



THE  
**JERE BEASLEY REPORT**

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**A NATIONAL LAW FIRM LOCATED IN MONTGOMERY, ALABAMA**

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# I. CAPITOL OBSERVATIONS

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## *THE LEGACY OF ROSA PARKS*

I will candidly admit that in the late 1950s, I didn't fully comprehend what all Mrs. Rosa Parks would accomplish when she refused to give up her seat and move to the back of a Montgomery city bus. The Montgomery Bus Boycott, which lasted for 381 days and which was successfully led by Dr. Martin Luther King, resulted in sweeping changes in this country. I now know that, because of her stand, Mrs. Parks, a brave and courageous lady was largely responsible for much of the progress our country has made in the area of civil rights. The events after her death last month put things in perspective for all American citizens. We were all required to look back and, as a result, got a real lesson in American history. It was entirely fitting for a nation to pay tribute to this great and gracious lady. But, it's now time to look ahead to the future of our country. I hope the progress started in Montgomery by Mrs. Parks will continue until we have stamped out the ugly face of racism in this country. One lesson to learn from what happened in Montgomery on a cold December day in 1955 is that ordinary people can have an extraordinary effect on a nation and indeed the world.

## *THE TEXAS TRIAL*

By the time this issue is received we will be trying the first Vioxx case in Houston, Texas. As you know, this is the first federal court case to be tried. While lots has been written and said about Merck's big win in New Jersey, the result in that trial hasn't changed how we are trying our case in Texas. In New Jersey, Merck couldn't win on the

science and medicine, so they reverted to the oldest trick in the book - and that's to attack the victim. They did that with a vengeance and it worked well for them in that case. Judge Fallon has instructed all parties to our Texas case not to discuss the case with the media. That is certainly appropriate since the case should be tried in the courtroom and not in the media.

We will try our best to prove our client's case in Texas and will let a jury decide whether or not she is entitled to a verdict in her case. Hopefully, what happened in New Jersey - the home base of Merck - won't have any effect on us in Texas. All I can say is that being described by the national news media as being like "David" taking on a "giant" is nothing new for our firm. I just hope and pray that the end result in our story comes out like the biblical account of David's bout with his giant.

## *THE GOVERNOR'S RACE*

The Governor's race in Alabama is still about six months away, but that hasn't slowed down the early campaigning by the announced candidates. Even though the primary elections won't take place until June of next year, we are seeing lots of very early activity. As expected, a number of polls are currently being run by interested groups to find out who the "real" players will be. It will be interesting to see how things shake out between now and January of next year. Several folks have told me that they are already getting a little tired of all of the "political talk" when "storms," "football," and "hunting season" are more important to them at this time. Nevertheless, I suspect things will continue to heat up.

Finally, I keep hearing that there is another potential candidate who is considering throwing "his" hat in the ring in the Democratic primary. That person may be taking the "Brer Rabbit"

approach at this juncture and is just waiting for the appropriate time to make his candidacy known. His decision may depend on what ultimately happens to Don Siegelman.

## *THE SIEGELMAN INDICTMENT*

The indictment of Don Siegelman a few weeks ago was not totally unexpected. Rumors had been floating around Montgomery for months that a good number of persons would be indicted. While the timing might be a

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little suspect, I don't believe the U.S. Attorney's office in the Middle District of Alabama engages in political prosecutions. In my opinion, this will be a real trial and not just a political ploy by the GOP as some have suggested. In any event, it will be interesting to see how all of this pans out. There have been at least two polls run with the sole focus being Don's indictment and the effect it will have on his candidacy. Neither of the polls I have seen indicated that folks believe Don should drop out of the governor's race at this stage. Obviously, this turn of events has hurt him politically, and the polls did reflect that. I hope there will be a trial this year to avoid letting the case drag on into the next year. A speedy trial would be in order, and if that happens, it will be good for Alabama. If Don Siegelman is not guilty, he should be acquitted by a jury. On the other hand, if he is guilty, I believe that the former governor will be convicted. I don't believe the potential political effect of a guilty verdict will even be considered by jurors who hear the case.

#### **THE WHEELS SEEM TO BE COMING OFF**

The Bush White House is having more problems now that folks are beginning to realize that a man like Karl Rove has no place running our nation's government. Being a political genius is simply not enough. Character and integrity should have a top priority in the make-up of the man who tells the President what to do and when to do it. It doesn't take a political genius to see that the wheels seem to be coming off the Bush political machine. Even the President's strongest supporters say privately that the Bush White House is in real trouble. For the good of the country, the President should get rid of anybody in his Administration who at this stage "needs" to attend a seminar on "ethics!" It's a little late to teach an "old dog" new tricks. It's pretty obvious, however, that some of his cronies never attended a real class on ethics.

#### **FLORIDA MEDICAID PROGRAM RECEIVES \$4.2 MILLION FROM NATIONAL SETTLEMENT**

The taxpayer-supported Florida Medicaid Program will receive more than \$4.2 million as part of a \$124-million nationwide settlement with a Tennessee-based drug manufacturer, according to Attorney General Charlie Crist. The money will serve as restitution and fines from King Pharmaceuticals Inc., a generic drug manufacturer. A federal investigation revealed that King Pharmaceuticals improperly reported prices for its products to the federal government. These incorrect prices were used by the government to calculate rebates King Pharmaceuticals was required to pay to state Medicaid programs in order to keep its products eligible for Medicaid reimbursement. By reporting the wrong prices, King Pharmaceuticals cheated the various states' Medicaid programs out of millions of dollars in rebates. As a result, taxpayers were forced to pay a greater amount to maintain the Medicaid program. General Crist had this to say:

*Ripping off Medicaid places an undue burden on Florida's taxpayers and cheats the poor and disabled from receiving needed services. This settlement eases some of the taxpayers' burden and helps ensure that the poor will receive needed medicines.*

The settlement was negotiated by the Justice Department and the National Association of Medicaid Fraud Control Units. Florida was one of four states that brokered the national settlement. Since 2003, the investigative and prosecuting efforts of the Florida Medicaid Fraud Control Unit have resulted in 212 criminal convictions of individuals or entities charged in state and/or federal courts with defrauding the state's Medicaid program. During the same period of time, the unit has substantially increased the amount of recouped money, with recoveries now exceeding \$139.3 million on behalf of the State of Florida's Medicaid program.

Sources: Associated Press and The Insurance Journal

#### **AN UPDATE ON STATE REVENUES**

In the November issue, we wrote about the federal government's shifting of a financial burden to the states. I learned after our November issue was mailed out that the State of Alabama will have to send more than \$5 million each month to the federal government. This will come from the state's Medicaid agency. Our state, along with others, will be subsidizing the new Medicare prescription program. Alabama will have to pay more than \$40 million to the federal treasury. The payments will start in February of 2006 and will amount to about \$43 million for the fiscal year, which ends on September 30<sup>th</sup>. I may be missing something, but for some reason this deal doesn't seem too good for Alabama.

#### **A DEDICATED PUBLIC SERVANT**

In my opinion, Kay Ivey is doing a very good job as State Treasurer. Kay is a dedicated public servant and I believe that most folks in Alabama - Democrats and Republicans - would agree. I have known Kay for a number of years and am not a bit surprised at her good work. She is not only a very good state official, Kay is a fine person.

## **II. LEGISLATIVE HAPPENINGS**

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#### **A LOOK AHEAD TO 2006**

If history repeats itself, the 2006 regular session of the Alabama Legislature will likely be one of "huff and puff" and little more. The simple fact that 2006 is a political year leads me to believe that the session will be highly political and largely unproductive. I

hope and pray that I am wrong. This Legislature could make history by having a successful and productive session. I urge our Alabama readers to encourage their legislators to put politics aside - to the extent possible - when they come to Montgomery next year. If they can do this, it will help make the session a good one. There will be plenty of time for politics after the session. I believe the people of Alabama would largely agree that a moratorium on politics during the session would be a great thing. If the legislators are able to do this, which might require a miracle, the voters would show their appreciation at the polls.

### ***THE PROPOSED REPUBLICAN TAKE-OVER***

The Republican Party has announced its plans to take over the Alabama Legislature in next year's elections. The GOP claims to have all of the money required to accomplish their goal. I may be wrong, but I don't believe the people of Alabama are ready to turn the Legislature over to the GOP at this point in time. The fact that President Bush won't be on the ballot will have some effect in Alabama. Candidates won't have his coat tails to hang on to. But, I'm not too sure that the President coming to Alabama would help local candidates very much, considering his current circumstances. In fact, it might be a desirable for GOP candidates to run as "Alabama Republicans" in 2006 rather than have to justify or explain the "mess" in Washington. Many would say that the Democrats have had plenty of experience in playing "dodge ball" when it comes to the national Democratic Party. I have to admit that is pretty much an accurate appraisal. In any event, when it comes to electing legislators, I don't believe either political party will be able to dictate what happens with the voters at the local level. If nothing else, the GOP money coming in next year will help our economy. That is, if it comes in as predicted.

## **III. COURT WATCH**

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### ***EXPERT WITNESS FOR AUTOMOBILE INDUSTRY DESTROYED EVIDENCE***

One of the automobile manufacturers' leading expert witnesses, Robert Gratzinger, intentionally destroyed evidence in order to help his client, Honda, avoid liability, according to a court that sanctioned Honda. Before providing expert testimony on behalf of automobile companies, Mr. Gratzinger was an engineer who worked for General Motors Corporation and Nissan Corporation between 1971 and 1994. Following his retirement, Gratzinger has made a good living testifying for the automobile industry. He consistently has testified that roof structures and seat belts designed and manufactured in GM, Ford, Nissan, Toyota, Mazda, Isuzu, and Honda automobiles were reasonably safe.

In the case, in which Honda was severely sanctioned, Mr. Gratzinger was hired by Honda to support its defense that the Honda seatbelt system was not defective. During his investigation, Mr. Gratzinger "attempted to, or did, obliterate certain 'witness marks' on the buckle of the seatbelt" worn by the plaintiff. Such actions led the court to conclude that Honda was trying to "win by cheating." The court further found that Honda and its expert witness, Mr. Gratzinger, "wrongfully and intentionally altered the most significant physical evidence in the case." The court ordered sanctions intended to punish the past conduct and deter similar future conduct. In layman's terms, this paid expert witness destroyed evidence on a critical issue in the case.

The court entered these sanctions on October 3, 2002. But, the court sealed its order for the next four years. During this four year period of time, the same automobile manufacturers continued to hire Mr. Gratzinger as an expert witness,

even though they knew about his questionable character. When Mr. Gratzinger testified in other cases, he refused to discuss what sanctions Honda suffered as a result of his bad conduct, the details of which were unknown because of the sealed file. In fact, lawyers in our firm questioned Mr. Gratzinger on a number of occasions following the entry of the sanctions order. On every occasion, Mr. Gratzinger hid behind the sealed order and refused to discuss his unethical behavior that resulted in sanctions.

Fortunately, the Trial Lawyers for Public Justice (TLPJ) decided to challenge the secrecy order. TLPJ was successful. Now the scathing thirty-six page order is unsealed, open to the public, and Mr. Gratzinger can expect to be questioned about his destruction of evidence. The order specifically acknowledges that Honda and Gratzinger destroyed evidence on the "single most critical issue" in the case and "attempted to rob" the plaintiff of "her right to litigate on a level playing field."

It should be noted that Mr. Gratzinger was testifying in a case in which a 17-year-old girl was paralyzed in a motor vehicle accident. Her life was changed forever. Our firm thanks the Trial Lawyers for Public Justice, and more specifically, Arthur Bryant, its executive director, and Rebecca Epstein, who argued the case, for all of their hard work. This dedicated organization aims to keep the courthouse doors open for all and to encourage courts to recognize the necessity of publicizing corporate wrongdoing. TLPJ has done the public a tremendous service. The conduct by this expert witness and the cover-up by the automobile industry can't be tolerated in our legal system.

### ***A NEW SUPREME COURT NOMINEE***

I must confess that I thought that President Bush's first nominee to replace Justice Sandra Day O'Connor

would be confirmed without a great deal of opposition. Was I ever wrong! The biggest surprise for me, however, was the source of the opposition to Harriet Miers. I really thought that she would be confirmed and would join the High Court. I never believed that this lawyer would be subjected to the type of treatment she received from the President's own party. By not accepting the Bush Administration's "nod and a wink" to "trust me" that Ms. Miers is a true blue, die-hard conservative, Republican opponents effectively forced her withdrawal as a nominee, subjecting the President to criticism that he caved in to the hard right wing of his party.

The President's second nomination, apparently made without consulting Senate Democratic leaders, had those same conservatives turning backflips. Indeed, one of the most prominent critics of the Miers selection gleefully called the nomination of Judge Samuel Alito a "grand slam" for the right wing. No one disputes the credentials of Judge Alito, who carries the track record in public life — especially as a judge — that many of the conservative critics said Ms. Miers lacked. Judge Alito has been a judge on the United States Court of Appeals for the Third Circuit for 15 years, serving before then as U.S. Attorney in New Jersey and a Deputy Attorney General and assistant to the Solicitor General during the Reagan Administration. While serving in the Reagan Administration, he argued thirteen cases before the U.S. Supreme Court. By all accounts, Judge Alito is a superbly qualified and talented lawyer and judge.

But, although the Bush Administration is trying to portray Judge Alito as a mainstream conservative, both the nominee's Democratic critics and many of his Republican supporters agree that if confirmed to replace Justice O'Connor, who often has cast the "swing vote" on close decisions, Judge Alito would likely move the High Court to the right. Judge Alito has dissented frequently in cases

on which he has sat in the Third Circuit, nearly always taking a more conservative position than the court's majority. Although his views on abortion have been the most prominent topic of debate, other areas of Judge Alito's record are noteworthy as well. For example, Judge Alito's judicial opinions reflect a conservative, restrictive view of the power of Congress to legislate under the Commerce Clause, the main constitutional provision on which many contemporary federal laws are based. If Judge Alito holds to that perspective, various laws could be at risk of being struck down at least in part, among them the Clean Water Act, some criminal laws (he urged in dissent that federal regulation of the possession of machine guns is unconstitutional), and some applications of the civil rights laws. On another issue, based on his record, Judge Alito is expected to be supportive of public displays of religion and the "free exercise" of religion, imposing fewer conditions on those activities, which I agree with. But, along with those supporting religious free speech, business groups generally have been very positive of the Alito nomination too. As an appellate judge, Judge Alito has tended to support employers and governmental defendants in employment discrimination and other civil rights claims, and has upheld arbitration provisions and "choice of law" provisions that make it harder for injured parties to sue.

Judge Alito's conservative views are likely to cause "sparks" in the confirmation process, and a number of interest groups have been seeking to mobilize opposition to Judge Alito's nomination. But, some key moderate Senate Democrats have already indicated that they are not likely to support a filibuster. With a 55-45 Republican majority in the Senate, the question becomes whether enough moderate Republicans have enough questions about Judge Alito to call his nomination into doubt. Given

the numbers in the Senate and Judge Alito's record, I will be very surprised if Judge Alito is not confirmed. Still, Senate hearings on Judge Alito's appointment are scheduled to begin on January 9<sup>th</sup>, and with all that's at stake in this nomination, I predict the hearings will be very interesting indeed! I will go out on a limb again, however, and predict that this nominee will be confirmed.

### ***THE FIRST ROBERTS COURT RULINGS COME DOWN***

The public has now had the benefit of two rulings from the U.S. Supreme Court with Chief Justice John Roberts in the leadership role. The Court ruled unanimously last month that companies must pay plant workers for the time it takes to change into protective clothing and walk to their work stations. The issue was one of two that justices settled in a pair of unanimous decisions. These were the first rulings under the leadership of the new Chief Justice Roberts. But, the Chief Justice Roberts did not write either opinion. The Court said in the first case that while employers aren't required to pay workers for time spent changing clothes, they must pay for the donning of "integral" gear and the time it takes workers to then walk to the production area. The Court, in a ruling by Justice John Paul Stevens, upheld a decision of the U.S. Court of Appeals for the Ninth Circuit in favor of workers at a meat processing plant in Pasco, Washington.

In a second ruling, the justices said the U.S. Court of Appeals for the Ninth Circuit should reconsider whether federal officials can be sued for negligence over an accident in an Arizona copper mine. Justice Stephen Breyer, writing that opinion, said the appeals court ruled too broadly in allowing the lawsuit by two men who were seriously injured in 2000 when a nine-ton rock

slab fell from the ceiling of the Mission Underground Mine.

I don't believe that the results in these two opinions should be considered as starting any significant trend. Each case, however, dealt with an issue relating to a business. While some are claiming the rulings are major defeats for business, I don't agree. It simply appears that the justices followed the rule of law - as they should do in every case.

Source: *Associated Press*

### **FOLKS DON'T LIKE HYPOCRISY**

In recent years, there have been complaints by the tort reformers about "frivolous lawsuits" and "huge jury awards." ABC News did some investigating recently and they turned up some interesting facts. At least some of the people in favor of tort reform - even some of its loudest proponents - have themselves benefited financially from the legal system. Some of these have been discussed in recent issues. The most prominent politician who has filed a number of lawsuits is none other than our current President.

Another is Senator Rick Santorum (R-PA). The Senator has said that the number one health care crisis in his state is medical lawsuit abuse. In the past, Senator Santorum has called for a \$250,000 cap on non-economic damage awards or awards for pain and suffering. In fact, he attended a rally in Washington D.C. this past spring and was a strong advocate for restricting the legal rights of victims. But Senator Santorum's wife sued a doctor for \$500,000 in 1999. Mrs. Santorum claimed that a botched spinal manipulation by her chiropractor led to back surgery. Interestingly, she claimed pain and suffering. Even more interestingly, the Senator's wife sued for twice the amount of the cap her husband has supported.

Senator Santorum has sponsored a \$250,000 cap on non-economic

damages on at least two occasions. But, he testified in his wife's case against the doctor. The Republican Senator told the jury that he even had to carry the laundry upstairs for his wife because of her injury. He also told the jurors that, because his wife suffered humiliation from weight gain, she no longer had the confidence to help him on the campaign trail. The jury was so moved by the Senator's testimony it awarded Karen Santorum \$350,000. It is interesting that the trial judge cut the jury's award in half, saying it was excessive. The moral of this story is that some of the proponents of destroying the legal system change their tune when one of them or a family member becomes a victim. I have heard for years that nobody likes a hypocrite. If that is true, then I don't guess we should like Senator Santorum very much. But, I will give him the benefit of the doubt and say that he is just another garden variety politician who really doesn't mean what he says politically!

### **RHODE ISLAND'S LEAD PAINT LAWSUIT BACK IN COURT**

Tens of thousands of children in Rhode Island have suffered from lead poisoning, and the former makers of lead-based paint have done nothing to fix the problem in that state. A second trial has started in the State of Rhode Island's lawsuit seeking to hold the paint companies accountable for a public nuisance that has sickened children, contaminated hundreds of thousands of homes, and burdened Rhode Island families, landlords and taxpayers.

The four defendants in the case are the Sherwin-Williams Co., Atlantic Richfield Co., Millennium Holdings LLC and NL Industries, Inc. The companies, former makers of lead paint and pigment, call the lawsuit unfair and say they are being targeted for a problem they didn't create. A portrait of corpo-

rate wrongdoing was outlined to the jurors. The companies made lead-based pigment and paint despite knowing the product posed a health risk for children. The defendants were accused of engaging in a public relations campaign to deny and downplay medical problems associated with lead.

Half the homes in Rhode Island are potentially contaminated with lead paint, and 35,000 children have suffered lead poisoning in the last decade. Rhode Island, with its large stock of older homes and buildings, is among the most at-risk states for lead poisoning. The defendant's lawyer told the jurors that the lead paint problem is confined to a small pocket of "poorly kept-up properties" and that even routine maintenance can reduce the risk of childhood lead poisoning.

Lead poisoning can cause brain damage in children, behavioral disorders, and even death. Lead paint was banned nationwide in 1978 after studies showed children who eat or breathe flaking paint chips or dust could suffer severe health problems. Rhode Island was the first state to sue the paint industry in 1999. The first trial ended with a hung jury. DuPont Co., one of the original defendants, was dismissed as a defendant after reaching a multimillion-dollar agreement with the state.

### **THE NEW YORK TIMES WANTS AN EARLY RULING FROM THE U.S. SUPREME COURT**

*The New York Times* is asking the U.S. Supreme Court for certiorari in its effort to head off a libel suit on a motion to dismiss. As our lawyer readers know, a motion to dismiss is the earliest possible time for a case in litigation to be thrown out by a trial judge. It is not surprising that the U.S. Supreme Court rarely grants cert on cases at such an early stage. Lawyers for the *Times*, however, are hopeful that a strongly worded dissent written by Judge J. Harvie

Wilkinson III of the U.S. Court of Appeals for the Fourth Circuit will get the justices' attention. The case raises First Amendment concerns about the stage at which a defamation case should be dismissed. The case involves Steven J. Hatfill, the former Army bioterrorism expert, who sued the *Times* and its columnist Nicholas Kristof for a series of columns in 2002 that Hatfill claims defamed him. Hatfill also claims the articles encouraged the FBI to unnecessarily focus its investigation of anthrax-laced mail on him. As you may recall, the investigation involved a series of mailings in 2001 that left five people dead and caused the country to take precautions in opening mail.

A U.S. District Judge in Virginia had entered an order dismissing the case. But a 4<sup>th</sup> Circuit panel ruled 2-1 to reinstate it, saying that under Virginia law the columns are "capable of defamatory meaning" and that the columns were "extreme or outrageous" enough to enable Hatfill to pursue damages for intentional infliction of emotional distress. Judge Wilkinson, a member of the panel, dissented, saying that his reading of the columns did not support Hatfill's claims. Interestingly, the full court refused to hear the case on the request for rehearing.

In his October 18<sup>th</sup> dissenting opinion, Judge Wilkinson warned that letting the panel decision stand "will restrict speech on a matter of vital public concern." Judge Wilkinson advocated for early dismissals of libel claims when the facts warrant such action. The judge, who incidentally is a former editorial page editor at the *Virginian-Pilot*, a newspaper based in Norfolk, Virginia, wrote:

*While a heightened pleading standard in defamation cases may be inappropriate, ... there is no reason why an action of this kind cannot frequently be resolved on a motion to dismiss.*

Because of the First Amendment,

courts have generally taken a skeptical view of any defamation action. But, it is difficult to see how at the motion-to-dismiss stage a complaint can be dismissed if it states a cause of action including a claim of injury to the plaintiff. Many lawyers from the plaintiffs' bar believe courts dismiss libel and defamation cases prematurely. But, many judges believe that the First Amendment requires them to do "a special review under a stricter standard." Under the law in most every state, and in the federal courts, every possible inference should be made in favor of the plaintiff on a motion to dismiss. I don't believe a defamation case should be treated any differently if the statement at issue could be read to be defamatory. Whether an ordinary person would read the words to be defamatory is an issue for a jury to decide. In my opinion, summary judgment is the proper method of disposing of a defamation case that lacks merit. It will be interesting to see whether the U.S. Supreme Court elects to get involved at this stage of the litigation.

Source: *Alabama Bar Association Journal*

#### **MASSACHUSETTS COURT RULES IN AN ALCOHOL-RELATED CASE**

A recent case in Massachusetts dealing with alcohol sales has caused a great deal of discussion in legal circles. A Suffolk County Superior Court in Boston ruled that an "admittedly drunk" underage drinker in Massachusetts can sue two bars that served him alcohol before he was involved in a vehicle crash. According to the judge, the drunk driver, who was 19 at the time of the crash that left him a paraplegic, presented enough evidence that the licensed establishments violated their legal duty not to serve an under-age customer. The judge wrote in his opinion:

*In short, since it is a crime for a tavern to serve alcohol to an underage adult, a tavern has a*

*legal duty to not serve alcohol to anyone it knows or reasonably should know is under 21 years of age. That duty is owed not only to any third party injured by the underage adult but to the underage adult himself, since the law seeks to protect all persons under 21 from their anticipated inability to drink responsibly. If the underage adult can prove that a tavern breached that duty, and that he was injured as a result of the alcohol the tavern negligently permitted him to drink, he can obtain damages for the injuries caused by the defendant tavern's negligence.*

State law in Massachusetts allows drunk drivers to sue bars that served them if they show "willful, wanton, or reckless" disregard for their intoxication. But, the judge ruled that because the drunk driver was under-age, he only needed to show that the bars were negligent in serving him alcoholic beverages, and thus his case could proceed to trial. The superior court judge reserved for the trial court the question of whether the defendant taverns may claim comparative negligence. The young man admitted that he was driving drunk, but contended that he could have avoided the accident if he had not been intoxicated. It will be interesting to see how the case turns out. I firmly believe the law should be very tough on any establishment that sells alcoholic beverages.

Source: *The Insurance Journal*

#### **HARTFORD ARCHDIOCESE REACHES \$22 MILLION ABUSE SETTLEMENT**

The Roman Catholic Archdiocese of Hartford, Connecticut has agreed to pay \$22 million to 43 people who say they were sexually abused by priests. The settlement was the result of mediation ordered by the court. The settlement came after two years of mediation. The Bridgeport Diocese had paid \$21

million to settle abuse claims in 2003. At the time, the payout was believed to be the third-biggest settlement by a U.S. diocese since the scandal that rocked the Roman Catholic Church broke in Boston in 2002.

The alleged abuse in the Hartford archdiocese dated as far back as the 1960s and involved 14 priests or former priests. Six of the priests are dead, four are retired, and three are no longer in active ministry. I hope we will soon see an end to claims of this sort. All churches must take the required steps to make sure that child molesters don't find a way to get in a position where they can abuse children. A church is the last place where a parent should have to worry about the safety of a child.

Source: *Associated Press*

#### **MISSISSIPPI AUTOMOBILE INSURANCE LAW DOESN'T REQUIRE PUNITIVE DAMAGE COVERAGE**

The Mississippi Supreme Court says that insurance companies in Mississippi aren't required by law to cover punitive damage awards in their automobile liability policies. The court said that Mississippi's Insurance Commissioner had misinterpreted a previous court decision when he denied requests from two companies to amend their Mississippi automobile insurance policies to **exclude** liability for punitive damages. Shelter Mutual Insurance Co. and Shelter General Insurance Co. filed the requests in 2002. In 2003, Commissioner Dale, in denying the changes, cited a court ruling and an attorney general's interpretation that state law required insurers to pay punitive damage awards. A Hinds County Chancellor sided with the commissioner in 2004 in a lawsuit filed by the insurance companies. The chancellor said state law was written so broadly as to require coverage for punitive damages.

The Supreme Court in its ruling over-

turned the lower court and sent the case back to the Insurance Commissioner. Under this ruling insurance companies in Mississippi are not prohibited by law from excluding coverage for punitive damages in its automobile policies. The Supreme Court says Mississippi law refers only to coverage amounts for bodily injury, death, and property damage in automobile liability policies. The fact that the Legislature made no reference to punitive damages in the statute was said to be significant to the court. This ruling will benefit insurance companies, but it will hurt both victims and Mississippi policyholders where conduct above a negligence standard is involved in moving vehicle accidents. The Legislature should correct this problem, but that may prove to be most difficult.

#### **PAYDAY LOANS RULED ILLEGAL**

The Alabama Supreme Court came down on the side of consumers in a recent ruling dealing with a most important issue. The court ruled in late November that payday lenders - who lent money from 1998 to 2003 - did so illegally because they charged usurious interest rates. This is the gist of the Alabama Supreme Court's decision and that's good news. The state's highest court, ruling on a 3-year-old appeal, said that payday loans made during that time frame were subject to restrictions of the Alabama Small Loan Act.

Mike Skotnick, who is with the Birmingham firm of Haskell, Slaughter handled this case for the consumers and should be thanked. We all appreciate the hard work and it paid off. Payday lenders have contended for many years that the law capping interest rates charged by lenders didn't apply to them. We always believed they were wrong and the court has now agreed. Customers who got loans from 1998 and 2003 will now be able to sue for

damages stemming from the usurious interest. As many as 50,000 loans were made during that time. The payday lenders will claim, however, that the statute of limitations will bar some of the suits. But, a number of suits are pending around the state. Hopefully, lawyers handling these cases will get their cases ready for trial and let Alabama juries know how truly bad this industry is. Our firm has a number of pending cases.

The legislature passed a law in April 2003, that authorized the payday loans and limited the interest to 17.5% per transaction, along with other fairly weak restrictions. I believe that the legislature should now make this law much tougher. In its present form, it is not good for consumers and actually protects the industry. In any event, the Supreme Court did a good thing and that's really good news. The payday lenders must be controlled in our state. Now, it's up to the legislature to do its part. Contact your Senators and House members and ask them to get involved.

## **IV. THE NATIONAL SCENE**

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#### **THE GIANT OIL COMPANIES SHOULD BE ASHAMED**

People all over the country are up in arms over the record profits being raked in by the giant oil companies. **Exxon Mobil Corp.** and **Royal Dutch Shell PLC**, the world's number one and number three oil companies, reported record third-quarter earnings that totaled almost \$19 billion. As previously reported, ExxonMobil reported third-quarter net income of \$9.92 billion, up 75% from the year-ago period, on revenues of \$100.72 billion. It was among the biggest quarterly profits of any company in history, and amounted to a **per-minute profit** of \$74,879.23

during the quarter. Shell, the third largest oil company by market value behind ExxonMobil and Britain's BP PLC, reported that its third-quarter net income rose 68% to \$9.03 billion, on \$76.44 billion in revenues. Like Exxon-Mobil, Shell's profit came mostly from operations. The combined quarterly revenues of these companies - \$177.16 billion - totally exceeded the entire economic output of some countries last year.

Congress must give consumers some relief and should act immediately. There is no way to justify the current situation. A federal anti-price gouging law is badly needed. Bringing oil company bosses in and making them testify under oath is not the answer. No corporation, regardless of how politically powerful it may be, should be allowed to abuse the free enterprise system to benefit themselves and their businesses at the expense of all Americans. The Bush Administration must shake off its close ties to the oil and gas companies and take action to protect American consumers. At least, the political backlash against high fuel prices and oil-company profits appears to be getting the attention of both Democrats and Republicans. I hope the President is listening too. But, folks need real relief and not just political talk. Taking on the oil companies is one way for the Bush Administration to get the media to take Karl Rove off page one.

#### **BUSH BORROWED MORE THAN ALL PREVIOUS PRESIDENTS COMBINED**

It is impossible for me to understand how any fiscal conservative could support George Bush's economic and fiscal policies. The President appears to be a real "liberal," based on his record. President Bush and the current Administration have borrowed more money from foreign governments and banks than the previous 42 presidents combined. According to the Treasury Department, from 1776-2000, the first

224 years of U.S. history, 42 U.S. presidents borrowed a combined \$1.01 trillion from foreign governments and financial institutions. It is shocking that in the past four years alone, the Bush Administration has borrowed \$1.05 trillion. It's difficult to justify how a president who says he is "conservative" can continue to drive our government deeper and deeper into debt. The financial mismanagement of our country by the Bush Administration should be of concern to all Americans, regardless of political persuasion.

It makes absolutely no sense for the U.S. government to be so deeply indebted to foreign countries. We have an addiction in this Administration to deficit spending. We can't mortgage our country's resources to foreign interests without endangering, not only our nation's economy, but also our national security. We had best wake up and soon! If this recklessness is not stopped, I truly believe our economic freedom as American citizens is in great jeopardy. I have to wonder why more GOP members of Congress aren't concerned over what we are seeing.

#### **LIBBY INDICTMENT IS BAD NEWS FOR THE BUSH WHITE HOUSE**

Without question, the recent indictment of a high-level Bush Administration official was very bad news for the Bush White House. Many Americans believe President Bush's cronies went to unprecedented lengths to twist the truth about the reasons for invading Iraq. It has become very clear that anybody who disagreed with the President was labeled as a traitor to his or her country and even worse was called a "liberal." It certainly appears that national security was threatened by "Scooter" Libby and others simply to punish a respected public servant who dared to expose the sham of why the U.S. went to war. These arrogant offi-

cially obviously believed they could smear and even destroy their opponents and leave no fingerprints. I have to believe that others in the Administration had to know what Libby and others were doing. Joan Claybrook, president of Public Citizen, had this to say concerning the current state of affairs:

*Fortunately for the country, this time, a top official has been caught. This ethically deprived government has sunk into a morass of its own lies. It's time for Bush Administration officials to be held personally responsible for their shameful deceptions. Even as the special counsel's investigation continues, Congress should put aside partisanship and immediately launch hearings into not only the cynical outing of an undercover CIA agent by officials at the highest levels of government but also into the lies against the American people that took us to war. Special Counsel Patrick Fitzgerald, who is a Republican appointee, tracked down the truth and brought an indictment for knowing perjury and obstruction of justice. He helps revive the public belief in the rule of law.*

Source: Public Citizen

#### **LOBBYING AND ETHICS REFORMS BADLY NEEDED**

It is quite apparent that business interests have virtually captured the federal government and are exerting **undue influence** over policy and procurement decisions as a result of the revolving door that exists in our nation's capital. The frequent appointment of corporate executives and lobbyists to public posts and the movement of government officials from public service into lucrative jobs in the private sector has become a major problem. A report titled **A Matter of Trust** was issued in

late October by a group known as the Revolving Door Working Group.

The Revolving Door Working Group is a broad-based network of 18 organizations ranging from Public Citizen and Common Cause to Farm Aid and Public Employees for Environmental Responsibility. The Working Group was formed to promote ethics in public service and to bring about an arm's length relationship between the federal government and the private sector. The Working Group's report calls for extensive changes in federal lobbying and ethics rules - a sentiment echoed by Senator Russ Feingold (D-WI) and Representative Marty Meehan (D-MA), both of whom appeared at a press conference with members of the group. Senator Feingold, author of a reform bill - The Lobbying and Ethics Reform Act (S.1398) - that incorporates a number of the same proposals as those put forth by the Revolving Door Working Group, stated at the news conference:

*For too long, lobbyists and special interests have had too much power in Washington, and much of that power is hidden from public view.*

Representative Meehan, who has introduced the Special Interest Lobbying and Ethics Accountability Act (H.R. 2412), added these most timely and relevant comments:

*There's an ethical cloud hanging over Congress and the executive branch. It's time to take steps to restore the American people's confidence in the federal government.*

Speaking on behalf of the Revolving Door Working Group, Public Citizen president Joan Claybrook, said:

*The mishandling of Hurricane Katrina and the Abramoff lobbying scandal are only the latest examples of how cronyism and excessive corporate influence are undermining the federal govern-*

*ment. Addressing the revolving door problem will go a long way toward restoring integrity in the system.*

Chellie Pingree, president of Common Cause, who appeared at the news conference, stated:

*Whether it's Katrina relief or support for our troops in Iraq, the American people deserve to know that our money is not being wasted and is being used effectively. Our public servants must be just that—people who hold federal jobs because they have the right qualifications, not because they know the right people.*

The Revolving Door Working Group report provides a thorough analysis of the three major forms of the revolving door:

- **THE INDUSTRY-TO-GOVERNMENT REVOLVING DOOR**, through which the appointment of corporate executives and business lobbyists to key posts in federal agencies establishes a pro-business bias in policy formulation and regulatory enforcement.

- **THE GOVERNMENT-TO-INDUSTRY REVOLVING DOOR**, through which public officials move to lucrative private-sector positions in which they may use their government experience to unfairly benefit their new employer in matters of federal procurement and regulatory policy.

- **THE GOVERNMENT-TO-LOBBYIST REVOLVING DOOR**, through which former lawmakers and executive-branch officials become well-paid advocates and use their inside connections to advance the interests of corporate clients.

Based on their analysis, the Working Group recommended a number of needed changes, including:

- Strengthening conflict-of-interest rules

to allow the disqualification of potential appointees whose employment background would make it difficult for them to comply with the rule requiring impartiality on the part of federal employees;

- Strengthening the recusal rules that bar appointees from handling matters involving their former employers in the private sector;
- Extending to two years the “cooling off” period during which former officials cannot become paid lobbyists after leaving government;
- Revoking the special privileges granted to former members of Congress while they are lobbyists; and
- Placing all lobbyist disclosure reports, recusal agreement, waivers, and other ethics filings on the internet for all to see.

Larry Mitchell, CEO of the American Corn Growers Association, highlighted the need for these reforms by focusing on revolving door abuses in the Department of Agriculture:

*The movement of corporate executives and lobbyists into key posts at the Department of Agriculture - along with the movement of officials back into high-paying private-sector jobs - has resulted in a distortion of USDA policy-making. The interests of small farmers get lost in a Department oriented to the needs of big agribusiness.*

It appears that the Bush Administration has been the worst offender of all occupants of the White House in modern times. Cronies of the Administration have been placed in key positions throughout the structure of the federal government. It is obvious that these folks are not there to help ordinary citizens and consumers generally. It would take decades to undo some of

the anti-consumer and anti-small business measures that will have been put into place during the “Bush years.”

The members of the Revolving Door Working Group are: American Corn Growers Association, Center for Corporate Policy, Center for Environmental Health, Center for Science in the Public Interest, Center of Concern/Agribusiness Accountability Initiative, Common Cause, Corporate Research Project of Good Jobs First, Defenders of Wildlife, Edmonds Institute, Farm Aid, Government Accountability Project, Institute for Agriculture and Trade Policy, National Catholic Rural Life Conference, Organization for Competitive Markets, Project on Government Oversight, Public Citizen, Public Employees for Environmental Responsibility, and Revolt of the Elders. If you want to read the full report, it is available on the Working Group’s website at [www.revolving-door.info](http://www.revolving-door.info).

Source: Public Citizen News Release

### **NEW YORK ATTORNEY GENERAL STRESSES STRONG ENFORCEMENT AS GOOD FOR BUSINESS**

Attorney General Eliot Spitzer, who is running for Governor in New York, has painted his critics as defenders of corrupt practices and not true champions of free enterprise. He also has sought to refute the idea that strong enforcement of laws and regulations is bad for business. Spitzer’s gubernatorial candidacy has spurred a great deal of interest both in and outside New York. One critic has blasted what he called Spitzer’s “corporate terrorism” approach. U.S. Chamber of Commerce President Tom Donohue called the Attorney General’s forced settlements with businesses “the most egregious and unacceptable form of intimidation that we have seen in this country in modern time.” New York State GOP Chairman Stephen Minarick

has claimed that Spitzer’s high-profile investigations are “making it harder to do business and create jobs in New York.” I strongly disagree with all of these “politicians” in their attacks on Spitzer. I believe strong regulation and enforcement by government makes for a better climate for businesses. If the government had done its job of regulating, we would not have experienced all of the corruption we have had in Corporate America.

Lots of folks are wondering what sort of governor Eliot Spitzer will be. Spitzer has dismissed his critics and says:

*Those who supposedly speak for the free markets refuse to acknowledge that we’ve been right in these cases. Instead, they recede into a shell of ossification, pretending that these issues should not have been addressed in the first place.*

In a commentary in the *Wall Street Journal*, Spitzer explained why he believes a number of powerful interests oppose his methods:

*Part of the reason is a mistaken belief that enforcement is bad for the economy. This is a major misconception rooted in an outdated ideology that fixates on examples of intrusive government regulation in the distant past.*

*Today’s situation is qualitatively different. We are now combating a series of problems arising almost exclusively from the abandonment of basic concepts in business ethics - concepts like fiduciary duty, transparency, accountability and fair play. This conduct betrays the core principle of our economic system: full, fair competition. Prosecutors are compelled to respond, and they have done so in ways that are targeted and measured.*

Some powerful political leaders continue to argue for deregulation. General Spitzer, however, has stressed applying existing regulations, arguing that government needs to be a more effective enforcer of rules so that free markets operate fairly for all businesses and consumers. In remarks before the National Press Club in January, in which he spoke of the influence on him of the “trust busting” Teddy Roosevelt, the New York Attorney General said:

*Business, in many cases, will descend to a lowest common denominator. And if we believe that the market depends upon integrity and fair dealing, then government must step in to make sure that the rules are honored.*

Frankly, I believe the work of the New York Attorney General has been good for our country. I believe the business community is beginning to realize that too. It’s pretty hard to argue against what he has accomplished in a relatively short period of time.

Sources: Associated Press and *The Insurance Journal*

### **EUROPEAN DOCTORS CALL FOR NEEDED LEGISLATION**

Europe’s leading medical associations have called for a strict EU legal framework for chemicals, arguing that bending to industry demands and watering down a proposed chemicals bill would further increase the incidence of cancer on the continent. Representatives of the French Association for Research and Treatment of Cancer and the Standing Committee of European Doctors - an organization representing two million physicians - told members of the European Parliament that cancer, congenital malfunctions, and asthma were often linked to the toxicity of chemical pollutants in the environment. Dr. Dominique Belpomme, a leading French oncologist, stated:

*We are in a serious situation. Some 75% of cancers are due to mutations induced by environmental factors, mainly chemicals.*

Dr. Belpomme called for better testing of dangerous substances, adopting more stringent toxicological standards, and a mandatory substitution of the most dangerous chemicals. A vote on controversial new European Union chemicals legislation was scheduled in the European Parliament for the week of November 13<sup>th</sup>. Germany requested that the vote be pushed back until after Berlin has finalized a new government.

The legislation, known as REACH - for registration, evaluation and authorization of chemicals - puts the burden of proof on businesses to show that the thousands of common industrial chemicals and substances they put on the market are safe. Over the last few months, expectations have risen that EU governments could reach a political agreement on the bill after they signaled their willingness to ease data requirements on chemical companies and cut administrative red tape. The Parliament is divided over the bill. Its environment committee voted to toughen the proposal by effectively outlawing the most harmful chemicals, bringing forward the testing of more pernicious substances, and clamping down on animal testing. The environment committee's position is in sharp contrast to votes in the other committees responsible for shaping the legislation in the Parliament.

The internal market and industry committees adopted a more business-friendly approach by voting in favor of changes reducing the requirements for chemical substances and weakening the provisions for the authorization of substances. It will be interesting to see how all of this works out. In any event, it's encouraging to see governments being concerned over safety issues. Perhaps, what happens in Europe will affect how our political leaders view the problem in the U.S.

## THE NEW SEC CHAIRMAN'S AGENDA

In a recent interview, the new SEC Chairman **Christopher Cox** told *Forbes News Service* that his "natural bent is toward the retail investor and the little guy." If this is really true, it would be music to the ears of the millions of ordinary individual investors who are no better protected than they were a decade ago. Despite Sarbanes-Oxley and a rash of CEO convictions, little progress has truly been made to protect investors from the corrupt practices of brokers to whom they entrust their money. Many believe that what has happened so far, with court and SEC settlements, amounts to little more than slaps on the wrist when compared with the staggering profits reaped by firms that peddle dubious securities to investors. This is Commissioner Cox's agenda as related to *Forbes*:

- **Overhauling The Arbitration System.** Currently, as a condition to buying securities from brokerages, investors waive their rights to a jury trial should something go awry and, instead, agree to submit claims to industry arbitration panels. This stacks the deck against investors before any dollars change hands. At the NYSE and the NASD, investors' cases are heard by a three-member panel with one "industry" arbitrator and two "public" arbitrators. All too frequently, public arbitrators have financial ties to the securities industry or are dependent upon securities arbitration for their livelihood. These arbitrators often develop a bias that results in little or no award to investors in meritorious cases, despite the strong claims they file. To be truly fair, the SEC should also eliminate the requirement for a securities industry arbitrator on every panel. Public arbitrators are completely capable of understanding the workings of the securities markets and can adequately assess the

interactions between brokers and their customers. The SEC should also require that arbitration panels reflect a diversity of backgrounds, such as jury pools do. Current arbitration panels are typically comprised of older white men.

- **Bolstering NASD Rule 2130.** In April 2004, the NASD adopted Rule 2130, which required any disciplinary rulings against a broker to be posted in its Central Registration Depository. Via the CRD, the NASD maintains the qualification, employment and disclosure histories of registered securities employees of member firms. As the cliché dictates, where there's a will, there's a way. And sure enough, Wall Street has found a way to circumvent the rule's intent.

Nearly 90% of customer arbitration cases are settled, and in the 16 months since Rule 2130 was passed, brokerage firms have invariably insisted that investors acquiesce to having the brokers' misdeeds expunged from their CRDs as a settlement condition. Indeed, the practice is so pervasive that some investors won't name the broker as a respondent for fear of impeding a potential settlement.

Simply put, the SEC should require that the NASD bolster Rule 2130 and close this unintended loophole.

- **Regulation Of Clearing Brokers.** The SEC must implement regulations that hold clearing brokers accountable for the stock trades they process. There are countless examples of clearing brokers allowing withdrawals and wire transfers to be illegally drawn from an investor's account, but they have rarely been held responsible for their role as middleman in these transactions. Commercial banks are responsible for the checks they allow to be fraudulently cashed, and clearing brokers should face the same standard.

- **Investor Education Fund.** The \$55 million investor education fund amassed by the SEC and New York Attorney General Eliot Spitzer has been a disaster. The fund's executive director and board members resigned this year, and the SEC has since asked a federal judge for permission to turn the money over to an NASD nonprofit grant-making foundation.

Even if the amount calculates to just 55 cents per investor, disbanding the fund is misguided, as the need for the "dissemination of neutral, unbiased information" has never been greater. Investor advocates - rather than government bureaucrats - should be appointed to oversee investor education and the preservation of these funds, in order to facilitate those initiatives.

In an interview with Forbes, Cox indicated that the Office of Investor Education and Assistance would be much more heavily involved than it has been. That would be a good first step.

- **Increasing SIPC Limits.** The Securities Investor Protection Corporation was created in 1970 to allow investors to recover a maximum of \$40,000 in cash and \$100,000 in securities when these funds were lost as the result of broker theft. In 1980, the respective amounts were increased to \$100,000 in cash and \$400,000 in securities.

Another increase in these limits is long overdue. In the last 25 years, we have seen steady inflation and an onslaught of millions of investors entering the market. Who knows - an increase may even be something of a deterrent, as the SIPC is funded by Wall Street firms themselves.

Commissioner Cox has given every indication that he will work for the individual investor. When all is said and done, however, a man is judged by his actions, not his words. I hope the new

commissioner will do what no other SEC chairman has consistently done in the past, and that is protect the interests of the individual investor. Considering Cox's background and his anti-consumer record while in Congress, I was really surprised to read his agenda in the Forbes article. We should all watch closely to see whether his agenda is actually carried out. If it is, investors will have had a good friend in a most important role. I sincerely hope that Commissioner Cox will be a man of his word.

Source: *Forbes News Service*

### **COURT ALLOWS FAMILY TO SUE OVER JESUS POSTER**

I am very interested to see how a case dealing with "free speech" that is currently in the federal system winds up. A federal appeals court recently reinstated the free speech claim of a kindergarten student who says school officials improperly censored the religious content of a class assignment. In its October 18<sup>th</sup> opinion, the New York City-based U.S. Court of Appeals for the Second Circuit said that the school's actions in covering up part of the child's poster depicting Jesus may amount to **viewpoint discrimination**. Questions still remain, Judge Guido Calabresi wrote, about whether school officials "were particularly disposed to censor Antonio's poster because of its religious imagery and that they would not necessarily have similarly censored secular images" that weren't discussed in the classroom. The judge said that if these facts are ultimately proved, the [school] district's actions might well amount to viewpoint discrimination."

The dispute began when a teacher at an elementary school in New York state instructed her students to create posters showing what they had learned about protecting the environment. The posters were to be displayed at a school

assembly. The child, with his mother's assistance, created a poster that said the only way to save the environment and the world was through Jesus. The teacher took the poster to the school principal, who told the teacher to have the child do another poster. His mother said the teacher told her that because of "religious reasons," the poster could not be displayed. A second poster was made with less religious content, although the poster still contained "the robed, praying figure of Jesus, a church and a cross." The child was allowed to "show and tell" his poster, and it was displayed with posters of the other children on school cafeteria walls. But, the principal required that the child's poster be folded to **conceal** the religious references.

A suit was filed in federal court, contending that school officials violated the child's constitutional rights under the First Amendment and the equal protection clause. It was contended that school officials committed **viewpoint discrimination** by singling out this poster because of its **religious** messages. School officials contended the religious content of the poster did not relate to the concepts learned in class. A federal district court granted summary judgment to the school district, saying that the censorship of the assignment was viewpoint-neutral and justified by legitimate educational concerns. The federal district court added that the state did not inhibit religion in violation of the establishment clause. In reinstating the free speech claim, the 2<sup>nd</sup> Circuit addressed a larger legal issue looming in the federal circuits: whether a 1988 U.S. Supreme Court decision (*Hazelwood School District v. Kuhlmeier*) permits "viewpoint discrimination" that is reasonably related to a legitimate educational concern. Under a U.S. Supreme Court case, school officials may censor school-sponsored student speech if they have a reasonable

educational reason for doing so. But, lower courts have been divided on the question.

Liberty Counsel, which is based in Orlando, Florida, represents the child and his mother. It is contended that to allow a kindergarten poster to be displayed for a few hours on a cafeteria wall, along with 80 other student posters, is far from an establishment of religion. To censor the poster solely because some might perceive a portion of it to be religious is an egregious violation of the Constitution, according to the family. Hiram Sasser, director of litigation for the Plano, Texas-based Liberty Legal Institute, praised the appellate court's decision:

*I think it is a step in the right direction. Hazelwood has never been an authorization for viewpoint discrimination. Hazelwood employed a forum analysis, and viewpoint discrimination has never been allowed even in a non-public forum. Eventually, the U.S. Supreme Court is going to have to decide whether viewpoint discrimination is allowed under Hazelwood.*

A spokesman for the Washington, D.C.-based Americans United for Separation of Church and State calls the school officials' actions justified. For your information, the case is *Peck v. Baldwinville Central School District*. I agree wholeheartedly with the position taken by the Liberty Legal Institute in this case. It is high time that we all take a stand on issues of this sort.

Sources: *Alabama Bar Association Journal*

#### **MORE SHOCKING INFORMATION ON RALPH REED**

A hearing for the U.S. Senate Indian Affairs Committee in early November has indicated that Ralph Reed has been using the Christian Coalition to feather his own financial nest. According to tes-

timony before the Committee, Washington lobbyist Jack Abramoff, who hired Reed to manage a campaign dealing with gambling interest, made it clear that Reed knew he was working for the Coushatta Tribe of Louisiana. An email message released after the hearing confirmed that fact. All the tribe's income comes from a single casino located in Louisiana with an annual income of \$300 million.

You will recall that Reed had worked with other Indian tribes on gambling issues. Financing for one project came through the Alabama Christian Coalition chapter from the Mississippi band of Choctaws. In one shocking bit of information that came out from the email presented to the committee, it appears that Reed and his lobbying buddies were simply using the Christian Coalition as a means of feathering their own nest. One of the gambling lobbyists boiled down Reed's importance to one of the gambling projects as follows:

*Simply put, we want to bring out the wackos to vote against something and make sure the rest of the public lets the whole thing slip past them. The wackos get their information from the Christian right, Christian radio, email, the Internet and telephone trees.*

Ralph Reed is just another political operative who has used folks who really have religious beliefs for his own personal financial gain. I hope people are beginning to realize how much of a phony Ralph Reed really is. If nothing else, Reed should be ashamed to be associated with folks who call Christians "wackos."

## V. THE CORPORATE WORLD

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### **\$1.4 BILLION RECOVERED IN FRAUD AND FALSE CLAIMS FOR FISCAL YEAR 2005**

The Justice Department recently announced that the United States has recovered over \$1.4 billion in settlements and judgments in 2005, pursuing allegations of fraud perpetrated against the federal government. Peter Keisler, Assistant Attorney General for the Department's Civil Division, stated:

*This year's outstanding recoveries in civil fraud cases demonstrates the government's unwavering commitment to root out government fraud and ensure that citizens' tax dollars are well spent. It also attests to the fortitude of whistle-blowers who report fraud and the tireless efforts of the civil servants who investigate and prosecute these cases, from Justice Department's Civil Division, the U.S. Attorney's Offices and other agencies.*

Of the \$1.4 billion, \$1.1 billion is associated with suits initiated by whistleblowers under the False Claims Act's qui tam provision. These provisions authorize individuals, known as relators, to file suit on behalf of the United States against those who have falsely or fraudulently claimed federal funds. Such cases run the gamut of federally funded programs from Medicare and Medicaid to defense contracts, disaster assistance loans, and agricultural subsidies.

Those persons who claim federal funds that they know they aren't entitled to are liable for three times the government's loss plus a civil penalty of \$5,500 to \$11,000 for each false claim. If the government intervenes in a qui tam action, the person who filed the suit can recover from 15 to 25% of any

settlement or judgment attributable to the fraud Identified by the whistle-blower. The relator's share increases up to 30% if the United States declines to intervene and the whistle-blower pursues the action alone.

Over the last several years, health care has accounted for the vast majority of fraud settlements and judgments, \$1.1 billion. The Department of Health and Human Services reaped the biggest recoveries, largely attributable to its Medicare and Medicaid Programs. The Office of Personnel Management, which administers the Federal Employees Health Benefits Program, has also made substantial recoveries.

One of the most significant recoveries in fiscal year 2005 was a \$327 million settlement from HealthSouth Corporation for allegations of fraud against Medicare and other federally insured health care programs. The United States alleged that HealthSouth, the nation's largest provider of rehabilitative medicine services, engaged in the following major schemes to defraud the government:

- The first, comprising \$170 million of the settlement amount, resolved HealthSouth's alleged false claims for outpatient physical therapy services that were not properly supported by certified plans of care, administered by licensed physical therapists or for one-on-one therapy as represented.
- Another \$65 million resolved claims that HealthSouth engaged in accounting fraud, which resulted in over-billing Medicare on hospital cost reports and home office cost statements.
- The remaining \$92 million resolved allegations of billing Medicare for a range of unallowable costs, such as lavish entertainment and travel expenses incurred for HealthSouth's annual administrators' meeting at Disney World, and other claims. Government-initiated claims accounted

for \$251 million of the settlement amount, with the remaining \$76 million attributable to four qui tam lawsuits.

It continues to shock me that some in Corporate America continue to cheat the federal government. It is even more shocking that apparently they do so with no real fear of the consequences of being caught. They just pay their fines or verdicts and go on about their business. I hope the public will eventually demand that this sort of thing be stopped.

Source: U.S. Newswire

### **THE TRIAL OF THE ENRON BOSSES IS FINALLY HERE**

It appears that the former big bosses at Enron will finally be facing a trial. Four hundred Texans recently received a juror questionnaire in preparation for a trial that defines an era of corporate wrongdoing. A jury will be selected in Houston to hear the fraud trial of former Enron Corp. bosses Kenneth L. Lay and Jeffrey K. Skilling. The trial is scheduled to start in January. Former accounting chief Richard A. Causey will also be a defendant. Charges that these men conspired to mislead the public about the financial health of Enron, once ranked as the country's seventh-biggest publicly traded company, will finally be heard.

As we all know, Enron's 2001 collapse was the first in a series of corporate disasters that resulted in record-breaking bankruptcies and a tremendous drop in investor confidence. The collapse wreaked havoc, costing thousands of employees and investors their retirement and life savings. The Justice Department created a special prosecutorial task force to deal with the fallout. If the Enron scandal hadn't occurred, I don't believe we would have ever heard of some of the other big-time fraud and corruption occurring in Corporate America.

It will be interesting to see what type

jurors will be selected to hear this case. All America will be watching this trial. It should be interesting. Frankly, I never thought Karl Rove would ever let "Kenny Boy" face a jury. I suspect some folks in Washington are "sweating" this one out - stay tuned! Can you imagine what would happen if "Kenny Boy" decided to plead guilty and cooperate with the Justice Department?

### **CORPORATIONS PAID ILLEGAL KICKBACKS TO SADDAM**

More than 4,500 companies took part in the United Nations oil-for-food program, and more than half of them paid illegal surcharges and kickbacks to Saddam Hussein, according to a report in the New York Times. Interestingly, the country with the most companies involved in the program was Russia, followed by France. The inquiry was led by Paul A. Volcker, former chairman of the Federal Reserve Board, and the findings are shocking. The committee's fifth and final report, a document of more than 500 pages, details how outside companies from more than 60 countries were able to avoid United Nations controls and make money for themselves as well as for the Iraqi government.

The new report studies the people outside Iraq who profited illicitly and how they did it, according to the Times. The report names companies and individuals from more than 60 countries who took part, both deliberately and inadvertently, in the scheme. Those manipulating the program ranged from established trading companies to front companies set up solely for the purpose. The companies involved included some companies of international reputation as well as many well known in their home countries. The guilty parties should be prosecuted and punished severely regardless of their position in corporate circles or their political influence.

Source: The New York Times

## FLUOR TO PAY \$12.5 MILLION TO SETTLE FALSE CLAIMS ACT LAWSUIT

Fluor Corporation will pay \$12.5 million to settle allegations that it knowingly overbilled the Departments of Energy and Defense. A False Claims Act lawsuit was brought against Fluor in 2000 by Cosby Coleman, a 15-year Fluor employee, who worked in the company's government contracting office. Coleman alleged that from 1995 to 1998, Fluor knowingly overbilled the government under the many cost-reimbursable contracts held by its Fluor Daniel subsidiary, now Fluor Enterprises. Fluor Corporation, headquartered in Aliso Viejo, California, is a Fortune 500 engineering and construction firm with revenues of \$9.4 billion in 2004. It has recently been in the news as the recipient of large no-bid contracts from FEMA for Hurricane Katrina cleanup operations.

In the lawsuit, Coleman alleged that Fluor Daniel used a fictitious accounting entity, Fluor Daniel Federal Operations, to recover corporate overhead costs that were not proper under the government's cost accounting standards. The costs disputed by Coleman included multi-million dollar bonuses paid to Fluor's management, \$13.2 million invested in raw land, \$7.3 million spent for improvements to office buildings Fluor leased to other companies, \$2.6 million spent for construction of a parking garage Fluor leased to another company, \$410,000 spent for luxury condos in Palm Springs, \$1.8 million spent on a fine art collection, \$75,000 spent for a Mercedes Benz convertible driven by the company's president, and \$20,000 spent for an antique Chippendale chair.

Source: *Corporate Crime Reporter*

## VI. CONGRESSIONAL UPDATE

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### A STRING OF CONSUMER SUCCESSES IN CONGRESS

So much has been going on recently, in Washington and elsewhere, that many of us have lost track of some of the things that have been accomplished by consumers groups so far this fall. Public Citizen, which has worked tirelessly for American consumers, has supplied the following information. Take a look at a few of the successes that occurred as a result of some very hard work.

- **The Estate Tax** - You will no doubt recall the outrage that ordinary citizens felt when they heard that Senate Majority Leader Bill Frist's first priority when returning after Labor Day - in the midst of Katrina's devastation of New Orleans and the Gulf Coast - was to hold a vote on the permanent repeal of the estate tax! This outrage over wildly misplaced priorities - the repeal would overwhelmingly benefit the wealthiest Americans - translated into thousands of emails and phone calls to the Senate, and while Senator Frist was not able to see the light on this issue, he soon began to feel the heat. Sensing a public relations disaster, he withdrew his plans for a vote on the estate tax, quietly and without comment. Even with hardliners like Representative Tom DeLay saying the vote should proceed, the Bush Administration was forced to trot out Treasury Secretary Snow to say that there would be no push for estate tax repeal - this year. Expect it to be brought up again.
- **Campaign Finance Reform** - The actions of folks of folks back home, at the request of Public Citizen, resulted in substantial successes on this

subject in just the past several weeks. In October Senate Majority Leader Bill Frist (R-TN) and long-time reform opponent Mitch McConnell (R-KY) conspired to insert a tiny provision in the completely unrelated transportation appropriations bill - a provision that would have allowed members of Congress to give unlimited amounts of money from their **Leadership PACs** to national party committees... which could then give the money right back to the member of Congress for the election campaign. (It is illegal for members of Congress to use Leadership PAC money directly for their election campaigns, as it is supposed to be for basic office functions.) This maneuver was caught by sharp-eyed staff at the office of Senator John McCain (R-AZ), and once again, after many activist calls and emails, Frist and McConnell were forced to back off and withdraw the provision. McConnell then refused to even admit he had anything to do with it!

- Public Citizen, with the help of hundreds, brought about a tremendous success over the summer in beating back the **Ney-Pence-Wynn** bill, which would have rolled back many campaign finance reforms dating back to the Watergate era. The power of the reform ideal was once again demonstrated in November, when Representative Jeb Hensarling (R-TX) introduced a measure to exempt **internet advertising** from the type of Federal Election Commission regulations governing political ads in other media, such as television. The House leadership once again tried to sneak it through, this time by including the measure in a special "suspension rules" procedure usually meant for non-controversial matters. (Ironically, even though the proponents claimed the bill was needed to protect "free speech" on the internet,

the suspension rules under which it was introduced limit floor debate and preclude amendments.) This sleight-of-hand to create a giant loophole in campaign finance reform was spotted again, though, and went down in defeat. This was a tremendous win for the “people” and a defeat for “politics as usual.”

• **Country-of-Origin Labeling (COOL)**

- Although the lobbying efforts by Public Citizen failed to have this mandatory program included in the Agriculture Appropriations bill, requiring labels on foods to state where and how the food was raised or produced is overwhelmingly popular with the public, as you might imagine. The program was effectively killed in the House-Senate Conference Committee. This final move was made behind closed doors. Even though Public Citizen tried to attend this so-called public meeting, no one who was standing in line was allowed to enter the room. Once again, the Republican leadership running Congress decided to bow to the wishes of their campaign contributors in industry, as opposed to working for the welfare of their constituents, the American people.

While the destruction of the COOL program is a major disappointment, it is at least instructive that Congressional leaders felt forced to do it behind closed doors - the public reaction was too strong for them to try and vote on this in the open. And the successes on campaign finance and the estate tax repeal demonstrate that successful resistance to the right-wing agenda is building across the board.

Source: Public Citizen

**AMERICA'S PUBLIC LANDS FOR SALE?**

As this issue was going to press, the respective budget reconciliation bills

passed by the House and Senate put the two chambers on a collision course whether Congress, after 25 years of efforts by the oil industry, would finally allow drilling in the Arctic National Wildlife Refuge and offshore. The House stripped such drilling provisions out of its budget reconciliation bill before its final vote. The Senate, on the other hand, included an Arctic drilling provision in the budget bill it passed.

Of equal interest to environmental groups and others, however, was a provision in the House budget reconciliation package that would put America's public lands up for sale, giving land away at virtually no cost to the mining industry and other developers. Those groups argue the bill manages to worsen the already antiquated 1872 Mining Law and defraud the American taxpayer, all while promoting a huge western land grab.

Signed into law by President Ulysses S. Grant, the 1872 Mining Law set policy for metal mining on federal public lands. The law allows private companies to buy public lands containing valuable minerals, including gold, silver, and copper, for \$2.50 to \$5 per acre, without paying a royalty to the taxpayer. Since 1872, more than \$245 billion worth of minerals have been extracted from public lands at these below-market prices.

In 1994, Congress adopted a moratorium on the “patenting,” or buying, of federal lands that has been renewed yearly. The House budget reconciliation bill repeals this moratorium and reinstates the patenting of public lands. If the Senate agrees, public lands will be back up for sale once again. The sale of public lands is expected to raise just \$155 million over the next five years by selling public lands to mining companies for the low price of \$1,000 an acre or fair market value of only the surface of the land - far from the true value of the minerals underneath. According to

the Sierra Club, the proposal “erodes already weak requirements that must be met before the federal government gives away the public land, enshrining an absurd ‘right to mine’ on public lands.”

**SENATORS PROPOSE REWARDING NO-BID CONTRACTORS AT VICTIMS' EXPENSE**

It is hard for me to imagine anyone in Congress viewing the tragedy of Hurricane Katrina as an excuse to reward wealthy, powerful corporations with a license to pollute, abuse their workers, and rip off Katrina evacuees. Yet, that is exactly what the authors of legislation proposed in the U.S. Senate (S. 1761) have done. S. 1761 would extinguish the rights of individuals to hold corporations accountable for violating dozens of federal laws and regulations and gives government contractors immunity from lawsuits when they harm the residents of Louisiana, Mississippi, and Alabama already devastated by Hurricane Katrina.

Here are some examples of egregious acts that could receive immunity under S. 1761:

- If a contractor violated federal clean water laws, and dumped chemicals in the stream near someone's house, polluting his groundwater, he could not go to court under any of these laws to recover his child's medical expenses from drinking contaminated water from a well on his property or the loss of property value because of the contaminated well.
- If a contractor violated DOT or US Army standards in rebuilding one of the breached levees, and the levee fails during a storm next year because of a construction defect and floods a neighborhood, the residents of that neighborhood cannot recover against the contractor for the damage to their homes.

- If a contractor ignores EPA regulations for safe removal of asbestos from an elementary school damaged by Katrina, and next year – or ten years from now – children are sickened by leftover asbestos, they will not be able to recover against the contractor for medical bills.
- If a contractor didn't check for occupants before demolishing a building, and crushed someone to death, his or her surviving family would not be allowed to recover from the contractor for funeral costs, lost wages, or wrongful death.
- If a contractor used defective roof trusses in rebuilding a school or community center and it collapsed, the families of those killed would not be allowed to recover against the contractor for lost wages and wrongful death.

Under S. 1761, contractors – some of whom will make millions in a no-bid process – are protected in two ways:

- This bill bars any individual citizen from bringing a lawsuit for violating any federal environmental law or regulation administered by the Secretary of the Army, the Secretary of Transportation or the Administrator of the EPA. If in breaking these laws – such as the Clean Air Act, Clean Water Act, Safe Water Drinking Act, or asbestos cleanup requirements issued by the EPA – these contractors poison drinking water, spread toxic waste, or even injure or kill people, citizens are barred from suing in any court to force the contractors to clean up the mess, recover economic losses, or recover compensation for personal injury or loss of life. In short, the bill would allow contractors to pollute with impunity.
- It protects contractors who harm Katrina victims or their workers from ever being held accountable in state

court. Not only does the bill eliminate rights under federal environmental laws, it also eliminates statutory and common law rights that exist in all fifty states. This is because the bill radically expands the so-called “government contractor defense,” making contractors virtually immune from any claims brought under existing state and federal statutes and common law. Such a broad and unwarranted expansion of this defense means contractors can cause grave harm to communities trying to recover from a disaster and never be held accountable.

I find it unconscionable that anyone could take advantage of the devastation and misery caused by a natural disaster the size of Katrina, and even more so that United States Senators would top that by giving those who would take advantage special protection. I only hope that the Senate gives S. 1761 the quick death it deserves.

## VII. PRODUCT LIABILITY UPDATE

### ***NHTSA ROLLS OVER FOR THE AUTO INDUSTRY***

Under the Transportation Equity Act of 2005, Congress directed the National Highway Traffic Safety Administration (NHTSA) to establish rules to reduce deaths and injuries caused by vehicle rollover accidents and to specifically propose a new standard for how strong a vehicle's roof must be. Currently, 10,000 people die and 24,000 people are injured every year in rollover accidents. Instead of acting to significantly reduce injuries as Congress directed, NHTSA, caving in to the powerful automobile industry, proposed a weak “roof

crush standard” that leaves safety at the status quo. This means only 70% of vehicles on the road currently meet the new proposed standard. Still worse, the proposed rule marks an unprecedented power grab by a federal agency, preempting ALL state requirements and state tort law. The result: as long as a car manufacturer meets the proposed standard, which is not very strong, no individual may bring a claim in any court if they are injured or killed because of a badly made roof.

- *NHTSA ignored the Congressional directive and failed to make people safer.* Congress demanded rules that would make people safer, that would significantly lessen the thousands of deaths and paralyzing injuries that occur when a car or truck rolls over. NHTSA freely admits that their proposed rule would save only an estimated 13 to 44 lives out of the 10,000 persons that die every year in rollover crashes. Can't the federal agency responsible for the auto safety of all Americans do any better? The majority of cars currently on the road already meet the proposed rule's “new” requirements, yet ten thousand people die every year. The following gives us an indication of how powerful the automobile industry lobby is:

- *NHTSA failed to follow the statutory directions provided by Congress.* In the Transportation Equity Act of 2005, Congress specifically directed NHTSA to promulgate a roof strength rule that would require vehicle manufacturers to test roof strength on both the driver and passenger sides of the vehicle. Two-sided testing is important to ensure that all vehicle passengers are protected no matter which way the vehicle rolls. The proposed rule only requires driver's side testing. By not following Congress's directions, NHTSA is usurping the power of Congress while at the same time putting consumers at risk.

- *NHTSA usurped the authority of Congress, state legislatures and state courts.* NHTSA expressly states their intention to override all state requirements and all common law developed by both state and federal courts. NHTSA does this without Congressional authority, without constitutional authority, and without complying with Executive Order 13132, which requires NHTSA to consult with the states before proposing a rule that would substantially affect them. Instead, NHTSA purports to take away the right of all Americans to bring a claim in any court against a car manufacturer who meets the new, low standard. NHTSA's attempt to override all other rollover safety determinations of the state and federal courts is nothing more than an agency power grab and should not be tolerated by Congress or the American public.
- *NHTSA's standards are a floor, not a ceiling.* Congress, in the Safety Act, delegated certain vehicle safety responsibilities to NHTSA. This Act defines "motor vehicle safety standard" as a minimum standard for motor vehicle performance. (49 U.S.C.A. § 30102) Thus, NHTSA's regulations provide minimum requirements that cars must meet in order to be sold to consumers. State and federal courts should not suddenly be prohibited from finding a manufacturer liable when it is proven that a manufacturer reasonably could have and should have done something additional to avoid causing harm. Because the majority of cars on the road already meet the proposed standard, and in some cases are still found to be defective and to have caused injuries, this rule should constitute the minimum, not the maximum safety standard.
- *Under NHTSA's proposed rule, there*

*is no incentive to make safer cars.* As long as the manufacturer complies with the minimum federal standard, consumers are left without the ability to hold manufacturers accountable in court for causing harm. The civil justice system demands only that people and companies act reasonably under the circumstances. Accountability acts as an incentive for manufacturers to make safe cars. In some cases it also prompts manufacturers to take defective vehicles off the market. With a weak federal standard and no accountability, where are the protections for consumers? Where is the improved safety standard Congress demanded?

- *Federal regulations alone cannot keep people safe in a fast-paced, ever-changing world.* Federal regulations quickly become obsolete as rapidly evolving motor vehicle technology offers better and safer options. This is the first time in over 30 years the safety standard on roof crush resistance has been updated by NHTSA. With all of the technology that has been developed in the last 30 years, why is NHTSA claiming to only be able to save 13 to 44 lives? The American public cannot rely solely on a slow-moving federal agency to keep them safe. It is critical to the public health and safety that there be additional mechanisms—including the civil justice system—to maintain a high level of safety and ensure that we don't have to wait another 30 years for enhanced safety.
- *The civil justice system uncovers information essential to public safety.* NHTSA does not publicly disclose any data they gather from manufacturers in regards to vehicle defects. Thus, the only mechanism available to compel manufacturers to reveal to the public internal safety and testing data is the civil justice system.

Through this process the public is made aware of problems and, as a result, is better able to protect themselves against dangerous products in the market.

Source: ATLA

### **HEAVY TRUCK CRASHWORTHINESS/ROOF STRUCTURE**

Our firm continues to handle several cases involving the crashworthiness of "heavy trucks." One of the primary issues concerning the crashworthiness of heavy trucks is the cab and/or its roof structure's ability to protect its occupants in foreseeable rollover events. Heavy trucks and their roof structure's design are inadequate and often collapse on the occupant in rollovers, causing serious and fatal injury. Unfortunately, the heavy truck industry has for the better part ignored engineering improvements recommended by engineers to strengthen the roof structure of cabs in an attempt to save lives in rollover accidents.

As I have written in the past, heavy trucks, unlike passenger cars, have little regulation when it comes to safety, design, and crashworthiness. This is particularly true with regard to the roof structure. Since the 1960s, the federal motor vehicle safety standards have provided minimum safety standards for passenger cars that require some minimum performance and safety for component parts such as seats, seat belts and even roof structures. Remarkably, there are no federal or state regulations similar for heavy trucks.

While heavy trucks do not roll over with the frequencies of SUVs, when they do, the consequences are often tragic to the occupants. The industry has known since the 1980s that rollovers are one of the types of accidents involving their vehicles that often cause death. In the 1990s, the heavy truck industry confirmed that rollovers

were the most dangerous type of accident for the occupants in its vehicles because of the roof collapsing on the occupant during the roll-over.

In the 1990s, a group of engineers, which was predominately comprised of representatives from the heavy truck manufacturers, made up what was known as the Heavy Truck Crashworthiness Subcommittee Task Force. The Task Force's objective was to study all types of heavy truck accidents and determine which were the most serious in terms of harm to the occupants. The Task Force's goal was then to study ways to help prevent or lessen injuries through testing and design changes if possible.

Based on its study of heavy truck accidents, the Task Force determined that rollovers, particularly 180 degree rollovers, were at the top of the list as far as causing the most harm to driver and occupants. With this knowledge, the Task Force, among other things, set out to determine through engineering analysis, testing, and design recommendations how the occupants of heavy trucks could be afforded more protection in rollover events.

During some of the Task Force meetings, safety engineers recommended that the cab's roof structure be strengthened through design changes. The engineers who recommended these design changes to the Task Force had performed certain analysis and work to determine that the roof structure could be strengthened through these changes by two to two and a half times. This would obviously provide more protection to drivers and occupants and just as obviously save lives. Remarkably, the Task Force rejected these engineer's recommendations to make cabs stronger primarily based on cost factors. In doing so, they ignored an obvious hazard to truck drivers and a need for design changes that could help eliminate that hazard. Regrettably, the heavy truck industry's decision not to

strengthen their cabs' roofs as recommended by safety engineers has resulted and will result in the rollover continuing to be the most deadly of the heavy truck accidents.

#### ***NEW SAFETY RULES TO ADDRESS CAR/TRUCK COLLISIONS***

According to the Insurance Institute for Highway Safety, auto industry officials are expected to announce plans to make head-on collisions between cars and trucks safer. The plans include developing criteria or voluntary standards to help prevent cars from sliding under trucks and sport utility vehicles in these types of collisions. The auto makers have started redesigning the front end of vehicles and integrating front beams to prevent smaller cars from sliding under trucks. In addition, the auto makers are expected to agree on strength tests for these beams as well. But, there are no tests such as crash tests planned to ensure these measures reduce the risk.

Until recently, these safety plans seemed unlikely because of Ford Motor Company's attempt to block these measures aimed to make these types of collisions safer. But, according to Ford officials, Ford is committed to working with the rest of the auto industry to agree on these safety measures. Senator Mike DeWine (R-OH) says he's been assured that "Ford is back at the table." Senator DeWine is adamant that these safety measures will be put into place. He says: "I'm going to be yelling and screaming to get this thing done."

#### ***FORD ORDERED TO PAY \$61 MILLION IN SUV ACCIDENT***

A jury has ordered the Ford Motor Co. to pay more than \$61 million to the family of a 17-year-old boy killed in an Explorer roll-over accident. The jury found Ford was liable in the accident

because it sold a vehicle with poor handling and stability. The teenager's family contended Ford knew the Explorer was prone to roll-overs and failed to warn consumers about the vehicle's defects at trial. Ford blamed defective Firestone tires for the Explorer's handling and stability problems.

The teenager was reclining in the front passenger seat and wearing his seat belt when the Explorer rolled over four times. He was ejected from the vehicle and died at the scene. The driver fell asleep, woke up and attempted to regain control of the vehicle, but a handling problem with the Explorer caused it to turn sideways, which triggered the roll-over. Ford vehicles are supposed to be designed to slide out in an emergency situation, not roll over, and that's according to Ford's own internal criteria. The Explorer is one of the Ford vehicles that doesn't meet its own criteria. Instead of sliding, the Explorer will roll over.

The jury ordered Ford to pay the family \$1.2 million in damages, and \$60 million for the pain and suffering of the teenager and his mother. Ford was not ordered to pay punitive damages. Ford says it will appeal the verdict and as expected says the Explorer is a very safe vehicle.

#### ***DODGE SUV AND DAKOTA STEERING PROBED***

The National Highway Traffic Safety Administration (NHTSA) is investigating nearly 500,000 Dodge Durango sport utility vehicles and Dodge Dakota pickup trucks because of a possible loss in steering control. NHTSA has received several reports of looseness in the steering shaft or separation because of loose or missing coupling bolts in the vehicles. The preliminary investigation will involve more than 467,000 vehicles, including the 2004-2005 models of the Durango and the 2005 model of the Dakota. There have been no crashes or

injuries linked to the issue, according to NHTSA. At press time there had been no vehicles recalled.

Source: *Associated Press*

### **GOVERNMENT PROBING CHRYSLER MINIVANS, MERCEDES AND HYUNDAI MODELS**

The government has opened an investigation of the Chrysler Town & Country and Dodge Grand Caravan minivans after receiving complaints about failure of front airbag crash sensors. Models made by Mercedes-Benz and Hyundai Motor Co., meanwhile, are also under separate investigations for potential defects. In the Chrysler and Dodge cases, the National Highway Traffic Safety Administration (NHTSA) said in a posting on its Web site that it had received five complaints alleging failure in 2005 model year minivans of the front airbag crash sensors, which are located behind the front bumper.

The complaints said dealers replaced the front crash sensors after receiving questions about the airbag warning lamp illuminating. Field reports indicate the sensors may have failed because of corrosion. The preliminary investigation involves about 410,000 vehicles. As you know, Chrysler and Dodge are brands of DaimlerChrysler AG. NHTSA opened a probe into the 2000-2001 models of the Mercedes-Benz S Class sedans after receiving reports that the instrument panel, which includes the vehicle's speedometer and fuel gauge, failed to light up. The inquiry involves about 72,000 vehicles. The panel, which also holds the turn signal indicators and warning lights, is supposed to light up whenever the ignition key is turned on. NHTSA has received seven reports alleging failure, but says there have been no crashes or injuries linked to the issue.

In the Hyundai case, the government is looking into allegations that the tire

valve stems are failing in the 2002-2003 Sonata sedans, leading to tire deflation. The probe involves about 93,000 vehicles. The complaints involved tires that had been replaced and then deflated while traveling at highway speeds. Hyundai says it will cooperate with NHTSA in the investigation.

### **U.S. SUPREME COURT REFUSES TO HEAR WIRELESS RADIATION APPEAL**

The U.S. Supreme Court has refused to hear a case against wireless telephone providers and manufacturers over radiation emissions. This means the class action lawsuits will be able to go forward because the High Court declined to hear an appeal by the companies. The justices rejected the request by companies like Nokia and Cingular Wireless to review a decision by a U.S. appeals court that reinstated the lawsuits that argued manufacturers knew about and hid the risks of radiation emissions wireless phones posed to users. As you most likely know, wireless phones are radios that emit frequency radiation. In the United States, the Federal Communications Commission must approve any device that sends out such radiation.

Exposure to high levels of radiation can cause adverse health effects, but the jury is still out on the impact on a wireless phone user who is exposed to low levels of radiation when a phone is held to an ear directly. Health advocates have expressed concerns about radiation causing problems ranging from headaches to tumors. But the wireless industry has pointed to U.S. government statements that scientific evidence so far has not shown any health problems associated with wireless phone use. Five class action lawsuits were filed in state courts seeking damages, including money for wireless users to buy a headset or reimburse those who had already had purchased one. A U.S. dis-

trict court judge dismissed the five lawsuits on the grounds that state regulation of wireless phone emissions was preempted by the FCC, but the U.S. Court of Appeals for the Fourth Circuit overturned that decision and reinstated the cases.

As a result of the Supreme Court's action, one lawsuit will go forward in federal court while the four other lawsuits will advance in state court. The health issues involved with the use of wireless telephones are most serious. I hope the government's position regarding the health effects is correct. If not, there will be some most significant consequences.

Source: *Reuters News Service*

### **MORE ON THE PROBLEMS AFFECTING GUIDANT**

The Guidant Corporation, the maker of defibrillators and pacemakers, has really been in the news lately. The company says it will start issuing periodic reports that would highlight for each model the number of confirmed failures that prevented the units from delivering critical patient therapy. The move appears to be a significant change because Guidant, like other makers of heart devices, had previously told doctors only about the total number of product malfunctions, rather than separating those that posed high risks from those of lesser concern. It is not known how soon the company planned to start regularly releasing more detailed product failure information to doctors. Because of a lack of data on specific models, doctors may not be aware that a particular model may be malfunctioning in a way that could harm patients or even contribute to their deaths.

Guidant, which is based in Indianapolis, has been criticized for failing to disclose to doctors a high-risk defect - the tendency of two devices, a defibrillator and an advanced pacemaker, to short-circuit. Four deaths have been associ-

ated with the electrical failures of the devices. The United States Attorney's office in Minneapolis is seeking more information about the devices. Guidant's policy change on physician reporting was noted in a broader company report that was sent last month to the Food and Drug Administration (FDA) in response to concerns raised by the agency after an inspection of a manufacturing plant. In that report, FDA inspectors noted problems with quality control.

Source: *New York Times*

#### **THE GUIDANT AND JOHNSON & JOHNSON BUY-OUT MAY HAPPEN AFTER ALL**

Guidant, which agreed to a \$25.4 billion buy-out by Johnson & Johnson last December, recently filed a lawsuit in New York federal court in an attempt to force Johnson & Johnson to complete the merger. Johnson & Johnson has recently soured on the deal in light of the multitude of problems currently facing Guidant. Experts say a flood of lawsuits as a result of the product failures by Guidant could provide the ammunition Johnson & Johnson needs in arguing that Guidant's prospects have materially changed for the worse since Johnson & Johnson agreed to the acquisition in 2004.

This lawsuit comes on the same day that the Securities and Exchange Commission (SEC) began a formal inquiry into Guidant's product disclosures and trading of shares. Before its problems arose, Guidant controlled about one-third of the \$5.5 billion defibrillator market. Now, Medtronic Inc. and St. Jude Medical Inc. have moved up to overtake Guidant's presence in the market.

Johnson & Johnson initially stated their intentions to vigorously defend the Guidant lawsuit under the theory that a "material adverse change" had occurred, which would allow the company to walk away from the deal. But, at press time, Johnson & Johnson announced a tentative agreement to revise the deal to

buy out Guidant for a reported \$21.5 billion. Under the new agreement, Johnson & Johnson would pay about \$63.08 per share as opposed to the original price of \$76 a share, a difference of approximately \$4 billion. Guidant, whose shareholders must approve the revised agreement, would receive \$33.25 in cash and 0.493 shares of Johnson & Johnson common stock for each share. Both companies' shares spiked after news of the agreement was announced.

Source: *Wall Street Journal*

#### **BRIDGESTONE APPEARS TO BREAK RANKS**

Bridgestone Firestone North America Tire, LLC, Bridgestone Corp.'s U.S. tire-making unit, has broken ranks with the rest of the U.S. rubber industry in recommending a maximum life span for passenger and light-truck tires. In a recent technical bulletin to its dealers, Bridgestone said all tires - including spares - that are more than 10 years old should be replaced, regardless of their external appearance. The company is following the same recommendation issued in September by the Japan Automotive Tire Manufacturers Association. As you know, Bridgestone is based in Japan. Many U.S. car makers have pushed ahead with such recommendations, although their age recommendations vary and generally are much shorter. Earlier this year, Ford Motor Co. started urging consumers to replace tires after six years. Ford said at the time that its research shows that tires "degrade over time, even when they are not being used."

The U.S. tire industry, however, insists there is no science to support this view. Daniel Zielinski, a spokesman for the Rubber Manufacturers Association, the tire industry's main trade group, observed: "Our position all along has been that in order to establish any maximum service life for tires, there needs to be some scientific or factual basis behind it." Mr. Zielinski said it

made sense for Bridgestone's U.S. operations to follow the same recommendations adopted by its parent company in Japan. A spokesperson for Bridgestone Firestone North American Tire LLC, based in Nashville, Tennessee, says her company's stance isn't inconsistent with the view of the rest of the U.S. industry. The tire maker's technical bulletin notes that although the company "is not aware of technical data that support a specific tire service life," it believes it is appropriate to follow the Japanese tire industry's new recommendation.

Source: *Wall Street Journal*

## VIII. MASS TORTS UPDATE

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### **OUR MASS TORTS SECTION**

Our firm has established a national reputation as a leader in the area of product liability litigation. This has taken lots of hard work and some dedicated employees. In recent years we have developed one of the largest and most technologically advanced Mass Torts practices in the country. Presently, the Mass Torts Section represents a good number of people in claims against companies that manufacture and/or market defective pharmaceuticals, over-the-counter medications, and medical devices. We have attempted to allow lawyers and their support staff to develop expertise in certain areas within the Section. Andy Birchfield heads up the Section. Other lawyers in the section are Ted G. Meadows, Jerry Taylor, Frank Woodson, J. Paul Sizemore, W. Roger Smith, III, Melissa Prickett, Navan Ward Jr., Wesley Chadwick Cook, Benjamin L. Locklar and Leigh O'Dell. The Section is currently handling cases in the following areas:

- **Baycol**

This cholesterol-lowering drug was pulled off the market on August 8, 2001. It has been linked to the sometimes fatal condition of rhabdomyolysis, a painful disorder that destroys muscle tissue and can lead to kidney failure. We are currently taking cases involving rhabdomyolysis or kidney failure.

Primary Lawyers: Frank Woodson & Melissa Prickett

Primary Contacts: Cathy Perry & Ann Kaufman

- **Crestor**

Crestor is a member of a class of drugs commonly referred to as "statins" and is used to lower cholesterol. AstraZeneca originally filed its application for approval with the Food and Drug Administration (FDA) in June of 2001. This application was delayed because of safety concerns revealed during clinical trials, which included reports of kidney damage and rhabdomyolysis, a potentially life-threatening condition which causes muscle cells to breakdown. We are currently taking cases involving rhabdomyolysis or kidney failure.

Primary Lawyer: Melissa Prickett

Primary Contact: Ann Kaufman

- **Guidant Ancure Endograft System**

This device was manufactured and introduced by EndoVascular Technologies (EVT), a subsidiary of the Guidant Corporation, and was used to repair abdominal aortic aneurysms. EVT received approval by the FDA for Ancure® in September 1999 and first recalled the product in March 2001, several months after seven anonymous employees reported the failures and problems with the Ancure® system to the FDA. EVT reported last year that they would no longer be manufacturing the device after pleading guilty to 10 felony counts and paying more than \$90 million in

federal penalties surrounding their failure to report more than 2,600 incidents of problems with the device, including deaths and serious injuries.

Primary Lawyer: Ted Meadows

Primary Contact: Amy Brown

- **Guidant Heart Devices**

In July of 2005, the FDA announced the recall of implantable defibrillators and pacemakers manufactured by the Guidant Corporation. These devices are surgically implanted in persons who have a type of heart disease that creates the risk of a life-threatening heart arrhythmia (abnormal rhythm). Some of the risks associated with the defibrillators are deterioration of wires and its inability to deliver therapy. One of the risks associated with the pacemakers is that a hermetic sealing component used in the subset of devices may experience a gradual degradation, resulting in a higher than normal moisture content within the pacemaker case. We are currently investigating claims involving these types of devices.

Primary Lawyer: Ted Meadows

Primary Contact: Amy Brown

- **Hormone Therapy**

For years, women have taken Hormone Therapy (HT) to reduce the symptoms of menopause. Studies now show that HT medications such as Prempro and Premarin can increase the risk of breast cancer, ovarian cancer, stroke, and heart disease. We are currently investigating potential claims against the manufacturers of HT medications.

Primary Lawyers: Ted Meadows & Melissa Prickett

Primary Contacts: Amy Brown & Ann Kaufman

- **Medtronic Heart Devices**

On April 16, 2004, the FDA announced the recall of numerous

implantable defibrillators manufactured by Medtronic, Inc., which were implanted in 1997 and 1998. These devices are considered a Class I recall, which is the highest priority recall. In addition, another recall was issued by the FDA on February 10, 2005, for additional Medtronic defibrillators whose batteries were manufactured between April 2001 and December 2003. We are currently investigating claims involving the particular recalled devices.

Primary Lawyer: Ted Meadows

Primary Contact: Amy Brown

- **Neurontin**

Neurontin was approved by the FDA in 1993 as an anti-seizure treatment used in epilepsy patients. But, recent statistics have shown that the vast majority of Neurontin prescriptions are for off-label uses. We are currently investigating claims on behalf of patients who have taken Neurontin and attempted suicide or have committed suicide.

Primary Lawyer: Frank Woodson

Primary Contact: Cathy Perry

- **Serevent and Advair**

Serevent and Advair are prescription drugs manufactured by GlaxoSmithKline for the treatment of asthma. The Salmeterol Multi-Center Asthma Research Trial (SMART) study, which began in 1996 to assess the safety of Serevent and its relation to serious asthma-related health problems, was halted in 2003 when the Food & Drug Administration (FDA) announced that Serevent may be associated with an increased risk of asthma-related deaths, especially in African-American patients. We are currently investigating cases involving serious injury or death caused by Serevent.

Primary Lawyer: Chad Cook

Primary Contact: Tabitha Dean

- **Smith and Nephew Knee Replacements**

In September of 2003, Smith and Nephew withdrew two of its knee replacement products from the market in the United States after potential problems were identified. The Oxinium Genesis II and the Profix II were voluntarily withdrawn. We are currently taking cases involving these knee replacements, which were done between February of 2002 and September 2003.

Primary Lawyer: Ted Meadows

Primary Contact: Amy Brown

- **Statins (Lipitor, Pravachol, Lescol, Mevacor & Zocor)**

Statins are a class of drugs used to lower cholesterol. Statins have been associated with renal failure and rhabdomyolysis, a painful disorder that destroys muscle tissue. We are currently investigating claims involving serious injury or death.

Primary Lawyer: Melissa Prickett

Primary Contact: Ann Kaufmann

- **Stevens-Johnson Syndrome**

Stevens-Johnson syndrome is an immune complex hypersensitivity reaction that can be caused from an infection or immune response to drugs. It is a severe expression of a simple rash known as erythema multiforme. SJS is also known as erythema multiforme major. It affects all ages and genders including pediatric populations. The most severe form of SJS is toxic epidermal necrolysis (TENS). SJS occurs twice as often in men as in women. Most cases of SJS appear in children and young adults under age 30. Females with SJS are twice as likely as males to develop TENS, and have an even higher chance if taking a category of drugs known as non-steroidal anti-inflammatory drugs or NSAIDs.

Primary Lawyer: Frank Woodson

Primary Contact: Cathy Perry

- **Tardive Dyskinesia**

Tardive Dyskinesia (T.D.) is a syndrome of involuntary movements or movement disorders that may develop in patients who have been prescribed antipsychotic medications for depression, anxiety, obsessive-compulsive disorder, and other such symptoms. Most T.D. cases are drug-induced, and many antipsychotic medications are used for off-label purposes. Tardive Dyskinesia affects all ages and genders, including pediatric populations.

Primary Lawyer: Chad Cook

Primary Contact: Tabitha Dean

- **Vioxx, Celebrex & Bextra**

Vioxx, Celebrex, and Bextra are popular and heavily advertised arthritis drugs commonly referred to as a non-steroidal anti-inflammatory drug (NSAIDs). As you know, Vioxx was taken off the market in September 2004. Bextra was taken off the market in April 2005. Celebrex currently carries a black-box warning on its label, but is still on the market.

Vioxx, Celebrex, and Bextra have all been associated with an increased risk of cardiovascular events such as heart attacks and strokes. These drugs are classified as COX-2 inhibitors. COX-2 inhibitors, like older NSAID drugs such as ibuprofen and naproxen, work to decrease swelling in affected joints. But, unlike older NSAIDs that also caused irritation to the lining of the stomach by inhibiting the Cox-1 enzyme, it is theorized that COX-2 inhibitors only block the COX-2 enzyme, leaving the stomach protecting COX-1 alone. Recently published data calls the beneficial advantages of these drugs into question, and raises new questions about "serious cardiovascular events" related to this class of drugs. We are currently litigating heart attack, stroke, and death cases.

Primary Lawyers: Andy Birchfield, Paul Sizemore, Leigh O'Dell, Roger Smith, Jerry Taylor, Ben Locklar and Navan Ward

Primary Contacts: April Worley, Amy Cobb, Lisa Bruner, Sabrina Tuck or Katrina Owens

- **Zyprexa**

Zyprexa is a prescription drug designed to manage symptoms of schizophrenia and other psychotic conditions. This drug is Eli Lilly and Co.'s best-selling product. The consumer group Public Citizen has criticized the FDA for failure to adequately inform physicians and patients of the serious risks associated with Zyprexa. We are currently investigating claims on behalf of patients prescribed Zyprexa who have developed diabetes, hyperglycemia, and other serious injuries.

Primary Lawyer: Frank Woodson

Primary Contact: Cathy Perry

- **Zithromax**

Zithromax (azithromycin), manufactured by Pfizer, is a popular antibiotic used most often to treat respiratory infections, while also used to treat skin infections and some sexually transmitted diseases. Zithromax is taken once daily, usually two to five days under normal dosage. The most serious types of health problems that have been attributed to Zithromax include liver damage resulting in death or liver transplant surgery. The symptoms for liver damage may include yellow eyes, abdominal pain, nausea, clay colored stools, and dark urine. Recent warnings have been added to the label regarding abnormal liver function, jaundice, necrosis, hepatic (liver) failure, and death, which have been reported by persons taking this drug.

Primary Lawyer: Chad Cook

Primary Contact: Tabitha Dean

## HARVARD DOCTORS AT ODDS OVER MERCK EXPERT WITNESS' TESTIMONY

We had expected to see Dr. J. Michael Gaziano appear as an expert witness for Merck in our Texas Vioxx trial. He was pulled - with no explanation - as an expert by Merck before the trial started. We learned that Harvard Medical School professors are questioning Dr. Gaziano's court testimony in New Jersey that there is **no link** between the short-term use of Vioxx and severe heart problems. Dr. Gaziano, who is an Associate Professor of Medicine at Harvard, gave testimony in the New Jersey case that helped Merck get a defense verdict. It now appears that the published work of two of his colleagues, Assistant Professor of Medicine Daniel H. Solomon and Professor of Medicine Jerome L. Avorn, is in direct conflict with Dr. Gaziano's testimony. These noted doctors from Harvard can find no explanation for Gaziano's ideas, as expressed in court. In this report, Dr. Avorn had this to say concerning the study:

*The evidence is incontrovertible. Merck [the company that manufactures Vioxx] itself admitted that it found a doubling of heart attack and stroke in Vioxx users in a randomized trial it conducted. That's why it took the drug off the market.*

Dr. Gaziano, a cardiologist who has never done Vioxx research, was a paid witness for Merck in New Jersey and was touted as the company's star witness. Dr. Gaziano has to know that studies by Harvard and the Food and Drug Administration (FDA) do not exclusively address long-term use. Both studies have identified a strong link between heart problems and Vioxx. Professor of Ambulatory Care and Prevention Richard Platt, who serves on the FDA's Drug Safety and Risk Management Committee, has stated that he believes there are risks associated with the drug in all doses. Dr. Platt says:

*The evidence seems compelling that there is extra risk at high doses, and probably also at lower doses. In the clinical trials published within the last year, this risk is evident as long as there is good follow-up.*

*Associated Press* wrote a story on the New Jersey trial and said that Gaziano's testimony "contradicted" the FDA study. During the New Jersey trial, an attorney for the plaintiff attacked Dr. Gaziano's credibility, describing him as an "expert-for-hire witness" in the pocket of drug companies, according to the *Associated Press*. It was pointed out that Dr. Gaziano has also testified that there was no proof that the weight-loss drug Ephedra was dangerous. I am sure that Merck will find another expert to replace Dr. Gaziano in our case. Merck has sold the **myth** that Vioxx only causes heart attacks after 18 months of use. Merck knows that is totally false and even Dr. Gaziano should have known it.

As you know, Merck pulled Vioxx from the market last fall after its own 18-month-long study confirmed the FDA's findings, which linked Vioxx with an elevated risk of heart attack, stroke, and death with long-term use. Dr. Avorn says that Merck attempted to suppress the results of the Harvard study, which he co-authored with another doctor. Dr. Avorn, whose book, "Dangerous Medicines: The Benefits, Risks and Costs of Prescription Drugs," was recently published by Knopf, called Merck's alleged actions "unethical." Dr. Avorn says:

*The irony was that it was a study funded by Merck. It took forever to get the work done, and then Merck disavowed the study and said we got it wrong.*

Dr. Avorn points out that Merck even demanded that one of its own researchers have her name removed

from the study in order to distance the company from the results. The Harvard researchers ultimately decided to publish their study in *Circulation*, the journal of the American Heart Association, despite Merck's strong opposition. Dr. Daniel H. Solomon, a co-author of the study with Dr. Avorn, told the *Wall Street Journal*: "We made a decision that we should let the science rule the day." I would hope that Merck will do the same - both with the media and in trials. I don't believe we will be seeing Dr. Gaziano in any more Vioxx trials.

## VIOXX CASES ARE IN BOTH STATE AND FEDERAL COURTS

Cases have been filed in both state and federal courts. Currently, there are several thousand state cases and about 3,000 federal cases. All of the federal cases are in the MDL. There was an effort recently by a group of lawyers who were encouraging other lawyers to file their Vioxx case in state courts. U.S. District Judge Eldon Fallon, the judge overseeing cases in the MDL believes that this effort by these lawyers to keep their cases in state courts was "counter-productive" to his stated goal to eventually settle all Vioxx claims on a global basis. Judge Fallon expressed his feelings to lawyers at a MDL status conference. Judge Fallon wants state cases brought into the MDL so that he can preside over a few trials, determine a proper resolution to all the litigation, and then bring about a global settlement. Judge Fallon stated: "Hopefully, these cases can be resolved short of trying every case. That's my hope."

We believe that under Judge Fallon there is a much better opportunity for Vioxx victims to reach a global settlement of all cases. However, there will be individual state cases that won't go to the MDL. But, those cases also will be resolved satisfactorily for the victims who elect to keep their cases in state

court. Regardless, I don't believe it is good for a rift to develop between lawyers handling federal cases and those handling only state cases. If that were to develop, it will be counterproductive to reaching successful resolutions in the Vioxx cases. In fact, it would be playing into the hands of Merck & Co. and its host of legal firms who would like to see a split in the ranks of victims' lawyers.

#### **MORE CASES SET FOR TRIAL IN NEW JERSEY**

In the wake of the jury verdict in favor of Merck & Co. in the New Jersey Vioxx case, it appears there will be a shift in strategy. Judge Carol Higbee, before whom all New Jersey Vioxx cases have been consolidated, has announced her intent to schedule cases for trial involving individuals with pre-heart attack or stroke ingestion of Vioxx for 18 months or longer. The judge has set the first such cases for January 30, 2006. A provision in the New Jersey court rules would allow Judge Higbee to consolidate numerous cases for a single trial on common, general liability issues applicable to each plaintiff, and then bifurcate, or separate, the cases to deal with case specific causation issues. At press time, we did not know which cases would be tried. It could be only two of the seven.

In essence, Judge Higbee would conduct one large trial to determine, in general, whether Vioxx can cause or contribute to cause heart attacks and strokes. If the jury answered that question in the affirmative, new juries would be selected to hear evidence in mini-trials to determine whether Vioxx caused or contributed to a specific plaintiff's injuries, based upon facts specific to that plaintiff's case.

Although Merck pulled Vioxx from the market on September 30, 2004, Merck has worked hard to create the myth that Vioxx only causes heart attack or strokes after 18 months of

Vioxx use. That is totally false, and Merck's bosses have to know that better than anybody. The studies show a clear elevation in risk of heart attack and stroke after the first dose of Vioxx, continuing through and escalating further after 18 months of use. The company may regret its decision to make long-term use cases easier for the Vioxx victims.

#### **A NEW STUDY**

In another blow to manufacturers of Vioxx and other Cox-2 inhibitors, a recent Danish study found that patients taking Vioxx 25 mg daily who have suffered a prior heart attack are five times more likely to die than those patients not taking Vioxx. Patients taking 200 mg of Celebrex daily were 4.2 times more likely to die. In response to the study, officials at Merck pointed out that the Danish study was not a randomized, controlled clinical trial, which is the "gold standard." That is a typical responsible by the "spin doctors" at Merck. But, this latest revelation is bad news for Merck.

#### **NAME-BRAND DRUG PRICES CONTINUE TO SKYROCKET**

Prices for name brand drugs rose an average of twice the rate of inflation over the past year, while prices for generic drugs stayed the same, according to a recent AARP report released on November 2<sup>nd</sup>. Pharmaceutical company name brand drugs rose 6.1% in the 12 months ending with the second quarter of 2005. This was more than twice the 3.0% rate of general inflation. This analysis was based on a sample of the 200 name brand drugs most widely dispensed and those having the highest sales volume.

The AARP Data Digest (available at [aarp.org](http://aarp.org)) reports changes in wholesale drug prices for the name brand prescription drugs most commonly used by

Americans, age 50 and older. The report contends that the price a manufacturer charges to wholesalers is the most important part of the name brand prescription's retail price because, as a manufacturer increases its price to wholesalers, the added cost is passed on to the consumer.

The group says that through the end of the second quarter of 2005, annual increases in manufacturer drug prices charged to wholesalers and other direct purchasers continued to skyrocket. Price increases over a six-month period included Atrovent®, an emphysema medication, with more than an 18% increase, and Ambien®, a sleep aid manufactured by Proctor & Gamble/Sanofi-Aventis, up more than 14%. Other drugs with substantial price changes included Actonel® (7.5%), followed by Evista® (6.2%), and Toprol XL® (6%). Pfizer drugs Lipitor®, Celebrex®, Neurontin®, and Xalatan® each increased by 5%. Eight manufacturers - Proctor & Gamble, Monarch, Novartis, Eli Lilly, Boehringer Ingleheim, Allergan, Pfizer, and Eisai - had average six-month price increases that were at least three times the rate of general inflation during this same time period.

AARP says tracking manufacturer-set wholesale prices shows just how pharmaceutical companies are treating America's senior citizens. "We're putting a spotlight on what manufacturers are charging, which is by far the most significant part of the price equation," said AARP policy director John Rother. These reports show the obvious trends in the increase of pharmaceutical drug prices, according to Steven Findlay, whose group Consumer's Union publishes drug comparison studies online.

This latest study shows that, because of these price increases, the typical older American who takes three brand name prescription drugs per day will see an average annual increase of \$97.14. And because many seniors depend on Medicare or insurance to

cover all or part of the cost of drugs, these unfair price increases negatively affect all Americans through higher taxes and higher insurance premiums. Overall, these unreasonably high and unwarranted price increases have a staggering effect on the economy and the most vulnerable members of society, our seniors. Local drug stores are barely making a profit on prescription drugs because giant pharmaceutical companies are charging outrageous prices for their drugs. Something has to be done to correct this situation.

Source: USA Today

### **DR. DAVID GRAHAM SPEAKS OUT**

Dr. David Graham is the associate director for science and medicine in the Office of Drug Safety of the Food and Drug Administration (FDA). This is part of the FDA center that reviews and approves new drugs. You will recall that in testimony before Congress last year, Dr. Graham told the Senate Finance Committee the FDA is “virtually defenseless” against another “terrible tragedy and a profound regulatory failure” like Vioxx. Merck is much more powerful than the FDA and that’s a tragic truth. In an interview with *USA Today*, Dr. Graham says that we are “worse off when it comes to drug safety than it was a year ago.” That’s because the FDA’s recent drug safety initiatives serve only as window dressing, diverting attention away from real solutions, such as an **independent** Office of Drug Safety, according to Dr. Graham. He goes further to say that the Drug Safety Oversight Board established by the FDA in February to oversee management of drug safety issues is “a kangaroo court.” Dr. Graham pointed out that several of the 15 members are FDA employees who work for the center that reviews and approves new drugs. Neither does Dr. Graham think much of the ongoing Institute of Medicine study of drug safety requested by the FDA. He doubts

the study will make much of a difference, because it’s based largely on information supplied by the FDA.

An article in the *Journal of the American Medical Association* supports Graham’s assessment of the FDA. Especially in the past five years, writes Howard Markel, a University of Michigan pediatrician and professor of the history of medicine, the FDA has been heading downward “from a sterling — albeit very human — regulatory agency into one much more tarnished, politicized, and increasingly disputed by the very people it was designed to protect.”

We have learned during our litigation against Merck & Co. and the other powerful pharmaceutical companies that the FDA is very weak and actually is pretty much of an extension of the industry it is supposed to regulate. The American people want to believe that the medicines they take are safe, and for that reason most of them still want to trust the FDA. I believe they are learning slowly that the government’s system of regulation is broken and needs fixing. Congress should listen to Dr. Graham and strengthen the FDA. That will mean better funding and staffing. That will also mean ending the “revolving door” that allows the pharmaceutical industry to furnish staffing to the FDA and then take them back after a tour of duty. Senator Chuck Grassley (R-IA), chairman of the Senate and Finance Committee, believes there is hope for change. This senator has working hard in that director.

Source: USA Today

### **FDA TO REVISIT DRUG MARKETING**

Last month we wrote on the problems with the direct marketing of prescription medication to consumers. The Food and Drug Administration (FDA) has started collecting ideas on how such advertising could be regulated. Dr. Janet Woodcock, the FDA’s deputy commissioner for operations, observed:

*A lot has happened in the last decade with direct-to-consumer advertising, and we believe it’s time to receive additional input. It’s critical, from a public health standpoint, that the advertisements are truthful and balanced.*

I have to wonder why it has taken the FDA so long to spot the problem. Since 1997, when the FDA relaxed the rules on marketing prescription medicines, ads for treatments of such ailments as depression, erectile dysfunction and chemotherapy-related anemia have moved from medical journals to television networks and consumer magazines, creatively describing the benefits of a more cheerful mood, enhanced virility, and increased energy while fighting cancer.

Today, direct-to-consumer advertising is a \$4.1-billion-a-year industry. Numerous studies have demonstrated that such marketing increases sales of specific drugs. Common sense — without the basis of any study — tells me that when a drug company spends millions, sales of a drug will increase. But debate over the effectiveness and accuracy of the ads has polarized consumer groups, which are seeking stricter regulations, and drug manufacturers, which contend that such marketing is free speech. As I have stated on numerous occasions, direct-to-consumer advertising should be banned. I can see no justification for this advertising on TV or otherwise of a prescription drug. The selection of such drugs should be left to medical doctors, assisted when necessary by trained pharmacists.

### **WYETH WINS IN PHILADELPHIA DIET DRUG TRIAL**

A jury ruled in favor of Wyeth, the drug maker, in a trial in which three people claimed they had been harmed by using the company’s withdrawn diet drug. In the second diet drug verdict in

Philadelphia recently the jury ruled against Lee Ann Brunson, Colleen Rondas, and Lonnie Zimmerman. In October, a jury ordered Wyeth to pay damages of \$88,000 to Brigitte DeMonja, who claimed she suffered heart valve damage from taking Pondimin. Wyeth has taken more than \$21 billion in charges for legal liabilities related to diet drugs that were pulled from the market in 1997 after they were linked to heart valve damage. Pondimin was part of a drug combination known as “fen-phen.” This recent verdict was said to be good news for Wyeth.

Source: Reuters

## IX. BUSINESS LITIGATION

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### **GEORGIA RECEIVES MCI SETTLEMENT**

Georgia will apparently be one of the largest recipients of a settlement MCI, Inc. is making with several states for unpaid taxes. Georgia’s payment reportedly will be \$39.7 million. Revenue Commissioner Bart Graham told the *Atlanta Journal Constitution* that the settlement was good news. He stated: “We feel very good about the outcome because early on the company only offered us \$1.5 million. Others suggested we accept it because we did not have the money to litigate it.” The Georgia Revenue Department, in conjunction with State Attorney General Thurber E. Baker, announced Georgia’s share of the settlement agreement reached with fourteen other states and the District of Columbia in the bankruptcy proceedings of WorldCom, Inc. The bankruptcy court must approve the settlement with the states before it takes effect.

The state tax claims concerned state tax minimization programs that were identified by an examiner appointed by

the bankruptcy court to inquire into WorldCom affairs. The participating states alleged that WorldCom’s placing royalty charges upon subsidiaries for “management foresight” of WorldCom’s managers resulted in improper tax treatment. Other states participating in the settlement are Alabama, Arkansas, Connecticut, Florida, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, Wisconsin, and the District of Columbia.

### **SHELL TO PAY MILLIONS FOR GAS STATION VIOLATIONS**

A \$10.75 million dollar settlement has been reached in California with Shell Oil Company over environmental health violations at its local gas stations in San Diego County. The settlement is the largest settlement ever in an environmental protection case in that county.

The enforcement action occurred after more than 2,200 violations were found during routine county inspections at Shell and former Texaco stations in San Diego County. Problems discovered included leak-detection sensors that were tampered with, record-keeping problems and improper disposal of waste at some stations. Officials have said that fortunately the problems did not include gas leaking into the underground water.

Shell has agreed to install new tamper-resistant sensors at its 62 Shell stations in the county, provide increased maintenance and improved employee training, and create management systems to prevent future problems. The company has also agreed to install new sensors at forty other stations in California. The company will pay \$4.75 million in costs, attorneys’ fees, and civil penalties. The agreement technically is with Equilon Enterprises, an entity owned entirely by Shell. The settlement was reached less than one week after the city and county filed a lawsuit against the company. In announcing the

settlement, District Attorney Dumanis said:

*You cannot continue violating the environmental laws and endangering the health of people in San Diego without consequences. We are going to hold those accountable who would wish to pollute our environment and we are going to hit them where it hurts the most - in the pocket.*

Much of the case centered on leak-detection systems at gas stations that were supposed to ensure the integrity of underground storage tanks and make sure hazardous materials did not leach into the ground. It was alleged that station owners or managers had moved or tampered with sensors that were supposed to detect if water flowed underneath gas pumps or leaked into the secondary containment systems around underground storage tanks.

This settlement is a very good result for the citizens of San Diego. It is interesting to note that while violations were found at stations over the past six years, the company was “pretty non-responsive” to these violations. A spokesperson for the county’s Department of Environmental Health noted that: “It took us a number of years to get their attention.” That shouldn’t come as a surprise to anybody who has had legal or environmental problems with an oil company.

### **GROUP OF WORLD.COM INVESTORS SETTLES FOR \$651 MILLION**

A group of institutional investors who lost money in the collapse of WorldCom have reached a settlement worth more than \$651 million. The settlement funds are to be paid primarily by the telecommunications company’s former investment banks. More than 65 funds are participating in the settlement, including the largest U.S. pension fund, the California Public Employees’ Retirement System (CALPERS). The investment banks

that underwrote WorldCom securities offerings, including Citigroup and JPMorgan Chase, will pay the funds. Other defendants in the case included former WorldCom board members and officers.

This settlement is separate from a \$6.1 billion class action settlement stemming from investor losses in WorldCom's 2002 collapse. Some WorldCom stock and bond holders opted out of that settlement, which was led by the New York State Common Retirement Fund and recently won court approval, to pursue their own lawsuits. The settlement covers 32 lawsuits by insurance companies, investment funds and retirement funds — including CALPERS — that had bought billions of dollars in WorldCom securities from 1998 to 2001.

The latest agreement ends civil litigation against the company, and as a result the WorldCom litigation is finished. Under the settlement, Citigroup and JPMorgan Chase — two of 14 Wall Street banks sued by investors — agreed to petition the Securities and Exchange Commission in support of stronger disclosures by banks that underwrite stock and bond offerings. That supports investors' demands for broader disclosure by the banks and their corporate clients of their financial dealings with each other, including loans paid to bank officers and directors and allocations of initial public offering shares. While Citigroup and JPMorgan Chase will pay most of the settlement, the defunct accounting firm Arthur Andersen, which audited WorldCom's finances, will pay \$8 million. A small amount of insurance money will be paid on behalf of former WorldCom CEO Bernie Ebbers and former chief financial officer Scott Sullivan.

This all came as a result of one of the largest corporate scandals in history. WorldCom's accounting fraud led to huge stock market losses for investors, the company's bankruptcy filing, and the conviction of and a tough prison sentence for its founder. As you know,

WorldCom is now called MCI. About \$586 million of an estimated \$920 million in losses, or 65 cents on the dollar, after investing \$16 billion in the two largest WorldCom bond sales, was recovered by the funds as a result of the lawsuits.

#### ***\$400 MILLION QWEST SETTLEMENT***

Qwest Communications International Inc. has reached a \$400 million settlement of most shareholder lawsuits filed after an accounting scandal that forced the company to restate billions in revenue. The settlement will cover Denver-based Qwest, some former executives, and its board of directors, with the exception of former Chief Executive Officer Joseph Nacchio and former Chief Financial Officer Robert Woodruff. The company is the primary local phone provider in 14 mostly Western states, including Washington.

The federal government investigation into Qwest began in February 2002. The Securities and Exchange Commission (SEC) said fraud at Qwest occurred between April 1999 and March 2002, allowing it to improperly report about \$3 billion in revenue that facilitated its 2000 merger with U.S. West. Among other things, the SEC said Qwest repeatedly booked revenue from one-time sales of equipment and fiber-optic swaps while falsely claiming to investors that the income was recurring. Qwest later restated earnings from 2000 and 2001 to erase about \$2.2 billion in revenue. The shareholder lawsuits alleged that Qwest, the former officers, and board members concealed information about the revenue.

*Source: Associated Press*

#### ***OREGON HOSPITAL SETTLES CLASS ACTION CLAIM***

A settlement has been reached in a class action lawsuit filed on behalf of uninsured patients who claim a major

nonprofit hospital system in Oregon overcharged them. Providence Hospital System contradicted its stated mission of providing universal access to health care by charging uninsured patients higher rates for the same services than other patients. The agreement must be approved by the court. If approved, it will affect tens of thousands of low-income Oregonians. As we have reported, similar lawsuits have been filed against hundreds of hospitals in at least 27 states, alleging that tax-exempt nonprofit hospitals charge higher prices to uninsured patients than insured patients.

The settlement covers medical charges to uninsured patients at seven Providence hospitals in Oregon over a six-year period, going back four years and the next two years. All charges will be recalculated. One of the lead plaintiffs is Gerry Hugo of Medford, Oregon, a retired construction worker who was billed about \$13,000 for a routine hernia operation at a Providence hospital. He took out a home equity loan after a collection agency hired by the hospital threatened to place a lien on his property. If the settlement is approved, Mr. Hugo will receive a \$7,300 refund. In my opinion, the settlement helps level the playing field for poor people struggling to cope with corporate health care providers.

*Source: Associated Press*

## **X. INSURANCE AND FINANCE UPDATE**

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### ***INSURANCE CARRIER WON'T HAVE TO PAY CLEARONE***

A federal judge has ruled that an insurance carrier does not have to help ClearOne Communications cover a \$10 million settlement with its shareholders. U.S. District Judge Tina Campbell said ClearOne, a maker of audio and video

conferencing equipment, had provided the National Union Fire Insurance Co. of Pittsburgh the same doctored financial statements that it gave the Securities and Exchange Commission (SEC) and its stockholders. Under Utah law, an insurance provider can rescind its coverage if it relied on such misrepresentations in issuing its policy. The SEC filed a lawsuit three years ago alleging the company and two of its top executives schemed to inflate ClearOne's share price by doctoring its books. ClearOne eventually settled that dispute without receiving a fine or admitting wrongdoing.

But, a class action lawsuit by shareholders raised many of the same allegations as the SEC's action. ClearOne agreed to pay \$5 million in cash and issue an additional 1.2 million shares to settle with its stockholders. The SEC's Salt Lake City office recently notified ClearOne that local SEC officials want to revoke the registration of the company's stock because it failed to file current annual and quarterly reports. If SEC officials in Washington adopt the recommendation of the Salt Lake City office, ClearOne's stock will no longer trade. ClearOne filed a statement with the SEC detailing its reasons why it believes it isn't necessary for regulators to revoke its stock in order to protect shareholders. It has not made the statement public or revealed it to its shareholders. ClearOne takes the position that this is private information, which the company won't make public. The company has promised its shareholders that it will complete the audit of its 2004 financial results before year end and that it will submit its 2005 documents by the end of the first quarter in 2006.

In August, ClearOne finally filed its financial reports for the years questioned by the SEC in its lawsuit. The reports revealed the company had gone from a \$3.6 million profit in fiscal 2001 to a \$35.9 million loss in fiscal 2003.

This is just another example of how greed infects a corporation, with disastrous results.

Source: *The Insurance Journal*

#### **ALLSTATE'S CLAIM HANDLING PRACTICES**

It has come to our attention, through a paper written by David J. Berardinelli, J.D., and secret documents of McKinsey & Company (an efficiency consulting firm that specializes in redesigning product delivery systems) referenced therein, that Allstate Insurance Company, back in 1995, implemented recommendations made by McKinsey & Company that put corporate profits above the interests of Allstate policyholders. Allstate hired McKinsey in 1992 to redesign its claims handling system. McKinsey & Company's plan for redesigning Allstate's claims approach is called "Claims Core Process Redesign" or CCPR. According to Allstate's own documents, since its implementation in 1995, CCPR has been the most profitable claim handling system in insurance industry history, generating between \$15 to \$25 billion in excess profits for Allstate. The McKinsey documents explain how Allstate's top management redesigned its insurance business from a financial service providing greater economic stability for its policyholders into an economics game providing profits for Allstate at its policyholders' expense. Allstate implemented what has been called the "Zero Sum Game" approach. Under the "Zero Sum Game" theory, Allstate's claim handling approach is driven exclusively by self-interest. Allstate can only win the "game" at the direct expense of someone else, i.e., by taking money *away* from its policyholders. In short, Allstate is giving itself the "Good Hands" treatment while giving its policyholders the "Boxing Gloves" treatment.

#### **LAWSUIT CLAIMS DISABILITY INSURER SOUGHT TO AVOID PAYING CLAIMS**

Another major lawsuit has been filed against UnumProvident Corp., the nation's largest disability insurer, in a California court. The suit alleges the insurance company systematically sought ways to avoid paying claims to millions of California customers. The lawsuit, filed in Superior Court by policyholders, seeks class action status. It comes just a few weeks after UnumProvident was ordered to pay an \$8 million fine to settle similar charges against the company by state insurance regulators in California. The lawsuit seeks billions of dollars in premium refunds and damages for denied claims. In addition to UnumProvident, UnumProvident subsidiary Paul Revere Life Insurance Co. is also named as a defendant.

#### **MAINE DIRIGO FOUND TO SAVE \$44 MILLION**

Maine Governor John Baldacci has applauded a ruling by Maine's top insurance regulator that found \$43.7 million in first-year savings from Dirigo Health, a state-subsidized program designed to provide health coverage to Maine's uninsured. Backers of Dirigo Health said the ruling by Insurance Superintendent Alessandro Iuppa means that the program will have enough money to operate into 2006. The superintendent's decision followed a public hearing held to gauge how much savings the program has generated in Maine's health care system. The ruling was seen as vital to Dirigo's future. That's because insurers are required to make an annual savings offset payment to fund the program. The payment is based on the premise that insurers will reap the benefits of voluntary spending caps by hospitals and other cost-control efforts associated with Dirigo Health.

The state is providing its Dirigo-Choice product to 8,500 Maine residents.

The amount of the savings offset payment, to be assessed starting in January, will be determined by the board of directors of the Dirigo Health agency. The fee cannot surpass 4% of paid health claims. Governor Baldacci said he hopes insurers refrain from passing the cost of the offset payments onto customers. "They must deliver the savings to the health care consumer, so everyone benefits," the governor told *Associated Press*.

Source: *Associated Press*

### **CREDIT CARD COMPANIES ARE TARGETING TEENAGERS**

As we all know, the teenage years can be a very difficult time in a young person's life. Unfortunately, it looks like credit card companies are trying to make it a lot more complicated for teenagers. Credit card companies are spending millions of dollars aggressively marketing credit cards to teenagers. According to JumpStart Coalition for Personal Financial Literacy, students entering college are offered on average eight credit cards during their first week of school. The most targeted demographic for credit card companies has mainly been college students. But, now it seems that these large companies are going after an even younger market.

Credit card companies are soliciting youngsters who still live at home with their parents, many who are not even old enough to drive. These companies send credit card offers co-addressed to the teens and their parents, because teens under 18 technically cannot apply for a credit card without a co-signer. Many parents feel that it is ok to co-sign with the teen in hopes that it will teach financial responsibility. Unfortunately, most industry research indicates that teenagers don't understand how a credit card actually works and they too often believe that if they make their

minimum payments, everything will always be all right. According to Nellie Mae, the student loan lender, the average card debt of an *incoming* college freshman is \$1,585.

Credit cards can be dangerous instruments in the hands of unwary teenagers. Many young people are more susceptible to peer pressure combined with the overwhelming need to "fit in." These concerns and desires of teenagers are fueled and exploited by the credit card industry in their advertisements and the solicitations they mail out. It is a good idea for parents to take the time with their children and make sure they understand how these credit cards work.

If a parent believes the use of a credit card can teach financial responsibility, they are several alternatives to the real thing. One such alternative is a debit or check card, which can be used anywhere a credit card can be used but is linked to a bank account. Another alternative is a pre-paid or store valued card, which is "loaded" with a fixed dollar amount, like a gift card.

The world is still a very sophisticated place. Providing education to our teenagers is one way we can ensure they are equipped to handle the challenges the world throws at them. Financial responsibility is certainly an important lesson that our children need to learn. We should make sure that these credit card companies don't continue to destroy our children's finances and credit ratings before they are even able to get a job.

### **\$3 MILLION BAD-FAITH VERDICT**

A Colorado jury has returned the state's largest bad-faith verdict against an insurance company over lost wages. The jury has awarded a former University of Colorado professor nearly \$3 million. The 39-year-old professor had sought \$125,000 - 85% of his actual lost wages - during a year-long sabbatical

following a 2003 automobile accident that left him with a brain injury and badly mangled arm in addition to nearly \$150,000 in lost wages. The jury found that the plaintiff was entitled to \$1.1 million in punitive damages and \$1.1 million for pain and suffering.

The six-member jury found against American Family Mutual Insurance Co. for breach of contract and ruled the defendant's refusal to pay the \$125,000 claim was "willful and wanton." Under Colorado state law, willful conduct triples the lost wages award to \$375,000. American Family must also pay the plaintiff's lawyer's fees and 18% annual interest on the three-year-old wage award, as allowed under that state's laws. Madison, Wisconsin-based American Family, the country's 10th-largest automobile insurance carrier, maintained the claim hadn't been formally denied, but that the case was still under investigation. Apparently, the jury didn't buy that defense.

Underwriting issues were a major focus of the plaintiff's case. A former American Family nurse case manager in Denver testified that the insurer was guilty of bad faith and that the Colorado office was under intense pressure to reduce personal injury protection payouts. Jurors were told about a senior case manager who kept on her desk a battery-operated "if pigs could fly" toy, used as an office joke each time a rejected claim brought the staff closer to its cost-cutting goal. Among the documents introduced was a 2003 Colorado business plan that called for reducing claims payouts by 28% to match the lower claims-loss ratios of American Family's competitors. Underwriting problems shouldn't have anything to do with what an insurance company pays out in claims.

# XI. PREMISES LIABILITY UPDATE

## A LOOK AT SOME TYPICAL PREMISES CASES

A number of serious injuries and deaths occur each year in apartment complexes, in public parking lots, and other public places. People now expect businesses and rental properties to maintain adequate security for persons who will lawfully be on their premises. The following are some examples of actual cases where a breach of the duty to maintain adequate security was alleged:

- **Inadequate security in an apartment complex parking lot.** The case involved inadequate security in an apartment complex parking lot where a tenant shot and killed another tenant.
- **Failure to give adequate notice of prior crimes.** Another apartment complex case involved liability where the owners and managers of the complex failed to give adequate notice of previous crimes on the premises.
- **Inadequate security involving lighting in an apartment complex laundry room.** This apartment complex case involved a lease's exculpatory clause for criminal acts. A court held that such a clause was against public policy in a case of illegally inadequate security in a laundry room because of inadequate lighting on the premises.
- **Sexual assault of a tenant.** This case involved a landlord's duty to provide security measures against third-party criminal activity. A tenant was sexually assaulted on the premises.
- **Failure to warn tenants of prior assaults.** An apartment owner and manager failed to warn tenants of prior assaults and failed to keep the premises safe.

- **Failure to change locks between tenants.** This case involved the owner and manager of an apartment complex failing to change the locks and install a keyless interior deadbolt lock when a tenant moved out. The new tenant was sexually assaulted by a former tenant.

- **Inadequate shopping center parking lot security.** This case against Publix Supermarket Inc. involved a supermarket and shopping center providing inadequate security in a parking lot where a "good Samaritan" was shot.

- **Failure to prevent shooting in a shopping mall parking lot.** The liability of the landlord and tenant liability in this case was based on inadequate security in a shopping mall parking lot where a man was shot while escaping a gunman.

- **Inadequate motel security.** This case alleged that a motel provided inadequate security leading to the murder of two guests.

- **Parent company responsible for inadequate security of convenience store.** This case involves inadequate security of a convenience store where a woman was shot and killed when the store was robbed.

## FEED PLANT CAUSES ILLNESSES

A lawsuit against West Central Cooperative, a livestock feed ingredient plant in Jefferson, Iowa, alleges the plant is making people who live and work nearby sick. More than 100 residents of Jefferson have sued the cooperative, one of Iowa's largest farmer-owned co-ops, contending that the plant has caused health problems and property damage in the city of about 4,700 people. West Central opened the business - SoyChlor - in February. Since then, emissions from the plant have corroded metal buildings and other property within a mile of the plant, the lawsuit

alleges. The suit alleges further that emissions also have killed grass and other vegetation, eliminated wildlife, ruined windows, and discolored surrounding structures and roadway rock. The plant, according to the lawsuit, has exceeded legal limits for emissions of both hydrogen chloride and "particulate matter," or dust. When combined with moisture, the chemical turns into hydrochloric acid, a highly corrosive substance known to be toxic to humans and animals.

SoyChlor makes a nutritional supplement that is fed to pregnant dairy cows to prevent milk fever. The company has manufactured its patented product for about seven years marketing it throughout North America. The product previously was made in Adair, Iowa, but manufacturing was moved to Jefferson this year after West Central opened its plant.

In the lawsuit filed against West Central in Greene County District Court, residents and business owners contend the company violated state law by failing to comply with clean air standards and by failing to fully disclose to state regulators and to the community the contents of emissions from the plant. The plaintiffs are seeking punitive and compensatory damages, as well as a permanent injunction forcing the closure of the plant.

Source: Des Moines Register

## 'SIZZLER' RIDE TIED TO DEATH AND INJURY CASES

Amusement rides like the "Sizzler," which threw a Massachusetts man to his death at a church fair last year, have been involved in at least 10 other incidents since 1991 that resulted in death or injury to riders. This comes from information put together by federal regulators. While some safety advocates say that further study is needed to determine whether a pattern exists, others think that the number of incidents is

negligible considering the vast number of riders over the years. Three other people died after riding the whirling "Sizzler," one other person suffered serious head trauma, and six suffered relatively minor injuries, according to U.S. Consumer Product Safety Commission records. I believe this activity should make the federal government look further into this matter. It might help to compare "Sizzler" accidents with accidents on similar rides. About 200 "Sizzlers" are operating, most of them in the United States, according to the manufacturer, Wisdom Industries Ltd.

In most cases, the CPSC incident reports don't state a cause. Public safety officials in Massachusetts determined that the seating compartment that held the man referred to above broke apart when an improperly replaced lap bar nut loosened, a bolt with its head removed gave way, and an undersized bolt sheared off. The 38-year-old man died in the September 19, 2004, accident. Two other people were injured. I have contended for years that all states need to pass safety regulations relating to amusement park rides. At this point, there is very little regulation.

#### **CARBON MONOXIDE LEAK SICKENS DOZENS**

A carbon monoxide leak at a Montana resort sickened dozens of people attending a banquet celebrating the 230th anniversary of the Marine Corps. Over 40 people were sent to hospitals. Apparently, none of them suffered major illness. About 200 people were attending the banquet. Authorities found a "fairly major" carbon monoxide leak in the basement boilers at the Rock Creek Resort, which is located in south central Montana. The persons affected were most fortunate. This could have been a real disaster.

Source: *Associated Press*

## **XII. WORKPLACE HAZARDS**

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#### **LUCENT RETIREES SUE THE COMPANY OVER HEALTH BENEFITS**

Two Lucent Technologies retirees have filed a lawsuit against their former employer, claiming the company failed to maintain health care benefits for retirees as required by law. The plaintiffs in the case are members of the Lucent Retirees Organization, which is seeking to have the case certified as a class action lawsuit on behalf of 235,000 Lucent retirees and dependents. The claim was filed in U.S. District Court in Camden, New Jersey. Many of the Lucent retirees worked for, and retired from, corporate predecessors of Lucent, which was spun off from AT&T in 1996.

The plaintiffs claim that in 1998, Lucent was required to maintain all retire benefits at their previous levels through September 2003. But they say Lucent did not keep that promise when the company raised co-payments, deductibles, and retiree contributions for coverage between January 1, 2001 and January 1, 2003. Employees who retired before March 1, 1990 from any of the companies that eventually became part of Lucent are not affected and could not join the lawsuit if it is granted class action status, according to Ken Raschke, president of the Lucent Retirees Organization. For more recent retirees, though - like many American workers - health care premiums have been rising fast. Ed Beltram, a spokesman for Lucent Retirees Organization, retired as human resources manager at the company's Oklahoma City plant in 2001. Mr. Beltram's situation is similar to that of many retirees in this country. He paid \$42 per month that year for health care for himself and his wife; two years later, he was paying

\$142 per month. The retirees say that because the company did wrong before September 30<sup>th</sup>, it was also violating tax laws for other, bigger changes that came after that date. Those changes include moves Lucent made since 2004, to stop subsidizing health care for dependents of workers who retired with salaries of more than \$65,000. For example, Mr. Beltram said that in 2006, he'll have to pay \$690 per month for medical insurance for himself and his wife, whose coverage is no longer subsidized. Lucent claims it is in compliance with the federal tax law provisions in question in the lawsuit.

Sources: *NewsDay* and *Associated Press*

#### **BFGOODRICH TO PAY FINES AND IMPROVE WORKPLACE SAFETY**

BFGoodrich has reached a settlement with the Occupational Safety and Health Administration (OSHA) over safety and health violations at its Tuscaloosa tire manufacturing plant. OSHA officials have agreed to reduce proposed fines against BFGoodrich from \$91,700 to \$62,000 in exchange for the company admitting to the workplace hazards and other violations and agreeing to correct them. OSHA cited BFGoodrich October 5<sup>th</sup> for what it called 26 "serious" violations, including failing to protect workers from falls into pits through floor openings, and electrocutions from unguarded machinery parts and electrical equipment. BFGoodrich also received two repeat citations for failing to provide employees with fall protection while working on platforms and lack of a written hazard assessment program. A repeat citation is when an employer has been cited previously for "substantially similar conditions" and the citation has become a final order of OSHA's independent review commission. Company representatives and OSHA officials reached the settlement at a conference. A spokesperson for OSHA said: "Our

primary concern is to get the hazards abated and make the workplace safe for employees, and the penalty is there to encourage the employer to comply.”

United Steelworkers Local 351 President Jimmy Price of Tuscaloosa said when the citations were announced that an increase in the injury rate at the plant triggered the OSHA inspection. A company spokeswoman claimed, however, that the number of lost-time accidents and reportable incidents at the plant had decreased in 2005 compared to 2004. The company claims OSHA citations resulted from inadequate preventive and procedural measures, rather than actual accidents. Jimmy Price is a good man and I would put a great deal of stock in what he says.

Source: *The Tuscaloosa News*

#### **JUDGE REDUCES FINES IN ALABAMA MINE BLAST**

In a most interesting development, an administrative law judge has thrown out most of the penalties levied against a mine operator for fatal blasts in 2001, saying government regulators didn't prove wrongdoing. The judge said last month that Jim Walter Resources Inc. should pay only \$3,000 in fines for minor violations instead of the \$435,000 for major problems. The Mine Safety and Health Administration (MSHA) indicated it may appeal. David G. Dye, MSHA acting assistant secretary said: “MSHA took strong enforcement action by levying the highest fines possible, and we're disappointed with the decision and are reviewing our options.”

As you will recall, two explosions ripped through a mine in Brookwood, Alabama on September 23, 2001. Thirteen were killed, many when trying to assist four co-workers injured in the initial blast. The government accused Jim Walter Resources of major flaws such as a lack of proper roof supports, improper training, and inadequate

efforts to prevent the buildup of volatile coal dust and gas. I hope that MSHA will appeal this decision, which sends the wrong message, and get the fines reinstated.

Source: *Associated Press*

#### **EXPLOSIVES MANUFACTURER FINED \$1 MILLION**

A federally licensed explosives manufacturer has been fined more than \$1 million for falsifying records to cover up the disappearance of explosives from some of its plants. The Ohio-based Austin Powder Co. pleaded guilty in August to three felony counts of falsifying inventory records from plants in Northampton, Greencastle and Dixon, Illinois. The explosives' disappearance and falsified records came to light after undercover agents purchased blasting caps that had been stolen from a delivery truck from the Greencastle facility. In all, the Austin Powder plea involved 55 pounds of Hydromite explosive missing from the Northampton plant; the blasting caps from Greencastle; and detonators from Dixon. All the explosives have been recovered. The company makes explosives for quarrying, mining, and construction.

A U.S. District Judge ordered Austin Powder to pay \$500,000 in fines and \$510,000 in forfeitures to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) under a plea agreement and accompanying administrative licensing settlements. The plea agreement allows the prosecution of others who may have been involved. The ATF permanently revoked federal explosives licenses at the Greencastle facility and at sites in Palmyra, Virginia, and Raleigh, North Carolina. In 2002, Austin Powder also pleaded guilty in federal court to misdemeanor counts of failing to notify the ATF about missing explosives in Nevada and improperly storing explosives in Kentucky.

#### **HOTEL SETTLES LANGUAGE SUIT WITH EEOC**

A most significant settlement has been reached in a lawsuit involving a major hotel chain. The Sheraton National Hotel in Arlington, Virginia, and its parent company, Interstate Hotels & Resorts Inc., will pay \$80,000 to settle the lawsuit filed last year by the U.S. Equal Employment Opportunity Commission. The suit was filed on behalf of a dishwasher who was fired because of a new English-only rule at the hotel. The employee, Jesus Romero, was temporarily laid off along with other kitchen workers in September 2001 while the hotel remodeled its restaurant. Employees were advised they would be rehired less than a year later, the lawsuit said. But, Romero was denied the job because of an English fluency requirement, according to the EEOC.

The EEOC found the firing to be discriminatory. This was because, as a dishwasher, Romero had little contact with the public. As a result, English fluency was not a business necessity. He had worked as a dishwasher for 16 years. The case is one of several in which the EEOC has intervened on behalf of Spanish-speaking workers over English fluency policies, which the agency says have become an emerging issue with a growing immigrant population in the United States.

Although the hotel later abolished its English fluency policy, according to the EEOC, Romero was not rehired. According to EEOC policy, a fluency requirement is permissible in workplaces only if needed “for the effective performance of the position for which it is imposed.” The settlement will provide Romero with back pay, compensatory damages, and attorneys' fees. The settlement also includes an agreement that the hotel will provide training to managerial employees concerning the prohibition of national origin discrimination and the potentially discriminatory nature and

impact of English-fluency-requirement policies, according to the EEOC. Discrimination filings by Hispanics with the EEOC have increased by almost 23%, from 6,250 in 1999 to 7,687 in 2004. In the same period, national origin discrimination filings with the EEOC rose by 18%, from 7,108 to 8,361. The company in this case will provide additional training to managers.

Source: *The Washington Post*

### **THE DEVASTATING ECONOMIC IMPACT OF AN ON-THE-JOB INJURY**

Thousands of working citizens in Alabama and throughout this country are severely injured when working. An injured worker is entitled, pursuant to law, to receive medical care for his or her injuries and monetary compensation. The family of a deceased worker is entitled to a set amount of compensation. Unfortunately, many injured workers are neglected. Some are not referred to medical specialists, and others receive bare minimum care for complex injuries. Because of an inability to work, these workers and their families encounter unforeseen financial difficulties. If an injury results in death, the dependent members of the family are allowed to recover the present value of 2/3 of the injured person's salary multiplied by 500 weeks of employment. Such a small recovery never replaces the life-long loss of income to the family. If an employee is injured, the recovery amount varies depending on the injury. But, the recovery is far less than what a healthy employee would earn while working.

Unknown to the general public, the law does not allow an deceased person or the family of a deceased worker to file a lawsuit against the employer even if the employer's conduct caused the injury or death. Sometimes, however, the fault is caused by a third party, such as the manufacturer of a defective machine. If a third party pays an injured

worker, the employer's workers compensation insurance carrier is entitled to be paid back any monies paid to the employee. As a result, many employees don't see the benefit in filing a case against third parties that actually caused their injuries. In other words, why fight for monies that will be returned to the employer's insurance carrier?

But, we believe that our firm is sometimes able to uncover evidence that will allow an injured employee to recover substantial damages against a third party who manufactured, installed, repaired, or maintained the defective equipment. We accept these challenges in order to increase work place safety. Maybe one day in my lifetime, the workers' compensation laws in Alabama will be completely overhauled. The current state of the workers' compensation laws is unfair for hard working employees.

## **XIII. TRANSPORTATION**

### **SAFETY GROUPS RELEASE LIST OF MOST LETHAL STATES FOR TRUCK CRASHES**

We reported last month on the high number of truck crashes in the U.S. A number of our readers wanted to know more about this safety problem. The most lethal state in the country, measured by truck crash fatalities per 100,000 population, is Wyoming, followed by Arkansas, Alabama, West Virginia, Mississippi, Kansas, New Mexico, Oklahoma, Kentucky and Georgia, according to data released by Public Citizen. From our litigation experience, we know that the dangers posed by tired truckers are a major source of truck crashes. The trucking industry is lobbying hard to get Congress to give them some help. Congress should resist pressure from the trucking industry to codify a dangerous rule that permits big rig drivers to stay on the road for too many hours before pulling over to sleep.

The safety groups - Citizens for Reliable and Safe Highways (CRASH), Parents Against Tired Truckers (P.A.T.T.), Advocates for Highway and Auto Safety, and Public Citizen - issued a Travelers Alert warning the motoring public about the potential for sharing the road with lethally tired drivers behind the wheel of big rigs. The groups felt that the alert was necessary because the Federal Motor Carrier Safety Administration (FMCSA) is suspending enforcement of the hours of service rule until October 24<sup>th</sup>. The agency claims that suspending enforcement is necessary because the rule is new, although it is virtually the same as the rule issued in 2003. Between October 24<sup>th</sup> and January 1<sup>st</sup>, state enforcement of the rule will be optional. The groups sent the alert to thousands of consumers on e-mail listservs. The alert was also posted on the web and reporters were urged to warn the public. Daphne Izer, founder of P.A.T.T., whose teenage son was killed in 1994 by a truck driver who fell asleep at the wheel, had this to say:

*In giving states the green light to not enforce truckers' hours of service, the Federal Motor Carrier Safety Administration is also giving the green light to unsafe driving conditions. No load of freight is worth a human life.*

The August rule, like its 2003 predecessor, allows truckers to drive 11 consecutive hours, instead of 10 hours - the established maximum since 1939. Studies show that concentration is increasingly impaired and safety is compromised after eight hours of driving and by lack of sleep. Over the course of a week, truckers can drive an additional 17 to 18 hours, and over the course of a month, truckers can drive an additional 70 hours. This big increase is the result of a 34-hour "restart" provision in the rule allowing truck drivers to drive when they had to take off-duty rest time under the pre-2003 regulation. Also, the rule still features a drive-and-rest

cycle of less than 24 hours, ignoring the 24-hour biological clock. The danger large trucks pose to America's drivers is growing. The Bush Administration's own data show that fatalities stemming from large truck crashes were up 3.1% from 2003 to 2004. More than 5,000 people are killed every year in crashes with big trucks on U.S. roads. It is well known that fatigue plays an important role in truck crashes.

According to a new analysis of 2004 data from the Fatality Analysis Reporting System, Wyoming had 8.09 truck crash deaths per 100,000 people. Arkansas came in second with 4.09 deaths per 100,000 people. Last on the list was Hawaii, with 0.32 deaths per 100,000. To see the chart that lists truck fatality rates by state, and to view the statements made at the press conference and other fact sheets, please go to [www.citizen.org](http://www.citizen.org). Over the last ten years, 56,935 people have died and a million more were injured in truck crashes in communities across the country. That is unacceptable.

American families are paying a steep personal and financial price for this public health disaster. Truck deaths are increasing, government safety goals are ignored, and enforcement of safety rules is suspended while special trucking interests continue to push a dangerous agenda in Congress. It's time to stop letting the trucking industry have its way. The safety of all motorists, including truck drivers, should be a top priority.

A conference was held in October where truck crash victims were able to meet each other, build strength, and lobby for an hours of service rule that will protect the public. Victims came from Arizona, California, Washington, D.C., Kansas, Maine, Maryland, Michigan, Missouri, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, South Carolina, and Virginia.

FMCSA was created in 1999. In 2000, it proposed an hours of service rule that would have kept drivers on a 24-hour clock but expanded consecutive driving

hours from 10 to 12. In 2003, FMCSA issued the final rule, but allowed drivers to operate on a 21-hour schedule and boosted consecutive drive time from 10 to 11 hours. It permitted truckers to drive as many as 77 hours in a seven-day period or 88 hours in an eight-day period - an increase in total driving hours of nearly 30%. These provisions remain in the August 2005 rule.

In June 2003, safety groups sued, claiming FMCSA had ignored the health and safety of drivers. A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit unanimously agreed in 2004, finding that the regulations were fundamentally flawed and unsupported by scientific evidence. Despite this rebuke, FMCSA's August 2005 rule is virtually the same as the old one. In September, Public Citizen, Advocates for Highway and Auto Safety, CRASH, P.A.T.T., the Trauma Foundation, and the International Brotherhood of Teamsters filed a petition for reconsideration. The 2003 rule has been in effect since January 2004 because the truckers persuaded Congress to extend its life until October 1, 2005. Public Citizen President Joan Claybrook had this to say on the subject:

*Large trucks are rolling time bombs on our highways, with tired truckers allowed to work 14 and 16 hours a day under the new DOT rules, making truck driving the most dangerous occupation in America. Our decades-long battle with the DOT to get reasonable truck driving hours of work continues. The families here today will be fanning out to their members of Congress to stop legislative enactment of these rules and are issuing a Travelers Alert about the DOT decision to not even enforce its new, inadequate rules at all for the next week and then barely do so until the end of the year. It's past time for some sanity in trucking on our public highways.*

Because of the number of cases we have handled in which driver fatigue was a contributing cause of our client's injuries, and in some cases, death, I can say with certainty that the DOT must get serious about highway safety. It can start by enforcing its own rules. But, it should make the rules governing the trucking industry tougher.

Source: Public Citizen News Release

#### **STATE RURAL ROAD DEATHS IN ALABAMA**

A report by the Alabama Department of Public Safety reveals some interesting facts. Alabama state troopers say rural traffic fatalities this year are running almost neck and neck with last year. You will recall that highway deaths hit an all-time high last year. In 2004, wrecks in Alabama killed 1,154 people, a number that has been gradually increasing each year since 2000, according to statistics.

As of November 2<sup>nd</sup>, there had been 29,440 wrecks worked by state troopers this year, which killed 663 and injured 14,315 people. At the same time in 2004, there had been 29,135 wrecks, killing 665 and injuring 14,450 people. Forty-two percent of this year's wrecks were on county roads, according to the troopers' report. Seat belts or child restraints were not used in 61% or 347 of the 566 fatal 2005 wrecks. Troopers could not determine whether seat belts were used in 29 of the wrecks. It is interesting that most of the more serious cases our firm has handled over the past few years have involved moving vehicle accidents on interstate highways.

Source: Birmingham News

#### **BUS CRASH PASSENGERS AWARDED \$17.5 MILLION IN DAMAGES**

A Texas jury decided last month that the bus involved in a deadly 2003 Interstate 35 crash was defective because it didn't have seat belts. The jury awarded \$17.5 million in damages to bus passen-

gers in the lawsuit against Motor Coach Industries, a Schaumburg, Illinois-based bus manufacturer. The company says it will appeal the verdict.

Motor Coach buses, like all other tour buses manufactured for North American use, do not include seat belts. The accident occurred when 34 people from a Baptist Church in Temple were traveling in a chartered bus to Dallas in 2003 for a Christian music concert. The bus driver lost control in rainy conditions, crossed the median, and crashed into a southbound Chevrolet Suburban. Seven people were killed in the accident, including five on the bus and two in the Suburban. Nineteen bus passengers and their family members sued Motor Coach. A range of damages was sought, including medical bills, past and future lost wages, burial expenses, and the mental anguish resulting from the death of a spouse or parent.

Buses lacking seat belts, are unreasonably dangerous even though federal regulations do not require them. In this accident seat belts, along with laminated safety glass on passenger windows, would have protected passengers who were ejected from the bus. The jury in this case saw the case as an opportunity to bring about changes in bus safety standards. I hope the verdict will get the attention of both NHTSA and the industry. Several jurors commented after the verdict was returned that bus safety has to be improved. Some jurors said “compartmentalization,” which was a defense argument, was not an acceptable safety measure. Interestingly, defense lawyers argued that the bus driver, whom they said was driving too fast for the rainy conditions, was the cause of the accident, deaths, and injuries. Obviously, the jurors felt that a need for seat belts in buses eclipsed the specifics of the crash or the minimum federal standards that are in place.

## XIV. HEALTHCARE ISSUES

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### ***SWEEPING IMMUNITY FOR POSSIBLY UNSAFE VACCINES AND OTHER DRUGS***

On October 17, 2005, a new Biodefense bill was introduced in the U.S. Senate. Within one week, as predicted, the bill was pushed through the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee and onto the Senate Legislative calendar, without hearings. The bill would wipe out both regulatory and legal safeguards against certain unsafe vaccines, drugs and devices, leaving the industry completely off the hook for hurting American citizens. The Biodefense bill, likely written at the behest of drug and health industry lobbyists, basically eradicates regulatory safeguards against the production of unsafe vaccines, drugs, and devices that the government determines to be for pandemic, epidemic, or bioterrorism/security countermeasure use, and then wipes out liability for any drug company or health care provider that makes or dispenses them. It does so by:

- Allowing accelerated approval of a drug, biological product, device, or research tool that the government determines to be a national security or pandemic priority, severely weakening the normal safeguards that prevent unsafe vaccines, drugs and medical devices from reaching consumers; and
- Creating an exclusive federal cause of action against the manufacturer or health care provider of such vaccines, preempting all state products liability law, then drastically limiting the right to bring these federal claims.

As a result, families of patients who are killed or injured because of a defective or dangerous vaccine, drugs, or devices that fit within this category will

have no recourse, no ability to file a claim or lawsuit, no way to collect any compensation even if the drug company or health care provider was totally negligent, reckless or in some cases actually intentionally harmful. The sale exception is where the Secretary of Health and Human Services finds, in an administrative law proceeding based on clear and convincing evidence, that the drug company or health care provider “acted with willful misconduct” in violating the Federal Food, Drug and Cosmetic Act. If it becomes law, this legislation would remove all financial accountability for the drug industry that produces these vaccines, drugs and devices, removing the financial incentive they have to produce only safe products. This bill would be a massive intrusion into state law, pandering to the drug industry with provisions that also include eliminating anti-trust laws, and could be imposed on the public without a single public hearing.

The massive liability protection contained in this bill does nothing to address the reasons why this country experiences flu vaccine shortages. The drug industry is engaged in colossal and unjustified fear-mongering, blaming “lawsuits” and “liability” for the flu vaccine shortages in 2004. Nothing could be further from the truth. According to a 2004 *Washington Post* investigation, flu vaccine shortages are caused by arcane production and supply and demand problems, not liability problems.

The Journal of the American Medical Association (JAMA) discounted the importance of liability concerns for creating vaccine production problems. Consistent with the above *Washington Post* investigation, a recent article in JAMA found:

- There are ample reasons to suspect that flu vaccine is not an attractive product to drug manufacturers quite apart from liability concerns.

- [T]he historical record provides cause for skepticism that liability relief alone will prevent another flu vaccine shortage... These shortages likely resulted primarily from factors other than litigation costs, as did the flu vaccine crisis.

The drug industry already benefits from liability protection for production of seasonal flu vaccines and other childhood vaccines. The Vaccine Injury Compensation Program, enacted under the Childhood Vaccine Injury Act of 1986, provides drug manufacturers protection from lawsuits arising out of injuries caused by vaccination, forcing injured victims into an administrative compensation program. The Program covers the major childhood vaccines as well as the seasonal flu vaccine, which was added in 2004. The following gives us a good idea of how this program has worked:

- Since its conception almost 20 years ago, an average of 75% of claims are denied.
- Many of these claims are denied after long and contentious legal battles taking an average of 7 years to be resolved.
- Lawyers are less likely to take on vaccine injury cases because of these bureaucratic and political hurdles.
- The Fund is designed so that the Department of Health and Human Services may unilaterally tighten the restrictions on claimants. In 1995, DHHS changed the burdens of proof so drastically that claims went from being paid in one out of three cases to one out of seven.

Source: *Center for Justice and Democracy*

#### ***SWEEPING IMMUNITY FOR UNSAFE VACCINES AND DRUGS — THROUGH THE BACK DOOR***

As if it weren't enough that Senate Republicans are trying to give the drug industry broad protection from liability

as part of the Biodefense bill, Republican Congressional leaders also have been trying to sneak similar massive liability protections into an appropriations bill through a conference report. Under the version that Senate Majority Leader Bill Frist (R-TN) has been trying to insert into a spending bill, as in the Biodefense bill, a person injured by a vaccine would have to prove willful misconduct in order to bring a claim for damages against drug manufacturers or distributors. The Secretary of Health and Human Services would decide whether such misconduct occurred. If the Secretary finds such misconduct, the injured party's claim must be brought in federal court. In addition to those restrictions, however, punitive damage awards would be barred, and any award for pain and suffering or other non-economic compensatory damages would be capped at \$250,000.

Prominent members of Congress have criticized this attempt to absolve the drug companies of responsibility for the harm they cause to patients injured by dangerous drugs or vaccines. Opponents fault this immunity grab because:

- It's a massive special interest giveaway. The immunity covers drug companies if they commit even gross negligence and put dangerous and deadly drugs on the market. It's not just vaccines that are covered, but any drug or device that the Secretary of Health and Human Services designates as having some connection to a pandemic or bio-terror attack. Even over-the-counter painkillers or cold medicine could be covered. Individuals injured or killed by a covered drug, vaccine, or device would have no remedy.
- It's dangerous to the public. Eliminating the right of individuals to hold negligent drug companies accountable removes an important incentive for drug companies to make safe drugs - especially given the recent

track record of some big drug companies putting their bottom line before the health and safety of the public (as many as 55,000 people have died from taking Vioxx, a drug produced by vaccine manufacturer Merck). And doctors warn that giving vaccine manufacturers special protections could even make a pandemic outbreak worse because people will be less likely to get vaccinated if they know they cannot hold drug companies accountable.

- It's as unnecessary as it is risky. Public health officials at the National Institutes of Health, Centers for Disease Control and National Vaccine Advisory Committee all said last year that liability concerns had little or no effect on vaccine production. And, vaccine manufacturers are investing in the vaccine market at a rapid pace even without immunity from lawsuits.

If the Republican leadership were as persistent in addressing the pressing problems of our nation as they are in trying to protect the big drug companies, our country would be far better off. One thing is for sure — the pharmaceutical industry, which is one of the biggest, if not the biggest, contributors of campaign funds in Congress, is certainly getting what it has paid for.

#### ***BRISTOL-MYERS DRUG MAY NEED MORE STUDIES***

Drug maker Bristol-Myers Squibb Co. may have to conduct additional human studies of an experimental diabetes drug in order to meet Food and Drug Administration (FDA) requirements for approval. If so, that move that could delay its application about five years. The company has begun talks with partner Merck & Co. about dissolving their agreement to develop the drug. As reported, the FDA has requested more data on potential heart problems related

to the drug, an oral treatment for Type 2 diabetes called Muraglitazar. The agency issued Bristol-Myers an “approvable letter,” which means it expects to approve the drug if Bristol-Myers supplies sufficient information. At the time, Bristol-Myers said it expected to get the data from ongoing clinical trials.

Source: *Associated Press*

#### **WARNING ISSUED FOR BIRTH-CONTROL PATCH**

The Food and Drug Administration (FDA) has warned users of the popular Ortho Evra birth control patch that they are being exposed to more hormones, and are therefore at higher risk of blood clots and other serious side effects, than previously disclosed. Until now, regulators and patch-maker Ortho McNeil, a Johnson and Johnson subsidiary, had maintained the patch was expected to be associated with similar risks as the pill. But a strongly worded warning was added to the patch label last month that says women using the patch will be exposed to about 60% more estrogen than those using typical birth control pills. Although most pills and the patch are loaded with the same amount of estrogen, hormones from patches go directly into the bloodstream while pills are swallowed and digested first. The result is that women using the patch have much higher levels of estrogen in their bodies.

The FDA’s warning comes four months after The Associated Press reported that patch users die and suffer blood clots at a rate three times higher than women taking the pill. Citing federal death and injury reports, the report found that about a dozen women, most in their late teens and early 20s, died in 2004 from blood clots believed to be related to the birth-control patch. Dozens more survived strokes and other clot-related problems. More than 4 million women have used the patch since it went on sale in 2002.

Several lawsuits have been filed by families of women who died or suffered blood clots while using the patch.

Documents obtained as a result of that litigation show Ortho McNeil has been analyzing the FDA’s death and injury reports, creating its own charts that document a higher rate of blood clots and deaths in association with the patch than with the pill. In addition, an internal Ortho McNeil memo shows that the company refused in 2003 to fund a study comparing its Ortho Evra patch to its Ortho-Cyclen pill because of concerns there was “too high a chance that study may not produce a positive result for Evra” and there was a “risk that Ortho Evra may be the same or worse than Ortho-Cyclen.”

New published studies show that women using the patch absorb about 50% more estrogen than with the pill, according to Dr. Leslie Miller, an associate professor of obstetrics and gynecology at the University of Washington. When women take the pill, the medication is absorbed into the bloodstream through the digestive tract. In the process, about half of the estrogen dose is lost. Hormone levels in women on the pill are highest one or two hours after taking it. Twelve hours later, estrogen levels are quite low, meaning the body is not exposed to high levels of estrogen 24 hours a day. But the patch causes higher estrogen levels because delivery of medication continues all day. Those elevated levels may be high enough to increase some women’s risk of blood clots.

Even before the warning, some advocacy groups and medical providers were raising questions about the patch. In September, Public Citizen’s Health Research Group, a consumer advocacy organization, added Ortho Evra to its ongoing list of dangerous medicines, warning that there is “no medical reason for women to use the more dangerous Ortho Evra rather than one of the older, better understood, and equally effective

oral contraceptives.” I recommend that any person who is using the patch should consult with their personal doctor immediately.

Source: *USA Today*

## **XV. ENVIRONMENTAL CONCERNS**

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### **NEW JERSEY CLEANUP**

An environmental group and residents of Jersey City, New Jersey, who live near land contaminated with cancer-causing chromium, have indicated that they plan to file a claim against Honeywell International, Inc. to force a more extensive cleanup. The aerospace and high tech manufacturer earlier this year began cleaning up a 34-acre site on the Hackensack River based on an earlier suit filed by local residents. Mutual Chemical Company dumped tons of chromium residues, left over from making auto bumpers and other industrial products, along the river between 1895 and 1954. Around that same time, a predecessor company of Honeywell bought Mutual, along with the 34-acre site.

The suit indicates that the thirty-four acres was the dumping ground for the waste, but the spillover onto adjacent sites produced additional contamination, even in the groundwater. The state ordered Honeywell to clean up the site in the early 1980s. Years of delay led to a 1995 suit filed by a Jersey City community group, several residents, and the riverkeeper. In October 2003, a U.S. District Judge in Newark ordered Honeywell to remove one and one-half million tons of chromium waste from the site and to begin a groundwater cleanup. After performing studies and building an underground wall to prevent further spread of contamination, Honeywell is set to begin its full-scale excavation.

Source: *Newsday*

## **LUCITE INTERNATIONAL SETTLES EMISSION CASE WITH GOVERNMENT**

The Justice Department and the Environmental Protection Agency have reached a Clean Air Act settlement with Lucite International, Inc. The settlement requires the chemical manufacturer to install pollution controls on three emission sources at its Memphis, Tennessee plant. The new controls will supposedly eliminate 6,500 tons of pollution each year. Under the terms of the settlement, Lucite is to install an estimated \$16 million in new pollution controls, in addition to paying a civil penalty of \$1.8 million and performing a supplemental environmental project worth \$1.3 million.

Kelly A. Johnson, Acting Assistant Attorney General for the Justice Department's Environment and Natural Resources Division, said:

*The settlement announced today demonstrates our commitment to aggressively enforcing the laws that protect our environment and our citizens. Lucite is to install the \$16 million dual absorption control system on its sulfuric acid regeneration unit, which will reportedly eliminate 2,500 tons of sulfur dioxide emissions per year. Additionally, Lucite will implement a supplemental environmental project to re-route emissions from two other plant emission sources. This is said to result in a 90% reduction of previously permitted emissions from these sources.*

As a result of the settlement, Lucite will reduce emissions of pollutants that contribute to acid rain, cause severe respiratory problems, and exacerbate cases of childhood asthma, which are of great concern to the EPA. Lucite's Memphis plant produces methacrylate and acrylic sheeting. The pollutants addressed in the settlement are sulfur dioxide, sulfu-

ric acid mist, carbon monoxide, and volatile organic compounds.

Source: U.S. Newswire

## **MICHIGAN COURT LETS SUIT AGAINST DOW CHEMICAL COMPANY FOR DIOXIN CONTAMINATION PROCEED AS A CLASS ACTION**

On October 21, 2005 a Saginaw County, Michigan Circuit Court Judge granted class action certification to as many as 2,000 property owners in a lawsuit against Dow Chemical Company for damages related to dioxin contamination. The lawsuit alleges that Dow was negligent in its handling and disposal of dioxin, resulting in the pollution of the Tittabawassee River. The dioxin contaminants then allegedly migrated down the river and were deposited onto properties within the Tittabawassee River flood plain during heavy rains. Plaintiffs have alleged that the contamination reduced their property values and caused a severe risk of physical injury.

The suit was originally filed in March 2003 when the Michigan Department of Environmental Quality notified property owners in the Tittabawassee River flood plain that their homes were contaminated with dioxin beyond levels considered safe. The Plaintiffs' complaint alleges that as much as 7,300 parts per trillion of dioxin has been detected in and near resident's backyards, an amount that exceeds the residential clean-up standard. Residents in the flood plain were warned that they should limit contact with soil and dust and told that exposure could cause a variety of ailments, including cancer.

Dioxin is a persistent and toxic chemical that was a byproduct of Dow processes dating back several decades. Dioxin has been linked to diabetes mellitus, type II; multiple myeloma; non-Hodgkin's lymphoma; chronic lymphocytic leukemia; as well as other diseases. Although the plaintiffs also

sought relief in the form of medical monitoring, specifically a trust fund created by Dow to pay for medical diagnostics that would identify potential dioxin-related disease, the Michigan Supreme Court ruled in July 2005 that there could be no claim if there is no present injury.

Dow fought class action certification of the plaintiffs' property claims, arguing that each plaintiff should prove his or her case separately because there are differences between the property owners, including their proximity to the river, the dioxin levels on their properties, and the differences in the use of the plaintiffs' properties. The Saginaw County Circuit Court Judge disagreed. The judge concluded that because the evidence required to establish negligence and the causal connection between the alleged toxic contamination and the plaintiffs' damages would be the same for all plaintiffs, requiring 2,000 plaintiffs to file individual claims would impede the convenient administration of justice. Dow is planning to appeal the class certification to the Michigan Courts of Appeal. The company filed a motion to stay proceedings pending appeal shortly after the court's ruling. But, the Circuit Court denied Dow's request, allowing the plaintiffs to proceed.

## **McWANE INDICTED AGAIN**

McWane, Inc., one of the world's largest pipe manufacturers based in Birmingham, Alabama, was indicted recently in Utah. They have been accused of a 6-year conspiracy to violate the Clean Air Act and falsify tests to cover up emissions of a dangerous air pollutant. According to the indictment, McWane conspired to mislead regulatory officials into believing that Pacific State's Cast Iron Pipe (its pipe foundry in Provo, Utah) was in compliance with air pollution laws. The indictment accuses senior executives of tampering

with pollution monitoring devices, knowingly making false statements to regulators, and obstructing the Environmental Protection Agency.

### ***AN INTERESTING MOLD LAWSUIT***

Five Cherokee County, Georgia, fire stations have been the subject of mold lawsuits. The five multipurpose buildings — which include a community meeting room and a Sheriff's Department office — are the subject of two lawsuits because of mold infestation. The Cherokee County Commission filed a lawsuit in October against M.G. Patton Construction Company and a lengthy list of subcontractors, charging that improper design and poor workmanship are responsible for the mold and other damage to the buildings. The lawsuit, filed in Cherokee County Superior Court, asks for money to repair the buildings and to repay money spent by the county resulting from the damage.

The county's lawsuit follows a \$60 million lawsuit filed in February 2004 by more than 40 firefighters who say they have health problems stemming from mold contamination at three stations. The firefighters are seeking punitive damages for what they say is a "cover-up." They also seek unspecified damages to compensate them for their injuries. The five stations were built by Patton between the spring of 2000 and January 2002. The county's lawsuit charges the contractor with negligence in allowing the buildings to fill with rainwater over seven months. The contractors then "intentionally concealed the growth of toxic mold in the community centers by covering the mold with primer and paint . . . trapping the growing mold within the interior," the lawsuit states.

One of the five fire stations was abandoned by firefighters in May. They moved out to allow crews to knock out a bathroom wall to remove mold. Repairs have yet to be completed on

the building. It may take as much as \$300,000 to \$400,000 to repair each of the \$1.2 million buildings. It is contended that the air-conditioning system of each building is inadequate, allowing high indoor humidity that encourages the growth of mold.

Source: *The Atlanta Journal-Constitution*

### ***REPORT FINDS FLAWS IN MAD COW DISEASE TESTING PROGRAM***

The Food and Drug Administration's testing of cattle feed is sometimes too slow to stop cattle from eating feed that might be contaminated, according to a recent report by the Government Accountability Office (GAO), the investigative arm of Congress. Feed safeguards are the most important firewall against mad cow disease, said Sen. Tom Harkin (D-Iowa). "If FDA's testing program is not catching violations, and catching them in time, that needs to be corrected immediately," Harkin said.

Mad cow disease is only known to spread through feed containing certain tissue from infected animals. Animal protein is commonly added to feed to speed growth, but the U.S. has banned cattle protein in cattle feed since 1997. The FDA's feed testing program is a small part of the government's campaign to keep mad cow disease out of the food chain. The program has many weaknesses, according to GAO.

In half the feed samples analyzed, FDA took more than a month to determine whether banned cattle protein was present. Cattle feed is eaten quickly after it's manufactured, and the feed may have been consumed before tests are finished, GAO said. The report examined 989 samples analyzed from August 2003 through June. Investigators said the agency required no documentation of its reviews and FDA officials were lax in overseeing the testing program.

Mad cow disease, the common name for bovine spongiform encephalopathy, or BSE, has been found in more than

two dozen countries, including the United States. Eating meat products contaminated with infected tissue is linked to a rare, fatal illness, variant Creutzfeldt-Jacob Disease, that has killed more than 150 people worldwide, most of them in Britain, where there was an outbreak in the 1980s and 1990s.

Source: *USA Today*

## **XVI. THE CONSUMER CORNER**

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### ***CONSUMER-FRIENDLY FOOD LABELING PROGRAM KILLED***

Country-of-origin labeling (COOL) legislation suffered a disappointing defeat recently. The House-Senate Conference Committee on the agriculture appropriations bill (H.R. 2744) failed to include the requested mandatory labeling program in the report. By its inaction, the committee effectively killed a mandatory program that would require labels on foods sold in grocery stores to state where and how the food was raised or produced. As is typical of this Congress, this "killing" move was made behind closed doors. I understand that Public Citizen tried to attend this so-called public meeting, but wasn't allowed to attend the meeting.

Despite polls showing that consumers overwhelmingly support mandatory labeling, lawmakers have killed the idea through budgetary gimmicks because they favor a weaker, voluntary labeling program. A mandatory program wouldn't have cost the government any money. Instead, that cost would have been borne by the food industry. This was a defeat for consumers and a win for those who don't want to tell folks where their food is coming from.

As outlined in the recent Public Citizen report *Tabled Labels*, available at <http://www.citizen.org/documents/COOL.pdf>, Big Agribusiness used millions of dollars

in lobbying expenditures and campaign contributions, and a network of Washington insiders with close connections to the Bush administration and Congress, to thwart COOL. This latest effort to kill COOL was led by U.S. Representative Henry Bonilla (R-TX), who has received more than \$167,000 from COOL opponents in the past three election cycles, making him their top beneficiary.

The Food Marketing Institute, which represents the grocery industry, and the National Cattlemen's Beef Association, which represents the meat industry, have been the biggest opponents of mandatory COOL. It is apparent that our elected lawmakers' main concern is to protect industry, not consumers. While the appropriations bill delays mandatory COOL for meat to September 2008, this move effectively kills the program because this new implementation date is beyond the expiration date - 2007 - of the 2002 Farm Bill that originally mandated it. Rules for voluntary COOL are already in effect, yet most consumers are not getting information about where their food was produced. For nearly four years, Congress has stalled on this issue. Congress has failed to institute a simple program that would have been useful to every consumer in the United States.

Source: Public Citizen News Release

#### **FDA CAN ORDER RESTITUTION OVER UNAPPROVED DRUGS**

In what is being called a significant victory for the Food and Drug Administration (FDA), a federal appeals court has ruled that the agency has the right to demand restitution for consumers from companies that sell unapproved drugs. A unanimous three-judge panel of the U.S. Court of Appeals for the Third Circuit rejected the argument that the FDA cannot demand restitution because the federal Food Drug and Cosmetic Act does not expressly provide for such a remedy. Circuit Judge Marjorie O. Rendell wrote the opinion, joined by

Judges Maryanne Trump Barry and Edward R. Becker. The court's opinion stated:

*Whether or not Congress specifically contemplated restitution under the FDCA, the ability to order this remedy is within the broad equitable power granted to the district courts to further the economic protection purposes of the statute.*

The decision upholds a ruling by U.S. District Judge William G. Bassler of the District of New Jersey that required Lane Labs to pay \$109 million in restitution to consumers who purchased products that contained shark cartilage and were pitched as treatments for cancer and HIV. In addition to injunctions, the ruling will allow the FDA to demand disgorgement of profits and restitution. I hope the agency will aggressively take advantage of this ruling.

#### **STATE FARM SUED OVER SALVAGED AUTO SETTLEMENT WITH 49 STATES**

You will recall that State Farm Mutual Insurance Co. agreed to pay \$40 million to tens of thousands of car owners to settle allegations that it allowed salvaged automobiles to be resold without appropriate titles. At the time, State Farm was lauded for its actions. A recent lawsuit filed in Pennsylvania now claims State Farm crafted a "sweetheart deal" with attorneys general for 49 states, including Pennsylvania, under which it will pay a fraction of what car buyers are out. The plaintiff in the case contends that he is being offered up to \$2,700 for a Honda Civic he bought two and one-half years ago for more than \$14,000. He claims that the car wouldn't have been purchased if he had known it was salvaged. The lawsuit, filed in Allegheny County court, alleges that the plaintiff bought a car with a clean title and the state of Pennsylvania is saying he must turn his clean title in.

The plaintiff says he will have to get a

salvage title when the car is inspected in June. That will reduce the car's resale value and, should the vehicle be in an accident, he would be compensated based on the salvage title, not what he paid. He also will lose the extended warranty. State Farm says thousands of people have accepted the settlement.

State Farm approached state prosecutors after it said it uncovered instances in which vehicles that it had insured should have been branded as salvage, either from crashes, theft, or other damage. The company says the problem was uncovered during an internal review. In announcing the settlement in January, state officials lauded the company. Iowa Attorney General Tom Miller, who helped craft the settlement, said at the time the settlement was announced:

*It is rare that a company comes to us, discloses a problem, and presents a very viable solution to correct the problem and help consumers.*

The lawsuit claims State Farm had a financial motive for allowing salvage cars to enter the market without appropriate titles and delayed notifying car buyers in hopes of reducing its payout. The suit seeks damages for the cost of the car, punitive damages, and attorneys fees. The suit also named the car dealer as a defendant, claiming that it either knew or should have known that the Honda had been salvaged, but sold the car anyway without disclosing that fact.

#### **FOUR NISSAN VEHICLES GET LOW QUALITY MARKS**

Quality problems with vehicles made at Nissan North America's Mississippi assembly plant are continuing to cause the automaker problems. *Consumer Reports* magazine announced recently that it has put the Nissan Titan pickup, Armada sport utility vehicle, Quest minivan and Infiniti QX56 SUV on its list of vehicles with the largest potential

for problems in the 2006 model year. All four are assembled at the Canton plant, which opened in 2003. Nissan has spent a good part of this year and last working to improve quality problems with its Mississippi-made vehicles. The company sent in teams of engineers from Japan to try to improve design and manufacturing processes to help the vehicles score better with consumers.

The *Consumer Reports* list is based on a survey of more than one million vehicle owners who subscribe to the magazine or its website. The survey looks at data from the past three years to predict how vehicles will perform in the coming model year. The magazine uses those scores to determine whether to recommend a particular vehicle to buyers. It should be noted that other Nissan vehicles scored well on the survey. David Champion, senior director of *Consumer Reports'* Auto Test Center in Connecticut, stated:

*The message to consumers is clear: You can't gauge reliability based only on a nameplate. Some automakers do have a better track record, but individual models — especially newer ones — can have problems.*

The vehicles have scored poorly on other quality and consumer satisfaction surveys from J.D. Power and Associates and AutoPacific, two other consulting groups. Annual surveys by these companies found major improvements in the Nissan vehicles. The Quest was the most improved model in this year's J.D. Power initial quality survey. Nissan says that the survey relies on previous year's data and doesn't take into account improvements in the past year. Nissan says it has addressed many of the issues raised by the surveys and is continuing to work on making more. It should be noted that most of the complaints in the J.D. Power report stemmed from rattles and squeaks in the doors. Dissatisfaction with brakes was the most fre-

quently cited problem in AutoPacific's survey this year. J.D. Power listed the Canton plant as its most improved plant in its survey this year. Nissan says it expanded product testing at the plant to specifically look for potential problems. The company says it also made some design changes.

#### **AS A RULE EXTENDED WARRANTIES AREN'T NEEDED**

I get frequent requests from companies to buy extended warranties on products used in our home and on our vehicles. I don't buy them. Calling extended warranties a retailer's profit gimmick, *Consumer Reports* says consumers shouldn't buy them. On its website, [www.consumerreports.org](http://www.consumerreports.org), the non-profit watchdog group says extended warranties are a "sweet 40 to 80% profit" for most retailers, and consumers should "pass up this costly add-on." There may be times when an extended warranty purchase on a product makes sense. My advice is to check things out carefully before saying "yes."

#### **SOME TOYS TO AVOID**

Since Christmas will bring toys to children, it is a good idea to find out which toys might be dangerous for children. A consumer watchdog group has just unveiled a new list of toys to avoid. World Against Toys Causing Harm (WATCH) singled out 10 toys that, it said, could make playtime for children a bit painful. The list includes the Fantastic Four Electronic Toy Hands made by Toy Biz. The group said the package on the oversized super hero fists encourages children to engage in "clobberin' time." WATCH also cautioned parents about the Baby Serena doll sold at Target stores. WATCH said the package comes with no warnings, but the baby bottles inside pose a significant choking

hazard. You can find more information on the group's Web site, [ToySafety.org](http://ToySafety.org). The group said the 10 worst toys are:

- Baby Serena - Baby I'm Yours (Target)
- Air Kicks Kickaroos Anti-Gravity Boots (Geospace International)
- Lord of the Rings Uruk-Hai Crossbow Set (Toy Biz)
- Fantastic 4 Electronic Thing Hands (Toy Biz)
- Camouflage Water Bomb Fun Kit (Pioneer Worldwide)
- Splatmatic Pistol Splat Paintball Shooter (Palco Marketing)
- Animal Alley - Ponies (Toys R Us)
- City Blocks (IQ Preschool / Small World Toys)
- Fisher Price's Little Mommy Baby Doll (Mattel)
- Star Wars Energy Beam Blaster (Hasbro)

I also encourage parents and operators of facility that have children under their custody and care to check out other websites for valuable information on toys. Two good ones are [www.cpsc.gov](http://www.cpsc.gov) and [www.toysfortots.org](http://www.toysfortots.org).

## **XVII. RECALLS UPDATE**

### **GM RECALLS NEARLY 106,000 SUVs**

General Motors has recalled nearly 106,000 sport utility vehicles in the United States and Canada to fix a rear door latch that may not close properly because of corrosion. GM says the 105,893 vehicles affected by the potential safety defect included Chevrolet TrailBlazer EXT and GMC Envoy XL SUVs from the 2002-2003 model years. According to GM, one alleged injury had

been caused by the faulty door latch. A small number of 2003 model Isuzu Ascender SUVs are also affected, Adler said. GM builds the Ascender for Isuzu Motors Ltd. A total of about 98,000 of the recalled vehicles were registered or sold in Northeast and Midwest U.S. states, where corrosion can occur because of winter road salt. An estimated 7,893 vehicles sold in eastern Canada are also affected.

#### **HONDA RECALLS 25,000 CIVICS OVER GAS PEDALS**

Honda Motor Co. has recalled about 25,000 Civics because the accelerator pedal was improperly installed on some 2006 models, which could cause a crash. If the pedal is improperly installed, it could come loose, cause the throttle to stick, and raise the potential for a crash. Honda says there have been no crashes or injuries linked to the issue in the popular-selling vehicle. The company says the "vast majority" of the 25,298 vehicles under recall in the United States have not yet been sold. A dealer inspecting the vehicles discovered the problem in late September and reported it to the automaker, leading to an internal investigation.

Honda redesigned the sedan for the 2006 model year and it continues to post strong sales figures. The Japanese automaker sold 23,911 Civics in October, up 14% from last October, according to Autodata Corp. The company sold 257,749 Civics in the first nine months of this year, down 1.2% from 262,958 sold last year. Apparently, Honda doesn't have a breakdown of how many 2006 models have been sold thus far. The redesign includes a new floor-mounted gas assembly that involves the accelerator. The sedans under recall were manufactured from early June through early October. Honda says countermeasures have been put in place on the assembly line to fix the problem. Owners were notified of

the recall in November and told to bring their cars to a dealership. Dealers will either reset the pedal or replace the assembly at no cost to consumers.

#### **VOLVO TO EXTEND WARRANTY ON STALLING CARS**

Ford Motor Co.'s Volvo subsidiary has quietly reached a deal with California regulators to extend the warranty of defective throttles in about 356,000 vehicles in the United States and Canada that are prone to stalling. The car maker will extend the warranty of the ETM throttle, which can become corroded and force the car to stall or slowdown, according to internal memos obtained by The Associated Press and later confirmed by the company. The warranty will be expanded to 200,000 miles, or 10 years. The warranty now offers protection for up to seven years, or 70,000 miles. Volvo has reached a settlement with the California Air Resources Board, which began eyeing the devices more than a year ago after a lawsuit was filed by plaintiffs demanding that Volvo replace the devices.

The settlement would also reimburse consumers who have paid as much as \$1,000 to have the part replaced. But, there apparently won't be a recall. It only provides motorists with a replacement, or coverage for the part's cleaning, if the part fails or begins to fail. Apparently, a dashboard light indicates the part is becoming defective. It would make more sense to replace the throttles before the devices begin to fail. I understand there are as many as 94% of ETMs will fail before their designed life span of 100,000 miles.

California pollution regulators became involved because the part, while also regulating engine velocity, helps control emissions. The affected vehicles include the 1999-2002 C70 coup and convertible models; 1999-2000 S70, V70, and V70SX models; 2000-2001 V70, V70XC, and S60 models with

turbocharged engines; 1999-2001 S80 models; and 2000-2002 V70 and S60 models with non-turbocharged engines. As you know, Ford acquired Volvo from Sweden's Volvo AB in 1999. I have always wondered how that would affect Volvo's safety performance.

Source: Associated Press

#### **FORD RECALLS 220,000 VEHICLES**

Ford Motor Co. has recalled about 220,000 vehicles from the 2005 model year amid concerns that a battery cable was rubbing against the vehicle frame, potentially causing fires, and that a fuel tank strap could separate after logging tens of thousands of miles. The recall linked to the cable involves more than 98,000 Ford Crown Victoria, Lincoln Town Car, and Mercury Grand Marquis sedans. Ford told the National Highway Traffic Safety Administration that it had received four reports of fires. A Ford spokeswoman Kristen Kinley said chafing of the cable caused the exposure of wires to the vehicle frame, causing the frame to become electrified in some cases and carry the potential for heat damage or fires.

A separate recall caused by the separation of fuel tank straps involves more than 123,000 Ford Freestyle crossover vehicles, Ford Five Hundred sedans, and Mercury Montego vehicles. The automaker discovered the problem during durability testing of a future model of the Five Hundred at very high mileage. The company's investigation found that the manufacturer of the strap changed to a weaker grade of steel in December 2004 that could not meet Ford's durability requirements. At mileage levels of 100,000 and more, the automaker was concerned the strap would separate and cause the fuel tank to drop. Most 2005 vehicles would not likely have approached those mileage levels. Ford says there have been no reported injuries tied to either recall.

## **WATER HEATER RECALL**

A-O Smith of Ashland City, Tennessee, a company that makes water heaters, is warning customer of a possible fire hazard. Consumer Product Safety Commission says the company is voluntarily recalling about five thousand, 75-gallon propane gas water heaters. The heaters may build up soot on the burners, posing a fire hazard. Affected models were made between January of 2004 and July of this year, and have the names "A-O Smith," Apollo, Maytag, State and Reliance. Affected models include: Reliance 675CRRS, 675CRRSD, S7576PE; Apollo: A675CQRSL; A675CRRSL; A675CRRSLCGAD; A. O. Smith BT-80-271, FCG-75-271, PCG-75-271; Maytag HRP11275Q; and State GS675CRRS, GS675CRRSD, SBS7576PE, SBS7576PED, SBS7576PECGA, SBS7576PECGAD. If you are affected by the recall, you can contact A.O. Smith toll-free at (866) 880-4661 between 7 a.m. and 7 p.m. Monday through Friday or visit [www.hotwater.com](http://www.hotwater.com).

## **XVIII. SPECIAL PROJECTS**

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### **BEASLEY ALLEN CHRISTMAS PROJECTS**

Our firm believes it is important to reach out to our community and help those who are less fortunate than we are. This Christmas season will be no different. Our employees picked five charities to be involved in. I am pleased to report that their efforts were highly successful. They participated in Operation Christmas Child, which is a unique project of Samaritan's Purse. Employees were asked to take "shoeboxes" and fill them full of small gifts for children. The shoeboxes will be delivered to children in time for Christmas. Our employees filled 130 boxes, and that will make 130

children happy on Christmas Day.

Another project involved the local Veteran's Administration. Our employees participated in collecting food items to help feed the hundreds of homeless veterans in the area. These veterans helped to secure the freedoms that every American citizen enjoys. We were grateful for the opportunity to give back to those who once wore a military uniform on behalf of our country.

We also helped out Capitol Hill Healthcare, a local nursing home. Each Christmas Capitol Hill puts up an Angel Tree for the residents. Each Angel on the tree contains a resident's Christmas wish list. Employees were invited to choose an Angel and purchase something on the resident's wish list. Our employees filled 100 wish lists for the nursing home residents.

New this year, our employees participated in a program involving Alabama service personnel. The program is called "Adopt-An-Alabama-Soldier." We got a list of the personnel of Bravo Battery -1/117th FA, who are stationed at Ft. Cook in Baghdad. These men and women are from Greenville, Andalusia, Citronelle, Geneva and Luverne and will not be able to enjoy Christmas at home with their families this year. Each of our employees was given the name of a soldier, along with a box (similar to a shoebox). They were asked to fill the box with small gifts and personal items. This was a most meaningful program for our employees.

Lawyers in our firm were also able to participate in a Sunshine Center project. Each year a list of needs from six families from this shelter is given to the lawyers. The needs on the list are always met with little difficulty. These gifts are purchased and wrapped by each participating lawyer. All of the gifts are taken to the Center in preparation for the Christmas party held for the families.

It gives all of us a good feeling to know that we have helped lots of folks

during the Christmas season. In my opinion, we have a strong obligation to help folks who have real needs. God has blessed our firm, and He expects us to share our success with those who are less fortunate.

## **XIX. FIRM ACTIVITIES**

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### **EMPLOYEE SPOTLIGHTS**

#### **Navan Ward**

Navan Ward is a lawyer in our firm's Mass Torts Section. Currently, Navan is heavily involved with Vioxx pharmaceutical drug litigation. Additionally, he is responsible for overseeing many aspects of Celebrex and Bextra pharmaceutical litigation. Navan graduated from the University of Alabama in 1999 and received his Juris Doctorate in 2002. While attending Alabama, Navan was the recipient of the Authurine Lucy Foster Outstanding Minority Leadership Award. Navan was also a member of Bench and Bar Legal Honor Society, served as an Honor Court Associate Justice, was the president of Student Farrah Law Society and was a member of the Black Law Student Association. Navan is a board member of Faith Outreach Ministries, Inc. Additionally he is a member of Leadership Montgomery's Class XXI. Navan is married to the former Bridget L. Maynor, who is from Irondale, Alabama. Navan's childhood church was Bethany Seventh Day Adventist Church, but he now attends Faith Full Gospel Baptist Church. Navan is a very good lawyer and is a most valuable member of our firm.

#### **Tabitha Dean**

Tabitha Dean has been with our firm for over four years in the Mass Torts Section. She currently serves as legal assistant to Chad Cook. In this position, she works on Serevent, Advair, Zithromax, and Welding Rod cases. She assists with the preparation of pleadings and

discovery, schedules depositions, performs research, and maintains documents for all filed cases. Tabitha and Matt were married in March of 2003 and they live in Wetumpka with their Chihuahua, Belle. Tabitha and her husband enjoy fishing. She also enjoys sewing, cross-stitching, and riding horses. Tabitha is a very good employee and has done a good job for her Section.

### **Bobby Mozingo**

Our firm currently employs six full-time investigators. Bobby Mozingo has been employed as an investigator with the firm for 13 years. Before coming to the firm, he was employed by the Montgomery Police Department for 10 years, with five of those years being in the Detective Division. Bobby has been married to his wife, Vicki, for 20 years. Vicki is a registered nurse and works in a local pediatrician's office. Bobby and Vicki have two daughters, Amy, 17 and Paige, 14. Amy, who is a senior at Stanhope Elmore High School, has been accepted at Troy University and the University of Alabama. She has a tough choice to make since Bobby is a very big "bama fan." Paige is a freshman at Stanhope Elmore and is cheering on the junior varsity cheerleader squad.

Before moving to Alabama, Bobby grew up in Chattanooga, Tennessee, where he graduated from Lakeview High School. He attended the University of Tennessee at Chattanooga. Bobby's hobbies include camping, NASCAR racing, golf, and attending his daughters' ballgames and activities. He and Greg Allen have worked hard in their part-time role of Grant Enfinger's racing team. Bobby claims to be largely responsible for all of Grant's wins, which might be a "little suspect." As members of Eastmont Baptist Church, Bobby and his family are involved in several ministries there. Bobby is doing an outstanding job for the firm. We are most fortunate to have him with us.

## **XX. A SPECIAL TRIBUTE**

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### **Mickey DeBellis**

My friend Mickey DeBellis died on November 15<sup>th</sup>. Mickey, who had been fighting a recurrence of lung cancer, was a fighter and never gave up. Mickey served as Insurance Commissioner under two governors, George Wallace and Fob James, and did a tremendous job. He had worked in the Department since 1972. The Greenville native was a strong advocate for Alabama consumers. He actually resigned his position as Insurance Commissioner when he was ordered to implement an anti-consumer program in the Insurance Department. That took both courage and dedication to a cause. Mickey DeBellis was an outstanding public servant and was a loyal friend of mine.

I first met Mickey in 1966 when Lurleen Wallace was running for Governor Alabama. I really got to know Mickey when I was a young lawyer managing Jim Allen's campaign for the U.S. Senate in 1968. Mickey was one of the Senator's best supporters in Butler County. Mickey became one of my strongest supporters when I ran for Lt. Governor in 1970. We became very good friends and worked together for a number of years in a number of endeavors.

Mickey DeBellis was the very best Insurance Commissioner that our state has ever had. He was a strong consumer advocate and stood up for the rights of ordinary citizens. Mickey would not yield to the pressures put on the Department by the insurance industry. He resisted any effort that he felt would hurt consumers. Mickey was fair to the insurance companies, but was not intimidated by them. In my opinion, all of the insurance company executives admired Mickey because of his honesty and candidness in all of their dealings with him.

The thing that I really liked about Mickey DeBellis was the simple fact that he would do what was right regardless of the consequences. Mickey helped lead the fight in our state against the evils of mandatory, binding arbitration, which he described as one of the worst things that ever happened to Alabama citizens. Mickey gave of his time and efforts and after his retirement, he traveled the state speaking out on behalf of consumers in the arbitration fight.

Mickey was a good family man and was devoted to his wife Sue, and his daughter Susan. He was also a God-fearing man and that helped guide his path. If I had to describe Mickey DeBellis - I would say that he was a good friend, extremely loyal, and as tough as a lightered knot. In plain, everyday language, Mickey DeBellis was just a good man. I am extremely proud to say that he was my friend. My prayers are now with Sue and Susan. They - like all of us - will miss Mickey.

## **XXI. SOME PARTING WORDS**

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The Thanksgiving and Christmas seasons should be very special to all of us. This time of year gives us the opportunity to count all of our many blessings and, more importantly, to acknowledge their source. We should all cherish the opportunity during this season to spend quality time with our families. Because of busy schedules and the demands that are a part of our work, many of us sometimes neglect our families. I know that I have been guilty of doing that over the years, and I regret it very much. But, I have been blessed with a tremendous family who have always supported me in my work and in my other endeavors. In fact, they supported my efforts even when I messed around with politics for a while and I appreciated that very much. I know my family really didn't like being in the political arena. Never-

theless, they stuck by me during both the good and bad times. After I was “put out of politics” for good, I realized that I had been sort of like a “fish out of water” during my political days. I must confess that I wasn’t very good at the political game. On the other hand, I have really enjoyed my work as a lawyer and have been blessed to be able to do the sort of work I do. I am proud to be a lawyer who represents folks who are generally the underdog.

I encourage all of our readers to pray for peace in our world during the Christmas season. We should look to the Lord’s prayer for guidance. Sometimes we recite the words and really don’t fully comprehend their true meaning. I am convinced that only when God’s kingdom comes to earth, will we ever have real peace in the true meaning. In the meanwhile, however, we should continue to pray for peace in our world. As hard as they try, the politicians will never be able to accomplish a lasting peace in my opinion. God is the **only** answer and that’s a **truth** that can’t be denied.

During the remaining weeks prior to Christmas, we should prepare our hearts to celebrate the birth of Jesus. The Christmas message will never change nor will it ever lose its true meaning. We are blessed to be able to celebrate a risen Savior. We should celebrate His birth in a meaningful way and do it with our families and friends.

In my last message of 2005, I encourage all of you to make this a very special Christmas. The Christmas Story, as told in Luke, will assure you of putting your holidays in the proper perspective. In

fact, I will set it out for you here so that during the entire month of December it will remind you of the **source** of your many **blessings**.

*And it came to pass in those days that a decree went out from Caesar Augustus that all the world should be registered. This census first took place while Quirinius was governing Syria. So all went to be registered, everyone to his own city. Joseph also went up from Galilee, out of the city of Nazareth, into Judea, to the city of David, which is called Bethlehem, because he was of the house and lineage of David, to be registered with Mary, his betrothed wife, who was with child. So it was, that while they were there, the days were completed for her to be delivered. And she brought forth her firstborn Son, and wrapped Him in swaddling cloths, and laid Him in a manger, because there was no room for them in the inn. Now there were in the same country shepherds living out in the fields, keeping watch over their flock by night. And behold, an angel of the Lord stood before them, and the glory of the Lord shone around them, and they were greatly afraid. Then the angel said to them, “Do not be afraid, for behold, I bring you good tidings of great joy which will be to all people. For there is born to you this day in the city of David a Savior, who is Christ the Lord. And this will be the sign to you: You*

*will find a Babe wrapped in swaddling cloths, lying in a manger.” And suddenly there was with the angel a multitude of the heavenly host praising God and saying: “Glory to God in the highest, And on earth peace, goodwill toward men!” So it was, when the angels had gone away from them into heaven, that the shepherds said to one another, “Let us now go to Bethlehem and see this thing that has come to pass, which the Lord has made known to us.” And they came with haste and found Mary and Joseph, and the Babe lying in a manger. Now when they had seen Him, they made widely known the saying which was told them concerning this Child. And all those who heard it marveled at those things which were told them by the shepherds. But Mary kept all these things and pondered them in her heart. Then the shepherds returned, glorifying and praising God for all the things that they had heard and seen, as it was told them*

*Luke 2: 1-20.*

May the Lord watch over your “coming and going, both now and forevermore,” as you approach the New Year. Read the 121<sup>st</sup> Psalm and it will give you any assurance that you need. I wish for each of you and your families a blessed Christmas and a New Year filled with joy, good health, and prosperity.

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