the fly ash and the construction of these reservoirs."

The federal Environmental Protection Agency doesn't regulate the utility ponds because it doesn't consider the

coal ash hazardous material, although it can contain trace amounts of heavy metals. Two federal agencies that oversee mining keep an eye on similar waste at coal mines, but don't regulate coal-burning power plants. At the Kingston plant, two small leaks in 2003 and 2006 caught the attention of Tennessee's Department of Environment and Conservation, which asked TVA to provide additional details on the water going into the ponds. However, the state didn't require a new storage system.

TVA said the piles of ash were as tall as 60 feet above the water and the ponds contained more than 145 million gallons of water and towered more than 700 feet high on the banks of the Emory River. TVA applied for a landfill permit in the late 1990s when it decided it needed a new system to handle the ash piling up at the Kingston plant. TVA had to repair the dike in 2003 after the ash started to leak out. The leak wasn't big, but it was enough to lead TVA to consider disposing of the ash in a dry form, according to Tennessee officials. The utility eventually decided to continue using the pond and repairs were made apparently based on several recommendations from an independent engineering consultant.

According to a 2008 inspection report, TVA stopped dredging operations in a main pond after the 2003 leak, but continued using a smaller temporary pond while repairs were made. TVA resumed dredging in 2006, only to find ash seeping out of the dike just nine months later. TVA installed a system to relieve pressure on the walls, but according to reports, it was typical to see small areas of water seeping out of the ponds because of the drains TVA installed.

The state regulators in Tennessee were focused on the effect on the environment, and nothing in TVA's latest inspection reports in May and October indicated that there was a structural problem with the retention ponds. But Spadaro, who spent nearly 30 years with the federal government as a mining regulator and instructor, says

TVA's last inspection report indicated the agency was "irresponsible" for failing to see these previous failures as an indication of a serious stability problem.

Spadaro, who also directed the National Mine Health and Safety Administration's training academy, said that rather than continuing to operate the pond, TVA should have drained it and rebuilt the dam. According to news accounts, Tennessee is now planning stronger oversight of such ponds. Other states where TVA has ash ponds or landfills, including Kentucky and my State of Alabama, say they perform regular inspections at these sites. Knoxville-based TVA supplies electricity to Tennessee, Mississippi, Alabama, Kentucky, Georgia, North Carolina and Virginia.

Source: *Associated Press*

ALABAMA HAS COAL ASH PONDS IN NINE LOCATIONS

The problems concerning the coal ash spill in Tennessee have caused people in a number of states to be greatly concerned. Millions of tons of toxic coal ash are piling up in power plant ponds in 32 states, a situation the government has long recognized as a risk to human health and the environment but has done nothing about. An Associated Press analysis of the most recent Energy Department data found that 156 coal-fired power plants store ash in surface ponds similar to one that ruptured last month in Tennessee.

Records indicate that states storing the most coal ash in ponds are Indiana, Ohio, Kentucky, Georgia and Alabama. The man-made lagoons hold a mixture of the noncombustible ingredients of coal and the ash trapped by equipment designed to reduce air pollution from the power plants. Over the years, the volume of waste has grown as demand for electricity increased and the federal government clamped down on emissions from power plants.

Alabama citizens have every reason to be concerned. Utilities operate coal ash retention ponds at nine locations in

Alabama. Alabama Power Co. has retention ponds at its six coal-fired steam plants stretching from Gadsden to the Mobile area. The Tennessee Valley Authority has ponds at its two coal-fired plants in north Alabama. The ninth location is operated by PowerSouth Energy Cooperative at its Lowman Power Plant in Leroy in southwest Alabama.

The Alabama Department of Environmental Management reports that the nine locations are the only ones in Alabama. ADEM inspects discharges from the ponds that flow into Alabama waters and an agency spokesperson says it has requirements to make sure the ponds have adequate capacity to receive large amounts of rain without overflowing. The Department says it does that by regulating the amount of space between the top of the pond's contents and the top of the retaining walls.

Coal ash results from burning coal in the power plants. Water is used to capture small particles of ash to keep it from going up smoke stacks. Then the watery mix is stored in ponds. The ash is periodically dredged from the ponds and used to make concrete or to build roadbeds. The Tennessee disaster will require states to make sure these regulatory efforts are effective.

Source: *Associated Press*

JUDGE APPROVED GAMBRILLS COAL ASH SETTLEMENT

A Baltimore judge has given his approval to a \$54 million settlement between residents of Gambrills and a subsidiary of Constellation Energy. The residents claimed in a lawsuit last year that Constellation Power Source Generation contaminated their water supply by dumping coal ash near their homes for more than ten years. The company deposited millions of tons of ash from two of its Anne Arundel County power plants into two Gambrills quarries from 1995 until last year. Last year, Constellation paid a \$1 million fine as part of a consent decree with the Maryland Department of the Environment.

Constellation dumped tons of its fly ash, the by-product of coal combustion at power plants, into two former gravel mines in Gambrills as a way to dispose of the material and reclaim land. But the liners failed several years ago, and dozens of wells around the pits were found to have high levels of metals that could cause cancer and other health problems. Some wells have elevated levels of arsenic. The power company's coal fly ash left many wells undrinkable.

The settlement creates a \$10 million compensation fund for the 84 affected properties and will pay for property damage or physical harm caused by the fly ash pollution. Residents have 120 days to file claims to receive compensation. The settlement also provides public water connection to 79 properties, which Constellation said would be done by 2010.

Constellation also must perform \$10 million in environmental repairs at the dump site, though the power company has been required to do so under a Maryland Department of the Environment order. In that case, Constellation and the mining company had to pay \$1 million. Constellation also must stop dumping fly ash at the site, though the company halted dumping in 2007. No new fly ash dump sites are allowed in Anne Arundel pursuant to a new county law passed this year.

Source: *Associated Press*

OBAMA EPA WILL INVESTIGATE COAL ASH SITES

It was good to learn that the Obama Administration has started to assess the hundreds of coal ash disposal sites at power plants across the country. Lisa Jackson, President Obama's pick to run the Environmental Protection Agency, said the agency will also reconsider federal regulation. As pointed out, coal ash ponds storing waste created by burning coal are not subject to federal regulations.

The pledge was made last month during Ms. Jackson's confirmation hearing before a Senate panel. In 2000,

the EPA recommended setting a national standard for the hundreds of coal ash disposal sites nationwide. But the EPA never acted on that recommendation during the Bush Administration.

Source: *Associated Press*

IV. THE PONZI- SCHEME SCANDALS

OUR FIRM IS REVIEWING FRAUD CLAIMS AGAINST TREMONT INVESTMENTS

Lawyers in our firm are currently reviewing Tremont Investments claims on behalf of investors. These cases involve securities fraud and will likely include as Defendants the following companies: Tremont Group Holdings, Inc.; Tremont Partners, Inc.; Rye Investment Management; Oppenheimer Acquisition Corporation; Oppenheimer Funds; Inc.; Massachusetts Mutual Life Insurance Company; and KPMG, LLP. Our initial investment reveals that Tremont unlawfully and deceptively failed in its oversight of clients' investments and that Tremont passed most of these duties on to Bernard Madoff of Madoff Investment Securities, Inc., who used clients' capital in a massive Ponzi scheme. As all Americans now know, the Madoff scandal resulted in more than \$50 billion in client losses to date. It's being called the largest investment scandal in United States history.

Tremont and the other companies failed to perform proper due diligence and failed to exercise due care in managing client investments and specifically concealed from investors the fact that Tremont was not actively overseeing and safeguarding client investments. Clients invested more than \$3 billion with or through Tremont's Rye Investment Management Funds, paying substantial investment advisor fees to Tremont in connection with the investments. The fees were intended to assure that Tremont would select suitable investment managers, diversify

clients' investment portfolios, follow a professional investment strategy and continually monitor clients' investments to avoid frauds and any unnecessary investment risks. But instead the investments were given to Madoff. If you need additional information on this subject contact Dee Miles, Jay Aughtman, or Scarlett Tuley in our firm at 800-898-2034.

MADOFF SCANDAL TO COST INSURERS \$1.8 BILLION

There has been a great deal written about the Madoff scandal that has hurt a tremendous number of persons. While the maximum potential exposed insurance limits resulting from the alleged Ponzi scheme run by Bernard Madoff, with lots of help from others, are estimated to be above \$6 billion, the range of direct insured losses will be a far smaller number, most likely somewhere between \$760 million and \$3.8 billion. The best estimate is said to be \$1.8 billion. That is according to an analysis by global reinsurance intermediary, Aon Benfield. The total losses from the Madoff Ponzi scheme are estimated to be over \$50 billion.

Source: *Insurance Journal*

PENNSYLVANIA MAN CHARGED IN \$50 MILLION PONZI SCHEME

The federal government says an investment manager from Broomall, Pennsylvania, ran a Ponzi scheme that swindled an estimated \$50 million from as many as 80 investors. Joseph S. Forte was given the money to invest between 1995 and 2008, according to the Securities and Exchange Commission. Through his firm, Joseph Forte LP, he either lost it playing the market or didn't invest it at all, authorities said. Meanwhile, Forte was telling his investors that he was making huge profits. His portfolio in September reported a value of more than \$150 million, but its trading account contained less than \$147,000, according to the SEC complaint that was filed on January 7th of this year.

The investors thought their money was going into a commodity futures pool that traded in securities futures contracts, including S&P 500 stock index futures. The SEC said Forte admitted falsifying investment returns from the beginning. Many of the alleged victims of the scheme were Forte's friends and acquaintances, according to Daniel M. Hawke, director of the SEC's Philadelphia Regional Office. Hawke observed:

Using other people's money, Forte promised and reported outrageous returns over more than a ten-year period, and because of his relationships with investors was able to lull them into trusting him with their funds.

U.S. District Judge Paul S. Diamond issued an emergency order freezing Forte's assets and requiring him to turn over pertinent financial documents. According to the SEC, the investigation is continuing. The Commodity Futures Trading Commission, named the Plaintiff in a related civil complaint, said Forte did not deposit any money into the trading account from October 2002 to February 2007. I find that many people really don't understand Ponzi schemes. Stephen J. Obie, acting enforcement director of the federal oversight agency, wrote:

Ponzi schemers succeed by creating an illusion of profitability through lies and deceit. We are committed to rooting out miscreants who, like Forte, destroy the lives of innocent victims and, ultimately, undermine the confidence of investors everywhere.

The commission wants Forte to pay fines and full restitution and seeks to have him permanently banned from commodities trading. The news of the case is just the latest investor fraud to come to light since Bernard Madoff's \$50 billion Ponzi scheme made the headlines.

Source: *Associated Press*

FLORIDA MEN CHARGED IN \$1 BILLION VIATICAL PONZI SCHEME

Ponzi schemes have been in the news lately primarily because of the Madoff scandal. Four mutual sales agents with Mutual Benefits Corp., a viatical and life settlement company, have been indicted in Florida for their alleged involvement in another Ponzi scheme that officials say raised more than \$1.25 billion from more than 30,000 investors before being shut down in May 2004. The indictment charges the Defendants with fraud.

The indictment was announced by Eric I. Bustillo, acting U.S. Attorney for the Southern District of Florida, and Jonathan I. Solomon, special agent for the Federal Bureau of Investigation. According to the 25-count indictment, the Defendants' fraud caused more than 28,000 victims to lose approximately \$837 million. Many of these victims lost their investments for retirement, education and medical expenses, while the Defendants made millions of dollars and, in some cases, lived extravagant lifestyles that included million dollar homes, expensive cars, horse farms and international travel.

According to the indictment, MBC sold viatical and life settlement investments through an international network of sales agents. A viatical or life settlement is an investment in which an investor purchases the right to receive the benefit on a terminally ill or elderly person's life insurance policy. An investor in a viatical or life settlement realizes a profit if, when the insured dies and the policy matures, the death benefit paid is more than the price paid for the policy and the expenses needed to keep the policy active. The longer an insured lives, the more expensive it becomes to maintain the investment because more premium payments must be made to prevent the policy from lapsing and becoming worthless.

The indictment alleges that MBC's sales agents and marketing materials falsely promised investors "safe" investments in "secure" life insurance policies. Instead, MBC's viatical and life

settlement were investments that had many undisclosed risks to investors. MBC is accused of engaging in wide-scale fraud by improperly acquiring policies that could not be bought and sold, pressuring doctors to rubber-stamp false life expectancy figures, and mismanaging premium funds in an unsustainable Ponzi scheme.

According to the indictment, one of the Defendants, the principal executive in charge of most major decisions made at MBC, was a convicted felon. He had been convicted in a federal court of defrauding investors in the past. His controlling role at MBC was hidden from investors. To carry out this scheme, doctors were hired who could be pressured to adopt false life expectancies, allowing MBC to buy low-value policies and immediately resell those policies to investors at a higher price by claiming that the insureds covered by the policies were near death.

Two of the Defendants are lawyers who allegedly assisted MBC with the marketing of its fraudulent investment by meeting with investors in his Fort Lauderdale law offices and encouraging them to purchase MBC investments. One of the lawyers was MBC's premium trustee, who held millions of dollars of investor money in accounts under his control. Instead of protecting the money entrusted to him, the indictment alleges that the lawyer used money collected from more recent investors to pay premium obligations on older policies as part of a Ponzi scheme.

Source: The United States Attorney's Office, Southern District of Florida

V. LEGISLATIVE HAPPENINGS

THE START OF THE REGULAR SESSION

Since this issue went to the printer before the regular session started on February 3rd, I won't be able to write on

how things went at the outset. But I can venture a guess. Veteran legislative watchers have predicted that this session will be one of the most difficult in recent memory. There will be a tremendous number of very tough issues to be dealt with and most of them will be money-related. There will be some extremely difficult and politically sensitive matters that the Legislators won't be able to put off to be dealt with in future sessions. Hopefully, all of the partisan politics that we have seen in recent sessions will be put aside so that the interests of the people of Alabama can be better served. Frankly, I don't believe the voters are in the mood for a replay of the discord evidenced in previous legislative sessions. This time there must be cooperation between Governor Riley and his folks and the Legislative leadership. There must also be more than token cooperation between Democrats and Republicans in the Legislative process.

STATE SHORTFALL MAY HIT ONE BILLION DOLLARS

Two leading Alabama legislators believe next year's state education budget could be as much as one billion dollars short because of the ailing economy. Rep. Richard Lindsey and state Senator Hank Sanders, who chair the House and Senate committees overseeing the education budget, told the capital press corps that they don't know exactly where cuts will be made. It will be impossible to cut a billion dollars out of a budget without hurting Alabama citizens. The 2009-10 budget will take effect on October 1, 2009. Budget hearings started on January 12th. Individual departments will make their budget requests. There were reports on the conditions of the Education Trust Fund and the General Fund, which pays for most government costs other than schools, and they weren't good. The Department of Finance and the Legislative Fiscal Office, a nonpartisan agency that handles budget issues, painted a dismal picture about the state's revenue situation.

Source: Associated Press

ALABAMA STATE BAR OFFERS ASSISTANCE

The Alabama State Bar will provide some tremendous help to the Alabama Legislature during the Regular Session. The bar created a "Panel of Neutrals" to serve as a resource for all Legislators. The panel will consist of two former Governors, Albert Brewer and John Patterson, Former Federal Magistrate Judge Delores Boyd; two former members of Congress, Jack Edwards and Ronnie Flippo; Butch Ellis, a lawyer and former member of the state Senate; and former Mayor Scotty McCallum. The project was announced by State Bar President Mark White. Mark White should be commended for coming up with this concept. It will be good for Alabama.

The sole motivation for putting this group together was to provide a service to the Legislature. While we recognize the political nature of the legislative process, this gift should help the men and women who represent our state. This group of distinguished and extremely talented individuals should be of great help to the Legislators who in my opinion will take advantage of this assembly of experience and talent from the Bar.

LEGISLATION AIMS TO LIMIT SPENDING IN JUDICIAL RACES

A bill will be considered by the Alabama Legislature in the regular session that if passed, will limit contributions to candidates in Alabama judicial races. The bill, pre-filed by state Rep. Chris England, D-Tuscaloosa, will be considered in the regular session that started this month. The proposed legislation comes after last year's tremendously expensive race for the single state Supreme Court seat on the ballot. Republican Greg Shaw defeated Democrat Deborah Bell Paseur in a close race where the candidates spent at least \$4 million. But that amount—even though large—doesn't include amounts spent by political parties and out-of-state shadow groups.

Rep. England's bill would limit contributions in court races from individuals or political action committees to \$500

per candidate. England, the son of former Supreme Court Justice John England, introduced similar legislation in the last regular session. That bill was approved by the House Constitution and Elections Committee, but died without coming up for a vote in the full House.

Language in the proposed legislation says the large amount of money in judicial races creates “the potential for corruption and, as important, the appearance of corruption.” It has been reported that the American Bar Association has been critical of the spending in judicial races in the state. Mark White, president of the Alabama Bar Association, says that the motivation behind this legislation is “absolutely correct.” Mark told the *Associated Press* that the real problem candidates had during the last election was “the amount of money and the tactics used by third parties.” He is absolutely correct in that assessment.

Tommy Wells, who is the current president of the American Bar Association and a very good Defense lawyer from Birmingham, wrote an excellent op-ed piece recently that appeared in the *Birmingham News* on the need for reforming the way judges are elected in Alabama. Incidentally, the *News* doesn’t believe the England bill goes far enough even though it believes it’s a step in the right direction. Here’s what that paper had to say in a recent editorial:

For starters, why set limits only on judicial races? If limits are good enough for candidates running for judge, they are good enough for candidates running for Governor, or state senator, or Attorney General, or any other elected office. England’s limit of \$500 is a little low in this day and time when campaigns rely on expensive ad buys. Federal spending limits—for example, \$2,300 for individuals to give candidates each election—seem more reasonable.

Force all groups trying to influence an election or referendum to

report spending. The Shaw-Paseur contest was filled with attacks and counterattacks, some of them fueled (and funded) by groups that are not required to report who gives them money. At least one group, the conservative, Virginia-based Center for Individual Freedom, dumped more than \$1 million into ads supporting Shaw and attacking Paseur. Voters deserve to know who was behind those ads.

Ban money transfers. Another problem not limited to judicial races is the legal money laundering through PACs and political parties that hides from the public the true sources of campaign contributions. Every election cycle, millions of dollars from corporations, unions, other special-interest groups and individuals with deep pockets flow through PACs to make sure their source can’t be traced.

Allowing that much unregulated money into the political process only invites corruption. If voters can trace the source of every dollar spent on candidates’ campaigns, they at least know who is backing them and can make better-informed choices. And when things turn ugly the way they did in this year’s Supreme Court race, voters will know exactly whom to blame.

Hopefully, the England Bill will be made stronger and passed. If that happens, our judiciary will be the better for it and that will be good for all Alabamians. I urge the legislators to pass this important legislation.

Source: *Associated Press*

ISSUES TO WATCH IN ALL STATE LEGISLATIVE BODIES THIS YEAR

The Democrats now enjoy a more than 850-seat edge around the country in state legislative bodies. But their reward will be severe budget shortfalls with some states facing shortfalls

running into the billions of dollars. The cash crunch will rival the one states had to deal with earlier this decade. In fact, from all projections this year’s problems will likely surpass it. Nick Johnson, director of the State Fiscal Project at the Center on Budget and Policy Priorities, made this observation: “People said that the last fiscal crisis was the worst in 50 years. Now, here we are again.”

It certainly appears that money—or the lack of it—will govern almost every issue that state legislators take up this year. The economic recession will shape many policy and regulatory debates and dictate results. Legislators will have some very difficult decisions to make and nothing will come easy. Every state is facing a critically short money supply and sacrifices will be required.

The biggest uncertainty for the states this year is Washington and how the Obama Administration and Congress will deal with the states on funding issues. If Congress includes significant aid to the states in the economic stimulus package proposed by President Obama, it would change budget calculations in state capitals overnight. Regardless of which state we might mention, including my State of Alabama, the lack of money to fund essential programs will be the overriding problem. Josh Goodman of *Governing* believes the following issues will have to be dealt with by all state legislative bodies:

- **Balancing the Budget:** As states get to writing their budgets for the year, many of them also will have to go back and plug holes in last year’s budget. Some 41 states either have a mid-year shortfall for the 2009 fiscal year or will face a shortfall in 2010, according to the Center on Budget and Policy Priorities. Many states already were enduring fiscal problems last year. But others had managed to avoid that fate: states whose economies rely on agriculture or energy resources generally thrived. This year, however, the pain is much more widely shared. Accord-

ing to the Rockefeller Institute of Government, all three legs of the state-revenue stool—personal income taxes, sales taxes and corporate income taxes—are weak. Unless they can scrounge more money out of reserves, legislators will face many difficult choices between cutting spending and raising taxes.

- **Education Budgets:** Higher education is usually the first line-item states cut when they hit budget trouble. K-12 education is always the top priority as it should be. Colleges and universities can raise tuition rates when state support declines. K-12 programs don't have that luxury. This year, however, education budgets at all levels will suffer greatly.
- **Transportation:** The federal government almost certainly will spend billions of dollars on state highway and bridge projects this year. States face long-term problems when it comes to financing transportation projects and more federal aid is essential.

States from coast to coast are rethinking the way they pay for transportation projects. Some of the ideas on the table include tolling new and existing roads, leasing toll roads to private companies and shifting road maintenance to local governments. Meanwhile, some states are studying replacing the gas tax with mileage-based taxes. Whether the political dynamics have changed enough for states to raise gas taxes is uncertain. When gas prices were north of \$4 per gallon, such a move would have been politically suicidal. Now, with gas prices much lower, the idea is likely to receive a look in a few states.

- **Global Warming:** For the past eight years, a growing group of states has pushed for bolder action against global warming. More often than not, the federal government pushed back. Now, with a more sympathetic Administration in Washington, the states will be left with a new challenge: finding their role on climate

change as the feds begin to act. States have set targets for reducing greenhouse-gas emissions, formed interstate partnerships to cap emissions from power plants, and have pledged, pending federal permission, to regulate automobile emissions.

- **Social Safety Net:** The strength of the social safety net that states provide for the poor is about to get its biggest test in at least a generation. Already, it's clear that there are a couple of holes that need patching. One of them is unemployment benefits. In as many as 19 states, the funds that pay for unemployment benefits have been pushed to the brink of insolvency. Some states likely will ask the federal government for emergency loans, but they also may be forced to raise taxes or make benefits less generous.

At the same time, a lot of states are looking at overhauling their welfare programs. In 2006, Congress tightened some requirements under Temporary Assistance for Needy Families. Now, the implications of those rules are becoming clear. About half of the states probably won't meet federal standards for shifting welfare recipients into work. One trend is for states to provide financial help to the newly employed, to ease the transition from welfare to work. The reality in 2009, however, is that work won't be easy to find. Some economists expect the national unemployment rate to reach 9%. As always, demand for social-safety net services will increase at precisely the moment that states struggle most to pay for them.

- **Corrections:** Budget crises have a way of making the politically impossible suddenly possible. Case in point: criminal sentencing. Corrections was becoming a strain on state budgets even before the economy went in the trash. Over the past few decades, prison populations have grown at a far faster rate than the population as a whole.

Gradually, some states have been stressing alternatives to incarceration, in the belief that rehabilitation programs would prove more effective. But the tenor lately is different: now, it's about cutting costs, and quickly. Lawmakers in Pennsylvania and Kentucky expanded early release programs last year. Even in conservative South Carolina, the corrections chief is asking legislators to approve early releases.

- **Energy:** Even as gas prices went down sharply, interest in state energy policy remained as high as ever. Policy makers see alternative fuels and clean energy not only as a means to heal the environment but also to heal their economies. A lot of the discussion in legislatures will be about more traditional energy sources. While the federal government must take the lead in this critical area, the states must play major roles.
- **Controlling Health Costs:** Health care costs have been growing faster than the rate of inflation for years. Today, Medicaid represents more than 20% of state budgets—and it's still growing. So as the debate over expanding health coverage moves to Washington, the big health care issue in state capitals will be finding ways to spend less.
- **Redistricting:** State legislatures won't begin redrawing electoral maps until 2011—after the next census and another round of legislative elections. But now is when the posturing begins. A number of states this year will be debating ways to take partisanship out of the process and make elections more competitive.
- **Gun Control:** The U.S. Supreme Court's landmark decision on gun control last June established a private right to own firearms. Whether *District of Columbia v. Heller* will be a boon for the National Rifle Association isn't clear yet because few places have gun laws as restrictive as the one that the court struck down in that case. But the Heller case did

leave some room for persons and groups who want to have reasonable controls over guns and to present their case before state legislatures. There can be gun control without taking away the constitutional right of citizens to own guns.

I'm sure that there are many more issues to be dealt with but the above list will keep the lawmakers in all states very busy and will be a "heavy load!" Some states will deal with their problems better than others. It will be a real test for the politicians.

Source: Josh Goodman, Governing

VI. COURT WATCH

RECENT DECISION MAKES CIVIL RICO ACTIONS VIABLE TOOL TO COMBAT FRAUD

The United States Supreme Court recently declared that if a person's business or property is injured as a result of misrepresentations made using the mail or telephone, that person may have a civil RICO claim regardless of whether the fraudulent statements were made directly to the victim or whether the victim was the actual person relying on the statements. Justice Thomas handed down this landmark decision in June of 2008 in the case of *Bridge v. Phoenix Bond & Indemnity Company*.

The Racketeer Influenced and Corrupt Organizations Act or RICO was enacted by Congress in 1920 as a response to the then-growing influence of organized crime. Although RICO originally targeted the Mafia, it has expanded far beyond its original purpose and is frequently used by Plaintiffs who have suffered harm to their business or property as a result of fraud. The Court's decision in *Bridge*, by eliminating the requirement that the fraudulent statement be made directly to the victim, makes civil RICO actions a much more viable mechanism for compensating the victims of fraud.

There are many areas of litigation

already affected by the Supreme Court's decision in *Bridge*. In Michigan for example, six men, all employees or former employees of the same transport company, were injured on the job but were denied workers' compensation benefits. They alleged that their employer deliberately selected and paid unqualified doctors to give fraudulent medical opinions supporting the denial of their benefits. The workers brought a civil RICO claim. Under the old law, the fraudulent statement had to be made to the victim in order to recover under civil RICO.

In this instance, because the doctors' fraudulent statements that the workers were not injured were made to the transport company rather than the individual workers, the trial court dismissed the case, stating that under civil RICO, the fraudulent statements must have been made directly to the victims seeking recovery. However, following the *Bridge* decision, the Michigan court was required to reconsider the case because the workers did not have to prove that they personally relied on the false statement but only that the false and fraudulent statements damaged them.

A second example occurred in New York, where a federal court determined that the makers of the drug Zyprexa made fraudulent representations through the mail to doctors about the safety and effectiveness of the medication. Specifically, the drug company failed to warn doctors that ingesting Zyprexa increased the risk of weight gain and diabetes. The manufacturer also failed to disclose research studies showing that Zyprexa was no more effective than other similar, cheaper, and safer drugs. Doctors' prescribing Zyprexa relied on the drug company's false statements about Zyprexa's effectiveness and safety and widely prescribed the drug, causing the price of the drug to be elevated.

The elevation in price resulted in many patients having to pay much more than they otherwise would have for their medications. The New York trial court certified a class of third party payers based on the Supreme

Court's decision in *Bridge*. The trial court found that even though the fraudulent statements were made to doctors and not the patients, the people paying for the medications were injured as a result of the elevated price of the drug and therefore, the payers should be able to pursue a civil RICO claim against the manufacturer.

It appears that the Supreme Court's decision in *Bridge* will result in civil RICO claims being a much more effective tool to vindicate the rights of victims of fraud. That's good news for persons who become victims of corporate abuse and wrongdoing.

RECUSALS URGED IN CASES OF SUBSTANTIAL ELECTION CONTRIBUTIONS

In a West Virginia case (*Caperton v. Massey*), now before the U.S. Supreme Court, 27 former chief justices and justices of 19 state Supreme Courts have urged the High Court to rule that a judge must recuse himself or herself from a case in which a party has made a substantial financial contribution to the judge's election. The former justices explain in an amici brief filed in the *Caperton* case:

Substantial financial support of a judicial candidate—whether contributions to the judge's campaign committee or independent expenditures—can influence a judge's future decisions, both consciously and unconsciously. Amici believe that the only way to preserve a litigant's due process right to adjudication before an impartial judge is to require that a judge recuse from a case not only when the judge consciously perceives the judge's own partiality, but also when there exists a reasonable appearance of partiality or impropriety.

Texans for Public Justice (TPJ), an Austin-based government watchdog group, joined in a separate amici brief filed with the Supreme Court on January 6th by the Justice at Stake Campaign in Washington, D.C. Craig McDonald,

TPJ's director, says the Justice at Stake Campaign is a loose federation of organizations working for judicial selection reforms.

The High Court will hear arguments on March 3rd in the *Caperton* challenge, which arises out of the refusal of acting Chief Justice Brent Benjamin of the West Virginia Supreme Court of Appeals to step aside from a multimillion-dollar appeal involving his major campaign contributor. Don Blankenship, chairman and chief executive officer of Massey Energy Co., appealed a \$50 million jury award for tortious interference with existing contractual relations, fraudulent misrepresentation and fraudulent concealment in a suit against his company by Hugh M. Caperton of Harman Mining. With post-trial interest, the award grew to \$76 million.

Between the verdict and Blankenship's filing of the appeal in 2006, there was a hotly-contested battle for a seat on the state high court between incumbent Justice Warren McGraw and Brent Benjamin, who was a lawyer in private practice at the time. Blankenship reportedly made campaign expenditures of \$3 million in that race, the bulk of which went to a 527 organization, "And for the Sake of the Kids," working to defeat the incumbent, about \$517,000 of which was in direct support of Benjamin. The rest was used as these 527 groups always do. The \$3 million total reportedly was \$1 million more than the total amount spent by all of the candidate's other campaign supporters and three times the amount spent by Benjamin's own campaign committee. After the election, now Chief Justice Benjamin cast the deciding vote in a 3-2 ruling in favor of Blankenship's company.

In their amici brief, authored by Charles Wiggins of Wiggins & Masters in Bainbridge Island, Wash., the former justices argue that due process does not require a judge to recuse from any case in which a party gave financial support to the judge's election. But they draw a distinction when the support is very large and they contend:

Rather, amici submit that due

process is only triggered by substantial financial support for a judge's election. Amici do not believe it is necessary for the court to define specifically what constitutes substantial financial support. Suffice it to say that the massive financial support provided by respondent Blankenship to the election of Justice Benjamin triggers due process concerns under any reasonable definition of substantial financial support.

All 27 former justices, according to Wiggins, believe that Chief Justice Benjamin's participation in the coal company case appeal created an appearance of impropriety, and they would have recused themselves in similar circumstances. I believe the justices are correct and hopefully the justices on the High Court will feel the same way.

Source: *National Law Journal*

APPLESEED IS ON THE RIGHT SIDE IN THE SUPREME COURT CASE

Charging into the New Year with a renewed commitment to social justice, the non-profit corporation Appleseed, a group that works for the public interest, signed an amicus brief in the landmark U.S. Supreme Court case mentioned above. Appleseed got involved because of its concern about the state of judicial ethics. Justice at Stake asked Alabama Appleseed to enlist the support of other Centers. Viewing this case as an opportunity to improve judicial impartiality and ensure due process for litigants, the national office of Appleseed was soon onboard, joining Centers in Chicago, Massachusetts, and Washington.

Ten other amicus briefs in support of the petitioners were submitted by such institutions as the American Bar Association, the Brennan Center for Justice, and the National Association of Criminal Defense Lawyers, as well as the one filed by the former state chief justices. The court granted certiorari on November 14, 2008, and will hear oral argu-

ment on March 3rd. With fellow amici, Appleseed seeks to ensure equal access to justice—in this case, by insulating the bench from corruptive conflicts of interest. Appleseed Executive Director Betsy Cavendish, said in a statement:

Appleseed and our network of Centers seek to remove structural impediments to justice, and getting involved in this case fits in perfectly with that mission. Quoted in the New York Times, Keith R. Fisher, a lawyer for the ABA, likewise noted Caperton's bearing on preserving judicial integrity. If the public believes that judges can be bought, that is really poisonous and undermines public confidence in an independent judiciary.

The Supreme Court is being asked in the *Caperton* case to provide clearer guidance for states to follow when enacting their own laws. You can visit Appleseed's website (www.appleseed-network.org) for updates on the case's progress. It's good to see Appleseed taking a strong stand in this area of concern. You can view Appleseed's brief on the Website.

Source: *Association Press*

VICTIMS OF CORPORATE FRAUD GET A BREAK

For the first time, a federal appeals court has applied a broad definition of "crime victim" to financial fraud in the case of 112 borrowers in a Florida mortgage loan scam. This ruling will entitle far more people to seek restitution for economic crimes. The 11th U.S. Circuit Court of Appeals precedent, holding that borrowers are protected victims under the Crime Victims Rights Act, is most significant. This comes at a time when financial crimes dominate the front pages. The result in this case will be important for any victim of financial crime, potentially including people victimized by money manager Bernie Madoff.

The Appeals Court rejected both the government and Defense argument

that only the bank could be considered the victim in the case. The majority of the Court held that the Crime Victims Rights Act defines victim as any “person directly or proximately harmed,” extending protection to borrowers, although they were not included in the criminal charge or identified in the plea deal. The scheme was in closing costs from each mortgage contract among a developer, borrowers and the bank. Without disclosing the extra charge to the bank, the borrowers were charged two points, rather than one, to close deals. The proceeds were split between the two Defendants.

As many as 700 borrowers became investors, signing up for construction mortgages with the intent to flip the finished homes for quick sales. Many of them lost money when the real estate market blew up and some homes were not built. They were solicited from investment clubs, individually and over the Internet. The investors in this case were represented by Alan E. Tannenbaum of Levin Tannenbaum in Sarasota, Florida and former federal judge Paul G. Cassell of the University of Utah S.J. Quinney College of Law. They did a very good job for their clients.

Source: *National Law Journal*

COURT UPHOLDS \$7 MILLION AWARD AGAINST FLORIDA DAY CARE FIRM

An Appellate Court in Florida has upheld a \$7 million judgment against a Tallahassee day care center for the parents of a seven-month-old baby found with bites, bruises and swelling across her body. The Court of Appeal for the First District ruled on behalf of the family of the young girl, who was apparently mistreated over a period of time by an older toddler at the center. State investigators reported a “gross lack of supervision” and said the Cradle to Crayons Child Care Center was “inadequate to accommodate the safety needs” of the children.

Source: *Associated Press*

LITIGATION AGAINST FINANCIAL SERVICES COMPANIES

The number of federal class action suits filed last year grew 19%, according to a recent report. There were 210 suits filed nationwide, compared to 176 in 2007 and 116 in 2006, according to an annual survey conducted by the Stanford Law School Securities Class Action Clearinghouse in cooperation with Cornerstone Research. Of the federal actions filed last year, 97 were associated with the subprime-liquidity crisis. This “wave” of litigation against financial services companies is certainly justified.

The study noted that nearly a third of all S&P-500 financial firms had been sued, a total of 103 suits, up from 52—9.4% of the total—in 2007. Overall, 9.2% of companies on the S&P index were sued, compared to only 5% in 2007, the study says. Federal courts in the 2nd U.S. Circuit Court of Appeals led the nation in lawsuits against all defendants and also recorded largest percentage increase. There were 92 filings in the circuit, up 58.6% from the 58 of 2007 and 112% from the ten-year average of 42. Eighty-five of the Circuit cases were in the Southern District. The study only included complaints filed before December 15th, but 16 additional cases were filed nationwide between then and the end of the year. Eight were in the Southern District, of which six were related to the \$50 billion Bernard Madoff Ponzi scheme.

According to the data, securities class action filings saw a “marked increase” because of subprime and liquidity crisis litigation starting at the end of 2007. Subprime and liquidity crisis-related suits first appeared in 2007, with 39 filings. There were 76 such filings in 2008. An additional 21 suits were filed over auction-rate securities, the first time such actions have been broken out by the survey. The first wave of lawsuits arose out of the mortgage and subprime liquidity crisis. Then a second wave involved auction-rate securities cases.

Source: *New York Law Journal*

VII. THE NATIONAL SCENE

NEWS YOU MIGHT NOT ALWAYS GET FROM THE NATIONAL MEDIA

Lots of folks believe that the national media are totally controlled by special interests and that the news reporting is always slanted. Some believe the media owners favor Democrats while others believe they favor Republicans. Regardless of which group is right, I do know that we don't always get the whole story from the media in reporting the news. Incidentally, I don't include most talk show hosts as legitimate members of the media. These folks always have an agenda. Looking back over the past year, I wonder if you have read or heard any of the following:

- 60% of U. S. corporations pay no income tax at all.
- The four Wal-Mart heirs have a net worth in excess of \$62 billion.
- 60% of the processed foods in U. S. supermarkets are genetically engineered—but have not been proven to be safe.
- 61% of the subprime mortgage borrowers were actually eligible for regular loans with much lower interest rates and other fees and charges.
- A farm-raised salmon doesn't get pink -it is grey—until the fish is fed a chemical pigment.
- Sea levels will rise dramatically—putting major U. S. cities like New York City partially underwater—if scientists are correct on global warming forecasts.
- Halliburton built at U.S. taxpayers' expense 14 permanent military bases in Iraq.
- The U.S. has built one of the most expensive embassies in the world in Iraq.

You might want to Google these

items to see how many times a story appeared in the national media that mentioned anything at all about these matters of interest and of concern. I'm reasonably sure many of you could add much more to the list.

FDA SCIENTISTS REPORT CORRUPTION TO PRESIDENT OBAMA

A group of federal scientists complained to the Obama transition team last month about widespread managerial misconduct in a division of the Food and Drug Administration. The letter was on the FDA's Center for Devices and Radiological Health letterhead. The Center is responsible for medical devices ranging from stents and breast implants to MRIs and other imaging machinery. A copy of the letter, with the names of the scientists redacted, was provided to *The Associated Press* by a Congressional official. The letter read:

The purpose of this letter is to inform you that the scientific review process for medical devices at the FDA has been corrupted and distorted by current FDA managers, thereby placing the American people at risk. Managers with incompatible, discordant and irrelevant scientific and clinical expertise in devices...have ignored serious safety and effectiveness concerns of FDA experts. Managers have ordered, intimidated and coerced FDA experts to modify scientific evaluations, conclusions and recommendations in violation of the laws, rules and regulations, and to accept clinical and technical data that is not scientifically valid. Currently, there is an atmosphere at FDA in which the honest employee fears the dishonest employee, and not the other way around.

The concerns of the nine scientists who wrote to the transition team echo some of the complaints from the FDA's drug review division a few years ago during the safety debacle involving the

painkiller Vioxx. Thus far, the FDA has refused to publicly respond to the letter, but did say the agency was working to address the concerns. In their letter the FDA insiders alleged that agency managers use intimidation to squelch scientific debate, leading to the approval of medical devices whose effectiveness is questionable and which may not be entirely safe.

This letter must be taken seriously by the Obama Administration. It's a shocking indictment of an agency whose duty is to protect the American people on safety and health issues. Senior Democratic and Republican lawmakers are urging Obama to appoint a commissioner for the agency who will shake up the FDA and restore the confidence of its working-level scientists and medical experts. These FDA scientists had previously taken their concerns to Congress and found support from lawmakers in the House. In the letter the group singled out mammography computer-aided detection devices as an example of a technology that should not have gone forward. The devices were supposed to improve breast cancer detection, but instead studies showed they were associated with false alarms that led to unnecessary breast biopsies.

It was pointed out in the letter that since 2006 FDA experts have recommended five times against approving the devices without better clinical evidence. In March of last year, a panel of outside advisers supported some of the concerns of the FDA's in-house scientists. Nonetheless, FDA managers overruled the objections and ordered approval. The letter said that top FDA managers committed the most outrageous misconduct by ordering, coercing and intimidating FDA physicians and scientists to recommend approval, and then retaliating when the physicians and scientists refused to go along. The Obama Administration and Congress can't ignore these warnings from inside the FDA. The agency must be repaired and made capable of doing its mandated duty to the public.

Source: Associated Press

WORTHY GOALS FOR THE NEW PRESIDENT

All environmental groups believe that they will have a real friend in the new president and I sincerely believe they will. Things have been tough for the past eight years and a change in direction on their issues is badly needed. The National Wildlife Federation had some good advice for President Obama as he entered his presidency. The group believes the Obama Administration can lead America toward achieving the following goals:

- Move to 100% of electricity used in the U.S. coming from clean sources such as wind and solar.
- Cut our country's dependence on oil in half.
- Create 5 million new clean energy jobs for American citizens.
- Reduce global warming pollution by at least 80%.

Each of these goals is worthy of serious consideration by the Obama White House. If the Administration can achieve all of them during the next four years, it will be a tremendous accomplishment. I may be overly optimistic, but I believe these goals will be reached and hopefully during this President's first term.

Source: National Wildlife Federal

THE NEW FCC CHAIRMAN

President Obama has selected Julius Ganchowski to serve as chairman of the Federal Communications Commission. He was Obama's technology adviser and a former general counsel at the FCC. It appears that the President's nominee is well qualified for this job. He has supported greater diversity in media ownership and also expansion of broadband access throughout the country, both of which are good things. Hopefully the new chairman will see that the laws against sexual content, nudity, profanity and obscenity on the public airways when children are likely

to be watching will be enforced. As the father of three Mr. Genachowski will see the need to protect children and make the entertainment industry more responsible. The nominee will have to be confirmed by the U. S. Senate. If confirmed he will be the nation's top official in charge of media issues.

THE BAILOUT REPORT CARD LEAVES ROOM FOR IMPROVEMENT

While it's far too early to give a final grade on the massive bailouts that have been approved by Congress, it is worth taking a look at what has happened thus far. I suppose an interim report card—even though there is little information available—is in order. The federal government has already shelled out hundreds of billions in an effort to restart our Nation's failed financial system. Over a period of 16 weeks, our government had pledged, loaned or invested close to \$10 trillion trying to fix ailing banks, jump-start financial markets and keep our domestic automakers from bankruptcy. But the final cost should not be that high since most of the assets the government is buying or insuring have some value. But, it's very clear that we haven't even come close to fixing the problems. In fact, the bailout may have made them worse in some instances, but the jury is still out on that front.

The best thing that can be said is that our financial system hasn't totally collapsed and that is good. But equally clear is the fact that the system hasn't been repaired. The bailout of the automobile manufacturers is too new to really assess and it's obvious that more financial assistance will have to go in that direction based on early reports. The new Administration has been left with problems more massive than those faced by any previous Administration in my lifetime. The grades for the main two prongs of the bailout for the banks can be put at:

- The Troubled Asset Relief Program (TARP) should get a "D" at this juncture. Hopefully some good has come from the \$350 billion doled out.

- The Homeowners aspect should be given an "F" since there has been no real direct help to homeowners that I can tell.

Hopefully, these grades will improve significantly once the Obama Administration and the new Congress have the opportunity to correct the weaknesses of the bailouts. Congress has given President Obama authority to use the remainder of the funds and it appears he has a good plan. I certainly have more confidence in the Obama Administration's ability to get the job done.

TAKING CARE OF THEIR CORPORATE BUDDIES TO THE END

The Bush Administration, assisted by Congress, used a double standard in the doling out of the huge amount of "bailout bucks" in its last stand for Bush's corporate buddies. Interestingly, the bailout battle developed into one more about **class** than **economics**. President Bush and Congress pretty well gave the Wall Street bankers—our Nation's financial royalty—a blank check with no real safeguards or controls to protect the American taxpayers when they authorized what was then said to be \$700 billion in bailout bucks. During the limited debate on that bailout package nothing was said by anybody in power about the banking royalty flying into Washington in their corporate jets with hands out, but with no real explanation as to what had caused their fiscal problems or how the money they wanted would be spent.

Royalty are always treated differently in our Nation's Capitol and certainly not like any working class folks who may happen to show up there. Consider that the bailout bucks were authorized when Treasury Secretary Paulson—on orders from the Bush White House—showed up with a three-page document demanding Congressional approval for a bailout of Wall Street. Congress in almost record time caved in to the demands of the elite of the banking royalty and pretty much

turned over the keys to the federal treasury without any real protest. Where was a well-defined justification for receiving the money and a plan on how it would be spent? What assurances were given to Congress by the banking royalty for what they would do with the money?

But when the American automakers showed up asking for help it was an entirely different story. To put it mildly—all Hell broke loose in Congress and politicians lined up to get in their licks. While the CEOs of GM—Ford—and Chrysler didn't do much to help their cause, it was a totally different game for them on the Hill. Some say it was because the automakers are really a blue collar outfit—even if their big bosses act like royalty—and as a result they are a much easier target. The attacks on the workers who make the cars started quickly and the attackers never let up. The Unions were sort of like the Christians in the Lions' Den and the attacks on their members were more than brutal. During the attacks, the attackers didn't always let the truth stand in their way and a great deal of misinformation was fed to the media. While everyone concedes there must be real changes in the way the American automakers operate, the Unions are not the real problem. If you check the record you will find that comparing the U.S. companies to their foreign competitors can be very misleading unless you dig deeper into the differences that really matter.

For example, when the attackers tossed out the \$73 per hour pay scale for Union autoworkers they didn't tell us that the number included all of the health-care and pension costs of retirees, all of the training costs, and all of the payroll taxes that the companies have to pay. I understand the base wage of a veteran UAW member is about \$29 per hour. When you consider that a non-union worker in Toyota's Kentucky plant is \$26 per hour, you will see that the pay scales are actually pretty close. The most recently-negotiated Union contracts will lower a domestic company's total labor cost to a level on par with what most Japanese companies

are currently paying non-Union American autoworkers. Some experts say the ever-rising cost of healthcare is the American automakers' big problem. Before the GOP Senators condemn America's Union workers, you might want to find out how healthcare costs are handled in Japan, Korea and in the European countries that are building their automobile plants on U.S. soil. National healthcare—financed by these foreign governments and their taxpayers—are very much a fact of life in those countries.

Regardless of how you might feel about Unions, it's abundantly clear there was a definite double standard in play when the corporate bailouts involving the financial royalty and the automakers were being discussed in Congress. In my opinion, the banking royalty and the automobile manufacturers along with their Union workers should have been treated the same. Neither should be given a pass if their prior conduct had contributed to the economic mess these industries find themselves in.

MORE ON THE CHEMICAL EXPOSURE LAWSUIT AGAINST KBR

Sixteen Indiana National Guard soldiers have now sued defense contractor KBR Inc., saying its employees knowingly allowed them to be exposed to a toxic chemical in Iraq five years ago. We wrote about this problem in last month's issue. The federal suit filed in U.S. District Court alleges the soldiers were exposed to a carcinogen while protecting an Iraqi water pumping plant shortly after the U.S. invasion in 2003. The complaint alleges that Houston-based KBR knew at least as early as May 2003 that the plant was contaminated with sodium dichromate, a known carcinogen, but concealed the danger from civilian workers and 139 soldiers from the Indiana Guard's 1st Battalion, 152nd Infantry.

The chemical, used to remove pipe corrosion, is especially dangerous because it contains hexavalent chromium, which is known to cause

birth defects and cancer, particularly lung cancer, the lawsuit said. The cancer can take years to develop. Some of the soldiers who served at the site now have respiratory system tumors associated with hexavalent chromium exposure. The lawsuit seeks reimbursement for medical costs, monitoring for cancer and other health problems and unspecified monetary damages. The lawsuit alleges that KBR knew of the contamination and played down the danger.

When Guard members and American civilians working at the plant began to have nosebleeds, KBR managers told them they were simply caused by the dry desert air, the lawsuit says. But nosebleeds are a symptom of acute hexavalent chromium poisoning, it says. The work wasn't shut down until September 2003, after KBR managers in full environmental protective gear inspected the plant while workers and Guard members remained unprotected. The plant later reopened, but workers then wore protective gear.

The extent of the company's knowledge of the hazard didn't become evident until Congressional hearings this June. KBR used to be a subsidiary of Halliburton Co., the oilfield services conglomerate whose chief executive from 1995 to 2000 was none other than former Vice-President Dick Cheney. KBR became a separate public company last year. Michael P. Doyle of Houston is the lead lawyer in the case.

Source: Associated Press

DRUG MAKERS RECOGNIZE A NEED TO POLISH THEIR TARNISHED IMAGE

The pharmaceutical industry, having to deal for the first time with very low prestige with the public and the prospect of more-aggressive government oversight, is trying hard to improve its image and to avoid increased regulation. Conceding that it has long been viewed as Republican-dominated, the industry's lobbying arm will spend tens of millions of dollars on an advertising blitz promoting Obama-style health coverage for every Ameri-

can. The first spot—sponsored by the drug lobby, consumer and labor groups, and health providers—was unveiled on January 8th. The industry bosses know that the American people back the President on this issue. They want to appear to be on his side in an effort to get points with the public.

On the regulatory front—and that's where the real concern by the drug industry lies—there have been some most interesting developments. Last month, the drug companies began to voluntarily submit to a number of marketing restrictions, a more designed attempt to preempt stricter regulations that lawmakers in both parties are pursuing. The single one thing the industry fears and is working hard to avoid is effective government regulation. Billy Tauzin, the former Republican Congressman who now runs the Pharmaceutical Research and Manufacturers of America (PhRMA), the drug industry trade association, says he is for moving away from the industry's "slash-and-burn kind of policy" in response to previous regulatory and legislative efforts. If Tauzin felt compelled to make that statement, his bosses must really be concerned.

What really concerns the drug industry is the arrival of a Democratic president who, in tandem with a Democratic-controlled Congress, is expected to add muscle to the Food and Drug Administration and press for an overhaul of the U.S. health system. The drug companies, utilizing their political muscle over the year, have literally run the show in Washington. The fallout is that the companies have operated under extremely weak regulation by the FDA.

Some meaningful legislation giving the FDA badly-needed powers so that the agency can do its job may have a chance to pass this year. A number of Senators and House members, as well as consumer watchdog groups, are dedicated to the task of strengthening the FDA, which will include both funding for staffing, and added authority.

Source: Washington Post

LEO BURNETT CO. TO PAY \$15.5 MILLION FOR OVERBILLING ARMY

Leo Burnett Co. has agreed to pay \$15.5 million to settle a federal whistleblower lawsuit that involved over-billing the U.S. Army in its “Army of One” recruiting campaign. The Chicago-based advertising agency was accused of submitting false bills in a 2004 lawsuit filed by two former executives. The company will pay \$12.1 million in cash under the settlement to the government and credit the Army for \$3.4 million in unbilled services. This is just another example of how important whistleblower lawsuits are for U.S. taxpayers. It’s also an example of Corporate America cheating these same taxpayers who foot the bill for government programs and services.

Source: *Associated Press*

DELL SETTLES FINANCING LAWSUIT WITH STATES

Dell Inc. has agreed to a settlement with states that claimed the computer company made misleading financing and service offers to PC buyers. Dell will pay \$3.85 million to at least 45 states, including Alabama, in the settlement. Dell was contacted by the Attorneys General from Connecticut and Washington, representing a larger group of states, last year. Connecticut Attorney General Richard Blumenthal said in a statement:

Consumers who sought and believed they received zero-percent financing were then ambushed by high interest rates and fees. Many consumers faced unacceptable obstacles obtaining warranty service on their Dell computers and others said they never received promised rebates.

Under the terms of the settlement, Dell agreed to give customers more information up front about what kind of financing they qualify for and allow them to cancel orders once they review final credit terms. Dell also agreed to mail rebate payments and

fulfill warranty obligations within a reasonable amount of time. The settlement requires Dell to tell customers whether they must troubleshoot problems by phone before qualifying for in-person technical support at home. Dell must also justify claims about its customer service. For example, if it wants to use the term “award-winning,” it must have won a customer service award in the past 18 months.

People who bought a computer or service on or after April 1, 2005, and had a problem with a financing offer, rebate or service can file a claim within 90 days with their state Attorney General. In Alabama the claims will be filed with Attorney General Troy King’s office. Alabamians who believe they are owed money by Dell must file a claim no later than April 13th. Claim forms will be available at www.ago.alabama.gov or you can call the Office of Consumer Affairs in the Attorney General’s office at 1-800-392-5658 for more information.

Source: *Associated Press*

JUDGE REJECTS CLASS ACTION OVER TRAILER FUMES

A federal judge has refused to certify a class action on behalf of thousands of Gulf Coast hurricane victims who were exposed to potentially hazardous Formaldehyde fumes while living in government-issued trailers after hurricanes Katrina and Rita. In the ruling, U.S. District Judge Kurt Engelhardt decided that the lawsuits against the federal government and several trailer manufacturers can’t be handled as a collective class action because the facts of each Plaintiff’s claim are unique and thus must be examined individually. As we have reported, Formaldehyde is a preservative that can cause breathing problems and is classified as a carcinogen. This court ruling simply means each case will be tried separately with awards in each case if the Plaintiff is successful based on the facts of that case.

Source: *Associated Press*

VIII. THE CORPORATE WORLD

THE CORPORATE CULTURE THAT ALMOST DESTROYED THE U.S. ECONOMY

The financial crisis that first affected Wall Street and then spread rapidly throughout the world is, in many ways, emblematic of the worst of the corporate-dominated political and economic system that has now been exposed. The barons of Wall Street—clearly the most elite of the banking royalty in the U.S.—had their way with very little government interference and their greed and arrogance almost destroyed our nation’s economy. There are several factors, fed by greed and ultimately corruption that caused this horrific mess.

- ***Deregulation and non-enforcement:*** Non-enforcement of rules against predatory lending helped the housing bubble balloon. While some regulators had sought to exert authority over financial derivatives, they were stopped by government—enabling the creation of the credit default swap market. Even Alan Greenspan concedes that that market—worth \$55 trillion in what is called notional value—imploded in significant part because it was not regulated.
- ***Short-term thinking:*** It was obvious to anyone who cared to look at historical trends that the United States was experiencing a housing bubble. Many in the financial sector seemed to have convinced themselves that there was no bubble. But others must have been more clear-eyed. In any case, all the Wall Street players had an incentive to not pay attention to the bubble. The bosses and lesser players were making stratospheric annual bonuses based on annual results. Even if they were certain the bubble would pop sometime in the future, they had every incentive to keep making money on the upside.

- *Financial:* Profits in the financial sector were more than 35% of overall U.S. corporate profits in each year from 2005 to 2007, according to data from the Bureau of Economic Analysis. Instead of serving the real economy, the financial sector was actually taking over the real economy. The tail was wagging the dog to put it in the common vernacular. It's not supposed to work that way.
- *Profit over social use:* The corporate-driven economy was being driven by what could make a profit, rather than what would serve a social purpose. Although Wall Street "hucksters" offered elaborate rationalizations for why exotic financial derivatives, private equity takeovers of firms, securitization and other so-called financial innovations helped improve economic efficiency, by and large these financial schemes served no socially useful purpose.
- *Externalized costs:* Worse, the financial schemes didn't just create money for Wall Street movers and shakers and their investors. They made money at the expense of others. The costs of these schemes were foisted onto workers who lost jobs at firms gutted by private equity operators, unpayable loans acquired by homeowners who bought into a bubble market, and now the public. Unconscionable lending terms became the norm for borrowers.

What is most revealing about the financial meltdown and economic crisis, however, is that it illustrates graphically that corporations—if left to their own worst instincts—will destroy themselves and the system that nurtures them. In addition to the financial sector, neither was the rest of the corporate sector on good behavior during 2008. They can't be allowed to escape justified scrutiny. If we haven't learned from what happened to our economy and why it happened, our Nation is likely doomed to a total collapse.

Source: *Multinational Monitor*

THE GLASS-STEAGALL ACT

It might be good to take a look at how the financial sector in our Nation got into the largest economic mess in history. Congress passed a law known as the Glass-Steagall Act of 1933, which was a part of President Roosevelt's New Deal initiatives, and a law badly needed at that time. The new law divided the banking industry into two separate groups: one being the investment banks that traded, that risked and borrowed against their own capital, speculated, and provided merger and acquisition as well as other services; and the other being the commercial banks which were supposed to be accepting deposits, providing secure savings accounts and making normal loans made by regular lenders.

To put it in terms that I can understand, the division was supposed to have the **risky** institutions in one group and the **less risky** institutions with government backing in the other group. As many of us know, the government—as a part of the New Deal—acting through the FDIC, provided insurance to make sure that the deposits in the commercial banks would be secure for the citizens who had them. As a result, the commercial banks operated with less risk and with a more transparent capital basis in their deposits.

As you may know the Act was repealed by Congress in 1999. As a result, the investment banks—the risky institutions in the financial arena—were then combined with the commercial banks that are backed by FDIC insurance and other protections. This has resulted in financial disaster for a tremendous number of American citizens. To make matters worse, insurance companies are now in the mix and are allowed to be merged with commercial banks. The lack of regulation and control by the federal government is a major factor in our economic meltdown in the U.S.

THE ROOT OF ALL EVIL

The lack of effective government

regulation, and in many cases no regulation at all, are clearly the root cause of much of the fraud and corruption that has been uncovered in Corporate America, especially in the financial sector. It may be going too far to label this failure to regulate as the root of all evil, but that failure has obviously resulted in a great deal of hurt and misery for many American citizens who became victims of corporate wrongdoing and abuse.

The Bush Administration has to take a great deal of the blame for the lack of regulation that has become commonplace in all too many industries in the United States. In fact, the Republican Party made non-regulation one of its campaign promises in almost every Congressional campaign. How many times have we heard that government is too big and needs to be downsized? When corporate bosses realized that their companies wouldn't be checked closely, some real bad stuff generally followed. We are now paying a very heavy price for the "sins" of the past in Corporate America and for the failure of government to do its job.

THE BAD GUYS MUST BE PUNISHED

Over the past few years we have seen first-hand how corrupt some of the big bosses in Corporate America have become. Many large companies such as Enron, American International Group Inc., Tyson Foods, HealthSouth and many others too numerous to list, have been run by bosses who had little regard for the law, their customers or clients, or even for their own shareholders. Many of these bosses have been the subject of criminal indictments and convictions and many more are currently under investigation. The events leading up to the bailout of the financial institutions have now been made public.

In my opinion, there are other investigations of a criminal nature that are certainly warranted. The recent scandal involving Bernard Madoff that cost investors over \$50 billion is just another example of how greed and

power can often lead to criminal intent with subsequent actions by persons in control of large companies. These corporate bosses get to the point in all too many cases while they really believe the corporate money and assets are theirs to do with as they please.

Corporate bosses who break the criminal laws should be treated like any other criminal and they definitely shouldn't receive special treatment. In fact I believe they should actually be held to a higher standard than the common criminal. I would like to know how many of our readers believe corporate criminals—like Maddoff—should be put under “house arrest” and not be jailed like other criminals.

CALIFORNIA JURY ORDERS PFIZER TO PAY \$38 MILLION FOR STEALING TRADE SECRETS

A California jury has ordered drug maker Pfizer Inc. to pay \$38 million to a Bay Area medical research non-profit for stealing trade secrets to develop a pain relief drug. The jury in Santa Clara County Superior Court reached the verdict in a 2004 lawsuit filed against Pfizer by the San Bruno-based non-profit Ischemia Research and Education Foundation. The lawsuit alleged that in 2002 Pfizer wanted to use the Foundation's database for clinical trials on Bextra, one of the drugs used to treat acute pain chiefly caused by arthritis. As we have reported in numerous issues, Bextra was eventually taken off the market because it posed a heart risk.

After the New York-based drug maker and the Foundation could not agree on terms for use of the database, the lawsuit alleged that Pfizer arranged a side deal with a lead statistician at the Foundation. This man provided the data without approval, according to the suit. The lawsuit also contended that Pfizer and the employee destroyed evidence when confronted about the data theft. The jury found that Pfizer and the statistician had acted with malice, which means the judge can now award punitive damages that by law could reach \$114 million.

As you know, Bextra was removed from the market in 2005 due to concerns that it increased the risk of heart attack and stroke. Pfizer settled class actions over Bextra and a related drug, Celebrex, for \$894 million in October. In this case, Pfizer could also face punitive damages that could increase the verdict to more than \$120 million. Post-trial motions were heard on January 16th by the trial judge. Pfizer said it plans to appeal.

Source: *Associated Press*

AIG BUYS \$16 BILLION OF COLLATERALIZED DEBT OBLIGATIONS

American International Group has purchased \$16 billion of complex financial instruments in an effort to reduce its exposure to insurance guarantees written against the instruments. The insurer bought investments known as collateralized debt obligations (CDOs), which are bonds backed by various slices of debt such as mortgage-backed securities.

AIG had written insurance-like contracts, called credit default swaps, to protect investors against default of the CDOs. By purchasing the CDOs, AIG was eliminating the need for insurance contracts against their default. This reduces AIG's risk of needing to make insurance payments. You will recall that AIG received \$150 billion in loans from the government to keep the company in business. AIG was in trouble—most of it self-inflicted—and the Bush White House came to its rescue.

Source: *Associated Press*

KENTUCKY BANK SUES MERRILL LYNCH FOR \$40 MILLION OVER INVESTMENT LOSSES

Kentucky's largest state-chartered bank has filed suit against Merrill Lynch for \$40 million over failed securities bought through the investment firm. Pikeville-based Community Trust Bank filed the suit in federal court on December 31st. Community Trust Bank claims it now holds \$9.9 million in worthless securities because of the deal. Community Trust says in the suit

that it bought the securities in January 2006 based on Merrill Lynch's assertion that the securities were “safe short-term investments.” The securities were linked to Fannie Mae, the mortgage giant that was taken over by the federal government and stopped paying dividends.

Source: *Associated Press*

SIEMENS PLEADS GUILTY TO BRIBERY-RELATED CHARGES

The German electronics firm Siemens AG and three of its subsidiaries have pleaded guilty to charges related to the U.S. Foreign Corrupt Practices Act (FCPA). The charges arose from a range of illegal activities, including attempted bribery of government officials worldwide, according to the U.S. Department of Justice and the Securities and Exchange Commission. Due to the charges resulting from an \$805.5 million bribery scheme in the United States, Siemens and the subsidiaries agreed to pay criminal fines totaling \$450 million, with the parent company paying \$448.5 million. In connection with the cases brought by the U.S. government agencies and the Munich Public Prosecutor's Office, Siemens AG will pay a combined total of more than \$1.6 billion in fines.

In connection with those charges, Siemens AG agreed to pay approximately \$569 million, including a corporate fine and disgorgement of profits totaling over a billion dollars in U.S. dollars. In October 2007, the Munich Public Prosecutor's Office announced a settlement with Siemens AG under which Siemens AG agreed to pay approximately \$287 million, including over \$300 million in a fine in disgorgement of profits. The October plea was related to bribery charges in Siemens' telecommunications group.

Source: *IDG News Service*

IX. CAMPAIGN FINANCE REFORM

NOTHING TO REPORT THIS MONTH

Thus far in 2009 there hasn't been anything of significance to report on the Campaign Finance Reform front. With so many serious problems facing our nation, President Obama and Congress have had their hands full trying to save our economy, deal with two wars on foreign soil and get all of the Obama appointments confirmed. However, Campaign Finance Reform must not be put on the shelf. There is a tremendous need for reform!

X. CONGRESSIONAL UPDATE

NEW CONGRESS SWORN IN

The new Congress was sworn in on January 6th and they had to hit the ground running. This Congress will face more serious problems than any group of lawmakers has faced in my lifetime. Many needed programs will suffer greatly by being delayed because of the monumental problems that must be addressed immediately so that our Nation's economy can be saved from total collapse. The American people have the ability and resolve necessary for them to make it through these trying times. But they expect the Obama Administration and Congress to do everything in their power to turn things around.

SUBSEQUENT REPORTS ON CONGRESSIONAL ACTIVITIES SHOULD BE GOOD

Since it will be virtually impossible to give a timely report on Congressional activities this month, I won't even try to do much on Congress in this issue. Hopefully, there will be lots of good

stuff to report in the March issue. In the meanwhile, continue to pray for the President, his Administration, all regulatory agency personnel, and all members of Congress.

XI. PRODUCT LIABILITY UPDATE

NHTSA ROOF CRUSH STANDARD DELAYED AGAIN

The Bush Administration told Congress that it wouldn't complete a rewrite of a 35-year-old regulation on vehicle roof strength requirements before leaving office. That came as no surprise. U.S. Transportation Secretary Mary Peters sent a letter to Congress saying that another deadline would be missed in issuing its update of the regulation. She said the government would need until April to complete its work. That means President-elect Barack Obama's Administration will make a final decision on the issue. This is a blessing. However, this could re-open the entire question and delay the much-needed revision for months or even years. This was the third delay since June, when Secretary Peters said at that time the rules would not be finalized until October, citing the need for additional "regulatory analysis." In October, she pushed the deadline back to December 15th. Then another delay was announced.

In October there was a split within the Bush Administration over the final regulation being written by NHTSA. Congress ordered NHTSA to rewrite the regulation in 2005 and gave it until July 1, 2008, to issue it. The Bush gang, which has been very weak on safety and health issues, was trying its best to weaken the standards on roof crush. Fortunately, there are enough folks in NHTSA who wouldn't cave in on the issue. The requirements should be strengthened and hopefully that will now happen.

Source: *Associated Press*

PAIN PUMP MANUFACTURER HAS POST-SALE DUTY TO WARN

A federal court in Virginia has ruled that a pain pump manufacturer has a post-sale duty to warn under state law. In that case, the Plaintiff alleged he suffered injuries caused by the use of a "pain pump" to deliver pain medications following surgery. The Plaintiff sued the Defendants—who designed, manufactured and sold the device—for allegedly failing to provide adequate warnings that the pump was not safe to use. The Defendants contended that the claim was based on a post-sale duty to warn, and therefore should be dismissed because this cause of action is not recognized in Virginia.

But the U.S. District Court determined that the Virginia Supreme Court "would allow a cause of action based on a negligent breach of a post-sale duty to warn to proceed." The Court wrote in its order

[I]f a reasonable person in the seller's position would provide a warning after the time of sale, a product seller or distributor who fails to provide such a warning may be liable for any resulting harm. To satisfy this reasonable person test, the Plaintiff must prove: (1) that the seller knew or should have known of the substantial risk posed by the product, (2) that those who should have been warned were identifiable and were ignorant of the risk, (3) that the seller could have effectively warned the consumer and that the consumer could have acted on that warning, and (4) that the risk of harm outweighed the cost incurred from providing a warning.

Source: *Lawyers USA*

FAMILY SUES DISNEY OVER BASSINET DEATH

The family of a child who died last year in a Winnie the Pooh bassinet has filed suit against the Walt Disney Co. It's alleged that the company allowed sales of the bassinets despite a flawed

design that had been linked to another baby's death in 2007. As we reported in a prior issue, the bassinet had a drop-down side for easy access. But the design created a gap where babies could slide through and hang to death. The baby was only six months old when she was strangled on August 21, 2008. Shortly after her death, the U.S. Consumer Product Safety Commission directed retailers to stop selling the bassinets, which were manufactured by Simplicity, Inc. Walt Disney's consumer products division licensed its Winnie the Pooh name and image to Simplicity.

The suit, filed in California state court in Los Angeles, involves a common practice in the nursery products industry. Companies that license their names and characters to manufacturers of products can be responsible when those products turn out to be defective. Under California law a licensor can be held legally responsible for a defective product. Charles Kelly, a San Francisco lawyer, represents the baby's parents.

Walt Disney Co. takes the position that it is not responsible and says "the functional and structural design as well as the manufacture and sale of Simplicity bassinets were solely the responsibility of Simplicity, Inc." The manufacturer was responsible to see that the product was in compliance with "legal and industry safety standards," according to Disney. Simplicity collapsed earlier this year in the wake of major crib recalls and babies' deaths. SFCA Inc., an affiliate of private-equity fund Blackstreet Capital Partners and a Simplicity creditor, purchased the Pennsylvania firm's assets at a foreclosure sale in May of last year. When the safety commission sought to recall the bassinets in August, the agency noted that SFCA had "refused to cooperate with the government and recall the products." At the time, SFCA said in a written statement that it was not liable for products manufactured by Simplicity. SFCA subsequently went out of business. Many retailers, however, are still offering refunds to consumers who return these bassinets.

It should be noted that about 11

months before the death of the baby in this case, a four-month-old Missouri baby, Katelyn Marie Simon, died after getting trapped in a Simplicity-branded bassinet that shared the same design as the Winnie the Pooh bassinets. As a result, it's alleged in the suit that Disney knew or should have known about the death and should have halted sales of the bassinets before this unit was purchased.

Source: *Chicago Tribune*

XII. MASS TORTS UPDATE

VIOXX SETTLEMENT PROGRAM UPDATE

From the beginning, negotiating Plaintiffs' counsel have been resolute in their conviction that the Vioxx Settlement Program should be fair and efficient. It is encouraging, therefore, to report that the settlement is progressing on schedule and that victims of Vioxx are being paid on a rolling basis. Since the settlement was finalized on November 9, 2008, over 48,000 claimants have enrolled in the Program. Of the 48,000 claimants, approximately 30,000 suffered heart attacks, and 18,000 suffered strokes.

The Claims Administrator continues to review claims packages to determine which claims qualify for compensation. Interim payments for those heart attack cases qualifying for compensation began in August 2008 and as of December 19, 2008, 4,585 claimants have been paid with over \$393 million being distributed to victims of Vioxx and their families. Interim payments in heart attack cases will continue over the coming months with the final payment in all heart attack cases planned for summer 2009. Interim payments in stroke cases are scheduled to begin in February 2009 in accordance with the terms of the settlement agreement.

The Vioxx Settlement is the largest in the history of pharmaceutical litigation,

and it is most encouraging for victims that the settlement program is also proving to be the most efficient mass tort settlement program created to date.

MORE LAWSUITS OVER CONTROVERSIAL MEDICAL DEVICE FOR WOMEN

A medical device used to treat a form of urinary incontinence in women is the subject of a number of lawsuits. A number of lawsuits have been consolidated. In the past 18 months, 32 lawsuits have been filed against Mentor Corp., a Santa Barbara, Calif.-based cosmetic surgery device manufacturer. In 2003, the company launched the ObTape, a sling that is surgically implanted to treat stress urinary incontinence, which often is brought on by coughing, sneezing or exercise, and is common in women after childbirth. The product was removed from the market in 2006.

In October, the U.S. Food and Drug Administration, while not singling out ObTape, issued a generic alert to doctors warning of complications in surgical mesh devices designed to treat stress urinary incontinence, such as infections, pain and scarring, and erosion of the vaginal wall. Many of these complications are at the heart of the claims in the lawsuits. The only case that went to trial resulted in a Defense verdict in a California court. It's alleged in the lawsuits that because of the defective device, this ObTape, women have experienced serious medical injuries and problems.

Of the 32 cases filed against Mentor, 29 are in federal courts in various states. The other three are filed in state courts in California. Of those actions, 22 were consolidated in multidistrict litigation before U.S. District Judge Clay D. Land of the Middle District of Georgia. The suits, which were filed in California, Florida, Georgia, Louisiana, Missouri, New Jersey, New York, Ohio and Oklahoma, involve allegations of negligence, failure to warn and breach of warranty on behalf of multiple women and, in some cases, claims for

loss of consortium on behalf of their husbands. A pretrial hearing on the federal actions is set for January 19th.

MERCK SEEKS ADDITIONAL APPROVAL FOR GARDASIL

In June 2006, the FDA approved the use of Gardasil in females ages nine to 26 to protect against cervical cancer caused by the human papillomavirus (HPV). Following its approval, the Centers for Disease Control recommended that all girls between the ages of 11 and 12 receive the vaccine. Merck undertook an aggressive campaign and attempted to get states to make the vaccine a requirement for school attendance, thereby forcing parents to subject their daughters to the vaccine. Gardasil quickly became one of Merck's top-selling vaccines, but sales began slowing in 2008 after a study concluded it was not cost-effective for women in their 20s.

In an attempt to increase the market for Gardasil, Merck is seeking to broaden usage of the vaccine. In late December, Merck asked the FDA to approve the use of Gardasil for males. In the application, Merck claims a 90% reduction in risk of pre-cancerous lesions and genital warts based on its study of approximately 4,000 males from ages 16 to 26. If the application meets FDA standards, the review process will take several months before a decision is made.

Sources: *Associated Press*

FDA IS STILL PROBING SAFETY OF SINGULAIR

It was reported last month that federal health officials are still conducting a months-long investigation into possible links between asthma drugs, including Merck's Singulair, and suicide. In March, the Food and Drug Administration said it was reviewing a handful of reports involving mood changes, suicidal behavior and suicide in patients who had taken Singulair. But, over nine months later, the agency now says it still has not reached a con-

clusion and will continue its investigation of Singulair and similar drugs. First approved in 1998, Singulair was Merck's best-selling product last year. The company expects to report between \$4.3 and \$4.5 billion in sales of the drug for 2008. It is part of a class of drugs that includes AstraZeneca PLC's Accolate and Critical Therapeutic-Sinc's Zyflo.

Source: *Associated Press*

HEART ATTACKS INCREASED IN NEWER ANTIPSYCHOTICS

A study has found that heart attack risks were doubled in people taking widely-used antipsychotic drugs in a study that found the medicines are no safer than the older medications they have largely replaced. The risk of heart attack for people getting the newer drugs, including Eli Lilly & Co.'s Zyprexa and Johnson & Johnson's Risperdal, rose with their dosage, according to a study published last month in the *New England Journal of Medicine*.

The medications came on the market 15 years ago as safer, gentler alternatives to the older drugs for schizophrenia, which were known to raise health risks. The newer drugs became available in the mid-1990s at a time of concern about the neurological disorders caused by older medications such as Haldol and Thorazine, which made many users doze, drool and twitch. A series of studies in the last several years have undermined the initial claims that the newer drugs were safer and more effective than the old ones.

Source: *Bloomberg*

BRISTOL-MYERS SETTLES PLAVIX CASE WITH THE STATES FOR \$1.1 MILLION

Bristol-Myers Squibb Co. has agreed to pay \$1.1 million to settle allegations by Attorneys General nationwide that the drug maker misled the states about a proposed Plavix patent deal with Apotex Corp. in 2006, a violation of court orders stemming from two earlier antitrust cases. Under the settle-

ment—entered into between Bristol-Myers and all 50 states, the District of Columbia and four U.S. territories—the drug maker accepted responsibility for subverting reporting requirements. The settlement amount will be paid to all 50 states and the District of Columbia and four U.S. territories. Bristol-Myers Squibb acknowledged responsibility for violating court orders in two earlier lawsuits. Actions by BMS denied the states critical information needed to guard against anti-competitive conduct.

In two previous cases, BMS settled charges that they had unlawfully deprived consumers of less expensive, generic versions of two of its drugs, Buspar and Taxol. BMS paid the states \$150 million and agreed to two federal court orders allowing the states to detect future anti-competitive conduct. Both court orders required the company to notify the states of patent litigation settlements with generic drug competitors, and required BMS to provide yearly compliance reports.

In March of 2006, BMS reached a settlement with the generic drug manufacturer Apotex Inc. in a patent infringement lawsuit involving BMS's drug, Plavix, triggering BMS's notification obligations. It was later determined that the compliance reports provided by BMS were incomplete and that the company had failed to disclose a non-documented "side" arrangement it had made with Apotex, thus violating the Buspar and Taxol court orders. BMS acknowledged responsibility for making incomplete and false statements and agreed to revised court orders extending its reporting obligations, as well as to harsh monetary penalties for any future violations. In June 2007, BMS pled guilty to federal criminal charges relating to its conduct in notifying federal officials of the same settlement with Apotex.

Source: *New Medico Business Weekly*

XIII. BUSINESS LITIGATION

HUNTSMAN DROPS TAKEOVER BY APOLLO AND SETTLES LAWSUIT

Huntsman Corp. terminated its \$6.5 billion agreement to be acquired by Apollo Management's Hexion Specialty Chemicals, Inc. and settled its lawsuit against the private equity firm for \$1 billion. This was another in a series of merger agreements to fall apart amid the credit crisis. For example, a \$28.3 billion leveraged buyout of BCE collapsed after the Canadian telecommunications company failed to pass a solvency test by its auditors. The Hexion-Huntsman deal had been in a legal battle for months in July, 2007. Apollo's Hexion Specialty Chemicals unit had agreed to buy Huntsman, a specialty chemicals maker.

The deal faltered amid the credit crisis and legal battles as Apollo tried to get out of the deal. Apollo cited insolvency concerns about the combined company. It should be noted that Huntsman will continue its lawsuit against Credit Suisse and Deutsche Bank in Texas. Huntsman contends that those banks conspired with Apollo and interfered with Huntsman's prior merger pact with a previous suitor, Basell. A jury trial on those claims is set to begin on May 11, 2009.

Under the settlement with Apollo, Huntsman will receive a \$325 million break-up fee. Hexion said it had commitments from Credit Suisse and Deutsche Bank to fund the termination fee. Affiliates of Apollo will also make cash payments to Huntsman totaling \$425 million. In addition, certain Apollo affiliates will pay Huntsman an extra \$250 million in exchange for ten-year convertible notes issued by Huntsman. Payments of \$500 million were to go to Huntsman on or before December 31st, with any remaining payments that weren't made by that date to be made on or before March 31, 2009. Separately, an Apollo affiliate agreed to make a \$200 million investment in Hexion's parent company.

Source: Reuters

DOW SEEKS PAYBACK FROM KUWAIT

Dow Chemical is pursuing legal options against Kuwait for pulling out of their multibillion-dollar joint venture. In late December, the Kuwaiti government called off a \$17.4 billion deal to create the world's largest maker of polyethylene, a commodity heavily used in consumer products. It said the plunge in oil prices and downturn in the global economy made the venture too risky.

Dow is seeking more than \$2.5 billion in damages, according to a report by Reuters, from Kuwait's Petrochemical Industries Company (PIC) for backing out of its agreement. It's claimed that PIC is in breach of a contract between the parties. Dow says it must take action to protect the interests of the company and the shareholders.

Dow also said it was ready to go ahead with the Kuwaiti deal if PIC remedies the breach of contract. More than just another deal for Dow, the sale of 50.0% of its plastics business to a Kuwaiti state company was part of its strategy to reduce its exposure to the cyclical nature of the commodity chemicals business. Though Dow's management is insisting they're committed to a joint venture commodity business, it will be difficult for them to find a deal like the kind they had with the Kuwait company which had very attractive multiples.

Breaking off the deal also potentially upset Dow's plans to buy rival Rohm & Haas, for which it paid a high multiple, and was integral to its strategy to reduce its exposure to the commodity chemicals business. Dow was planning to use part of the proceeds from the deal to finance its \$15.3 billion acquisition of the Philadelphia-based specialty chemicals company. Under the joint venture agreement, PIC was to pay Dow \$7.5 billion.

Source: Forbes

XIV. INSURANCE AND FINANCE UPDATE

MAYOR HEALTH INSURER ACCUSED OF OVERCHARGING MILLIONS

In a settlement announced last month, one of the nation's largest health insurers has agreed to pay \$50 million for overcharging millions of Americans for health care. The New York Attorney General's office launched an investigation after receiving hundreds of complaints about Oxford Insurance and its parent company, UnitedHealth Group, which claims to rely on "independent research from across the health care industry" to determine reimbursement rates. In actuality though, it relies on Ingenix, a research firm which is owned by UnitedHealth Group. New York Attorney General Andrew Cuomo says Ingenix has been manipulating the numbers so insurance companies pay less. In a just-released report, it's contended that Americans have been "under-reimbursed to the tune of at least hundreds of millions of dollars."

Although UnitedHealth Group and Oxford Insurance were the only entities investigated, other major insurers use Ingenix, including Aetna, CIGNA and WellPoint/Empire BlueCross BlueShield. Attorney General Cuomo had this to say:

This is a huge scam that affected hundreds of millions of Americans (who were) ripped off by their health insurance companies. This was unethical, and it robbed vulnerable patients of insurance reimbursements they deserved.

This is what Nancy Nielsen, president of the American Medical Association, had to say about the nationwide problem:

This is huge. This problem went across the country. It's industry-wide, throughout insurers. So, it touched every state. Many doctors.

Many millions of patients, and this has been going on for years.

I understand there are more insurers under investigation. Attorney General Cuomo is currently investigating other insurance companies that use Ingenix's database to determine reimbursement rates for patients and taking steps to make sure this won't happen again in the future. The \$50 million settlement UnitedHealth Group will pay will be used to create a nonprofit organization that will determine reimbursement rates for patients.

Source: MSNBC

MARCH SETTLES INSURANCE BID-RIGGING CHARGES WITH 9 STATES

Nine states have reached a \$7 million settlement with New York-based insurance broker Marsh, Inc., Marsh & McLennan Companies, Inc., resolving a four-year investigation into Marsh's role in a nationwide bid-rigging scheme. Marsh allegedly made collusive arrangements whereby brokers entered into agreements with insurers to receive undisclosed compensation and engaged in anticompetitive conduct in the market for commercial liability insurance. In January, 2005, Marsh agreed to a much bigger settlement with the New York Attorney General's office over similar allegations. Marsh agreed then to set up an \$850 million fund to compensate clients.

This latest settlement of \$7 million is being divided among Florida, Hawaii, Maryland, Massachusetts, Michigan, Oregon, Texas, West Virginia and Pennsylvania. The Florida Department of Financial Services and the Florida Office of Insurance Regulation also joined these states' Attorneys General in the settlement. Massachusetts Attorney General Coakley had this to say:

Marsh's conduct underscores the need for strong enforcement and deterrence in the insurance arena. Customers need to know they can trust their brokers and that their insurance brokers are working with the customers' inter-

ests at heart. We will continue to closely monitor the marketplace in order to protect insurance customers against unfair and deceptive conduct.

Under the terms of the states' agreement, Marsh must disclose to its clients all compensation received from insurance companies in connection with the placement of an insurance policy, obtain the client's written consent to the compensation, and disclose at the end of each year annual totals of compensation received in connection with a client's policy. The intricate bid-rigging scheme allowed Marsh to designate which insurance company's bid would "win" a particular account. To create the appearance of a competitive bidding process, Marsh would instruct certain insurers to submit inflated, intentionally uncompetitive bids. These schemes gave commercial policyholders the impression that they were receiving the most competitive commercial premiums available, when they were actually being overcharged.

Additionally, Marsh was involved with a "pay-to-play" arrangement centered on its receipt of contingent commissions, in addition to standard commissions and fees, from certain insurance companies. Contingent commissions, also known as profit sharing commissions, are incentive-based compensation programs offered to brokers by insurance companies. These arrangements were often undisclosed to consumers, and provided an incentive for brokers to steer business to the insurer that offered the most lucrative contingent commissions, often in violation of their clients' interests, according to the officials.

Source: *Insurance Journal*

PROPOSED SETTLEMENT FOR KATRINA AND RITA FLOOD VICTIMS

Notices have gone out notifying New Orleans area property and business owners about a plan for partial settlement of a federal class action lawsuit that claims substandard work by local levee districts caused levee breaches

during Hurricanes Katrina and Rita. Under the proposal, the Orleans, Lake Borgne Basin and East Jefferson levee districts will place \$20.8 million, the limits of their insurance policies, into a fund to benefit the "settlement class." The class is defined as anyone who lived or owned property in Jefferson, Orleans, Plaquemines and St. Bernard parishes when the 2005 storms hit and sustained property loss or injury because of the levee failures.

A hearing has been scheduled for April 2nd on this matter. U.S. District Judge Stanwood Duval will decide whether to certify the class and give final approval to the settlement. If Judge Duval approves the agreement, he will appoint a "special master" to recommend how the fund should be used to benefit the settlement class. The judge may later ask that a second notice be sent out explaining how the fund will be used. Those affected by the proposed settlement cannot exclude themselves from it, but they can object to approval of both the class and the settlement, either at the hearing or in writing. Written objections must be sent in by March 13th.

Source: *The Times Picayune*

POLICYHOLDERS SETTLE STATE FARM KATRINA LAWSUITS

Policyholders who were represented by Dickie Scruggs have been able to settle their lawsuits against State Farm. Included in the settlement was a racketeering case that alleged the insurance company conspired with vendors to minimize Katrina damage payments. More than 225 cases—90% of those the firm had against State Farm in Mississippi—have been settled, including the racketeering lawsuit with 38 Plaintiffs. Terms of the settlements are confidential. The law firm now representing the policyholders issued a written statement:

A combination of factors came together to allow the successful resolution of these claims including the compensation amount, the exhaustion of the clients with

the legal pursuit of their claims, unfavorable legal rulings over the last year and a half and a fresh perspective afforded by new counsel.

Most all of the Scruggs' cases were transferred to the Provost Umphrey law firm in Texas. Hopefully, the clients came out of this in decent shape. They certainly deserved to be adequately compensated for their losses.

Source: *Sun Herald*

COMPANY CARING FOR ELDERLY UNDER FIRE BY THE STATE OF TEXAS

A healthcare company hired to manage a program for elderly Texans as part of a broad privatization plan was fined more than \$1 million by the state in the past year over mounting complaints that included delayed or denied medical care. According to *The Dallas Morning News*, Evercare of Texas, a unit of Minnesota-based UnitedHealth Group, has been under fire by some powerful Texas lawmakers over its management of preventative and long-term care for the state's most vulnerable. The news started a four-part investigative series last month.

Last February, the Texas Health and Human Services Commission fined Evercare \$645,890 after a flood of complaints that doctors weren't accepting Evercare soon after the expansion of Texas' Star Plus program. That plan uses an HMO model to deliver acute and long-term care for elderly and disabled Medicaid patients. A month later, the commission fined Evercare another \$70,725 for payment and service infractions. The most recent fines, totaling nearly \$400,000, were in reaction to mounting complaints about the North Texas program.

Evercare is part of a vast expansion of healthcare outsourcing that state officials believe is saving the state millions of dollars. Since 2003, the state has paid Evercare and other UnitedHealth units more than \$1.2 billion to provide managed care to more than 255,000 Texans under four programs.

Texas is near the bottom among the 50 states in per-capita spending on health and human services, but it is a leader in outsourcing these functions to private contractors.

Source: *Associated Press*

FTC PROBING INSURERS OVER CREDIT-BASED HOMEOWNERS INSURANCE PRICING

The Federal Trade Commission has asked nine major insurance companies, including Allstate Corp. and Travelers Cos. Inc., to provide information about how they set prices for homeowners' coverage. The FTC ordered the companies to provide data about credit-based insurance scores. This is essentially the equivalent of a credit rating but one that focuses on how much particular consumers cost their insurance companies.

Source: *Insurance Journal*

UNINSURED PATIENTS WILL BENEFIT FROM HOSPITAL LAWSUIT SETTLEMENT

In a move with far-reaching effects on folks who don't have health insurance, two large Illinois hospital systems have agreed to settle lawsuits alleging they overcharged tens of thousands of uninsured patients and provided inadequate financial assistance. As part of the agreements, Resurrection Health Care and Advocate Health Care are offering to recalculate patients' bills and give refunds to needy patients eligible for free or discounted medical care. Resurrection also will extend a discount of 25% to anyone who is uninsured, regardless of income—a move thought to be unprecedented in Illinois. Resurrection owns eight hospitals in the Chicago area and is the state's largest chain of Catholic medical centers. A Cook County circuit judge has approved Resurrection's settlement. Advocate's settlement is expected to receive court approval in March.

Resurrection has sent notices to 220,000 patients informing them of the settlement terms and the opportunity to apply for financial relief on outstanding or past bills. Advocate, which operates nine hospitals, has notified

170,000 patients. Starting last month, Resurrection's hospitals also have broadened discounts available to uninsured patients. And for the first time, Resurrection is placing annual limits on what the uninsured will be asked to pay for hospital services in a year. The limits are more generous than those laid out in a new Illinois law that caps hospital payments for people without health insurance at 25% of income. That law goes into effect April 1st.

Source: *Chicago Tribune*

XV. PREDATORY LENDING

MERRILL TO PAY \$550 MILLION TO SETTLE SUBPRIME MORTGAGE SUITS

Merrill Lynch & Co. will pay \$550 million to settle claims by the Ohio State Teachers Retirement System and other shareholders that it misled investors about assets backed by subprime mortgages. Merrill, which was acquired by Bank of America Corp., will pay \$475 million in cash to investors including the teachers union fund and \$75 million in cash to settle claims by company employees who held stock in certain retirement plans. The company made this known last month in a filing with the U.S. Securities and Exchange Commission. Claims in the suits focused on subprime-related losses and related disclosures between September 2006 and December 2008.

The company was accused of issuing false and misleading statements about collateralized debt obligations and other assets backed by subprime mortgages, artificially inflating Merrill Lynch's shares, according to the complaints filed in federal court in Manhattan. Ohio Attorney General Richard Cordray said in a statement: "Many Ohioans saw the value of their retirement savings take a nosedive as a result of improper practices on the part of financial giants."

The settlements don't cover

derivative shareholder or bondholder claims. The company is defending those lawsuits, according to the SEC filing. Incidentally, the U.S. government will invest \$20 billion in Bank of America and guarantee \$118 billion of assets to help the company absorb Merrill and prevent the financial crisis from deepening. While the board of the Ohio state teachers fund has approved the settlement, it must also be approved in federal court in Manhattan.

Source: *Bloomberg*

TWO PREDATORY LENDERS HAVE A PLAN

Countrywide Financial Corp. has agreed to make loan modifications for about 395,000 U.S. mortgage holders and will pay \$150 million into a foreclosure relief fund to settle predatory lending complaints filed by various states. The subprime lender, which was bought last year by Bank of America, also has agreed to restructure hundreds of millions of dollars of outstanding debt. While the total cost of the settlement is said to be about \$8.5 billion, you must remember this comes from the company's estimate.

It appears that in this settlement, Countrywide is trying to resolve all allegations that it used "unfair and deceptive practices" in its loan origination and servicing business. Borrowers were sold mortgage loans that were unaffordable, leading to increased defaults and foreclosures. The restructuring program will cover borrowers with subprime loans, including adjustable rate loans with initial "fixed" rates and pay-option adjustable rate mortgages. In addition to those practices, Countrywide will waive loan modification fees and drop prepayment penalties on subprime and pay option ARM loans.

In a similar move, Citigroup Inc. claims to have a plan in place that will help mortgage borrowers remain in their homes. The Citi Homeowner Assistance program supposedly would preemptively contact 500,000 mortgage holders—involving \$20 billion of mortgage balances—to try to ensure that they can pay their loans. The focus is

said to be on borrowers who live in areas that are likely to face "extreme economic distress." Citi extended its moratorium on foreclosures, saying it won't begin or complete a foreclosure sale on a home on which it owns the mortgage if the borrower wants to stay in the home, but it has to be the borrower's principal residence. Citigroup said it expects about 130,000 borrowers to be involved.

I am not sure how these plans will work out. It would be very hard to implement such a program without government control and oversight. Hopefully, any states or other governmental entities entering into or approving these type settlements will perform their own due diligence and make sure the deals do what they purport to do.

Source: *Associated Press*

THERE WILL BE MANY MORE SUBPRIME LAWSUITS

Over the past several months, there have been an unprecedented number of subprime-related suits filed. The worsening economic conditions will result in many more lawsuits being filed this year. Navigant Consulting, Inc., is a global consulting firm providing dispute, investigative, operational, and risk management. Navigant recently released a report showing that 448 subprime mortgage and related cases were filed in federal court in the first nine months of 2008. This number exceeded by more than 50% the total filed for all of 2007. Filing volume in the September 2008 quarter was the third highest on record with 131 new filings. The total number of cases filed reached 742 for the 21-month period ending on September 30, 2008.

The Navigant report, titled *Third Quarter 2008 Update: Breaking New Ground*, also shows the subprime-related cases further outstripping the 559 U.S. savings-and-loan cases of the early 1990s. That had been a previous high-water mark in terms of litigation fallout from a major financial crisis. Jeff Nielsen, who leads Navigant Consulting's Financial Services Disputes & Investigations group, observed:

The bottom line is that new cases continue to be filed much more rapidly than existing cases are being disposed. We are looking at a traffic jam that will take many years to untangle.

Mr. Nielsen also emphasized that the disastrous market conditions of late 2008 would mean that new cases will continue to be filed. For example, the Chapter 11 bankruptcy filing by Lehman Brothers in September 2008—the largest such filing in U.S. history and perhaps the defining moment in the current credit crisis—has resulted in its own cottage industry of litigation. The report also notes that while the volume of new case filings continues unabated, the litigation is showing signs of maturing based on the breakdown of new cases filed.

For example, borrower class action filings—which lead all categories over the seven quarters tracked by Navigant—fell precipitously in the third quarter, as the underlying loan transactions become more remote in time. Meanwhile, the number of securities lawsuits and contract disputes increased sharply, registering their highest quarterly totals to date. An increase in the number of cases brought by investors and institutions was reported as affected parties take stock of their losses and the recriminations follow from there.

Source: *Insurance Journal*

MAJOR CITIES JOIN FORCES TO FIGHT FORECLOSURES

Several large cities have joined forces in an effort to find solutions relating to the wave of foreclosures across the nation. The goal is to share strategies and save neighborhoods. The cities from across the United States will share legal strategies in dealing with mortgage lenders in an effort to reverse the effects of the foreclosure crisis. St. Paul, Minnesota and Baltimore are co-chairing the group. At press time, 13 cities with major populations, including Atlanta, Chicago, and Memphis, had signed on. The name of the new

alliance is the National Multi-City Litigation Working Group on Foreclosures.

Cities across the nation have watched homes go vacant and neighborhoods deteriorate because of the explosion of foreclosures. Millions of dollars have already been spent coping with the problem. Cities have made varied efforts to stabilize their neighborhoods, from working with lenders on various programs to filing suits against the lenders. The initial goal of the group is to share information, coordinate legal strategies and pool resources and legal clout to get lenders to be “part of the solution,” according to St. Paul City Attorney John Choi. Our firm is representing the City of Birmingham. We are discussing litigation strategy with several other major U.S. cities. It’s very likely we will file suits for them very soon.

Source: *Star Tribune*

XVI. PREMISES LIABILITY UPDATE

THE IMPORTANCE OF PROVIDING A SAFE PLAYGROUND

Each year 200,000 children visit hospital emergency rooms for playground-related injuries. Sadly, fifteen of those children will die as a result of those injuries. The vast majority of playground related injuries resulting in a trip to an emergency room were caused by falls. Statistics show that up to 79% of playground-related injuries could be prevented by eliminating injury-producing falls.

These injuries can and should be reduced. Most playground injuries are not the fault of the child or improper adult supervision. On the contrary, 66% of all playground injuries are the result of poor playground maintenance, improper equipment, faulty installation and poor layout and design. This means that approximately 132,000 children are needlessly injured on playgrounds each year and another ten lives are lost

due to the negligence of others.

These injuries are occurring at commercial child care facilities, apartment complexes, parks, restaurants, resorts, schools and public recreation developments. These injuries will be reduced when these entities address the hazards frequently found at their facilities. A playground hazard is something that is hidden, unforeseen, or unexpected to the child or his parents. They are not hidden to those properly trained in inspecting and maintaining a public playground.

Any entity that provides a playground for public use has a duty to provide the following with regard to the design of the playground: proper layout, age-appropriate safe equipment, proper surfacing, appropriate materials, proper playground assembly and installation. There are many factors that go into each of these issues and each should be appropriately addressed at the design stage to reduce the number of playground injuries. Currently, two out of three playground injuries are a result of these design and assembly factors resulting in 87,120 injuries each year.

The duty does not stop at the design of the playground. Many entities that provide playgrounds hire outside corporations to design and assemble the playground. At that point, they feel their responsibility ends. Yet, poor maintenance is responsible for one in three playground accidents or 43,000 injuries per year. Any entity providing a public playground has a duty to inspect and correct the following hazards: broken or damaged equipment; hazardous debris; loose anchoring; surfacing problems; user modifications; vandalism; worn, loose or missing parts; wood splitting; rot; rust; tripping hazards; sharp points, choking hazards, entanglement or impalement risks; crush or shear points; and head entrapment.

SOME IGNORE LAW TO PREVENT POOLS FROM BEING CHILD DEATHTRAPS

We have written previously on the requirements of the new law that

requires new drain covers on pool filtration systems. It now appears that children’s lives are being put at risk in swimming pools across the country as government agencies waffle on how to enforce the new federal law. The covers prevent children from being caught in the suction, disemboweled, and completely eviscerated. Safe Kids USA, a Washington-based nonprofit organization dedicated to preventing injuries to children, is greatly concerned. Despite the dangers—and the federal law—many pools are not in compliance with the law. The law went into effect December 19, and pool operators have known about it for more than a year. The law applies to all pools with public access, including those at hotels, apartments and residential communities. But experts advise owners of residential pools to make the modifications, as well.

Complicating matters further is the different way that states are enforcing the law. Because the agency overseeing the law—the Consumer Product Safety Commission—is so small, that agency is looking to state public health and safety departments for help. And some states and towns are being more lenient than others at enforcing the law. Safety experts say there should be only one standard: “saving children’s lives.” Still, many states are allowing pools to remain open, or at least they have not begun inspecting the pools and actively shutting them down.

Source: *CNN*

XVII. WORKPLACE HAZARDS

PRESIDENT OBAMA AND CONGRESS TAKE A STAND AGAINST DISCRIMINATION IN THE WORKPLACE

President Obama and Democrats in Congress will act to overturn a Supreme Court decision that made it much harder for people to challenge discrimination in employment, education, housing and other fields. The High

Court's decision involving Lilly M. Ledbetter, who had accused her employer of sex-based pay discrimination, was handed down in May 2007. Since then, courts around the country have gone far beyond the facts of that case and cited it as a reason for rejecting legitimate lawsuits claiming discrimination based on race, sex, age and disability. In some cases, after initially ruling for employees, judges have actually reversed themselves and ruled in favor of employers. The judges apparently felt they had to switch because of the Supreme Court decision.

As you may recall, Ms. Ledbetter, who worked for 19 years at a Goodyear tire plant in Gadsden, Alabama, spoke at the Democratic National Convention in August. She campaigned for then-candidate Obama and also made a television commercial for him. This courageous woman soon became a hero to Democrats and an inspiration to all working men and women. As a U.S. Senator, President Obama was a co-sponsor of a bill to overturn the Supreme Court decision. In the final presidential debate, the then-Democratic nominee said he would appoint judges who understood the struggles of "real-world folks" like Lilly Ledbetter.

The legislation before Congress would essentially relax the statute of limitations under various civil rights laws, giving people more time to file charges. President Bush promised he would have vetoed the bill had it passed while he was in office. President Obama—to his credit—backs the legislation and will sign it into law. President Obama describes the bill as part of a broader effort by his incoming Administration to "update the social contract," reinvigorate civil rights and close the pay gap between men and women.

At issue in the Ledbetter case was the deadline for filing charges under Title VII of the Civil Rights Act of 1964. The Supreme Court did not deny that Ms. Ledbetter had suffered discrimination, but said she should have filed her claim within 180 days of "the alleged unlawful employment practice"—the initial decision to pay her less than men

performing similar work. The Supreme Court rejected the argument that each paycheck was a violation of the law. Writing for the majority, Justice Samuel A. Alito Jr. said the statute of limitations must be strictly interpreted to protect employers against "stale claims" and "tardy lawsuits."

In a dissenting opinion, Justice Ruth Bader Ginsburg said Ms. Ledbetter's pay fell behind that of men because of "a long series of decisions reflecting Goodyear's pervasive discrimination against women managers in general and Ms. Ledbetter in particular." Justice Ginsburg invited Congress to correct the Court's "cramped interpretation" of the law. That is exactly what Congressional Democrats are in the process of doing. Their bill states that a violation occurs each time a person receives a paycheck resulting from "a discriminatory compensation decision."

The House passed a similar bill, 225 to 199, in July 2007. In the Senate, supporters fell three votes short of the 60 needed to overcome a filibuster, but they will almost surely be able to clear that hurdle in the new Congress. As expected, the United States Chamber of Commerce opposes the bill. The bill passed the House and has now gone to the Senate. Hopefully, the bill will have passed the Senate and be signed into law by the time this issue is in the mail. It's something that is long overdue in the workplace.

Source: *New York Times*

ON THE JOB INJURIES ARE A MAJOR PROBLEM

All of us have heard that "accidents can happen anywhere." Most people spend at least a third of their day at their places of employment. Thus, it is no surprise that every year thousands of people are killed or seriously injured at work. On the job deaths or injuries are different from deaths or injuries occurring away from work primarily because of laws, rules and regulations formulated especially for work-related incidents. The Occupational Safety and Health Administration (OSHA) is tasked

with ensuring and improving safety by employers. Even OSHA's numerous rules and regulations cannot prevent the thousands of deaths and serious accidents that occur on business premises. Though OSHA's role in the workplace is well known, Workers' Compensation laws affect on the job injuries more than any other rules or regulations.

Most employers, not all, are required by law to have Workers' Compensation insurance. Oftentimes, an injured employee's on-the-job injury is his or her first true introduction to Workers' Compensation. Injured employees who believe they will be adequately compensated for their injury, their pain and suffering, their mental anguish, medical expenses and other damages recoverable under common law are usually in for a very rude awakening. We have represented hundreds, if not thousands, of injured employees or the families of those killed on the job. With respect to the benefits recoverable under Workers' Compensation, not one of these employees or survivors of an employee has been satisfied with the Workers' Compensation recovery. Because Workers' Compensation recoveries are defined and limited, injured employees and their attorneys must look beyond Workers' Compensation for an adequate recovery.

Any on-the-job death or injury should be fully examined to determine what Workers' Compensation benefits are available. However, the legal analysis does not end there. While the Workers' Compensation statutes prevent lawsuits against the employer except for the benefits allowed in the statute, they do not prevent third-party suits against any other entity or individual responsible for the death or injury. The good news is these third-party suits are not restricted by Workers' Compensation laws.

Defectively-designed machines account for some of the most horrific injuries sustained by workers. More often than not, defectively-designed machines are responsible for countless deaths and serious injuries because the manufacturer wanted to lower the

costs of production to increase their profit margin. This practice normally results in a machine that is not adequately guarded to protect the user from crushing, cutting, shearing, pinching and other entrapment hazards associated with industrial machinery. Many have been killed and many more have lost limbs to these unguarded machines.

We have represented many clients who have been injured by defective industrial machinery under product liability theories, negligence and wantonness. Depending on the severity of the injury, settlements and verdicts commonly range from six to seven figures. In some instances, the manufacturer's conduct is so egregious that punitive damages are recoverable. Given the sizeable recovery available with these type injuries it is extremely important to advise our clients on all of their legal claims, Workers' Compensation and third-party lawsuits. If you need additional information on this subject, contact Kendall Dunson in our firm at (334) 269-2343.

JURY VERDICT FOR INJURED STEELWORKER

An Indiana jury recently awarded a \$48 million verdict to an injured steelworker and his wife. The jury rejected attempts by Defense lawyers to blame the worker for his own injuries. The jury found Minteq International, Inc. negligent for over-spraying its refractory onto a stationary ladder in a Burns Harbor steel mill. The 42-year-old worker, Anthony Arciniega, was rendered paraplegic on November 20, 2004, when the refractory suddenly broke loose from the ladder, causing him to lose his grip and fall 17 feet. The jury also found that the worker was zero percent at fault for the accident. The verdict is believed to be a record for a paraplegia injury in Indiana and one of the ten largest personal injury jury verdicts in the United States last year.

In addition to blaming the injured worker, Minteq's lawyers tried to lay blame on other contractors in the steel

mill and on International Steel Group. The jury rejected both of these defenses. While 50% fault was allocated to the worker's employer, 100% of the verdict is attributable to Minteq since it never properly identified the employer as a non-party under Indiana law.

The injured worker faces millions in future medical expense and nursing care as well as constant nerve pain, according to trial testimony of his doctors. Despite the injury, however, he returned to work at the steel mill in a wheelchair within six months. After he was injured, his wife began working at a nursing home to make up for the family's lost income. She also served as her husband's nurse and took care of the couple's three children. Kenneth J. Allen, a lawyer with offices in Indiana and Illinois, handled this case and did a very good job.

Source: *Associated Press*

MASSEY ENERGY TO PAY \$4.2 MILLION IN 2006 FATAL FIRE CASE

A Massey Energy subsidiary has agreed to pay \$4.2 million in civil and criminal penalties and plead guilty to federal charges stemming from a fire that killed two miners at a southern West Virginia coal mine in January 2006. An investigation by U.S. Attorney Charles Miller is still in progress and he hasn't ruled out the possibility that individuals might be charged with violating federal mine safety laws. Miller says he hopes this "sends a message to the coal industry." Mine Safety and Health Administration spokeswoman Amy Louviere says the \$1.7 million civil penalty was the agency's highest ever against a coal company. The \$2.5 million criminal penalty was the second-highest.

According to state and federal investigators, an overheated conveyer belt caused the 2006 fire at Aracoma Coal Co.'s Alma No. 1 mine. Two miners—33-year-old Don Bragg and 47-year-old Ellery Elvis Hatfield—died after they were separated from the rest of their mining crew. Weeks earlier, a mine explosion killed 12 miners at Sago

Mine in northern West Virginia, owned by International Coal Group. Both incidents led to sweeping federal and state mine safety law revisions.

In November of last year, Richmond, Virginia-based Massey Energy agreed to settle a wrongful death lawsuit filed by the families. The terms of that settlement were not disclosed. The lawsuit claimed the Defendants knew or should have known that a series of problems at the mine, including a missing air control wall, could kill miners by allowing smoke to fill escape routes. U.S. Attorney Miller noted that the federal investigation confirmed that air control walls were removed and that Bragg and Hatfield weren't properly trained in how to escape. Aracoma was charged in a 10-count information, which means the company agreed to plead guilty rather than having the case sent to a grand jury.

The information accuses the company of violating federal safety requirements by failing to provide a primary escapeway for the miners, failure to properly withdraw the miners, failure to train the mine dispatcher on how to monitor the mine's air ventilating system, failure to conduct timely escape drills and providing a false record on when drills were conducted. A federal district judge will decide whether to accept Aracoma's plea. Aracoma President John Jones said the company has worked to improve safety at the mine. Bruce Stanley, the lawyer who represented the families, said he hoped the "penalties will help convince all operators that money will never be more important than miners' lives."

Source: *Associated Press*

CONCORD FAMILY WINS ASBESTOS WRONGFUL DEATH LAWSUIT

An Emeryville company has been ordered to pay more than \$4.3 million in damages to the families of three Bay Area industrial pipefitters who died of asbestos-caused lung cancer. The widow and son of William C. Hearn will receive \$1.29 million as part of a

verdict returned by a San Francisco jury on January 6th. Mr. Hearn was exposed to asbestos while working at a variety of industrial sites. The jury found that Plant Insulation Company, formerly a major industrial insulation products manufacturer and contractor in Northern California, was 59% at fault for the death. The company was also found liable for the deaths of James Harris who worked as a pipefitter at Bay Area oil refineries, and George Wetch, who worked at chemical plants and oil refineries in Contra Costa County.

Source: *Mercury News*

WAL-MART SETTLES DOZENS OF WORKER CLASS ACTION LAWSUITS

Wal-Mart Stores Inc. will pay as much as \$640 million to settle dozens of wage-and-hour class action lawsuits across the U.S. that accused the world's largest retailer of cheating hourly workers and forcing them to work through breaks and off the clock. Wal-Mart has faced numerous accusations in recent years that it has engaged in illegal wage practices such as short-changing workers on overtime pay and not allowing them to take lunch breaks. The 63 cases being settled involve thousands of current and former Wal-Mart employees.

A similar case in California, in which Wal-Mart was ordered to pay \$172 million, was not included in the settlements and is now on appeal. Under the agreements, Wal-Mart will pay between \$352 million and \$640 million. The actual amount will depend on the number of claims submitted. Wal-Mart's separate California case referred to above is under appeal after the retailer lost that suit in 2005 brought by workers who alleged they were forced to work through meal and rest breaks.

Source: *Los Angeles Times*

WORKER LAWSUIT OVER FORD STOCK TO GO FORWARD

A judge has ordered Ford Motor Co. to start discussing settlement of a

lawsuit filed on behalf of employees who had company stock as a retirement investment. In a key ruling made in late December, U.S. District Judge Stephen Murphy allowed the 2006 lawsuit to go forward over Ford's objections. Current and former non-Union workers say it was a mistake for Ford to offer company stock as an investment for retirement. From April 2000 to April 2006, the stock fell approximately 70% and now trades for under \$2.20. Judge Murphy said in his ruling: "A stock can be imprudently risky for an employee savings plan even in the absence of fraud or imminent collapse."

The lawsuit was filed under ERISA, the federal law that sets rules for pension and 401(k) plans and allows participants to sue over mismanagement. It was alleged in the lawsuit that Ford "had an obligation to protect the plan and its participants from unreasonable and entirely predictable losses," and that the company "failed to apprise participants of the myriad of systemic, internal and marketplace problems ... which threatened the viability of the company."

Ford claimed that employees had opportunities to diversify their investments in major mutual funds. Judge Murphy wants Ford and lawyers for employees to start holding settlement talks under the supervision of U.S. Magistrate Judge Steven Pepe. A similar lawsuit involving GM employees and company stock was settled this year for \$37.5 million.

Source: *Associated Press*

NASCAR SETTLES DISCRIMINATION LAWSUIT

The \$225 million lawsuit filed by a former NASCAR inspector against the stock-car racing organization has been settled. The suit, which was filed in June of last year, was settled during mediation in December. As part of the agreement to settle the suit, which was filed by Mauricia Grant, the terms of the settlement are confidential. Ms. Grant, who is black, alleged in her suit that she had been subjected to racial discrimination and sexual harassment

during the almost three racing seasons she worked for NASCAR.

Ms. Grant, who worked as a technical inspector in the Nationwide series, listed 23 instances of alleged sexual harassment and 36 instances of alleged racial and gender discrimination in her complaint. She said she was subject to sexual advances—which included indecent exposure—and lewd jokes and was called racially insensitive names by other NASCAR employees. But NASCAR claimed that Ms. Grant never filed complaints to superiors about the alleged behavior of other employees toward her and that she filed suit only after she was fired.

However, Ms. Grant said that she complained to series director Joe Balash but did not press her complaints to the NASCAR human resources department after Balash failed to act on her claims. In October 2007, Ms. Grant was fired by NASCAR for reasons never explained. After the filing of the lawsuit by Grant in June, NASCAR officials investigated her claims. In the wake of that investigation, two NASCAR employees—whom Ms. Grant said exposed themselves to her—were suspended and later fired. Interestingly, NASCAR has not explained why they were fired.

Source: *Kansas City Star*

XVIII. TRANSPORTATION

LAWSUITS FILED ARISING OUT OF METROLINK CRASH

A lawsuit has been filed by the mother of a man killed in a September train crash in Chatsworth, California, against the company that employed the Metrolink engineer. Michael Hammersley was on his way home from his job as a mail clerk at Los Angeles City Hall when the Metrolink train collided head-on with a Union Pacific freight train. National Transportation Safety Board investigators have said that Robert M. Sanchez, the commuter train's engineer, sent and received

dozens of text messages while on duty the day of the crash, including one only 22 seconds before impact.

In addition, Metrolink officials, as well as preliminary safety board findings, indicate the commuter train ran a red light just before colliding with the Union Pacific train. But the color of the light has been disputed by the surviving crewman, conductor Robert Heldenbrand, who apparently told investigators that he saw a green signal just before the train pulled out of the Chatsworth station, its final stop before the crash. The Engineer was among the 25 people killed in the crash which injured 135 others.

In addition to the wrongful death case, four persons who were injured in the crash have also filed suits. The lawsuits were filed in Los Angeles County Superior Court and name Veolia Transportation Services Inc., Connex Railroad and the Engineer's estate as Defendants. Two other lawsuits have been filed against the regional rail authority that operates Metrolink, several contractors and the Metropolitan Transportation Authority, according to reports.

An employee of Metrolink contractor Connex Railroad had allegedly complained about Robert M. Sanchez's cell phone use on the job before the deadly crash in Chatsworth. Officials with the contractor that provides crewmen to the commuter rail service knew that the engineer involved in the deadly crash had a history of sending text messages while on duty. The allegation came from an employee of Connex Railroad, which provides Metrolink with engineers and conductors.

The employee complained to his superiors about the engineer using his cell phone to send text messages, according to Los Angeles lawyer R. Edward Pfiester. The employee is said to have complained to management a few days before the wreck and complained a second time to a co-worker within three hours of the crash. Several months before the crash, a manager conducting a field test allegedly caught engineer Robert M. Sanchez with a cell

phone in his bag. The phone was turned on, which I understand was a violation of Connex policy.

Source: Los Angeles Times

LAWSUIT FILED IN MEDICAL HELICOPTER CRASH

A lawsuit has been filed against the companies that operated an emergency medical helicopter that crashed in Aurora last fall, killing a 14-month-old patient and the three crew members. Robert and Brooke Blockinger of Leland, Illinois, filed the lawsuit against Air Angels of Bolingbrook, Reach Medical Holdings and the pilot. The lawsuit, filed in Cook County Circuit Court, alleges widespread negligence and systemic failures to adhere to safety practices that would have prevented the accident.

Best practices recommended by the Federal Aviation Administration, but not adopted by Air Angels, included assigning two pilots to flights, supplying them with night-vision goggles and advanced training, and outfitting medical helicopters with terrain-awareness systems. The Bell 222 helicopter transporting Kirstin Reann was flying low from a hospital in Sandwich to Children's Memorial Hospital in Chicago when it hit a radio-tower support wire and crashed in Aurora.

Source: Chicago Tribune

XIX. NURSING HOME UPDATE

DEADLY DEFICIENCIES FOUND AT STATE VETERANS HOME

A U.S. Justice Department report on the William F. Green State Veterans Home in Bay Minette, Alabama, alleged "deficiencies have contributed to the untimely deaths of ... residents as well as led to other preventable illnesses, injuries, and harm." The report, released last month, was based on an inspection conducted in February along with

interviews and documents. The federal report concludes residents "suffer significant harm and risk of harm from the facility's inadequate medical and nursing services." It lists numerous specific examples going back several years, identifying residents only by initials. The problems found at the facility included:

- Inadequate nutritional and hydration services;
- Improper and dangerous psychotropic medication practices;
- Inadequate pressure-sore treatment and skin care;
- Inadequate restorative care and specialized rehabilitation services;
- Failure to protect residents from harm due to falls;
- Failure to adequately investigate allegations of resident abuse; and
- The inappropriate use of restraints.

The December 18th report from the Justice Department's Civil Rights Division was signed by Grace Chung Becker, acting assistant Attorney General. The report stated: "*Specifically, we have concluded that numerous conditions and practices at W.F. Green violate the constitutional and federal statutory rights of its residents.*"

Some deficiencies at the home were cited by the state Department of Public Health in a 2007 report. Human Management Resources had its license downgraded to probationary. HMR replaced Cullman-based USA Healthcare in 2004 as the management company for the state's three nursing homes for veterans. The Bay Minette facility opened in 1995 and houses about 150 veterans, according to reports.

Last year, the state Health Department returned for a follow-up inspection and upgraded HMR to a fully-licensed health care provider at the Bay Minette facility. The State Veterans Affairs Department said in that review, and one by the U.S. Department of Veterans Affairs last year, "there was

no indication in the agencies' reports that (William F. Green) was in violation of the constitutional and federal rights of residents, or that residents suffered from harm, or were at risk of harm." It should be noted that the Department denies all of the changes in the report.

Source: *Mobile Press Register*

NEW NURSING HOME QUALITY RATING

The Centers for Medicare and Medicaid Services (CMS) has recently implemented a new "5-Star Quality Rating System" for nursing homes. This rating system is an invaluable tool for family members seeking to place loved ones in nursing homes. The system was created to help consumers compare nursing homes more easily and identify areas about which consumers may want to ask questions. The nursing home ratings are taken from three sources: health inspections, staffing numbers and quality measures. CMS provides a star rating for each of these three sources. Finally, the three ratings are combined to calculate an overall "star rating." This information provides a good picture of the care individual nursing homes are providing.

As we have seen from many cases we have handled, the level of staffing is a key indicator of the quality of care provided in a nursing home. The staffing data in this new system looks at "overall staffing" and staffing "adjusted for the population." The overall staffing assesses the overall number of staff compared to the number of residents. The "adjusted for the population" staffing information is a key element of the new system. This aspect of the staffing rating takes into consideration differences in how sick the residents are in each nursing home. Obviously, sicker residents require more care. If more care is required, more staffing will of course be needed. In other words, two different nursing homes with the same number of residents may require different staffing based on the level of care required by the individual residents. We have found that this factor is seldom considered by nursing

home owners when providing staffing for facilities. Most nursing homes provide a set ratio of staff regardless of the needs of the residents.

As would be expected, CMS has found that the quality of care is generally better in nursing homes that have more staff to work directly with the residents. In choosing a nursing home it is extremely important to ask the management about staffing levels, qualifications of the staff, and to personally observe the number of staff in the facility. In conjunction with the new 5-Star Rating System, CMS has updated its website to provide a broader picture of these quality indicators. The website (www.medicare.gov/NH/compare.com) provides the 5-star rating for nursing homes. I would highly recommend that any family considering placing a resident in a nursing home review this information in addition to visiting the nursing home personally prior to admitting a loved one.

Source: *Associated Press*

MAXIMUM PENALTY SOUGHT IN NURSING HOME FALL

A North Carolina nursing home could face \$50,000 in fines after a resident with Alzheimer's disease fell from a loading dock and died. It was reported last month that state health officials have recommended the maximum penalty for Five Oaks Manor in Concord for failing to protect a resident who was 87 years old. Officials said the woman went unnoticed as she wandered through several doors, a kitchen, and onto an unlit loading dock December 18th. She fell about four feet.

The State Department of Health and Human Services suggests the nursing home be fined \$10,000 a day for the five days between the resident's fall and when repairs were completed. Repairs included an alarm system and fence around the dock. A final decision will come from the federal Center for Medicare and Medicaid Services.

Source: *Associated Press*

NURSING HOME MUST PAY \$1.25 MILLION FOR MAN'S SUFFERING

A Dekalb County, Georgia, jury returned a verdict in late December against a Georgia nursing home. Melvin Raybon died in pain four years ago, and the jury agreed that the cause of his suffering was neglect at the Tucker nursing home where he lived for nine months. The jury awarded Mr. Raybon's daughter \$1.25 million in the lawsuit over the care her father received at the Tucker Nursing Center. The Center was accused of providing inadequate attention to Mr. Raybon who was admitted in 2002.

Nine months after his admission, Mr. Raybon had to go to a hospital for treatment of a bed sore that infected his left buttock to the bone. Nursing assistants from the nursing home testified there weren't enough staffers at the Center to provide adequate care. Mr. Raybon should have been turned over every two hours to alleviate the pressure that leads to bed sores, but he was instead turned every four hours. Mr. Raybon, a former forklift operator, was admitted to another nursing home in Buckhead after the hospital stabilized him, but his condition deteriorated. He had suffered from malnutrition as a result of the original infection, which sent his body into a death spiral that led to more bed sores and infections at the Buckhead home. Mr. Raybon died in June 2004.

Kindred Healthcare, a company based in Louisville, Kentucky, owned the nursing home at the time of the alleged wrongdoing. In 2007, the home was sold to a new owner. It was agreed Mr. Raybon was ill when he arrived at the Tucker home. Part of his brain had been removed because of cancer, and one of his legs had been amputated. The nursing home claimed that Mr. Raybon's prior condition caused his death. Nurses at the Tucker home testified that they took good care the resident.

Lawyers for the nursing home claimed it was the later care at the Buckhead nursing home that actually caused Mr. Raybon's condition to deteriorate. Interestingly, four certified nursing assistants testified about the

inadequate care Mr. Raybon received at the Tucker facility. One of them was fired for “not doing her job.” Mr. Raybon’s daughter, Yolanda Latimore, said she repeatedly asked officials at the Tucker nursing home to take better care of her father. Ben Land, a Columbus, Georgia lawyer, represented the Raybon family and did a good job. The Defendants are expected to file an appeal.

Source: *Atlanta Journal Constitution*

XX. HEALTHCARE ISSUES

WATCHDOG FINDS LAX GOVERNMENTAL OVERSIGHT OF DOCTOR CONFLICTS

The Food and Drug Administration needs to improve lax oversight of the financial conflicts of doctors who test medicines before they are approved for sale, according to a government watchdog report. The FDA lacks a complete list of doctors conducting research on new medicines and cannot determine which companies have submitted financial information for all doctors working on studies, according to a report by the Department of Health and Human Services Inspector General. Investigators examined materials submitted for 118 marketing applications of medicines or medical devices approved in fiscal 2007. Forty-two percent of the applications were missing financial information, the report said. The FDA did not document a review of any financial data for 31% of the applications.

The report urged the agency to take several steps to make sure companies submit complete financial information for doctors and that agency reviewers check the submissions. It also said the FDA should require companies to submit financial information for doctors before human clinical trials begin. The FDA objected to that idea, saying it would add another layer of review that would not necessarily help

patients. It appears that the FDA generally agreed with the report’s recommendations.

Source: *Reuters*

MAJOR MEDICAL JOURNAL CHANGES ITS POLICY

Criticism by a national accreditation group over a lung cancer study that failed to disclose an author’s financial conflicts has led *The New England Journal of Medicine* to change its procedures. The study, conducted in 2006 by Dr. Claudia I. Henschke of Weill Cornell Medical College, said the widespread use of CT scans could prevent 80% of lung cancer deaths. But the Accreditation Council for Continuing Medical Education, in a letter to a cancer research newsletter, said the journal and its publisher, the Massachusetts Medical Society, had erred in failing to disclose “relevant financial conflicts of interests of the authors.”

The study failed to disclose that Dr. Henschke’s work had been underwritten in part by a \$3.6 million grant from the parent company of the Liggett Group, a cigarette maker, something the *Journal* editors said they had been unaware of. But Dr. Henschke did disclose to the *Journal* that she and her university had also licensed a patent related to CT screening to General Electric, a maker of CT scanners. The medical journal decided against disclosing the existence of this patent to its readers. As is customary with many research articles, the Massachusetts Medical Society offered doctors educational credit for reading and answering questions about the lung cancer study. Such educational efforts must be accredited by the continuing education accreditation council.

The council’s criticism was published in a letter to *The Cancer Letter*, a periodical that provides information on the state of cancer research and treatment. In response, the medical society wrote a letter promising to change its procedures. The letter, signed by Dr. Jeffrey M. Drazen, the *Journal*’s editor in chief, and Corinne Broderick, execu-

tive Vice-President of the Medical Society, dated October 1, 2008, stated:

When we published Dr. Henschke’s article in 2006 it was not routine NEJM editorial policy to publish details about pending patents. Since that time our thinking on this issue has evolved.

The journal now asks authors to disclose all patents or royalties related to their research. It also publishes the information with the studies. A spokeswoman for the medical journal, Jennifer Zeis, said the letter “speaks for itself.” This change is a good one and while perhaps overdue the *Journal* is to be commended. Clearly, it’s a step in the right direction.

Source: *New York Times*

HOPEFULLY RULE CHANGE WILL REDUCE DRUG PRICES

The federal agency that manages Medicare has completed a rule meant to curb an industry practice that has inflated drug costs for some patients with Medicare drug coverage. The practice involves pharmacy benefit managers (PBMs), the middlemen that administer drug plans on behalf of insurers. The PBMs are making a financial killing in providing this “service.” As you may know, PBMs negotiate drug prices with pharmacies and reimburse them for drugs that patients purchase. Insurers, in turn, pay the PBMs for administering the claims. The PBMs are making big bucks for their service in this process. *The Wall Street Journal* had this to say:

The higher drug costs for patients result from a so-called lock-in approach used by some PBMs. Under this practice, insurers pay the PBMs a set amount for drugs, regardless of what the PBMs actually paid the pharmacies. Often, what the PBMs pay the pharmacies is less than what the insurers pay the PBMs. But the size of that difference is typically secret, and the PBMs keep it. The practice can drive patients into Medicare’s

“doughnut hole” gap in coverage more quickly. While under the new rule, plans can still use the lock-in approach. The amount paid to the pharmacy—not the higher price paid by the insurer—will have to be what is used to determine patients’ pace to the doughnut hole. The rule will go into effect on January 1, 2010.

PBMs that have used lock-in pricing have argued that the extra money they make under the pricing method provides funds for programs to encourage more consumers to use lower-cost generic drugs. Express Scripts Inc., a PBM that has used the lock-in approach, said in a statement that it was “concerned this new rule will lead to higher costs and fewer competitive plan design choices over the long-term.” In a statement, Kerry Weems, acting administrator of the Centers for Medicare and Medicaid Services, said the new regulation will “reduce what [patients] pay at the pharmacy counter.”

Hopefully, this new rule will result in lower drug prices at the national level. I really don’t believe the public knows how the Bush Administration, Congress and the drug industry socked it to the American people when they passed the law that allowed the PBMs to enter the picture.

Source: Wall Street Journal

FDA WARNS OF TAINTED DIET PILLS

Now that the holidays are over, many Americans will be trying hard to lose a few pounds. That has become an annual event. Many turn to diet pills as a “quick” and “easy” way to take off the added pounds. Unfortunately, it appears there are a number of weight loss products that could be dangerous. In that regard, the Food and Drug Administration has warned folks about 69 hazardous weight loss products. The FDA says all of the products on its list contain both illegal and prescription-

grade ingredients.

According to the agency, if you are currently taking any of the products, stop immediately and see a doctor. It should be noted that diet pills are not government regulated and many are not extensively researched. All of us need to be extremely cautious before taking any diet pill that’s not recommended by our personal doctor. There also can be a problem with overdosing. People can also run into some interaction or reaction to other medicines they may be taking. The FDA says most of the tainted pills are sold online and come from foreign countries. Each is a good reason to steer clear of diet pills. The best way to lose weight is to simply exercise on a regular basis and cut back on calories.

These weight loss products, some of which are marketed as “dietary supplements,” are promoted and sold on various Websites and in some retail stores. Some of the products claim to be “natural” or to contain only “herbal” ingredients, but actually contain potentially harmful ingredients not listed on the product labels or in promotional advertisements. These products have not been approved by the FDA, are illegal and may be potentially harmful to unsuspecting consumers.

The FDA advises consumers who have used any of these products to stop taking them and consult their healthcare professional immediately. The FDA encourages consumers to seek guidance from a healthcare professional before purchasing weight loss products. Janet Woodcock, M.D., director of the Center for Drug Evaluation and Research, FDA, stated:

These tainted weight loss products pose a great risk to public health because they contain undeclared ingredients and, in some cases, contain prescription drugs in amounts that greatly exceed their maximum recommended dosages. Consumers have no way of knowing that these products contain powerful drugs that could cause serious health consequences. Therefore FDA is taking

this action to protect the health of the American public.

Health care professionals and consumers should report serious adverse events (side effects) or product quality problems to the FDA’s MedWatch Adverse Event Reporting program either online, by regular mail, fax or phone. You can get a list of the potentially dangerous diet pills by going to the FDA website www.FDA.gov.

Source: FDA

FDA BACKS VYTORIN AFTER FINISHING STUDY REVIEW

The Food and Drug Administration says patients should not stop taking Vytorin or other cholesterol-lowering drugs, based on its review of a controversial study. The agency is sticking to its original position that medicines that reduce bad cholesterol benefit patients at risk of heart attack or stroke. The FDA says it has finished reviewing the study, which compared Vytorin to one of the combination pill’s components, Zocor, that’s available as a much cheaper generic drug.

Last January, the study results showed Vytorin was no better than Zocor at reducing plaque buildup in arteries. That led some doctors to urge patients to abandon Vytorin. Now the FDA says patients shouldn’t do that, because Vytorin reduced bad cholesterol more than Zocor. You may recall that it was reported in May of last year that Vytorin could cause cancer. Apparently, that is no longer of concern to the FDA.

Source: Associated Press

XXI. ENVIRONMENTAL CONCERNS

EPA PROHIBITS USE OF POLLUTION LAWS TO CONTROL GREENHOUSE GAS EMISSIONS

In its final days, the Bush Administration tried to make sure that federal air pollution regulations wouldn’t be used

to control the gases blamed for global warming. In a memorandum, outgoing Environmental Protection Agency Administrator Stephen Johnson set an agency-wide policy prohibiting controls on carbon dioxide emissions from being included in air pollution permits for coal-fired power plants and other facilities. That decision gave the agency a basis for issuing permits that increase global warming pollution until the incoming Obama Administration can change it. Unfortunately, this was a move that will require a long rulemaking process to change things. "The current concerns over global climate change should not drive EPA into adopting an unworkable policy of requiring emissions controls," Johnson wrote. While he acknowledged public interest in the issue, he wrote further that "administrative agencies are authorized to issue interpretations of this nature that clarify their regulations without completing a public comment process."

The Bush White House had repeatedly said that the Clean Air Act should not be used to regulate carbon dioxide or other greenhouse gases, even though an April 2007 Supreme Court decision found that the EPA could legally do so. To their credit, environmentalists never stopped trying to protect the public interest. Johnson's memo was said to be an attempt to clarify the agency's position after an appeals board in November rejected a federal permit for a Utah power plant putting the fate of scores of coal-burning power plants and other industrial facilities in limbo.

In that case, the board said the EPA did not make a strong enough case for not requiring controls on carbon dioxide, the leading pollutant linked to global warming. Environmentalists had challenged the permit, pointing out that the law makes it clear that greenhouse gas emissions can be controlled. Environmentalists say that the EPA's memo would allow power plants that increase greenhouse gas emissions to be approved.

Source: Associated Press

COURT STRIKES RULE THAT LET PLANTS EXCEED LIMITS

On a positive note, the U.S. Court of Appeals for the District of Columbia Circuit struck down an exemption that for nearly 15 years has allowed refineries, chemical plants and other industrial facilities to exceed federal air pollution limits during certain periods of operation. The ruling was good news for environmental groups who hailed the ruling. The Court's ruling overturned a provision, enacted under President Clinton, that permits industrial operations that are starting up, shutting down or malfunctioning to emit more toxins into the air than is normally allowed. The Environmental Protection Agency and big business groups argued that the exemption was essential. But, the Court determined in a ruling that affects sources of air pollution across the country, the exemption was illegal.

The EPA created the exemption in 1994, and Bush Administration officials broadened the interpretation of the provision over time. This made it subject to judicial review. A coalition of advocacy groups including the Environmental Integrity Project, the Sierra Club, the Louisiana Environmental Action Network, the Coalition for a Safe Environment and Friends of Hudson filed the lawsuit to challenge the provision's legality. Earthjustice attorney Jim Pew, who argued the case on behalf of the coalition, stated:

What they did is take a bad provision and turn it into an almost complete barrier to enforcement. This was an attempt to make all of the air-toxics laws unenforceable, and they almost got away with it.

It has been reported that industrial facilities have routinely violated federal air standards under the guise of malfunctions. Industry representatives consistently have claimed these excesses were a necessary part of operations. This ruling was a good one and hopefully will have the desired effect of protecting the health and welfare of the American people.

Source: Washington Post

A VICTORY FOR CONSERVATIONISTS

In a stinging defeat for the Bush Environmental Protection Agency last month, the 6th Circuit Court of Appeals issued a clear rebuke against the Administration's 2006 rule which exempted certain commercial pesticide applications from the oversight provided by Congress under the Clean Water Act. The Court held that pesticide residuals and biological pesticides constitute pollutants under federal law and therefore must be regulated under the Clean Water Act to minimize the impact to human health and the environment. Several manufacturers and industry associations had joined the case in an attempt to broaden the Environmental Protection Agency's 2006 exemption. The Court told them in no uncertain terms that their products are harmful to human health and the environment, and therefore EPA must regulate aquatic pesticide applications under the Clean Water Act.

With this decision, virtually all commercial pesticide applications to, over and around waterways will now require National Pollutant Discharge Elimination System (NPDES) permits. The NPDES permits will allow for local citizen input, and provide for accountability and oversight. The permits will also require the regulatory agencies to evaluate effects on fish and wildlife from individual applications, to monitor exactly how much of a pesticide application goes into our nation's waters, and to evaluate the cumulative impact this residual effect has on aquatic organisms.

This decision is another in a long line of rebukes to the Bush Administration policies that overstepped their statutory authority and to the chemical manufacturers who peddle their poisons without concern to the effect on human health and the environment. In my opinion, the new EPA will protect the environment rather than the chemical industry. Protecting both water quality and the public health are the EPA's responsibility.

The organizations filing the lawsuit included Baykeeper, National Center

for Conservation Science and Policy, Oregon Wild, Saint John's Organic Farm, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, Waterkeeper Alliance, Environment Maine, Toxics Action Center, Peconic Baykeeper and Soundkeeper. The organizations were represented by the Western Environmental Law Center, the National Environmental Law Center, the Pace Environmental Litigation Clinic, the Columbia Environmental Law Clinic and Waterkeeper Alliance.

Source: *Western Environmental Law Center*

FDA TO RECONSIDER PLASTIC BOTTLE RISK

After its own advisory board accused the Food and Drug Administration of failing to adequately consider research about the dangers of bisphenol-A, found in many plastic baby bottles, plastic food containers and metal can linings, the FDA has agreed to reconsider the issue. The agency's draft risk assessment in August, finding the chemical safe as it is now used, stood out against a tide of recent scientific opinion.

The National Toxicology Program, part of the Department of Health and Human Services, has said there was reason to be concerned that BPA, as the chemical is called, could harm the brain, behavior and the prostate gland in fetuses, infants and children. Canada added the chemical to its list of toxic substances this year and has said it will ban BPA from polycarbonate baby bottles.

In September, a study published in the *Journal of the American Medical Association* found that adults with high levels of BPA in their urine were more prone to heart and liver disease and diabetes. More than 200 animal studies have linked ingesting minute amounts of the substance to a range of reproductive problems, brain damage, immune deficiencies, metabolic abnormalities, and behavioral oddities like hyperactivity, learning deficits and reduced maternal willingness to nurse offspring.

It has been reported that the FDA's position -- that current human exposure to BPA in food-packaging materials provides an adequate margin of safety -- appeared to be based on two large multigenerational studies by research groups that received funding from the American Plastics Council. Although the FDA reviewed other studies, only the two multigenerational studies met its guidelines for determining safety for human consumption, according to Dr. Mitchell Cheeseman, deputy director of the agency's Office of Food Additive Safety. Dr. Cheeseman had this to say:

I don't want to suggest that published studies are not valuable to FDA's safety assessment—they are. But they lacked details about how the study was done, they don't include all the raw data, so independent auditing can't be done by agency scientists, and they have a variety of protocol limitations.

Dr. Anila Jacob, a physician and senior scientist at the EWG, observed:

This was the FDA finally acknowledging that its assertion that BPA is safe may not be correct. Still, we don't think it's enough. With millions of babies being exposed to this chemical on a daily basis, every day we continue to delay removing this chemical from baby products is another day millions of infants continue to be exposed.

But the FDA's science board subcommittee on BPA, after receiving comments from an independent advisory panel, determined that the agency was wrong to disregard the large body of research showing health effects even at extremely low doses. The agency's decision to reconsider was made public in December. I must confess that I have more confidence in the Environmental Working Group, a Washington-based advocacy group, than I had in the leadership at the FDA on health and safety issues during the Bush Administration.

Source: *New York Times*

EXXONMOBIL SUBSIDIARY AGREES TO \$6.1 MILLION PAYMENT IN OIL SPILL

A subsidiary of **ExxonMobil** has agreed to plead guilty to a criminal charge and pay \$6.1 million for a 15,000 gallon diesel fuel spill at an Everett oil terminal in January 2006. ExxonMobil Pipeline Co., based in Houston, was charged with a criminal violation of the federal Clean Water Act in connection with an oil spill into the Mystic River. Under the plea agreement, the Everett terminal also will be overseen by a court-appointed monitor. The plea agreement was subject to court approval, which is expected.

Source: *Associated Press*

TOXIC AIR AT SCHOOLS IN THE UNITED STATES REPORTED

According to a special report published by *USA Today*, children across the country are being exposed to toxic chemicals in the air on a daily basis. Schools located near major industrial sources of pollution are exposing children to a variety of toxic substances. The danger of exposure to airborne toxins is greater for children than adults, because they breathe more air in proportion to weight and their bodies are still developing. The injuries sustained from exposure may not be seen for decades.

In some cases, injuries can be manifested more quickly. For example, in Port Neches, Texas, more than two dozen former high school students were diagnosed with cancer within years of graduating. A petrochemical plant located less than one mile from the school has settled out of court with 17 of the students, although the plant apparently denies liability.

The EPA maintains records of major air emissions, as reported by industries, and in reviewing these records *USA Today* was able to determine schools whose students were likely breathing toxic emissions. Four Alabama schools were in the highest 1% in the nation for toxic air emissions: Twenty Second Avenue Baptist Kindergarten and Lewis Elementary in Birmingham, and

Webster Elementary and Save the World Ministries Day Care in Muscle Shoals. To look at the toxins at your school, go to www.smokestack.usato-day.com.

Source: USA Today

CLASS STATUS DENIED IN SUIT AGAINST DUPONT OVER CHEMICAL-TAINTED WATER

The use of medical monitoring as a remedy for mass exposure to toxic chemicals has suffered a setback in New Jersey. A federal judge in Camden has denied class certification sought in behalf of 15,000 people whose drinking water may have been contaminated by a chemical spilled from DuPont's Chambers Works in Salem County. The Plaintiffs want DuPont to pay for medical monitoring to provide early warning of health problems caused by perfluorooctanoic acid (PFOA)—used in the manufacture of nonstick cookware, microwave popcorn bags and other products—that seeped into the water of the Penns Grove Water Supply Co.

New Jersey courts have recognized medical monitoring as a remedy for groups of Plaintiffs exposed to dangerous substances. It works unless there are so many significant individual issues that the case would break down into litigation of individual claims, the courts have said. The decision by U.S. District Judge Renee Bumb denying certification was in *Rowe v. E.I. du Pont de Nemours and Co.* The judge ruled that there were too many variables among the potential class members' exposure to the chemical or their potential risk of disease. The Plaintiffs' lawyers had relied on expert opinions that identified risk factors common to the average Plaintiff suffering the average exposure. The judge wrote:

Rather than conducting in-depth research and meaningfully identifying a group of individuals who have actually suffered 'significant exposure,' Plaintiffs have relied on risk assessments and superficially identified a group of individuals who have potentially suffered a

'significant exposure.' This is insufficient for purposes of class certification.

The leading New Jersey case on medical monitoring, *Ayers v. Jackson Twp.*, requires judges to demonstrate that the classes are cohesive by showing that all class members can prove the elements of medical monitoring through common evidence. Judge Bumb ruled that the common evidence could prove that PFOA is toxic, the diseases caused by exposure to PFOA are serious and early diagnosis is valuable. But she said common evidence wouldn't be enough to demonstrate "significant exposure, increased risk of disease, and the need for medical monitoring different than any monitoring than otherwise required." There were two sets of Plaintiffs in the case, one group seeking monitoring for anyone exposed to the water for a year or more, and one whose members were exposed to the water at any time.

Source: *New Jersey Law Journal*

XXII. THE CONSUMER CORNER

END OF THE YEAR BRINGS A RASH OF SETTLEMENTS WITH JUSTICE DEPARTMENT

The U.S. Justice Department has reached more than a dozen business-related settlements since the Presidential election. More were in the pipeline for January. Companies were seeking more favorable terms before the new Administration. The climate for business settlements could grow more harsh when Obama appointees seize the reins at the Justice Department, corporate lawyers say. The new Attorney General Eric H. Holder Jr., says he will expand "the focus of federal prosecutors into corporate suites."

Justice Department officials claim there is nothing unusual about end-of-year settlements. They defend their record in investigating and prosecuting corporate misdeeds. A spokesperson

for the Department says:

While the Department reaches these kinds of agreements throughout the year, it's not unusual for parties to resolve enforcement matters by the end of the calendar year.

Since November, the Justice Department has announced 19 settlements or plea deals with companies, compared with 16 in the same time frame the year before. In 2006, Department officials announced five business settlements in the same time frame. Patrick Burns, a spokesman for Taxpayers Against Fraud, a nonprofit group that supports whistleblowers, observed: "This is traditionally the time to ram a settlement through because no one notices. Putting it out between Christmas and New Year's is brilliant."

Ellen S. Podgor, a law professor at Stetson University who tracks corporate fraud developments, believes the timing of the Siemens case raised questions about "an end-of-the-year crunch." She told the *Washington Post*: "It seemed to me to be interesting coming at the end of the year." On her blog devoted to developments in white-collar crime, Professor Podgor has bestowed a 2008 "best timing" award on Siemens for reaching a plea deal with the government before a change in Presidential Administration.

Source: *Washington Post*

FDA FORMULA GUIDELINES ARE SAID TO BE FLAWED

The decision by the Food and Drug Administration to allow U.S.-manufactured infant formula contaminated with melamine or its byproducts onto store shelves is "seriously flawed" and medically risky because parents may feed their babies more than one product, according to scientists at the nonprofit group Consumers Union. The FDA detected melamine and its byproduct cyanuric acid separately in four of 89 containers of infant formula tested in the fall, but never at the same time. It was reported that a can of milk-based

liquid Nestle Good Start Supreme Infant Formula with Iron contained traces of melamine while three different cans of Mead Johnson's Enfamil LIPIL with Iron had traces of cyanuric acid.

The FDA says studies show potentially dangerous health effects from the industrial chemicals only when **both** are present. The lack of dual contamination is key, according to agency officials, and they use this as the basis for ordering no recalls of the tainted formula. In a letter dated January 9th, consumer advocates told FDA commissioner Andrew C. von Eschenbach and U.S. Department of Health and Human Services Secretary-Designate Tom Daschle that they were concerned the FDA was assuming parents would never feed their babies more than one type of formula. "FDA should regulate infant formula based on an assumption that infants may be exposed to melamine and cyanuric acid in combination," the consumer advocates wrote in the letter.

The FDA says it is reviewing Consumers Union's concerns. The agency says its tests "found that the U.S. supply of infant formula is safe." The U.S. government began testing domestically-produced infant formula in September, soon after melamine-spiked formula was blamed in the deaths of babies in China. It should be noted that so far melamine has been implicated in the sickening of nearly 300,000 babies in China and killing at least six infants there.

There has been very little research on what levels of melamine are safe. Cats had kidney failure after eating 32 parts per million of cyanuric acid and 32 parts per million of melamine. Rep. Rosa DeLauro, D-Conn., who heads a panel that oversees the FDA budget, has reiterated her call for a zero-tolerance policy for melamine in domestic infant formula. She said the discovery of tainted formula "used by some of our most vulnerable populations should compel the FDA to move expeditiously to eliminate melamine and cyanuric acid from the manufacturing process." I tend to agree with her stand on this issue.

Source: Associated Press

CPSC CLARIFIES REQUIREMENTS OF NEW CHILDREN'S PRODUCT SAFETY LAWS

New requirements of the Consumer Product Safety Improvement Act (CPSIA) will take effect this month. Manufacturers, importers and retailers will have to comply with the new Congressionally-mandated laws. Beginning on February 10th, children's products cannot be sold if they contain more than 600 parts per million (ppm) total lead. Certain children's products manufactured on or after February 10, 2009 cannot be sold if they contain more than 0.1% of certain specific phthalates or if they fail to meet new mandatory standards for toys.

Under the new law, children's products with more than 600 ppm total lead cannot lawfully be sold in the United States on or after February 10, 2009, even if they were manufactured before that date. The total lead limit drops to 300 ppm on August 14, 2009. The new law requires that domestic manufacturers and importers certify that children's products made after February 10 meet all the new safety standards and the lead ban. Sellers of used children's products, such as thrift stores and consignment stores, are not required to certify that those products meet the new lead limits, phthalates standard or new toy standards.

The new safety law does not require resellers to test children's products in inventory for compliance with the lead limit before they are sold. However, resellers cannot sell children's products that exceed the lead limit and therefore should avoid products that are likely to have lead content, unless they have testing or other information to indicate the products being sold have less than the new limit. Those resellers that do sell products in violation of the new limits could face civil and/or criminal penalties.

When the CPSIA was signed into law on August 14, 2008, it became unlawful to sell recalled products. All resellers should check the CPSC Website (www.cpsc.gov) for information on recalled products before taking into inventory or selling a product. The selling of recalled products also could

carry civil and/or criminal penalties. While CPSC expects every company to comply fully with the new laws resellers should pay special attention to certain product categories.

Among these are recalled children's products, particularly cribs and play yards; children's products that may contain lead, such as children's jewelry and painted wooden or metal toys; flimsily-made toys that are easily breakable into small parts; toys that lack the required age warnings; and dolls and stuffed toys that have buttons, eyes, noses or other small parts that are not securely fastened and could present a choking hazard for young children. The agency has underway a number of rule-making proposals intended to provide guidance on the new lead limit requirements. You can visit the CPSC website at www.cpsc.gov for more information.

Source: Consumer Product Safety Commission

SALMONELLA TYPHIMURIUM OUTBREAK

At press time, the Food and Drug Administration was still in the process of conducting a very active and dynamic investigation into the source of the most recent *Salmonella* Typhimurium outbreak. The FDA, the Centers for Disease Control and Prevention (CDC), and state partners have traced sources of *Salmonella* Typhimurium contamination to a plant in Georgia owned by Peanut Corporation of America (PCA), which manufactures peanut butter and peanut paste—a concentrated product consisting of ground, roasted peanuts—that are both distributed to food manufacturers to be used as an ingredient in many commercially-produced products including cakes, cookies, crackers, candies, cereal and ice cream. In addition, PCA peanut butter is distributed to and institutionally served in such settings as long-term care facilities and cafeterias.

The FDA has notified PCA that product samples originating from its Blakely processing plant have been tested and found positive for *Salmonella* by laboratories in the states of Minnesota and Connecticut. Those two

states have reported to FDA that samples of King Nut peanut butter tested in those states are a genetic match to the strain of *Salmonella* associated with the nationwide outbreak of *Salmonella Typhimurium*. King Nut is a distributor of PCA product.

The FDA recommends that consumers avoid eating any of the products that have been recalled and discard them. But it appears that major national brands of jarred peanut butter are not affected by the PCA recall. PCA does not sell peanut butter directly to consumers. Since this matter is still being followed by governmental agencies—federal and state—I advise all of our readers to get as much current information as possible on this health concern. The FDA has created a searchable list of products and brands associated with the expanded PCA recall. At press time, there had been 125 products recalled. This list is available on the FDA website at: <http://www.access-data.fda.gov/scripts/peanutbutter-recall/index.cfm>.

Source: FDA

OFFICIALS FEAR RISE IN CARBON MONOXIDE POISONINGS

Even though we have had very mild weather in Alabama it's very likely that we are in store for some real cold days in the coming weeks. Severe winter weather and a stormy economy could combine to make one of the season's common killers, carbon monoxide poisoning, even worse this year. Public health and safety officials say that coast-to-coast snowstorms and power outages, paired with spiking rates of utility shutoffs spurred by record unemployment, are likely to increase the accidental exposures that typically send more than 20,000 people to the emergency room and kill nearly 500 each year. Dr. Eric J. Lavonas, associate director of the Rocky Mountain Poison and Drug Center in Denver, had this to say: "I'm pretty sure we're going to see a big bump in carbon monoxide poisonings this winter. This economy is the perfect storm."

Deprived of power, many people will use gas-powered generators. Lots of folks will even bring barbecue grills indoors and use them as a heat source. In each such use, they forget or ignore the deadly consequences of the colorless, odorless, tasteless gas that can lead to illness, brain damage—and death. Jim Burns, past president and spokesman for the National Association of State Fire Marshals observed: "We see it during power outages and we see it during bad economic times. Unfortunately, people in desperate times take all means to stay warm."

The combination of a poor economy and bad weather is a predisposing factor for carbon monoxide poisoning. The problem is that many people don't realize how dangerous carbon monoxide can be. Carbon monoxide harms people by blocking oxygen from getting into the blood. The gas molecules bind more quickly than oxygen to hemoglobin, a protein in red blood cells, effectively smothering vital organs such as the heart and brain. Nearly three-quarters of carbon monoxide poisonings occur in homes and more than 40% occur in winter, according to the CDC. On average, the nation posts 110 carbon monoxide poisonings a day in December, 96 a day in January and 76 each day in February.

Source: *MSNBC*

CHINESE DAIRIES AGREE TO PAY \$160 MILLION TO TAINTED-MILK VICTIMS

The Chinese dairy companies blamed for selling contaminated milk that killed six children and sickened nearly 300,000 others last year have agreed to pay \$160 million in compensation to the victims and their families. A spokeswoman for the China Dairy Industry Association reports that a fund was established for the victims and that the payments would be made. China's state-controlled media reported that a group of 22 dairy companies would make one-time payments to the families of the victims. The settlement would amount to about \$550 per victim, which is the equivalent of about

three months of wages for the typical factory worker in southern China.

The association has also agreed to make payments to care for victims who suffer from long-term effects from the poisonings, according to Xinhua, the official Chinese news agency. Several lawsuits have been filed by families of the victims, but thus far none of them have been accepted by Chinese courts. Because of all the adverse publicity worldwide, China's top leaders have vowed to improve their country's food safety.

As we all know, some of China's largest dairy producers were accused last September by the government of selling milk contaminated with melamine, an industrial chemical that is believed to cause kidney stones and other ailments. In recent days, more than a dozen dairy middlemen have been charged with endangering public security in the northern province of Hebei and put on trial. They have been accused of intentionally contaminating dairy products in order to reap bigger profits. Because melamine is high in nitrogen, experts say, it can be used to artificially inflate protein readings on milk powder. In fact, some dairy producers and middlemen have admitted to using melamine as a cheap substitute for real milk powder.

It's interesting to note that Chinese authorities have arrested 60 people in connection with the country's tainted milk scandal that killed six infants and sickened nearly 300,000 more. The arrests were made over the past several months, but few of the names or dates were provided. Some have already been tried in court. Twenty-one went on trial between December 26th and 31st, including four executives of Sanlu Group. The court hasn't announced verdicts in those cases.

Tian Wenhua, former board chairwoman and general manager of Sanlu, pleaded guilty on December 31st for her role in the scandal. She and three other executives are on trial for producing and selling fake or substandard products. They were arrested in late September. From early August to mid-September, Sanlu Group produced 904

metric tons of melamine-tainted baby formula powder and sold 813 metric tons of tainted products made with contaminated milk.

Source: *New York Times*

SIMON SETTLES GIFT CARDS CLAIM

Indianapolis Simon Property Group, the owner of the Crystal Mall in Waterford, Conn., has agreed to pay nearly \$309,000 to settle alleged violations of the state's gift card laws. Connecticut Attorney General Richard Blumenthal says most of the money to be paid by Simon and its SPGGC affiliate will be in the form of refunds to thousands of consumers. The Attorney General's lawsuit, filed in 2004, alleged the company illegally subjected consumers to inactivity fees on Simon gift cards from 2003 to 2005.

Source: *Associated Press*

H&R BLOCK TO PAY \$4.85 MILLION SETTLEMENT OVER LOAN PROGRAM

The California Attorney General has settled a lawsuit against H&R Block over a widely-used loan program that gives the nation's largest tax preparer a part of customers' tax refunds. Attorney General Jerry Brown says the \$4.85 million settlement will stop H&R Block from offering high-cost loans it has marketed as early tax refunds. Former AG Bill Lockyer sued the company in 2006, adding California to a long list of other states that sued over H&R Block's "refund anticipation loans." The company says it arranges the cash advances for customers so they won't have to wait an extra one to four weeks for a check from the federal government. In return, customers give a percentage of their tax refunds to H&R Block and its banking partner.

While H&R Block did not acknowledge any wrongdoing, the company agreed to pay up to \$2.45 million in restitution for consumers who purchased a "Refund Anticipation Loan" or a "Refund Anticipation Check" through H&R Block between January 1, 2001

and December 31, 2008. The company also will pay \$500,000 in penalties and \$1.9 million in fees and costs. The settlement also bars H&R Block from marketing the loans and other products in a deceptive manner.

Source: *Associated Press*

MAJOR CREDIT CARD SYSTEM BREACH

Heartland Payment Systems disclosed last month that intruders hacked into the computers it uses to process 100 million payment card transactions per month for 175,000 merchants. The intruders appear to have had access to Heartland's system for a considerable period of time in late 2008. Apparently, the number of victims is unknown. According to tech security experts, the breach could set a record.

Heartland processes card payments for restaurants, retailers and other merchants. It discovered the security breach in mid-January when Visa and MasterCard notified the company of suspicious transactions stemming from accounts linked to its systems. Investigators then found the data-stealing program planted by the thieves. Heartland's disclosure coincides with reports of heightened criminal activities involving stolen payment card numbers. Security firm CardCops has been tracking a 20% year-over-year increase in Internet chat room activity where hackers test batches of payment card numbers to make sure that they're active. This has the potential for a tremendous loss for Heartland and its customers.

Source: *USA Today* and *ABC News*

XXIII. RECALLS UPDATE

NISSAN RECALLS MORE THAN 240,000 VEHICLES

Nissan Motor Co. is recalling more than 240,000 trucks in 20 cold weather states to fix a problem that could prevent front airbags from deploying in

a crash. The government said in a posting on its Website last month that the recall affects the Frontier, Pathfinder and Xterra from the 2005-2009 model years. In states where winter-time road salt is used, a mixture of snow, water and salt could enter a crash zone sensor area and rust, interrupting the signal. The Japanese automaker said that could prevent the front airbags from deploying in a crash.

A Nissan spokesman said the problem was discovered through warranty claims and no crashes or injuries have been linked to the issue. He said the red airbag warning light illuminates to alert the driver of the problem. A total of 242,720 vehicles are part of the recall and it involves trucks sold or currently registered in 20 states and the District of Columbia. The states are: Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, West Virginia and Wisconsin.

Nissan says owners in the cold weather states should be notified of the recall by mail later this month. Dealers will install a redesigned sensor at no cost. Owners in other states will receive extended warranty coverage to ten years for the sensor, the company said. Owners may contact Nissan at (800) 647-7261.

LEXUS RECALLS 214,000 VEHICLES WITH FUEL LEAKAGE PROBLEM

Toyota Motor Sales has announced a safety recall that involves approximately 214,500 Lexus vehicles sold in the U.S. and affected by ethanol fuel. The recall was launched with the National Highway Traffic Safety Administration. The recall affects certain 2006, 2007 and 2008 model-year GS300/350, IS250/350 and LS 460/460L vehicles. Some ethanol fuels with a low moisture content may corrode the internal surface of the fuel delivery pipes. If this occurs, the Malfunction Indicator Light (MIL) may illuminate. Over time, the corrosion may create a

pinhole in the fuel delivery pipes, resulting in fuel leakage. Dealers will replace the fuel delivery pipes with newly-designed components. As I understand it, no other Toyota or Lexus vehicles are involved.

CAR SEAT RECALL

Britax is recalling some of its car seats because they could fail to properly secure children in the event of a crash. The recall involves certain Britax Frontier child restraints. The harness straps may detach from the metal yoke on the back of the restraint if repeatedly loosened one strap at a time. To fix the problem, Britax will mail to all registered owners rubber caps that prevent the straps from detaching. Owners should call Britax at 1-800-683-2045 and request a kit or visit <http://www.frontierrecall.com>. The affected models include Britax Frontier models E9L54E7, E9L54H6, E9L54H7, E9L54M6 manufactured on or before September 14, 2008, and model E9L5490 manufactured on or before September 17, 2008.

BICYCLES WITH ROCKSHOX BICYCLE FORKS RECALLED

SRAM LLC, of Chicago, Illinois, has recalled about 175 bicycles using RockShox Domain 302 and 318 bicycle forks. The steel steerer on the fork can crack, causing the fork to detach from the bicycle frame. This can cause the rider to lose control and crash. Thus far only one incident with a minor injury has been reported. Two other incidents without injury have been reported outside of the United States. The recall involves RockShox Domain 302 and 318 bicycle forks with steel steerer sold for installation on new bicycles.

Only those forks manufactured between March 2008 and October 2008 with dates codes 09T8 through 42T8 are included in this recall. The date code is located on the back of the fork crown and on the lower leg. The RockShox Domain fork was installed on Transition Bottle Rocket bicycles,

and may have been installed on Rocky Mountain Flatline 1, Rocky Mountain Slayer SS350, and Rocky Mountain Slayer SS396 bicycles. For additional information, contact SRAM at (800) 346-2928 or visit the firm's Website at www.sram.com.

200,000 FISHER-PRICE RAINFOREST PLAY YARDS RECALLED

The U.S. Consumer Product Safety Commission has recalled 200,000 potentially deadly play yards with Fisher-Price's Rainforest theme, the alert raising questions about the promptness of the warning and whether other models could have the same flaw. Some 1,350 consumers complained that one or both sides of the Rainforest play yard had collapsed, with many reported injuries that included a broken nose, a mild concussion and a broken wrist. They are often used as portable cribs and have a bassinet attachment. When the rails collapse, babies can fall out, get trapped or gain access to unsafe areas. The play yards were made by Simplicity Inc., now defunct, under a licensing agreement with Fisher-Price, a unit of Mattel Inc. Fisher-Price agreed to send a \$100 refund to consumers who send the fabric sides to the company.

Simplicity also made its own branded play yards, some of which are still on the market. It's not clear whether those shared the same flawed design. The CPSC was investigating at press time. At least 18 children have died in other brands of play yards when the railings collapsed into a V-shape that strangled or trapped them, according to Nancy Cowles, executive director of Kids In Danger, a consumer group. This group was founded by University of Chicago professors whose son Danny Keysar died in 1998 when the rails of his portable crib collapsed around his neck. The CPSC knew rails on the Rainforest play yards were collapsing early last year, but officials decided "it did not rise to the level of a recall." A commission spokesman said the rails collapse in a U-shape, so they did not pose the

same strangulation hazard as prior recalls. But, the CPSC reconsidered when it was flooded with complaints late last year after SFCA Inc., the company that bought Simplicity's assets, stopped responding to consumers. The agency had been unable to make SFCA recall the play yards. Ms. Owles, with the consumer group, had this to say:

"Given the deadly legacy of play yards with collapsing sides, these play yards should have been taken off the market months ago, if not years ago. If there are other ones out there with this same design, they need to get them out of the marketplace or at least warn parents who have them."

Any person wanting to file a recall claim should call 800-432-5437.

STORK CRAFT RECALLS MORE THAN 500,000 CRIBS

About 535,000 Stork Craft Baby Cribs have been recalled by Stork Craft Manufacturing Inc., of British Columbia, Canada. The metal support brackets used to support the crib mattress and mattress board can crack and break. When one or more support brackets break, the mattress can collapse and create a dangerous gap between the mattress and crib rails, in which a child can become entrapped and suffocate. CPSC is aware of ten incidents in which one or more mattress support brackets have broken. In several incidents, the support bracket broke causing the mattress to collapse and create a gap between the mattress and crib rails. CPSC received a report of a toddler who sustained bruises to his forehead. In another incident a child reportedly became entrapped in the gap between the mattress and the drop side rail with no injury.

This recall involves Stork Craft Baby cribs. All cribs with manufacturing and distribution dates between May 2000 and November 2008 are included in this recall. The cribs were sold in various styles and finishes. The manu-

facture date, model number, crib name, country of origin, and the firm's name, address, and contact information are located on the assembly instruction sheet attached to the mattress support board. The firm's insignia "storkcraft baby" is inscribed on the drop side teething rail of some cribs.

The cribs were sold by major retailers including J.C. Penney, Kmart and Wal-Mart stores nationwide and online at Amazon.com, Babiesrus.com, Costco.com, Sears.com and Walmart.com from May 2000 through January 2009 for between \$100 and \$400. CPSC urges parents and caregivers to immediately stop using the recalled cribs and find an alternative, safe sleeping environment for their baby. Consumers should contact Stork Craft to receive a free replacement kit, with new mattress support brackets. Contact Stork Craft toll-free at (866) 361-3321 anytime to order the free replacement kit or log on to www.storkcraft.com.

JARDINE EXPANDS RECALL OF CRIBS SOLD BY BABIES "R" US

An additional 56,450 Jardine Cribs have been recalled by Jardine Enterprises, of Taipei, Taiwan. As you may recall, 320,000 units were recalled in June 2008. The wooden crib slats can break, creating a gap, which can pose an entrapment and strangulation hazard to infants and toddlers. CPSC has received 19 additional reports of crib slats breaking. In nine of these incidents, consumers reported that their infant or toddler broke the slat while in the crib. In addition, a 22-month-old child fell through the gap between the crib slats when a slat broke. Thus far no injuries have been reported.

This recall involves three models of Jardine wooden cribs with the date codes identified below. Cribs with other date codes are not affected by this recall. The date code and model number are printed on the label located on the inside of the bottom rail of the headboard or footboard. Jardine Cribs included in this expanded recall

are: Model # DA715BC, Dark Pine Olympia Lifetime Crib, with a date code of 2/04—1/07; Model # 0108L00, Antique Walnut Capri Single Crib, with a date code of 7/06—11/07; and Model # 0308C00, White Capri Lifetime Crib, with a date code of 12/05—11/07.

The cribs were sold at KidsWorld, Geoffrey Stores, Toys "R" Us, and Babies "R" Us stores nationwide, and at babiesrus.com, from March 2004 through January 2009 for between \$220 and \$330. Consumers should immediately stop using the recalled cribs and contact Jardine to receive a full credit toward the purchase of a new crib. Jardine will provide consumers with detailed instructions for purchasing cribs in retail stores and online. For additional information, contact Jardine at (800) 646-4106 or visit the firm's Website at <http://www.jardinecribre-call.com/>.

HOT COCOA SOLD AT BIG LOTS RECALLED

Georgia Agriculture Commissioner Tommy Irvin has warned residents that three G&J cocoa products packaged for Christmas sale were recalled because they may contain the industrial chemical melamine. The products were sold nationwide at Shopko and Big Lots stores. They include G&J Hot Cocoa Stuffer, G&J His and Hers Hot Cocoa Set and G&J Cocoa in French vanilla and double chocolate flavors. According to the company no illnesses from consuming the products have been reported so far. But they admit a few samples tested positive for melamine. The products were recalled by Dorsey Marketing Inc. of Ville St. Laurent, Quebec. Consumers should return the products to the store where they bought them for a refund.

7-ELEVEN BURRITOS RECALLED

A Denver firm has recalled about 172 pounds of burritos that may be contaminated with *Listeria monocytogenes*. The U.S. Department of Agriculture's Food Safety and Inspection Service announced the recall. The recall by

Home Fresh Sandwich Distributors Inc. involved 5.3-ounce packages of "7-Eleven Fresh to Go burrito with potatoes, bacon, eggs & Monterey Jack cheese" with a best by date of "Thursday 1225." Consumers may have purchased these burrito products on December 24th and 25th. The food-safety service has received no reports of illnesses associated with consumption of this product.

FDA RECALLS EYE-SURGERY DEVICE ARTICLE

Federal regulators have recalled a surgical device made by Advanced Medical Optics Inc. after receiving reports the product caused inflammation in patients' eyes. The recall by the Food and Drug Administration of the Healon D ophthalmic viscosurgical device came after the company started a voluntary recall. Advanced Medical, based in Santa Ana, California, voluntarily recalled the Healon D on October 30th, but only a portion of the units had been recovered by December 3rd, according to the FDA. An Advanced Medical spokesman said none of the recalled products is in public use and states there is "no risk it will be used in surgery." The Healon D is classified as a low-risk device by the FDA and is used to maintain space in the eye during surgery.

CIRCULAR SAWS SOLD EXCLUSIVELY AT HOME DEPOT RECALLED

Ryobi Corded Circular Saws has recalled about 12,400 circular saws manufactured by One World Technologies Inc., of Anderson, S.C. The return spring on the saw's lower blade guard can break, posing a laceration hazard to consumers. This recall involves Ryobi corded circular saws with the following model numbers: CSB123, CSB133L, and CSB142LZ. Circular saws included in this recall have manufacturing date codes between 0836 and 0842 on the data plate near the trigger handle of the saw. Circular saws with a green dot on or near the data plate and on the

outside of the package are not subject to this recall.

The saws were sold at Home Depot stores nationwide from October 2008 through November 2008 for between \$30 and \$70. Consumers should immediately stop using the circular saw and contact One World Technologies Inc. to locate their nearest authorized service center to schedule a free repair. For additional information, contact One World Technologies at (800) 525-2579 or visit the firm's Website at www.ryobitools.com.

WINDOW BLINDS SOLD AT COST PLUS AND WORLD MARKET STORES RECALLED

Cost Plus Inc., of Oakland, California has recalled its Roman shades and roll-up blinds. These Roman shades have a looped pull cord and exposed inner cords on the back of the shade. Looped pull cords and exposed inner cords on Roman shades present a strangulation hazard. The roll-up blinds have a looped pull cord and two lifting cord loops that run around the bottom rail. Looped pull cords and exposed lifting loops on roll-up blinds present a strangulation hazard to young children.

Thus far, no incidents or injuries have been reported with the Roman shades and roll-up blinds involved in this recall. However, CPSC is aware of the death of a child who became entangled in the lifting cord of a roll-up style blind whose manufacturer and retailer have not yet been identified. CPSC is aware of at least two deaths involving exposed inner cords on various styles of Roman-style shades, as well.

This recall involves four styles of shades, the "Canvass Roman Shade" available in four different sizes (4'x 6', 5'x 6', 2.5' x 6' and 3'x 6') with SKU numbers 376983, 376984, 376985, and 384870; the "Sari Roman Shade" available in two colors (berry and chocolate) with SKU numbers 394700 and 394701; and the "Buddha or Floral Matchstick Blinds" SKU numbers 407376 and 407221. A small tag on the back of the Canvass and Sari Roman

Shades states "World Market® Cost Plus, Inc., Oakland, CA 94607, Made in India, 100% Cotton." In addition, this recall involves other styles of wooden roll-up blinds, with or without valances, that have the following SKU numbers: 404991, 404992, 404993, 400742, 499743, 400744, 400745, 400746, 358064, 358065, 358066, 358067 and 358068. For additional information, contact Cost Plus toll-free at (877) 967-5362 or visit the firm's Website at www.worldmarket.com.

CPSC tells consumers to examine all Roman shades and roll-up blinds in their homes. If looped pull cords, exposed inner cords, or exposed lifting loops are found and there are children who live in your home or may occasionally visit your home, you should consider replacing the blinds or shades with products that do not have exposed pull cords or inner cords.

XXIV. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

RHON JONES

After serving as law clerk for U.S. District Judge Robert Varner, Rhon Jones began practice in Birmingham with the firm of Starnes & Atchison. Rhon joined our firm in 1994 and he now manages the Toxic Torts section of the firm. Rhon also has an active practice in predatory lending and class action litigation. The Troy native is currently involved in toxic exposure cases in Alabama, Colorado, Florida, Georgia, Minnesota, Missouri and New Jersey. Rhon has been involved in cases for the firm where the settlements or verdicts for clients have totaled over \$1.1 billion.

Rhon has taught Torts at Jones School of Law in Montgomery, and he is a regular speaker at national, regional and state seminars on various subjects for both Plaintiff and Defense counsel. He has authored more than 20 articles and papers for publication. Rhon is also

a Board member of the Public Justice Foundation, a national public interest law firm. He is an Advisory Board Member of the Family Sunshine Center, whose mission is to prevent domestic abuse. Rhon is also a former member of the Board of Directors of the Janice Capilouto Center for the Deaf, which fills special needs for the hearing impaired. He continues to actively support both of these groups.

In July 2007, Rhon received a Certificate of Recognition from the Alabama State Bar Committee on Volunteer Lawyers Program in tribute to his nomination for the 2007 Alabama State Bar Pro Bono Award. Rhon is a member of the First Baptist Church in Montgomery, where he teaches Sunday School. Rhon is married to the former Deanne Rawls, and they have four children. He is a huge fan of all Auburn University sports. Rhon does an excellent job for the firm. He works in an area that, when cases are successful, lots of folks benefit. We are most fortunate to have Rhon in a leadership role with the firm.

ANN EASLEY

Ann Easley, who has been with our firm for eight years, currently works as a legal secretary to Greg Allen in our Personal Injury/Products Liability section. The work in products liability cases is hard, demanding and intense. These cases will always involve either a death or permanent injuries that devastate our clients. One of Ann's best traits is her ability to communicate with our clients during these devastating times. She assists Greg in trials by filing pleadings with the court, organizing files, setting up depositions, and planning itineraries. Ann spends a lot of her time in Auburn where her daughter and son-in-law live. Ann says that she enjoys spending time with her two grandchildren, Luke and Lilly. Ann is a very good employee, a good person, and a credit to the firm. We are fortunate to have her with us.

DONNA PUCKETT

Donna Puckett has been with the firm since February 2001 and works as David Byrne's legal assistant in our

Toxic Torts Section. During that time, Donna has worked on some very important cases, including the Monsanto case, which settled in late 2003 for \$700 million and the Carbon Black case that went to the U.S. Supreme Court. She now works primarily on other environmental cases involving PFCs and leaking underground storage tanks (USTs). Donna and her husband John have been married since 1991 and they have three children, a son, Dylan, who is 17, and twin daughters, Leslie and Preslie, who are 16. Donna is a very good and dedicated employee who enjoys her work and we are extremely pleased to have her with us.

XXV. SPECIAL RECOGNITIONS

A TRIBUTE TO SENATOR PAT LINDSEY

My longtime friend, Pat Lindsey, died last month while on a hunting trip. The seven-term State Senator was one of the most respected members of the Alabama Legislature. Pat not only served with distinction, but he was also a master of the legislative process. His knowledge of the rules and precedence was unsurpassed. Pat will be missed by his many friends throughout the State of Alabama.

PUBLIC CITIZEN WORKS TO SAVE THE COURTS

Public Citizen has been working for years to oppose industry claims of preemption in the courts and in federal regulations. They are now pushing regulation and an executive order by President-elect Obama to stop this immunization of manufacturers. The Obama Administration must restore consumer rights, focus regulatory duties on protecting health, safety, and the environment. The following is a statement by Joan Claybrook, President of Public Citizen, setting out her thoughts and Public Citizen's goals:

If President-elect Barack Obama wants to set a different course than the Bush Administration, which resisted and turned back critical health, safety and environmental protections, he can start by striking down his predecessor's eight-year effort to tilt the regulatory field heavily toward big business and industry. In a letter sent Tuesday to Peter Orszag, the incoming Office of Management and Budget director, and Cass Sunstein, who is expected to serve as Obama's regulatory czar, Public Citizen reiterates its request that President-elect Obama make the health and safety of American families the underlying goal of all federal regulations. The new President can take an important step in this direction by amending a key executive order to reverse the erosion of consumer rights that occurred under the Bush Administration. Public Citizen, which was joined by other public interest groups, outlined in a letter sent to the transition team last month how the order could be drafted.

Specifically, the order should prohibit the abusive practice of inserting language in the preambles of or in federal regulations for the purpose of immunizing manufacturers from liability for injuries caused by faulty products. Through these preambles, the Bush Administration has been attempting to block consumers from holding manufacturers accountable for harm caused by hazardous drugs, medical devices, motor vehicles and other products. Under the Bush preemption doctrine, if a federal rule provides just a minimum floor of protection—for example, ensuring simply that a new drug isn't snake oil—then the manufacturer should be immune from all liability for harm the product causes, no matter how negligent or irresponsible the company was in designing, testing, labeling or marketing the product.

In a despicable abuse of its author-

ity, the Bush Administration in its last days continued to issue new regulations that contain these anti-consumer preambles—a last hurrah for an Administration that did everything it could to enrich its friends in Corporate America. Public Citizen has fought against this campaign to preempt consumer and state rights at every level. We have opposed harmful regulations at the administrative level, and we have filed numerous petitions for reconsideration of rules issued by the Bush Administration containing immunity clauses to stop them from taking effect until the new Administration can review them. We have backed legislation in Congress that would restore consumer rights and argued against preemption all the way to the Supreme Court.

The ability to hold manufacturers responsible in court for their defective products is one of the greatest safeguards the public has to ensure quality and accountability in the marketplace. In the coming months, Public Citizen attorneys will serve as lead counsel on a number of key cases involving preemption. For instance, we represent injured consumers against claims by generic drug manufacturers that they are entitled to special preemption protection. We also are involved in a series of cases in which food manufacturers assert that federal preemption immunizes them from claims that their product labels are false and misleading. And we are part of the team representing actor Dennis Quaid and his wife, whose infant twins almost died after being administered a mislabeled drug meant for adults. There, the drug's manufacturer is claiming preemption simply because the product was approved for marketing by the federal government.

We will also lobby aggressively for the reintroduction and passage of the Medical Device Safety Act, which would overturn the 2008

Supreme Court decision in *Riegel v. Medtronic*. In that case, the U.S. Supreme court held that pre-market approval of a medical device by the Food and Drug Administration immunizes the manufacturer from tort liability. The decision deprives injured patients of any compensation for their injuries. We have convened a group of leading public interest organizations to monitor and act on preemption issues before Congress and the executive branch. We hope that President-elect Obama, who as a U.S. Senator co-sponsored the Medical Device Safety Act, Professor Sunstein, and Director Orszag will move quickly and urgently to undo the damage to consumer rights done by the past Administration.

Public Citizen has been a strong supporter of consumer rights and has fought very hard to protect all Americans from defective and dangerous products. It has been a defender of the civil jury system and we all owe Public Citizen a debt of gratitude.

Source: Public Citizen

FIRM WILL SPONSOR LAW CALL

Our firm is proud to announce that we will be sponsoring LawCall to be aired on WSFA, Channel 12, in Montgomery. The television program will be hosted on a weekly basis by one of our lawyers, Gibson Vance. We believe that it is a good opportunity for our firm to provide a public service to the viewers in our area. The emphasis of the LawCall program will be to provide information regarding day-to-day legal issues that folks may encounter. Each week there will be a new topic and a guest lawyer who is experienced in dealing with cases regarding the scheduled topic.

The show will be aired every Sunday night at 11:00 p.m. The viewing area for WSFA includes the following counties: Autauga, Barbour, Bullock, Butler, Chambers, Chilton, Coffee, Conecuh, Coosa, Covington, Crenshaw, Dale, Dallas,

Elmore, Escambia, Geneva, Henry, Houston, Lee, Lowndes, Macon, Marengo, Monroe, Perry, Pike, Russell, Tallapoosa and Wilcox. We are proud to sponsor this program and we hope that the community will find it to be both informative and entertaining.

ALABAMA WOMAN JOINS OBAMA-BIDEN ON THEIR PRE-INAUGURAL TRAIN RIDE

We mentioned Lilly Ledbetter, the Alabama woman who is the namesake of federal legislation regarding employment rights, in another section of this issue. It's most significant that she was a special guest on the train carrying Barack Obama to his inauguration. She spoke at the Democratic National Convention last year. On their way to our Nation's Capital, Obama and Joe Biden took a whistle stop tour along the east coast before arriving for the inauguration. Ms. Ledbetter was one of about 40 invited guests on the train. Each one of these families has their own remarkable tale to add to our American story. The guests on the trip were from 16 families in 15 states and have contributed to society in some way. One was a soldier who now advocates for those suffering from post-traumatic stress disorder. As for her involvement, Ms. Ledbetter had this to say:

I am so excited because this new President is not going to forget what it's like to work your way up and he's keeping people from all walks of life involved.

Lilly Ledbetter is a true American hero. Without question, she certainly deserved to be recognized by President Obama and Vice-President Biden. This woman is a classic example of what ordinary folks can do to make things better for others. We at Beasley Allen are very proud of her. She is a real inspiration to all of us who are dedicated to helping others who need help.

SOME GREAT NEWS IN THE NEW YEAR

With all of the bad news that we are hit with daily, it's good to get some

good news for a change. When I learned that Dr. Sidney Wolfe had become a "player" at the Food and Drug Administration -- that was great news. Over three decades, Dr. Wolfe, head of the health group at Public Citizen, has helped take 16 drugs off the market and put restrictions on several multibillion-dollar products. The drug safety crusader has been so hostile to the FDA under President George W. Bush that he decried its 100th-anniversary celebration in 2006 as a "propaganda campaign" to hide its "unprecedented assault on the American public."

Now Dr. Wolfe is riding the wave of a larger shift in the Washington pendulum toward tougher company regulation. The drug industry had to be greatly concerned when it learned Dr. Wolfe was being appointed to a four-year term on the FDA's Drug Safety and Risk Management Committee. This group plays a key role in telling the agency which drugs are safe. What's more, Dr. Wolfe is so widely known and so well respected that he has the ear of several health leaders and members of Congress who are expected to influence FDA policy during the Obama Administration. As a matter of interest, Joshua Sharfstein, a former aide to Rep. Henry Waxman, who led the Obama transition team assessing the FDA, worked for Dr. Wolfe several years back.

Dr. Wolfe was invited once to the safety panel in May, when he helped torpedo Cephalon Inc.'s application to expand the use of its popular painkiller Fentora. The FDA named him to the panel full-time in August, at the urging of consumer groups that were owed a seat on the committee. Any person who believes protecting the public from a health and safety perspective is a worthwhile endeavor, has to feel very good about this development with Dr. Wolfe.

A graduate of Case Western Reserve Medical School in Cleveland and former researcher at the National Institutes of Health, Dr. Wolfe helped found Public Citizen's health group in 1971. The FDA, as Dr. Wolfe sees it, has been a **tool** of what he describes as the agency's corporate "clients." While

acknowledging life-saving drugs for heart disease and cancer, Dr. Wolfe says, “the history of the last 20 years is one of crises with drugs and medical devices, many approved despite the objections of the FDA’s own scientists.” I am in total agreement with Dr. Wolfe’s views and feel very good about his new role with the FDA.

Source: Wall Street Journal

FIRM LAWYER DOES WELL IN TEXAS CUTTING HORSE COMPETITION

Julia Beasley, a shareholder in our firm, competed in the 2008 National Cutting Horse Association (NCHA) Championship Futurity in Fort Worth,



Texas in December. The Championship Futurity is for three-year-old horses that have never been shown. Julia entered the non-pro and the amateur class on her gelding, Fiddle Gun. While she and Fiddle Gun didn’t advance in the non-pro class, they went to the semi-finals in the Amateur class. There were approximately 305 horses competing in the Amateur class. Julia and Fiddle Gun were among 46 horses that advanced to the semi-finals. As a result, they picked up a check for making the semi-finals and missed the finals by only one point. Only 25 horses made it to the finals. Julia and Fiddle Gun finished 28th out of 305 horses that were entered.

Fiddle Gun is a bay gelding and is out of the sire, Playgun, and the dam, Dainty Lena. Fiddle Gun was trained by Allen

Crouch of Noxapater, Mississippi. Julia will show Fiddle Gun as a four-year-old this year and they plan to enter some major events as well as many shows in the southeast. To learn more about the sport of cutting, you can go to the NCHA website at www.nchacutting.com. This is a fun family sport and the folks involved are wonderful, according to Julia. The website will show you the affiliates in each state and you can find a local show near your hometown.

A GOOD MESSAGE FOR THE NEW YEAR

I received a New Year’s message from the Christian Legal Society that is certainly worth passing on to our readers. Even though we are a month into 2009, it’s not too late to consider this message as we prepare for the events of this year.

Happy New Year!

How does this New Year find you? Do we, should we, expect anything new? The philosopher of Ecclesiastes was clear about this: “whatever is has already been...what will be has been before...there’s nothing new under the sun.” So what’s new? Regardless of time’s passing there are some things that are always new. “His compassions are NEW every morning.” (Lam. 3:23) “If anyone is in Christ he is a NEW creation.” (2 Cor. 5:17) “You have taken off your old self and put on a NEW self.” (Col. 3:10) “A NEW command I give you: love one another.” (Jn. 13:34) “His purpose was to create in himself one NEW man.” (Eph. 1:13-15). On the doorstep of a New Year, the issue is not in fact about what will be new in the next year, but rather, what is it that is already new that we take with us into this New Year.

Consider what the above scriptures have presented: new compassions, new creation, new character, new commandment, new community, all premised on a new covenant. May you know, experience and enjoy this continuing newness in your life. At the heart

of the very last communication attributed to God in scripture are these words: “I am making everything NEW!” (Rev. 22:13) We pray that you will know this present-tense work of God in CREATION, making the new out of nothing, as well as experiencing His power to renew what has succumbed to the wearing and wearying of time in His acts of RECREATION. We wish you a very blessed year, filled with the newness already given you by God.

*Grace and Peace,
The Christian Legal Society*

XXVI. SOME CLOSING OBSERVATIONS

As most all Americans have learned to their dismay, there have been some pretty bad actors in our Nation’s financial sector and millions of folks have been hurt by them. The federal government claims it was caught by surprise when all of the financial scandals began to surface. I find this real hard to comprehend. Our firm has been dealing with enough of the corporate fraud by financial institutions to have known for at least five years that there were some very bad actors in this important industry. Our involvement against the predatory lenders in recent years made us realize even more that our government in Washington has performed very poorly. Actually, there was a warning years ago that Americans should watch out for the banking institutions.

I believe that banking institutions are more dangerous to our liberties than standing armies. If the American people ever allow private banks to control the issue of their currency, first by inflation, then by deflation, the banks and corporations that will grow up around the banks will deprive the people of all property until their children wake up homeless on the continent their fathers conquered.

Thomas Jefferson 1802

Hopefully, we can look back in a few months and say that the financial institutions in this country have learned their lesson and are now operating within the law and with a renewed commitment to dealing with folks honestly, fairly, and with compassion. My prayer is that President Obama, members of his cabinet, all regulatory agency heads, and members of Congress will make the interests of the American people a top priority in all that they do. If that happens, our Nation will be much stronger as a result.

A TIMELY PRAYER FROM AN OLD FRIEND

My long time friend Corky Hawthorne sent me a prayer this month that is quite good and certainly appropriate for the perilous times we live in.

For He will command His angels concerning you to guard you in all your ways; they will lift you up in their hands, so that you will not strike your foot against a stone. Psalm 91:11-12. God, this is one of my favorite comforts from your Word. I pray and trust that you will command your angels concerning me, my family, my friends, my pastors and their families, that through your power and your command guardian angels will be around about to protect us and lift us up so that we will not "strike our feet against stones." Please protect us from all harm and evil. Help us remain pure and devoted to you. And for

those I know and love who are fighting addictions of various types, I pray that you will give them strength and power to overcome and that guardian angels will protect them and keep them from stumbling. In the name of Jesus I pray and give you thanks, amen.

NO BIBLE VERSES FROM READERS THIS MONTH

For some reason, we didn't get a single Bible verse sent in this month to go into the "favorite verse" category. Hopefully, that will change next month. In any event, I will include one of my own favorites this month.

For God so loved the world that he gave his only begotten Son, that whoever believes in him shall not perish but have eternal life.

John 3:16

I hope to continue this part of the *Report* and for that reason I encourage readers to send in their own favorite Bible verses to be included in the report.

XXVII. SOME PARTING WORDS

We are starting a new era in the United States of America. With all of the problems facing our Nation, our leaders

must learn to trust God and obey His commandments. God is faithful and will provide our needs if we will only believe, trust, and obey. While that may appear to some to be a simple solution to our problems, the fact is it's the only real solution. We should have learned a good lesson from accounts in the Old Testament relating to Israel. When the people obeyed God, the nation and all of its people did well. But when they didn't, things were bad. That is a historical truth!

We don't have to look far to find out exactly what each of us needs to do. The following instruction, which is very concise and very clear, is found in 2 Chronicles 7:14

If My people who are called by My name will humble themselves, and pray and seek My face, and turn from their wicked ways, then I will hear from heaven, and will forgive their sin and heal their land.

Our land is badly in need of healing. I can't think of a time when the American people needed this strong message more. I sincerely hope that all of our readers can agree. May God bless you, your families, and co-workers and may He bless our Country.

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