THE JERE BEASLEY REPORT

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A NATIONAL LAW FIRM LOCATED IN MONTGOMERY, ALABAMA

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I. CAPITOL OBSERVATIONS

The Spivey Family

On March 3rd, Sara and I went down to my hometown of Clayton for the Wallace play, which by the way was very good. While in Clayton we saw lots of folks from all over the area and one of them was Jean Spivey Self, who is the daughter of Durwood and Dixie Merle Spivey. Jean was a featured singer of 50's music before and during the play. Jean's father, Durwood Spivey, was killed in an accident several years ago involving a Kubota tractor that rolled over, pinning him underneath. His widow, Dixie Merle Spivey, filed suit against Kubota Tractor Corporation for the death of her husband, who at the time was a retired farmer. The Kubota tractor that Durwood was using didn't have a roll bar or any other rollover protection such as seat belts. While he was working around a pond on fairly level land, the tractor rolled over on a slight incline, pinning Durwood underneath. He was unable to free himself, and over a period of several hours, Durwood died a slow and painful death.

Greg Allen and I tried the Spivey case for 5 days before it was finally settled for $10 Million. We proved that the tractor industry, including Kubota, knew that rollover protection was needed on tractors and that thousands of people had been killed in rollover accidents involving tractors with no roll bars. At that time, there were over 2,000 rollovers involving tractors each year. We received Kubota documents revealing that the company had calculated how much it would cost them to leave the roll bars off of their tractors and defend lawsuits that were sure to come. Kubota elected to defend cases and run the risk because they figured it would be cheaper in the long run.

The interesting thing about the settlement is that when the offer was made by Kubota's lawyers on the fifth trial day, Kubota demanded that the settlement be totally confidential and that we return all company documents to the company as conditions of the settlement. When I presented the offer to Dixie Merle and her children, I was told in no uncertain terms that there would be **no confidential settlement** of their case because, as Dixie Merle put it, "Durwood would want other farmers to know about the need for rollover protection on tractors." The children all agreed with their mother and I relayed their message to Kubota's lawyers. To say they were shocked is the understatement of the century. For about two hours, the Kubota lawyers tried to convince Greg and me to go back to the family and get them to change their minds. We refused to do so and did exactly as we were instructed by our clients. Ultimately, the case was settled with no conditions.

We had received a great deal of incriminating documents and other information in the case, and we released all of it to the news media on the following Monday. The case received international attention, and as a result, some very significant changes in the tractor industry came about. We were able to see a change in the way the industry operated, and now all tractors are sold with roll bars. Jean reminded me that their case "was never about the money!" She thanked me on behalf of the family for being willing to help them and for not "caving in" when the settlement offer was made by Kubota.

The conversation with Jean made me realize once again how important the work is that our firm does. It gave me a real good feeling to look back and realize that we had not only helped a good family, but we had helped make a difference in safety for farmers all over the world. I already knew that the Spivey family were special folks. Handling their case made me realize it even more. Dixie Merle, who was a fine lady, died a few years ago. Durwood would have been proud of his wife and children for the courageous stand they took in an Alabama courtroom. I can say without hesitation that I was!

A Death Case Settled In Montgomery Federal Court

We settled a wrongful death case last month that was pending in the U.S. District Court in Montgomery. The case had been filed by the widow of a man who was killed on April 11, 2005 in a motor vehicle accident that occurred in Montgomery at the I-85 and I-65 Interchange. A semi-tractor and trailer unit, owned by Benton Express, Inc., was traveling fully loaded from Atlanta on its way to Pensacola, Florida, when it hit a guardrail at the interchange and burst into flames. The Benton unit then actually fell off I-

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85 and landed 50 feet down on I-65 where Mr. Roby's car was passing through. The Benton unit fell on the Roby vehicle, which then caught fire, and both vehicles burned. Mr. Roby was burned to death in his car. Witnesses, who were to testify at the trial before Judge Myron Thompson on March 20th would have told the jury that the driver of the Benton tractor and trailer had been driving at high rates of speed along 1-85 for a long distance and had actually run off the road on numerous occasions. Several truckers tried to stop the Benton driver, and the state troopers were notified in an effort to intercept and stop him. These attempts were unsuccessful and the tragic accident described above occurred.

The Benton driver was traveling at a high rate of speed as he approached the interchange and never even slowed up before hitting the guardrail, according to witnesses. Mr. Roby did absolutely nothing wrong and died a tragic death, leaving a loving wife, two sons, and a daughter. The case was settled a few days after the pretrial conference. There were three layers of coverage involved that afforded liability insurance coverage to Benton Express in this case. Just before settling the case we received the toxicology report from the state forensic laboratory which showed cocaine in the driver's system, which explains his erratic behavior as he approached Montgomery. We were very glad to reach a settlement that will assure the financial well-being of Mrs. Roby and her three children. The case was handled by LaBarron Boone, Cole Portis, and Julia Beasley from our firm. They did an excellent job of preparing the case and getting it ready for trial.

Interesting Case Settled Against Insurance Company

Our firm settled a case last month that was pending in an Alabama state court. The lawsuit, filed by the widow of a man who was killed in a motor vehicle accident that occurred on I-65 on February 4, 2003, was scheduled to go to trial on March 27th. The original defendants in the case were DWT, Inc. (a Tennessee trucking firm), Fleeman's Transportation (which leased tractors and drivers to DWT), and an Alabama trucking firm. Aggravated liability on the part of DWT's driver was clearly established by the state troopers who investigated the collision. The wrongful death case was settled with DWT on a pro tanto basis for that company's liability insurance policy limits. The Alabama trucking firm and Fleeman's were also dismissed as parties defendants at that time.

During discovery we had learned that the liability insurance carrier for DWT had voluntarily assumed a duty relating to safety at DWT. We added that company as a defendant, along with three other companies that were also involved, and proceeded with the case. We learned that the liability insurance company had voluntarily undertaken a duty to determine who could drive for DWT and also undertook a duty to assist DWT in improving overall safety at the company. The negligence of the new defendants was based on Restatement (Second) of Torts § 324A. The voluntary undertaking of a duty owed by DWT to the public to place safe drivers on the road was the primary basis of liability against these defendants. The new defendants were actively involved in making sure DWT had an adequate safety program. That duty carried with it the responsibility to do it properly and adequately.

At the time it applied for insurance with the liability insurance carrier, DWT had a very poor safety record and had an inadequate training program for its drivers. The new defendants evaluated each driver submitted by DWT, graded them on safety, and then instructed DWT who could drive for the company. Two drivers submitted by DWT for approval were rejected. Those drivers were later reinstated, but placed on probation by the liability insurance carrier. All other drivers, including, the driver involved in this case, Ray, were approved by the new defendants and allowed to drive for DWT. We contended that the involved driver had a bad driving record, had his driver's license suspended for a period of time, and was not a safe driver. The defendants were negligent in performing their assumed duty that had been owed by DWT to the motoring public, and that was to place safe drivers on the road. They also negligently carried out their duty to assist DWT to implement an adequate safety program. For example, the liability insurance carrier had required DWT to allow a safety inspection and evaluation of drivers as a condition of issuing a policy of insurance. The SAFER report, which the liability insurance carrier requested, evaluated DWT drivers and gave them a very poor safety rating.

Julia Beasley was the primary lawyer from the firm for the Stripling family. I assisted with the discovery when needed. Before the trial date, we settled the case against three of the new defendants for an amount that is confidential. The remaining defendant, an insurance agency, was dismissed by agreement. Interestingly, the new defendants requested that their names, the court where the case was filed, and the case number not be included in any news release or in any newspaper or other publication. We agreed to that request even though it wasn't a part of the settlement. We believe this theory of liability under Restatement (Second) of Torts, §344A is a good one. It definitely tells me that we need to include discovery requests including the sort of things we found in this case.

Celebrex Case Set For Trial In Alabama State Court

Our firm has a Celebrex case set for trial on June 6, 2006 on behalf of Ms. Rosie Ware, a resident of Clayton, Alabama, who suffered a severe stroke at age 53. Her stroke was caused by taking the pain-relieving drug Celebrex. The trial will take place in the Clayton division of the Circuit Court of Barbour County, Alabama. Defendants in the case are Pfizer, Inc., Pharmacia Corporation, Monsanto Company, and G.D. Searle, LLC. It will most likely be the first Celebrex case to be tried in the country. Rosie Ware took Celebrex (Celecoxib), which as you know is a pharmaceutical treatment for joint pain associated with osteoarthritis and other pain-related conditions, over a period of at least four

years. Ms. Ware suffered the stroke in February 2005, and we will show at trial that her stroke was caused by her use of Celebrex. As a result, Ms. Ware's physical setback cost her substantial sums of money for medical, hospital, and related care. Ms. Ware, who was in good health before the stroke, now has numerous health-related problems and is unable to work.

Our lawsuit alleges that the defendants failed to warn the medical, pharmaceutical, and scientific communities, as well as consumers—including Ms. Ware—of the potential risks and serious side effects associated with the use of Celebrex. It is significant that Celebrex now has a black box warning ordered by the Federal Food and Drug Administration (FDA), which is the strongest warning that a drug can have. The clinical literature shows that Celebrex use increases the risk of both heart attacks and strokes. The defendants knew of this risk for years before the FDA required the black box warning. The pharmaceutical industry and the FDA have let the American consumer down by manufacturing and quickly approving prescription drugs that cause more harm than good. How many people need to be at risk or possibly die by taking drugs like Celebrex and Vioxx before industry standards improve? Our law firm and the law firm of Penn & Seaborn, located in Clayton, Alabama, will try the case.

Mississippi Sues Drug Companies

The State of Mississippi recently filed a lawsuit against 86 drug manufacturers, alleging that the drug companies overcharged Medicaid patients in Mississippi. "They have defrauded the State of Mississippi," said Mississippi Attorney General Jim Hood. More than 20 other states, including Alabama, have brought similar drug pricing lawsuits on behalf of Medicaid Agencies against the pharmaceutical industry. To date, various states' Attorneys General have recovered around $2.5 billion in settlements from various drug companies. "These settlements are evidence of systemic, industry-wide problems that need to be addressed, "U.S. Representative Chuck Grassley, (R-IA), said recently when he opened a Senate hearing on Medicaid waste, fraud and abuse.

Attorney General Hood decided to file this case after he carried out an investigation and research into the matter. Discovery from lawsuits in other states has yielded "insider documents" that show companies purposely overcharge the nation's poor, covered by the states' Medicaid programs. The companies set up phony "average wholesale prices," which states rely on to reimburse for prescription drugs. The defendants set the average wholesale prices artificially high in order to attract providers and thus gain market share for their products, with the state picking up the tab. The defendants have reinforced the tactic with other deceptive practices, such as covert discounts, kickbacks, and rebates to providers, and the use of various other devices to keep secret the prices of their drugs currently available in the marketplace.

The "fraudulent pricing" has resulted in Mississippi's Division of Medicaid paying grossly excessive prices for the defendants' prescription drugs. One good example involves sodium chloride. A Justice Department memo in 2001 listed the actual acquisition cost for sodium chloride as $1.71 when the average wholesale price listed by Baxter International was $928.51. Mississippi's $268 million Medicaid deficit in 2004 was largely because of "the upward pressure of prescription drug costs." As a result of that deficit, the state's lawmakers reduced reimbursement for Medicaid recipients from 10 possible prescriptions to five—a low number for those suffering from chronic illness. Attorney General Hood believes that state lawmakers should use the money he expects to recover in the lawsuit for Medicaid purposes.

Our law firm and the Jackson, Mississippi law firm of Copeland, Cook, Taylor and Bush are assisting the Mississippi Attorney General with this important litigation. We will be able to use information obtained from other similar litigation, especially our case in Alabama, in the Mississippi case and that is a definite plus. Our goal is to recover what is lawfully due to the State of Mississippi, and we appreciate the opportunity to be involved.

\Illinois Joins The Ranks And Sues Drug Companies

The State of Illinois has filed a lawsuit against 48 pharmaceutical companies, alleging that for more than a decade the drug makers fraudulently published inflated prices for prescription drugs—forcing government programs and Illinois Medicare consumers to overpay hundreds of millions in drug costs. As we have reported, a number of other states, including Alabama, have filed similar actions against the major drug companies. Reimbursements by state and federal government health insurance programs to providers such as doctors, pharmacies, and hospitals are based on prices the drug companies themselves report to publications to be used as benchmarks. But, the drug companies allow the providers to buy drugs at a cost substantially less than what the states or consumers are paying based on the published drug prices.

The difference between the published benchmark price, known as the **average wholesale price (AWP)**, and the amount that providers pay is called a **spread**. The bigger the spread, the more money providers are able to pocket for themselves. According to Madigan's complaint, providers—seeking bigger profits for themselves—tend to prescribe and sell the drug with the **largest spread**—and the **most kickback** for themselves. This practice results in state Medicaid programs and Medicare participants who must pay copays being gouged even as providers and drug companies rake in billions of dollars. Illinois Attorney General Lisa Madigan, commenting on the lawsuit, stated:

> *Drug companies have manipulated the average wholesale prices and used these prices to overcharge state and federal government programs, taxpayers and Medicare consumers. We allege that this scheme is deceptive and illegal and has cost the state gov-*

ernment and Medicare consumers millions of dollars.

As an example of how the scheme has cost the State of Illinois and Medicare consumers, the Attorney General noted that Dey's Albuterol Sulfate (5 mg/ml solution, 20 ml,) had an AWP of $14.99 in 2000. But, it could be purchased for $4.05, which resulted in a spread of 270%, causing the state's Medicaid program and Medicare participants who must pay a co-pay to pay excessive prices for the Albuterol, an asthma medication.

Channel One Should Not Be In Our Schools

Channel One continues to operate full blast in Alabama public schools. To date it appears that our politicians either don't know what students are watching or just don't seem to care. The biggest evil relating to Channel One is the content of ads that children have to watch, some of which is pure filth. Some of the ads promote such things as R-rated movies and fast foods. To their credit, there are some news stories thrown in with the junk. There is also a problem with school administrators requiring time out of each school day for students to watch Channel One.

A recent study says Channel One, described as a classroom public affairs program, and which is shown daily in 12,000 schools in this country, does better with its teen-oriented advertisements than the news stories that go with them. Researchers surveyed 240 seventh- and eighth-graders at a school in Washington state. The students remembered, on average, 3.5 ads compared to 2.7 news stories. The fact that students remember more advertising than they do news stories shown on Channel One is not surprising. Students reported buying, or having their parents buy, teen-oriented products advertised on the show, including fast food and video games, according to the researchers. The 12-minute daily broadcast has content that is not fit for children to watch, and I am shocked that we allow Channel One in Alabama schools. The ads that Alabama children have to watch daily contain lots of filth and junk, which certainly has no place in our schools.

Schools that agree to show Channel One receive free televisions and satellite dishes. This turns students into a captive audience for advertisers. When I read about the number of school days in Alabama being extended, I have to wonder how much time each school year is spent by students watching Channel One. Nearly eight million students see the program nationwide, according to Channel One's parent company, Primedia. "The benefits of having Channel One in schools seem to have some real costs that should create an ethical dilemma for schools," according to Erica Austin of Washington State University, who was the co-author of the study referred to above.

Personally, I believe Channel One has no place in our schools. Here's what Jim Metrock, President of Obligation, who has led the fight against Channel One, has to say:

> *Channel One News is nothing less than a 21st Century form of indentured servitude. If a school district has a contract with Channel One, they are not serious about education, they are reckless with taxpayer money, and they are inviting the wrath of parents and other citizens who don't want school time replaced with commercials for junk food and sleazy movies.*

I encourage our readers to learn more about Channel One. You can go to www.obligation.org for more information. If you agree Channel One should be put out of our schools, let the Governor, Lieutenant Governor, Attorney General, and State Superintendent of Education know how you feel. Channel One has paid lobbyists in Alabama who apparently have convinced our public officials that Channel One is a good thing. Unless the politicians hear from folks around the state on this issue, I guarantee you that nothing will be done.

State Troopers Get Well-Deserved Pay Raise

On June 1st, Alabama state troopers will get a well-deserved pay raise. The legislation that provided the increase, approved March 2nd and signed by Governor Riley on March 14th, gives the following raises: troopers and corporals—10%; sergeants and lieutenants—7.5%; and captains and higher ranks—5%. Representative John Knight of Montgomery, who sponsored the bill that originated in the House, says the pay increase is needed to bring troopers' pay closer to what law enforcement officers are making in other states. Actually, the pay of Alabama troopers is below what police officers receive in some cities and counties in Alabama. In my opinion, a pay raise for state troopers is certainly one that is deserved and is actually over due. We should pay law enforcement officers at every level a decent wage with excellent benefits. For years, we have been far behind in Alabama and that is inexcusable. I hope that funds will now be made available to hire more troopers so our highways can be made safer. All of us—including public officials—have a strong duty to support law enforcement, and the trooper pay raises is a step in the right direction. The Governor and all of the legislators responsible should be commended for this action.

A Dull Political Year—So Far

I had certainly anticipated that the political season would be picking up steam by now—but how wrong I was! I must confess that thus far this is the dullest political year that I have ever experienced. It seems that the only folks talking politics these days are the politicians. We are just weeks away from the primary voting day and things are just plain dead. Because there are viable candidates in the governor's race in both primaries, things certainly should get more lively very soon. If Jim Folsom elects to run for Lieutenant Governor, his candidacy will add some interest in the race for the number two job in the executive branch. The Attorney

General's race hasn't attracted much attention thus far and that should definitely help the incumbent.

I believe that any Republican Congressman seeking reelection who has a significant opponent, will have to distance himself from all of the **mess** in Washington in order to go back to the Nation's capitol. There are a number of very good issues available, but I believe the drug plan could prove to be the difference in those races. Anybody who helped push that ill-conceived plan through Congress will live to regret it politically in my opinion. Of course, the other issues, especially the corruption issue, will likely have a trickle-down effect in Alabama in my opinion.

Fraud Charges Against Ocwen Federal Bank To Be Heard In Alabama State Courts

Our firm has a number of cases against Ocwen Loan Servicing LLC, formerly known as Ocwen Federal Bank FSB that are set for trial in several Alabama counties this year. The first one will begin in Russell County in April. Ocwen, headquartered in West Palm Beach, Florida, is the largest third-party mortgage service provider in the United States. We intend to prove that Ocwen wrongfully charged customers a $95 notice fee for each default notice sent. The United States Department of Treasury's Office of Thrift Supervision took exception to this practice. In April of 2004, Ocwen entered into an agreement with that government agency which required the company to cease charging these default notice fees to borrowers. Despite this agreement, Ocwen has failed to go through customers' files and remove previous default notice charges from their accounts.

In the Russell County case, the plaintiff, Debbie Long, was charged $95 default fees on several occasions and foreclosure fees of over $900 despite no foreclosure ever being initiated. Ocwen actually charged her late fees for payments that were sent on time. These payments by Ms. Long were reported to credit bureaus as being late. Throughout, Ocwen failed to disclose what fees, finance charges and penalties would be charged in connection with Ms. Long's mortgage. The company also failed to disclose other facts necessary for Ms. Long to keep her mortgage current and prevent negative reporting to credit bureaus and possible foreclosure.

Rhon Jones and Scarlette Tuley are handling the 37 cases that we have pending against Ocwen at present. We are looking at a number of other potential claims, mostly in Alabama at this time. The banking and mortgage industries should have the public's trust, but questionable activities by a few greedy and unethical operators give them a bad name. Hopefully, we will be able to bring about some significant and needed changes in how companies like Ocwen operate in the future.

II. LEGISLATIVE HAPPENINGS

The Record Education Budget

The Legislature passed a $6.2 billion budget for education in Alabama, which is a new record. While the budget didn't include Governor Riley's proposed income tax cut, it did include a pay raise for teachers and extended the school year by 5 days. While this budget set a record for spending, from all accounts, it is a good budget. Public education should be our state's top priority in my opinion. This budget gives a tremendous opportunity to put our education system on the right track. Obviously, the lack of money is not the only problem facing public education in Alabama.

Tax Reform

It is highly likely that a tax reform bill will pass the Legislature during the current session. The House of Representatives passed a bill which has been labeled as the "income tax fairness compromise" bill by a vote of 101 – 0. The measure sponsored by Republican John Knight and endorsed by Alabama Arise, if passed by the Senate and signed by Governor Riley, would raise the state income tax threshold from $4,600 to $12,600 next year. The bill will be in the Senate when the Senators return on March 30th from their spring recess. In my opinion, it should pass there with little difficulty. In its present form, low and middle income Alabamians will get needed tax relief and that's good. Personally, I don't believe persons with high incomes need any tax breaks. We have allowed a **broken tax system** to hang around in Alabama for all too long—this bill is a **step** in the right direction.

The Landlord-Tenant Bill

On March 7th, the Alabama Uniform Residential Landlord-Tenant Law moved one step closer to passage with a House vote of 100 to 0. Alabama Arise has been working hard for tenant protections since 1993. The bill would define a habitable dwelling, provide legal remedies for noncompliance by landlords, prohibit retaliation by landlords, and limit amount of deposits by tenants and require their return. Landlords will get a streamlined eviction process and preemption of city landlord-tenant ordinances. I believe the Senate will pass this bill, which in my opinion is badly needed. Alabama Arise should be commended for not giving up and continuing to push this badly needed legislation.

III. COURT WATCH

Sandra Day O'Connor Warns Of Rightwing Attacks On The Courts

The Honorable Sandra Day O'Connor, who recently retired after a distinguished stay on the U.S. Supreme Court, has issued a stern warning concerning our judicial system. It is critically important for all Americans to pay special attention to her warning. Ms. O'Connor, one of the most respected persons to have served on the Highest Court,

stated: "Statutes and constitutions do not protect judicial independence - people do." She noted death threats against judges were on the rise and added that the situation was not helped by a senior U.S. Senator's suggestion that there might be a connection between the violence against judges and the decisions they make. The senator she was referring to was John Cornyn, (R-TX), who made his remarks last April, soon after a judge was killed in an Atlanta courtroom and the family of a federal judge was murdered in Illinois. You may recall that Senator Cornyn stated at that time:

> *I don't know if there is a cause and effect connection, but we have seen some recent episodes of courthouse violence in this country ... And I wonder whether there may be some connection between the perception in some quarters, on some occasions, where judges are making political decisions yet are unaccountable to the public, that it builds up and builds up to the point where some people engage in violence.*

Although appointed by President Ronald Reagan, Ms. O'Connor was a frequent target for criticism from the Far Right. She said in a recent speech that if the courts did not occasionally make politicians mad, they would not be doing their jobs. She added that the effectiveness of judges "is premised on the notion that we won't be subject to retaliation for our judicial acts." You will recall that Republican Tom DeLay called for impeachment of the judges involved in the Schiavo case out of Florida. DeLay made a number of irresponsible statements relating to that case, which considering the source, is not surprising. Ms. O'Connor warns that the courts and judges must have the backing of the American people. I wholeheartedly agree with that assessment. A strong judicial system is most important to the continued well-being of our Republic. Those who attack it for political or selfish reasons should be ashamed and it should not be tolerated. Men and women who believe a strong and independent judicial system is important have a strong obligation to defend it!

Silent Tort Reform—If Successful—Would Override States' Powers

Federal agencies in Washington, which are supposed to regulate certain industries, have gotten deeply into the business of "tort reform." In fact, they have quietly joined with the giants in Corporate America in this tort reform movement. The Bush Administration has backed this end-run around Congress without a great deal of fanfare. Using a variety of largely unheralded regulations, officials appointed by President Bush have moved in recent months at the regulatory level to take away citizens' rights. At the urging of powerful industry groups, several federal regulatory agencies have inserted clauses in new rules that block the right to go to court for American citizens. This is what some have described as "silent tort reform."

State Attorneys General and state lawmakers have filed objections to the movement. Attorneys General in 16 states, including New York, California and Massachusetts, recently sent a letter to the National Highway Traffic Safety Administration about that agency's effort to preempt roof safety rules. In the letter, the Attorneys General stated:

> *The state common law court system serves as a vital check on government-imposed safety standards. The proposal is likely to erode manufacturer incentives to assure that vehicles are as safe as possible for their intended use.*

The new regulations will face court scrutiny in the coming months. The official White House position has been that the federal government **knows better** than the states on this issue. Based on the President's handling of Katrina and the issue concerning security at our nation's ports, I don't believe Karl Rove and his minions can sell that view to the American people. It certainly appears that this is another example of the President once again leaving his conservative base, who believe strongly in states' rights. Silent tort reform at the federal level flies in the face of their position on states' rights. The states are more than capable of handling this issue.

Source: *New York Times*

TLPJ Is Fighting To Keep Public Documents Unsealed

Trial Lawyers for Public Justice, a national public-interest law firm, is fighting hard to keep **public documents** unsealed in a Colorado court. There is no doubt that corporate efforts to expand court secrecy have clearly gotten out of control. TLPJ is challenging a court **secrecy order** in a case that is now before the Colorado Supreme Court. The justices agreed to hear TLPJ's challenge to a sweeping protective order by the trial court that would keep secret key evidence in an insurance bad faith case. The court entered the secrecy order even though the documents were already public at that time. An injury victim's lawyer had actually gotten the documents without a protective order after they were disclosed in a previous case against the very same insurance company. The unusually broad protective order involving Farmers Insurance was issued without the insurance company even having to show any good cause for secrecy. The order requires the injury victim's lawyer to identify all documents in his files that relate to the subject of the case. It also permits the insurer to stamp all those papers "confidential" regardless of where they came from, even if they came from the public domain. In addition, the order requires that any court records containing those documents be filed under seal.

In my opinion, it's wrong for an insurance company to use a protective order to keep key documents secret that were obtained from outside the case. Accordingly, I believe it's wrong for a court to issue such an order allowing a company to do so. In fact, key evidence of corporate wrongdoing should never be put under protective order. But this order goes much further. It is being argued by TLPJ that the order is "an unconstitutional prior restraint on free speech that violates the First Amendment."

The case against Farmers Insurance was filed in a state court for breach of contract, bad faith, and unfair and deceptive trade practices. The complaint alleges, among other things, that Farmers Insurance trains and gives incentives to their adjusters to limit the

amount of compensation awarded on claims. The adjusters' pay is linked to how much money they save their company on claims. The plaintiff's lawyers had obtained documents that had been disclosed without a protective order in a South Dakota case against Farmers Insurance and was using them in the Colorado case. Key documents relating to the company's practices had also been received from plaintiff's own expert. All of these documents were readily available to the public at that time. The trial judge then entered the protective order. The Colorado Supreme Court granted review of the trial court's order on January 5, 2006. The Supreme Court has stayed all proceedings in the trial court, and Farmers Insurance was ordered to show cause why the protective order should not be struck down.

We should all thank the Colorado firm of Brueckner, Bailey, and Kelly for their work in this important case. This case is part of TLPJ's 15-year-old Project Access, a nationwide battle against excessive court secrecy, and its Access to Justice Campaign, which is fighting to keep America's courthouse doors open for all. TLPJ and this dedicated law firm should be commended for looking out for the common good. Hopefully, they will be successful before the Colorado Supreme Court. You can learn more about TLPJ's work by going to its website, www.TLPJ.org.

Source: Trial Lawyers for Public Justice

Alabama Introduces Court E-Filing System

Alabama court officials are introducing an e-filing system this year that would potentially allow thousands of lawyers in the state to securely file complaints, discovery documents, proposed orders and other documents via the Internet. By the end of 2006, officials from the Alabama Administrative Office of Courts (AOC) want lawyers to electronically file about 80% of all civil cases through AlaFile. AOC is the office that oversees the state's unified court system and is responsible for centralized purchasing, personnel issues, technology, and other matters.

An estimated 3,000 lawyers account for 75% of civil cases, which include family matters such as divorces and child support, according to AOC. State officials are training lawyers and their staffs in Alabama's 67 counties to use the system. They have trained about 1,000 lawyers out of 14,000 in the state on the system so far. State officials are excluding criminal cases—felonies and misdemeanors—from electronic filings because the state must first take legislative action. The court system handles about 700,000 cases annually.

The AOC, which has 2,000 employees, dealt with budget cutbacks three years ago and laid off 250 employees. Forced to do more with less, the office sought to improve efficiency. Chief Justice Drayton Nabers got the ball rolling on this project when he was appointed about 18 months ago. AOC officials decided to enhance an existing case management system called Alacourt, developed by On-Line Information Services (OLIS), based in Mobile, Alabama. The state has had a seven-year partnership with OLIS, which provides a monthly subscription service to lawyers, who can view and retrieve information about a case by way of a secure website. In the case management system, all lawyers in the state were assigned unique identification numbers, which they can also use in the e-filing system. Also, procedures require lawyers to maintain original documents for two years in case someone questions the authenticity of an electronic document.

The state and OLIS started working on the e-filing project in January 2005 and launched the first test in September. Seven counties are participating in the project, and the state has been training more lawyers. To date, the court system has been electronically receiving motions on cases and original complaints. When a lawyer sends an electronic submission to a court clerk's office, it is automatically routed to the judge who is assigned to the case. The system will cut down on paper handling, improve worker productivity, and speed the movement of cases. Judges could also generate orders and e-mail all attorneys involved in a case almost instantly, shortening a process that can take three or four days. This is a good thing in my opinion. It should improve the system greatly.

Supreme Court Refuses To Consider Judicial Ethics

The U.S. Supreme Court has refused to consider whether an appellate judge in Illinois improperly voted to throw out a $1 billion judgment against State Farm Insurance Co. after allegedly accepting campaign donations of $350,000 from State Farm lawyers and executives. The case raised an important question about judicial ethics and that is, "Does the Constitution entitle average citizens a day in court before an impartial judge?" State Farm customers, who won a class action lawsuit accusing the company of fraud for refusing to pay for top-quality replacement parts on damaged cars, raised this important question. Illinois Supreme Court Justice Lloyd Karmeier was a deciding vote in the decision that threw out the entire judgment against State Farm last year.

A dozen public interest groups requested the Supreme Court to declare that "people have a due process right to an unbiased judge," pointing out that 30 states will hold Supreme Court elections this year and that "money may taint those contests." Lawyers for the groups, including Common Cause, told justices that high-dollar judicial races "engender an appearance of corruption that critically threatens the very foundation of the courts, and the rights of the litigants who appear in them." It should be noted that Judge Karmeier, a Republican, and his Democratic opponent spent, combined, more than $9 million in 2004 in what has been called the most expensive judicial race in American history.

It should be noted that State Farm denies the company gave any money directly to Judge Karmeier. In the State Farm case, the Illinois Supreme Court had been split on whether to overturn the verdict entirely. Justice Karmeier cast the deciding vote. Separately, public interest groups have asked a state board that looks into allegations of judicial

misconduct to investigate Justice Karmeier. Regardless of what happens there, the case is a prime example of why "money" must be taken out of all judicial races to the extent possible. The solution is very simple, and that's judicial campaign finance reform.

Source: *Associated Press*

Punitive Damages Ruled Out In Lead Paint Lawsuit

We reported on the jury verdict in Rhode Island last month against Sherwin-Williams Co., NL Industries Inc. and Millennium Holdings LLC, all former manufacturers of lead paint, and said that the court had not decided on punitive damages. These defendants will have to pay to clean up properties with the contaminated paint, but will not have to pay punitive damages. The trial judge decided in favor of the paint makers on the punitive damages question and against the State of Rhode Island. The jury found the defendants liable for creating a "public nuisance" by selling lead paint and decided that they must clean up contaminated paint in the state. While it is estimated that this could cost as much as $3 billion, the court has yet to decide what the firms will actually have to do in order to clean up the properties. The punitive damage ruling was a disappointment to the State of Rhode Island. There are similar lead-poisoning pending in other states. I am not sure what effect the ruling on punitive damages will have in those cases. The "public nuisance" theory of liability could prove to be more important to affected persons than the prospects of punitive damages being awarded.

The Time Limits On Church Suits Should Be Extended

A growing number of states have introduced legislation that would give church sex abuse victims more time to sue. Currently, more than a dozen states are considering legislation that would change the statute of limitations regarding civil lawsuits for past abuse, giving victims anywhere from one to three more years to file suit. Among the states considering extensions are Colorado, Massachusetts, New York, Michigan, Ohio, and Pennsylvania. Victims' advocates say that in recent years, several courts have rejected church sex-abuse lawsuits because they have been filed too late. Interestingly, the statute of limitations defense is often the number one defense used by churches in these cases.

In my opinion, new laws are needed to give victims more time to expose and sue guilty perpetrators who use a church for a very wrong and sinister purpose. A young child who is sexually abused by a priest or pastor has a terrible burden to carry. It's not reasonable to expect a victim of sexual abuse by a trusted priest or pastor to report acts of sexual abuse by a respected member of the community. The guilt that victims feel often keeps them from reporting this sort of criminal act. David Clohessy, national director of Chicago-based Survivors Network of those Abused by Priests, believes that statutes of limitations defenses have allowed a good number of churches to cover up abuse. He said that giving victims more time to sue has the effect of exposing predators and results in prosecuting them. It also provides an incentive for employers to keep better track of their employees and to monitor their activities. I would favor a lengthy extension of time for filing lawsuits against sexual predators.

Source: *National Law Journal*

Appeals Court Rules Damages In Harassment Case Excessive

A California state appeals court ruled last month that the amount of punitive damages awarded by a judge to workers who were sexually harassed at an Escondido grocery store was excessive. The San Diego-based 4th District Court of Appeal had ruled that four of the six women who originally sued Ralphs should receive $1.5 million in punitive damages in addition to the $250,000 they had been awarded in total compensatory damages plus their lawyer's fees. The appeals court ruled that the $1.5 million was "sufficient to punish Ralphs and deter it and others from similar conduct in the future." The court said further that a higher award was unwarranted because the harassment did not cause a significant personal injury to the women or represent a substantial threat to their health or safety. The plaintiffs will appeal to the California Supreme Court.

A jury in 2002 awarded $30 million in punitive damages to the six women who initially filed the lawsuit. But, the trial judge ruled that the award was excessive and reduced it to just over $8 million. A $3.3 million award in 1998 by an earlier jury had been thrown out because of juror misconduct. Two of the original plaintiffs accepted the trial judge's ruling and settled for a total of $4.5 million in punitive damages. The four others appealed, and this latest ruling affects only their claims. All of the women contended that they faced physical and verbal abuse from an Escondido store manager in 1995 and 1996. The company ignored their complaints, according to the women.

Status Of The Lawsuit Over Blackwater Deaths In Iraq

A security contractor doesn't want a wrongful death lawsuit, filed by the survivors of four former employees killed and mutilated in Iraq, to remain in a North Carolina state court. Blackwater Security Consulting, based in Moyock, N.C., contends the federal case should be in the courts because of the federal worker's compensation law. The company believes that law, which bars lawsuits and would entitle the deceased men's dependents to receive payments of only $1,100 weekly each, applies to civilian employees working overseas for the government. North Carolina law allows financial compensation in wrongful death lawsuits. In my opinion, the state court is where the case belongs.

You will recall that the slayings of the four contractors in March 2004 made worldwide headlines. Crowds dragged the men's charred bodies through the streets of Fallujah and actually strung two of them up from a bridge. The families sued the company in state court in

January 2005, alleging Blackwater intentionally cut corners on safety, leading to the deaths. The workers were allegedly sent into Fallujah without proper equipment and personnel to defend the supply convoy they were guarding. Unfortunately, that appears to have been pretty typical of how things worked in Iraq for many civilian contractors. In August, a federal judge ruled that a North Carolina state court should hear the lawsuit. Blackwater promptly moved to have the 4th U.S. Circuit Court of Appeals reconsider the opinion. The appeals court will most likely rule that the case belongs in state court. Hopefully, that will be the result so that the families of the men who were killed can be taken care of financially.

IV. THE NATIONAL SCENE

The National Political Landscape

The national Democratic Party currently has the best issues to present to the voters in Congressional races this fall that I have seen in years. Unfortunately, the party's leadership has done a very poor job of taking advantage of these issues thus far. The National Party hasn't come up with what the public wants and that's a plan to correct the problem. All of the national polls reflect that to be the case. That's because the Democrats lack a real spokesperson who can get the public's attention. Howard Dean, who heads up the party, doesn't fit the bill for sure. In my opinion, most folks around the country really care about each of these areas of concern, but not for political reasons. I believe American citizens are truly concerned because of what is happening to our country. I don't believe anybody could say with conviction that there aren't some major problems that "need fixing" as we approach mid-term congressional races. I would expect Democratic candidates to bring these issues into the political debate. If they don't, they should collectively be "bored for the hollow-horn" as my granddaddy used to say about local politicians in Barbour County who "messed up" their election bids. Let's take a look at some of these national issues:

- **The ports deal**, which is the worst thing that could have happened to our country from a national defense perspective, was killed. But, the President defended the deal to the bitter end, which defies all logic and common sense. The American people were outraged over the ports issue and with good reason. Turning the points over to a foreign country—and especially one with ties to terrorist groups—is about as bad as it gets. Frankly, something in this deal really smells!
- **The cost of lives and money in Iraq**—plus the prospects of civil war and total chaos in that country—should make the President and congressional leaders take a very close look at what they have created. The $500 Billion cost of the war and the thousands of American lives lost are heavy prices to pay. The war in Iraq won't end for a long time, and it is one that we should never have started. The situation at present is very bad and the prospects for it getting better seem very slim. Our military personnel have been put in an awful situation and one that's impossible to justify. We must continue to support our troops and pray that their presence in Iraq won't be as long as President Bush projects.
- **The massive corruption in Washington**, with more scandals than you can count, is something that folks expect to be cleaned up. I have been amazed at how quickly some of the politicians "forgot" who Jack Abramoff was!
- **The handling of the Katrina issues**—from the start to the present, with no end in sight—was unbelievably bad. You could line up the no-bid contracts and the unused, but paid for, trailers and they would reach from the Gulf Coast to the White House. The clean-up efforts have been badly bungled, and FEMA is a complete disaster. The total lack of preparation for Katrina makes one wonder about the priorities in Washington.
- **The new prescription drug plan**—written by the drug industry and which will cost more than Congress was told—has been another major disaster. The plan helps the insurance companies, the PBMs, and the drug companies, and appears to be rotten to the core. Drug prices at wholesale have risen by about 12% on average since the plan went into effect on January 1st. The "people," who were supposed to be the beneficiaries of the plan, have been victimized. The federal government doesn't even have the right to negotiate drug prices with the drug companies, and that is impossible to justify. Senior citizens and their families shouldn't support any politician who was responsible for pushing the drug plan through Congress.
- **The military threat from Iran and North Korea** is scary. Unlike Iraq, these countries have the capacity to be a threat to the U.S. I hope we actually have a planned strategy on how to cope with this very real threat.
- **The economic threat from India and China** looms on the horizon and should be of great concern to all Americans. Our trade deficit, which is at record levels, must be addressed and soon. The current imbalance is a definite threat to our economy. We have become a debtor nation and that's indefensible. I believe American citizens would be shocked to learn how much we owe and to whom.
- A **president** who inherited a **surplus** in the hundreds of billions has turned it into a **deficit** of about $500 billion in five years. How any "conservative voter" could say this is good for our country is beyond me.
- The President says we are **addicted to oil** and he is right in that assessment. Perhaps he should distance himself from the giant oil companies that have unparalleled power over his Administration and start to solve the problem. Instead of doing this, we see unparallel financial benefits given to the oil giants while American citizens are paying outrageous prices for gasoline at the pump.

- This Administration has the **worst environmental record** of any in my lifetime. Again, this is because that polluters have tremendous influence in Washington.
- **The Global Warming** issue is a threat that the Bush Whitehouse has largely ignored. Our very existence depends on some prompt action to reverse the present trends. We can no longer allow the giant oil companies to dictate policy in this critically important area.
- While some say the **Economy** is good, I would question how good it really is. There are over 36 million Americans living below the poverty line. The poverty rate has risen every year since the current President took office. In 2004, the number of Americans without health insurance rose for the fourth straight year—now about 46 million.
- The **outsourcing of jobs and technology to foreign countries** weakens our economy and also weakens our nation from a national security perspective. Losing our industrial manufacturing base to foreign counties like China and India is not a good thing and that trend must be halted.
- **The "Enron-style Bosses" of the corporate world**, who have stolen from their own employees and shareholders, as well as the American people, should be prosecuted to the fullest extent of the law. I suspect we only saw the tip of the iceberg in Corporate America, so to speak, and that's understandable considering the very good political connections of men like Ken Lay.
- **Shutting the courthouse door to victims of corporate wrongdoing and abuse** is part and parcel of the large corporate take-over of our government in Washington. The only line of defense is our judicial system and that's the reason for the constant attacks on the courts.

It will be interesting to see whether the national Democratic Party can come up with a real spokesperson and more importantly, will develop plans and programs that will solve the problems laid out above. For the good of all American citizens we must solve them and soon. It is not enough to just identify problems—we must have **workable solutions**!

Halliburton Wins Again

A Halliburton subsidiary will now receive all but $9 million of $222 million in disputed costs that Pentagon auditors questioned for oil industry work in Iraq. The decision by Army officials to pay came as somewhat of a surprise to most observers. At issue is a $2.4 billion contract awarded to Kellogg Brown & Root, which is a Halliburton subsidiary, to deliver fuel to Iraqis and repair oil industry equipment. Interestingly, the 2003 contract was awarded without competitive bidding. Many believed that the company's links to Vice President Dick Cheney, once its chief executive officer, gave them a distinct political advantage. According to a spokesperson, the Army did a "lengthy, detailed" review of the $221.9 million in challenged costs and resolved the questions largely in favor of Kellogg Brown & Root.

Houston-based Halliburton is one of the largest contractors in the massive effort to rebuild Iraq's economy and public works that were virtually destroyed in the early stages of the war. In 2003 and 2004 alone, the government awarded more than $10 billion to Halliburton and its subsidiaries, some of it by way of no-bid contracts. The Army's decision to pay much of the disputed charges was first reported in The New York Times. I don't really see how our government can afford to award no-bid contracts in Iraq or anywhere for that matter and certainly not to politically–connected companies such as Halliburton. It just doesn't meet the smell test with taxpayers.

Millions Wasted On Katrina Response

Federal auditors have released a report with more bad news on Katrina relief efforts. The government wasted millions of dollars in its award of post-Katrina contracts for disaster relief, including at least $3 million for 4,000 beds that were never used, according to the report. The review by the Government Accountability Office (GAO) of 13 major contracts — many of them awarded with limited or no competition after the August storm — offers the first preliminary overview of their soundness. Waste and mismanagement were widespread due to poor planning and miscommunication, according to the report. It appears money was paid for work that was never used. The report by the GAO, Congress' auditing arm, stated:

> *The government's response to Hurricanes Katrina and Rita depended heavily on contractors to deliver ice, water and food supplies; patch rooftops; and provide housing to displaced residents. FEMA did not adequately anticipate needs.*

Billions of dollars of government contracts have been awarded. Homeland Security Secretary Michael Chertoff appears to be incapable of managing a major government agency. That is troubling to say the least. Of more than 700 contracts valued at $500,000 or greater, more than half were awarded without competition, often to politically connected companies such as Halliburton subsidiary Kellogg, Brown & Root, Bechtel Corp. and AshBritt Inc. While no-bid agreements may have a place in disasters, there have to be some limits. Unfortunately, we have seen contracts awarded to politically connected companies at the expense of a slow Gulf Coast rebuilding effort.

The GAO report speaks broadly and does not actually address the validity of no-bid contracts. Reviews of those contracts are currently under way by inspector generals at Homeland Security and other agencies. But it did find significant problems in its general review of the 13 contracts, most of which were limited bid. According to the report, millions could have been saved if FEMA had adopted previous GAO recommendations to hire more

personnel, prearrange contracts and better train staff. Among the GAO findings are:

- Non-existent communication with local officials led to misjudgments on the need for temporary housing. They included $3 million that FEMA spent for 4,000 base camp beds that were never used and $10 million to renovate and furnish 240 rooms in Alabama, which housed only six occupants before being closed.
- Poor coordination between FEMA and the Army Corps contributed to waste in an Americold Logistics LLC's contract for ice. "The local Corps personnel were not always aware of where ice might be delivered and did not have authority ... resulting in inefficient distribution," it said.
- Inadequate planning led to the award of a Mississippi contract for classrooms without competition. "Information in the contract files suggests the negotiated prices were inflated." A review of that specific contract, with Akima Site Operations LLC, was continuing.
- FEMA had only 17 of the 27 monitors it deemed necessary to oversee the installation of temporary housing in four states, leading to inadequate controls. The 13 Katrina contracts involve the following 12 companies: C. Henderson Consulting; Americold Logistics; Clearbrook LLC; CS&M Associates; Gulf Stream Coach Inc.; Morgan Building & Spas Inc.; Bechtel National; Fluor Enterprises Inc.; CH2M Hill Constructors Inc.; E.T.I. Inc.; Ceres Environmental Services Inc.; and Thompson Engineering Inc.

You won't be surprised to find out that a number of the firms, including Gulf Stream Coach and Bechtel, have close ties to the Bush Administration or have contributed significantly to the GOP.

Source: *Associated Press*

Oil Giants Failed To Pay Fees Due To Federal Government

Normally oil companies have to pay the standard royalty of 12% on oil or gas produced on lands owned by the federal government. Under the government's royalty relief program, companies that drill in deep waters off the Gulf of Mexico don't have to pay the royalty on the large quantities of the oil or gas they produce. But federal regulations also call for that special incentive to be suspended if market prices rise above certain threshold levels. Market prices for both oil and natural gas have been higher than those levels since the end of 2002. This means the 12% royalty should have been paid by all the companies operating in the Gulf of Mexico.

More than three dozen energy companies fell nearly $500 million behind last year on royalty payments they owed to the federal government for oil and gas extracted from public territory. This is according to Interior Department documents that were released in February. While most of that money was later paid after the government demanded payment, almost $60 million remains in dispute. The companies, which included major producers like Chevron, Shell, and ConocoPhillips, had claimed lucrative government incentives for drilling in the Gulf of Mexico even though the incentives were not supposed to be available if market prices climbed above certain "threshold prices."

The Interior Department sent a report to lawmakers looking into the energy royalty program that revealed that the companies had failed to make the royalty payments. Forty-one companies were identified that incorrectly claimed about $493 million in "royalty relief" during 2004, when prices for both oil and gas climbed to record highs. The Interior Department said that 38 of the 41 companies paid $435 million in back royalties after it sent out warning letters in December. This was money that should have been paid shortly after the end of 2004. Three companies—Kerr-McGee, Forest Oil, and AGIP—continue to say they don't plan to pay $58 million in additional payments.

Royalty payments for oil and gas extracted from federal territory have drawn increased attention from Congress since The New York Times reported in January that royalty payments had not climbed in line with the huge increase in market prices. Last year, the government received about $5.15 billion in royalties on natural gas and about $3.5 billion in royalties on oil. While royalties have climbed sharply since 2003, they are still barely even with amounts collected in 2001, at a time when market prices were much lower. One apparent reason for the shortfall is that the government has had trouble auditing the flow of money.

The companies receiving the letters demanding payment included many of the biggest producers in the Gulf of Mexico: Anadarko, Amerada Hess, British Petroleum, Chevron, ConocoPhillips, Kerr-McGee, Shell, and more than two dozen others. But several major producers, like Exxon Mobil, were not on the list. Exxon officials told the *Times* that their company stopped claiming royalty relief long ago, because market prices had exceeded the price thresholds.

Source: *The New York Times*

Companies With Government Contracts Owe Back Federal Taxes

A recent report reveals that one in ten companies contracting with the U.S. General Services Administration owes unpaid federal taxes. Congressional investigators say the companies currently owe a total of at least $1.5 billion. An Associated Press report says that number could be too low. Evidence was found that 25 contractors had diverted payroll taxes for personal or business use. While investigators studied contracts from October 2003 through June 2005, they did not examine contractors who didn't file tax returns or underreported income. Investigators told Associated Press that the government is not required to consider a company's tax debt when awarding a contract. They say contracts can be awarded even if a company willfully fails to pay taxes. Actually, some of the activities related to the failure to pay taxes could be criminal. If a company owes unpaid taxes to

the government, I don't believe that company should be on a government bid list. At the very least, there should be some type restrictions put in place to limit their ability to bid.

Source: *Associated Press*

Violence On Children's TV Must Be Curtailed

Recently, the Parents Television Council (PTC) released its first study on children's television titled, "Wolves in Sheep's Clothing: A Content Analysis of Children's Television." This study found that there is more violence on children's entertainment programming than on adult-oriented television. That is certainly shocking, to say the least. Children's programming has been around as long as television itself, but until recently, it was limited to Saturday mornings or before school. Now, thanks to a handful of cable channels, cartoons and child-targeted programming are available almost around the clock. I understand that few broadcast networks even offer original Saturday morning children's programs any longer. Times have obviously changed. L. Brent Bozell, president of PTC, stated:

> *Parents often take it for granted that children's programs are, by definition, child-friendly. While a lot of entertainment programming for children is perfectly wholesome, parents nevertheless have to worry about the part of it that isn't appropriate. This disturbing trend signifies that parents can no longer be confident that their children will not have access to dark violence, sexual innuendo, or offensive language on entertainment programming targeted toward children. We do realize that this is probably not a deliberate effort to undermine the social fabric of young children, but this thoughtlessness still produces the same end result.*

For this study, the PTC focused on entertainment programming for school-aged children aged 5-10 on broadcast television and expanded basic cable. Eight networks—four broadcast and four cable—offer programming matching that criteria: ABC, Fox, NBC, WB, ABC Family, Cartoon Network, Disney Channel, and Nickelodeon. The PTC focused its analysis on after-school and Saturday morning programming. The analysis covered a three-week period during the summer of 2005 for a total of 443.5 hours of children's programming. The study, which did not include children's educational programming, found:

- 3,488 incidents of violence, for an average of 7.86 instances per hour. [Even when the innocent, "cartoony" violence (i.e. an anvil falling on Wile E. Coyote's head) is extracted, there were still 2,794 instances of violence, for an average of 6.30 instances per hour. According to a 2002 PTC study, the six broadcast networks combined averaged only 4.71 instances of violence per hour during prime time programming.]
- 858 incidents of verbal aggression, an average of 1.93 instances per hour
- 662 incidents of disruptive, disrespectful or otherwise problematic attitudes and behaviors, an average of 1.49 instances per hour
- 275 incidents of sexual content, an average of 0.62 instances per hour
- 250 incidents of offensive language, an average of 0.56 instances per hour

Although the Cartoon Network had the highest total number of violent incidents, the ABC Family Channel turned out to pack the most punch-per-program, with 318 instances of violence (only 11 of these could be considered "cartoon" violence) for an average of 10.96 violent incidents per episode. The Disney Channel had the least-violent children's programming, with 0.95 incidents per episode. The WB had the highest levels of offensive language, verbal abuse, sexual content, and offensive/excretory references.

According to the PTC, this new study has found that the violence aimed towards little children is **almost double** compared to the levels of violent content directed towards families and adults during prime time hours. Some may believe that violence in children's programming isn't a big deal. But, the violence is ubiquitous, often sinister, and in many cases, very realistic. In my opinion, we must do everything possible to clean up children's television programming. Broadcast and cable networks must be held accountable for allowing inappropriate content to corrupt our children. In addition, advertisers must be held responsible for underwriting these programs. I believe that the churches should be leading the charge to clean up children's programming. Unfortunately, they have been very silent in this important fight.

U.S. Senator Sam Brownback (R-KS) agrees that there is too much violence in children's television programming. The Senator made this observation:

> *I fear too many parents have an unjustified sense of security when they place their children in front of the television. I hope this new study from the Parents Television Council will demonstrate that children's programs are not necessarily free of violence, crude language, and coarse humor. I encourage broadcasters and network producers to consider the content they are disseminating to children, and I encourage parents to educate themselves about the content of their children's favorite shows.*

Last year Senator Brownback introduced a bipartisan bill called the Children and Media Research Advancement Act. This bill would allocate $90 million over five years to further study the effects of media on children. It would establish a panel of experts within the Centers for Disease Control to review current research on the role of media. The bill would also establish pilot projects in the Department of Health and Human Services. A similar bill is pending in the House of Representatives. If we can spend $500 Billion in Iraq, surely we can spend a little more in this country to help "save our children."

Source: Parents Television Council

We Should Applaud The FCC's Indecency Rulings

There is some good news from the Federal Communications Commission (FCC) concerning television programs. I hope this is a sign that the government is finally cracking down hard on indecency in programming. In one decision, the FCC fined CBS and its affiliates $3.6 million for re-airing an episode of *Without a Trace*. The episode included graphic scenes of a teen orgy party. Indecency complaints about the initial airing of *Without a Trace* were lumped into a bundle of complaints that were dismissed, without adjudication, by the FCC's November 2004 Consent Decree in exchange for a $3.5 million payment by CBS. Just weeks after the Consent Decree was agreed to by CBS' parent company, Viacom, the same episode of *Without a Trace* was shown a second time. Part of the Consent Decree states:

> *Viacom will also conduct training with respect to the Indecency Laws for all of its on-air talent and employees who materially participate in programming decisions. If a Viacom-owned station receives a Notice of Apparent Liability for a broadcast occurring after the Effective Date which relates to violation of the Indecency Laws, all employees airing and/or materially participating in the decision to air such material will be suspended and an investigation will immediately be undertaken by Viacom.*

The broadcast airwaves are public property and belong to the American people. As a result, the broadcast industry must be made to abide by community standards of decency. The airwaves must remain safe for families when children are likely to be in the audience. The FCC should be commended for upholding the substantial fine against CBS for Janet Jackson's indecent exposure during the 2004 Super Bowl, for finding the graphic sexual content in *The Surreal Life 2* to be indecent, and for clarifying whether utterances of vulgar language are indecent. Clearly, such material does not belong on broadcast television and certainly not when millions of children are in the viewing audience.

Source: *PTC* and *USA Today*

Those Who Profit From Selling Child Pornography Should Be Dealt With Harshly

All American citizens should be shocked to learn that child pornography is a multi-billion dollar business in this country like ours. That is a sad commentary for the state of affairs in a civilized country. We must go after any person or business that is involved in the child pornography industry and deal with them as harshly as possible. The offenders should be vigorously prosecuted in the criminal courts and sued for money damages in the civil courts. We must take all steps possible in order to make it virtually impossible for this industry to continue to exist. We must protect our children from men and women who would stoop to the lowest level imaginable and use children in such an evil manner. First time offenders should face stiff prison time. Personally, I would favor the death penalty for repeat violators. We need more than **political talk** on this issue—we must demand action from our public officials.

Employers Should Pay A Decent Wage To Their Employees

I wonder how in the world many families in this country, whose hard-working breadwinners make only $5.15 per hour for their work, can make it in today's world. When it takes $40 - $50 each time a working man or woman fills up their car with gas, the minimum wage battle is put into a clear focus. Obviously, buying just one tank of gas per week takes a big hunk out of their paycheck. I believe that Congress should raise the minimum wage to $7.25 per hour and can see no excuse for their failing to do so.

While you may not agree with the $7.25 number, I believe you will agree that we must increase the minimum wage significantly. We definitely don't need to have corporate CEO's making hundreds of millions annually while some workers in this country are making only $5.15 per hour for their labor. That is a recipe for disaster. I hope, Congress will act on the issue and correct this wrong.

A New Nominee To Head The FDA

Dr. Andrew von Eschenbach has been nominated by President Bush to be the new commissioner of the Food and Drug Administration (FDA). While I don't know a great deal about this nominee, I do have a great deal of respect for Dr. Sidney M. Wolfe, who is Director of Public Citizen's Health Research Group, and who is extremely knowledgeable in this area. Dr. Wolfe says that, if confirmed by the U.S. Senate to be the next Commissioner, Dr. Eschenbach will become yet another Bush appointee whose main reason for being selected is that he is a family friend. He also believes the nominee is a person who has been "warmly embraced by the regulated industries—especially the pharmaceutical industry—and is someone who has been and will continue to be loyal to the White House agenda." That agenda is not a good one when it comes to regulating the drug companies. Dr. Wolfe is convinced that this nominee is a very poor choice to head this critical agency and wants his nomination to be defeated. Certainly, over the years, the FDA has been largely ineffective and pretty much an extension of the powerful drug industry. We don't need to have the agency further damaged by putting someone in charge who may be unqualified or one who can be controlled by any special interest. I hope the Senate will take a very close look at Dr. Eschenbach's background and qualifications. If Dr. Wolfe is correct in his assessment, I feel sure this won't be an easy confirmation.

Source: Public Citizen

V. THE CORPORATE WORLD

Energy Trader Fined $50 Million For Manipulation

The Williams Cos. Inc., a supplier and processor of natural gas, has agreed to pay a $50 million fine and accept responsibility for two employees who manipulated gas prices between 1998 and 2002. According to the agreement, prosecutors agreed not to file criminal charges against Tulsa, Oklahoma-based Williams in exchange for the payment and the company's continued assistance to authorities investigating energy manipulation. Williams also agreed to comply fully with commodities trading laws for at least 15 months. Two former traders with the company's subsidiary, Williams Power Co. Inc., pleaded guilty to conspiring to report fictitious trades to increase profits. This appears to be a case where guilty parties need to be prosecuted if any criminal laws were broken.

Source: National Law Journal

Tenet Settles With Florida On Medicare Payments Dispute

Tenet Healthcare Corp., the giant hospital chain, has settled a dispute with the State of Florida involving Medicare payments. The company will pay a total of $7 million: $4 million to start a fund for uninsured patients in 13 county hospital districts in Florida, and $3 million to go to the Florida Medicaid Fraud Control Unit and public hospitals in the state. The settlement resolves a civil suit filed by the Florida Attorney General in 2005 on behalf of the 13 county hospital districts. An investigation by the Florida Medicaid Fraud Control Unit led to the lawsuit. But, the settlement does not end a pending class action lawsuit filed in Florida by the Boca Raton Community Hospital and other acute care hospitals. You may recall that in January, Tenet agreed to pay $215 million to settle federal class action litigation over charges it misled investors about Medicare payments.

Source: *Associated Press*

New York Attorney General Sues H&R Block

New York State Attorney General Eliot Spitzer has filed a most significant lawsuit against **H&R Block**, the tax preparation giant. The suit, filed in New York State Supreme Court last month, alleges that the company's Express IRA product didn't disclose enough information about the expenses associated with it. It is claimed that the product costs H&R Block customers far more in fees than the interest earned. The Attorney General says that H&R Block fraudulently marketed retirement savings plans that caused hundreds of thousands of mostly low-income clients to lose money. The suit seeks $250 million in fines plus refunds. It's alleged that H&R Block steered roughly 500,000 tax return customers to invest in individual retirement accounts, but failed to disclose high hidden fees that actually outpaced interest earned on the accounts. As a result, the Attorney General says that about 85% of these customers lost money. H&R Block says it will fight vigorously to defend the Express IRA product and denies any wrongdoing.

Jury Finds Custer Battles Liable In Iraq False Claims Act Case

A federal court jury in Alexandria, Virginia, has found contractor Custer Battles and its owners—Scott Custer and Michael Battles—liable for fraud in the first Iraq military contract case prosecuted under the False Claims Act. A verdict in the amount of $10 million was returned by the jury. The case was filed on behalf of the government by two former employees, Robert J. Jackson and William Baldwin. Interestingly, the federal government had refused to join the case. Patrick Burns, who is with the advocacy group Taxpayers Against Fraud, says the government's refusal to join was a political decision. He stated:

I believe this case was declined for political reasons. The hope was that the whistleblowers would go away and that this case would not be a front page story. Out of sight, out of mind. In Iraq, the U.S. government's position on fraud has been—don't ask, don't tell, don't listen. The government has 50 Iraq cases under investigation. But at some point we need some movement. The contractors in Iraq have been able to control the show. To the rest of the world, it appeared the U.S. government was winking at fraud. At some point, the government needs to show that it is serious and will prosecute and hold people accountable.

The jury found that the U.S. funds spent under the Custer Battles contract were fraudulently billed. In addition, the jury found more than 30 separate fraudulent acts, each one of which is subject to an $11,000 penalty. The jury also awarded Pete Baldwin $230,000 for being demoted and constructively discharged. As we have previously reported, under the False Claims Act, private citizens with special knowledge of fraud against the federal government may pursue a case to recover money on the government's behalf, with the potential for triple damages and up to $11,000 per fraudulent claim. Should the private citizen win the case, the whistleblower is eligible to receive up to a 30% award, with the other 70% going to the government. This False Claims Act lawsuit alleged that the company defrauded the government of $3 million worth of services as part of an Iraqi money-exchange program in which a new Iraqi currency was distributed following the collapse of Hussein's government.

Another trial, with the same set of whistleblowers, is scheduled on a separate $16.8 million contract Custer Battles was awarded to provide security at Baghdad International Airport. Retired brigadier general Hugh Tant III told the court in the case that was tried that Custer Battles' fraud "was probably the worst I've ever seen in my 30 years in the Army." General Tant testified that in one case, Custer Battles contacted to supply trucks to the military and pro-

vided vehicles that did not run and had to be towed to the site. When confronted, Mike Battles is said to have responded: "You asked for trucks and we complied with our contract, and it is immaterial whether the trucks were operational." I surely do hope that this contractor is the only one doing business in Iraq who is cheating the federal government—what do you think?

Source: *Corporate Crime Reporter*

VI. CAMPAIGN FINANCE REFORM

Nothing To Report

Unfortunately there has been nothing of substance happening to report on campaign finance reform on either the federal or state levels. I am not aware of any legislation that has passed relating to this most important issue. Neither am I aware of any significant court decisions dealing with reform in this area. The need for reform is great, but apparently our political leaders haven't been convinced enough so far to act. We could help solve a number of our problems in this country by passing meaningful campaign finance reform at the national level.

VII. CONGRESSIONAL UPDATE

Senate Cripples Effort To Enact Lobbying Reform

The Senate Homeland Security and Governmental Affairs Committee significantly improved a lobbying disclosure and reform bill by adding a requirement that major lobbyists disclose the money they spend on grassroots lobbying. While that is good news, the story doesn't end there. Unfortunately, the committee also took a giant step backward—crippling the reform effort—by rejecting an independent Office of Public Integrity. The best way to battle corruption is to deter it. While disclosure in some situations is very good, it isn't enough when it comes to lobbying activities. An independent Office of Public Integrity is crucial because it would conduct investigations and make recommendations to the Senate and House ethics committees free of political pressures. It would also regulate compliance with the Lobbying Disclosure Act, which to date has been subject to little oversight.

Because the ethics committees operate in complete secrecy, the public has absolutely no knowledge of what they did during all of 2005. Not one single decision was announced by the House or Senate ethics committees. We all know that the executive branch does not self-regulate. Instead, it has both independent inspector generals in each agency and an Office of Public Integrity, located in the Justice Department, which covers all federal employees. An independent office for Congress is needed and should be created without delay.

At least, the committee did require the disclosure of grassroots lobbying—a first—on which lobbyists spend hundreds of millions of dollars per year. Also, importantly, for the first time, lobbyists who violate Senate gift and travel rules would be subject to sanctions under the committee's measure. But the Abramoff and other scandals have marred the image of Congress and undermined public confidence in the ability of Congress to police itself. Folks in all parts of the country are fed up with all of the corruption in our nation's capitol. In my opinion, they expect things in Washington to change for the better and soon.

Public Citizen believes that the Senate should enact a comprehensive reform package that would do the following:

- create an independent Office of Public Integrity;
- cap lobbyists' campaign contributions at a low amount;
- prohibit lobbyists from soliciting, bundling, or arranging campaign contributions for candidates and political parties;
- prohibit lobbyists from serving on lawmakers' fundraising committees or serving as campaign treasurers;
- prohibit former members of Congress from both lobbying former colleagues and directing lobbying activities for two years after leaving office;
- require the disclosure of the dates and names of members of Congress and senior executive branch officials with whom the lobbyist made oral or written communications; and
- ban corporate-subsidized travel for lawmakers and staff.

In my opinion, all of these reform measures are badly needed. If you agree with these proposals, I urge you to let your Senators and members of Congress know. People must not only be concerned over the **mess** in Washington, and fuss about how bad things are, but they must also get actively involved in the reform movement. Contacting your elected officials in Washington is a proper first step. This bill that came out of committee can be made much tougher when it reaches the Senate floor. Let your Senators know that the passing of this legislation is a **good** thing to do.

VIII. PRODUCT LIABILITY UPDATE

Nebraska Court Upholds Verdict In GM Roof Crush Case

Penny Shipler, a resident of Nebraska, has won another round in her long legal battle against General Motors Corp. On March 10th, the Nebraska Supreme Court unanimously upheld an $18.6 million jury award to Ms. Shipler, whose spine was crushed when the roof of a 1996-model Chevrolet S-10 Blazer collapsed around her in a rollover accident. This was a most significant result in a case linking vehicle roof-strength to severe injuries in rollovers. GM had appealed the 2003 verdict against the automaker as being excessive. But the Nebraska

high court correctly denied GM's appeal. Ms. Shipler, a 38-year old former waitress, is paralyzed from the neck down. She and her 10-year-old son live on about $800 a month in Social Security payments, disability checks and food stamps. Her future medical care and assistance is estimated to cost $10 million.

The Nebraska Supreme Court rejected all of GM's claims on appeal. Foremost among its rulings, the state Supreme Court turned down GM's claim that the $18.6 million award was too large. Judge John Wright, writing for the court stated: "The court found no evidence that the damages were excessive or that they were awarded in the heat of passion or under any other undue influence."The trial court in the Shipler case found GM negligent in the design of the Blazer's roof, which crushed down an estimated eight inches on the passenger side where Ms. Shipler was riding. In a key portion of the Supreme Court's opinion, the court called the case one of "strict liability" regarding the ability of the Blazer to protect its occupants. Each year, an estimated 7,000 people are killed or severely injured in rollovers in which the roofs crushed.The federal standard for vehicle-roof strength dates to 1971, when passenger cars far outnumbered rollover-prone SUVs and light trucks. The standard was clearly inadequate and the automobile industry knew that to be the case.

Tire Aging Concerns Are Most Serious

Our firm has handled a number of tire aging cases where motor vehicle crashes resulted because of the condition of the tires involved. While our cases have been primarily against Firestone Tire Co., we have also had tire cases involving other manufacturers. Clearly, the issue of "tire aging" is a growing safety concern.The problem of tire aging involves the tire "aging out" before it actually "wears out." In other words, the tire may be severely degraded because of age before the tire treads are worn out. The issue of tire aging has become a greater concern in recent years because of consumers using vehicles that may have been driven fewer miles per year or may have tires that have been stored for significant periods of time before use. Tires age because of oxidation and ozone exposure. The longer the tire stays in use, the greater the effect of these two aging mechanisms.

This growing safety problem is complicated by the fact that even though the tires appear normal, there may be a breakdown in the internal compounds within the tires which can lead to a tire failure.Therefore, it can basically be an invisible hazard.The failure rates caused by aging are typically higher in southern states where tires are subjected to high temperatures. The aging process can be slowed by the use of "anti-degradation packages," which are chemical compounds added to the tire during production. But, to save money, many manufacturers use low quality additives that do not properly resist the aging mechanisms.

Tire manufacturers have been aware of the safety issues relating to tire aging for years. However, only recently have they begun addressing this potential safety hazard. Both the British Rubber Manufacturers Association and the Japan Automobile Tire Manufacturers Association have issued recommended practices concerning tire aging. One recommends that unused tires should not be put into service if they are over six (6) years old, and that all tires should be replaced ten years from the date of their manufacture.

Ford Motor Company has recently indicated that its research into tire aging suggests that the tire loses strength over time.As a result, Ford included warnings in its owner manuals for cars manufactured last year. Although there is no federal regulation indicating when a tire is no longer usable due to age, there is ongoing research by the National Highway Traffic Safety Administration on this issue. I hope the research will result in a regulation that will provide consumers with adequate information on the issue of tire hazards related to the aging process. Until then, I would highly recommend having your tires checked by a qualified technician on at least an annual basis after the tire is three years old. Be sure to note that this is three years from the date of production, not three years from the date of first use.Tires that sit in a warehouse for long periods of time still age.

Ford Can't Put All Of The Blame On Firestone Tires

Ford Motor Co. approved replacement tires for its Explorer sport utility vehicle that made it just as likely to roll over as the originals that Ford had blamed for more than 200 deaths. Ford's test results of replacement tires, introduced as evidence in an Explorer trial in Mississippi, will support hundreds of pending lawsuits contending that this SUV is unstable and can roll over amid evasive driving maneuvers. Ford has lost six Explorer rollover cases in trials held during the past year.You will recall that in a 2000 government investigation into Explorer rollovers, Ford blamed the original Bridgestone/Firestone Inc. tires for the accidents.

It is pretty clear now that the Explorer rollovers can't be blamed entirely—if at all—on the brand of tires in use. In computer simulations used to test substitutes, the Explorer tipped onto two wheels—a Ford indicator of rollover risk—on tires made by Goodyear, Michelin's Uniroyal, Continental, and other manufacturers. It was revealed by Ford documents that the company approved some failed tires as replacements.The Explorer tipped most frequently in the vehicle's two-wheel-drive model. Ford remodeled the Explorer for the 2002 model year, making it less susceptible to tire-related rollovers.

In Ford's tests of replacement tires, the Explorer tipped onto two wheels on 15-inch models of Goodyear Tire & Rubber Co.'s Wrangler RTS/AT, Wrangler GS/A A/S, Wrangler HT A/S, and Wrangler Workhorse, as well as 16-inch models of Goodyear's Wrangler and Eagle tires, according to a November 28, 2000, spreadsheet introduced as evidence in the trial.The spreadsheet listed the same results for 15-inch models of

Continental AG's General Tire Grabber and Continental Radial models, Cooper Tire & Rubber Co.'s Roadmaster Roughneck, and all versions tested of Uniroyal's Tiger Paw. In 2001, Ford approved as replacement tires the 15-inch Wrangler GS/A and HT and the 16-inch AP and RT/S, as well as General's Grabber tire, according to a list provided to dealers. The computer tests, called ADAMS modeling, simulated a maneuver called a J-turn and were the primary procedure to test for resistance to rollovers. This has been verified in a deposition of a Ford executive (Thomas Baughman) taken in December 2000. In testimony before Congress in 2000, Helen Petrauskas, then the head of Ford safety, said the company required the Explorer to pass the J-turn test.

Source: *Bloomberg News*

Airbags Make A Difference In Side Crash Tests

The latest test results are out from the Insurance Institute for Highway Safety (HIS). The 2006 Ford Fusion received poor marks in offering motorists' protection in side crashes, according to the test results. The Fusion, a midsize sedan starting at $17,795, received the lowest mark from IIHS on side-impact tests conducted on a model without optional side airbags. On frontal crash tests, the Fusion received the institute's second-best mark of acceptable. Adrian Lund, the institute's president says: "Nearly every car now earns good ratings in our frontal test." He says the Fusion was not competitive with other cars in its class and was the "lowest-rated moderately priced midsize car we've evaluated." The test results also apply to the 2006 Mercury Milan, the Fusion's corporate twin.

The institute released test ratings for eight new or redesigned midsize and luxury cars. The 2006 BMW 3 series and Lexus IS were considered the best overall performers in the group, receiving top ratings in both front and side testing. Test results for the 2006 Pontiac G6 showed the importance of side airbags. A G6 model with optional front and rear curtain airbags and front seat-mounted torso airbags received the second-highest score of acceptable. A G6 version tested without the side airbag package, an option that costs $695, received the lowest mark of poor. Both versions received top scores in frontal tests.

Lund says the performance of the G6 was "dramatically better" than its predecessor, the Pontiac Grand Am. In past testing, a 1999 Grand Am received the lowest mark on frontal tests. The institute said the 2006 Hyundai Sonata showed improvement over previous versions, receiving the top score in frontal tests and the second-highest mark for side-impact tests. Sonata models built from 1995-1998 had received a poor rating in frontal protection and the 1999-2005 models received poor ratings in side crash protection.

Among other newly tested vehicles, the 2006 Acura TSX and Infiniti G35 received the second-highest mark of acceptable in the side tests. Both had received top marks in previous frontal tests. In the institute's frontal-crash test, vehicles strike a barrier on the driver's side at 40 mph. In the side-impact test, vehicles are struck with a barrier moving at 31 mph to reflect the force of a pickup or sport-utility vehicle.

Source: *Associated Press*

The Hidden Dangers Of Reclining Seats

Recently a jury in Jacksonville, Florida awarded $16.9 million to a young college student who was rendered a paraplegic in a motor vehicle accident. The student was a belted passenger in a Ford Windstar who had reclined her seatback. During the trip, the Windstar was involved in a low impact collision. Because the student's seat was reclined, the seatbelt did not hold her in place. As a result, this young college student was rendered a paraplegic in what was clearly a very minor accident.

Another jury in Maryland awarded $59 million to a belted passenger in a Toyota vehicle who was also riding with his seat reclined. The car was involved in a frontal collision. During the collision, the belted passenger flew forward at the time of the impact. It resulted in the amputation of both of the passenger's legs. Both of these cases spotlight a very dangerous practice that automobile manufacturers have known about for decades—riding in a vehicle with your seat reclined can be deadly.

Take a minute and think how many times you have been in a car on a trip and have reclined your seat while wearing your seatbelt to take a nap. This is a very common practice. If a seatback is reclined, the common seatbelt becomes much less effective, if not completely useless, because the shoulder harness of the belt moves away from the body. People do not realize or understand that the more space between the seatbelt and an occupant's chest, the greater risk of death or serious injury in an accident. That's why the National Highway Traffic Safety Administration (NHTSA) and the automobile industry have to take action and prevent injuries and deaths in such situations.

Automobile manufacturers have been well aware of the dangers of reclining seats for nearly four decades. At a 1964 Stapp Car Crash Conference, two safety-equipment engineers presented a report analyzing the effect lap belts have on reclined-seat occupants. The report discussed sled testing in which the seatback was reclined almost fully. When the sled stopped suddenly, the test dummy submarined under the lap belt almost 10 inches, driving the belt into the dummy's abdominal cavity. In 1988, the National Transportation Safety Board (NTSB) conducted a safety study in which one of the issues was the effect of reclining seatbacks. The NTSB examined 167 collisions involving passengers who had worn three-point restraints. The result showed that three-point restraints offered good protection only if worn properly. An occupant who wears a seatbelt while his seat is reclined is not "centered" in the belt, rendering the belt ineffective for spreading crash forces over the body.

The NTSB stated that the protection offered by any type of seatbelt is compromised when the seat is reclined, presenting a "potentially dangerous combination in a moving vehicle." The NTSB noted that, "since vehicles had been marketed with reclining seats, most adults and children were tempted

to combine belt use with a reclined seat." The study concluded that, "at best, lap/shoulder belts, indeed, any type of seatbelt, offered reduced effectiveness when used with a reclined seat. At worst, a lap/shoulder belt in a reclined seat may be a potentially dangerous combination in a moving vehicle—proper fit is impossible." Although some vehicle owner's manuals warn of the dangers of reclined seatbacks in moving vehicles, the warnings do not state specifically what degree of recline is dangerous. Further, the NTSB pointed out that, because the manufacturers advertised their cars by showing a passenger in a reclined seat, while wearing a seatbelt, these advertisements **undermine** the already limited effectiveness of owner's manuals warnings (especially if the warnings are unclear, as in advertising not to recline the seat "any more than as needed for comfort").

The NTSB submitted safety recommendations to NHTSA based on the findings in the study. The report recommended that manufacturers limit the angle of inclination allowable in a reclining seat to no greater than the maximum angle that can safely be used in combination with a seatbelt. The report further requested that NHTSA determined to what degree a seatback could be reclined and still allow an occupant to be properly and safely restrained by a lap/shoulder belt combination. In March 1989, over 15 years ago, the NTSB stated that:

- Warnings and owner's manuals are not effective for preventing passengers from misusing lap/shoulder belts and reclining seats;
- It is not known at what point the lap/shoulder belt becomes dangerous with reclined seats; and
- Testing is required to determine the safe limits of reclined seats.

NHTSA also noted that "it is likely that most people who ride with the seatback reclined are not aware of the associated risks; they are simply using the added comfort the reclining seatback affords." In response to NHTSA's initial position and NTSB's findings, the auto manufacturers claim that the owner's manuals effectively "discourage" the use of reclined seats while a vehicle is in motion, and that "common sense" indicates that an upright seat is safer than a reclined one. Clearly, the industry's response was to blame the motoring public and ignore the problem.

It is shameful that the automobile industry has taken this position. There are ways for the industry to address this dangerous problem. A simple warning that points out the danger of reclining seats can be inexpensively incorporated into a vehicle design, and yet it would convey the needed information to alert the passengers of the danger. A warning label can be the first step towards educating the public. But a warning would be unnecessary if the industry would start designing its restraint system in such a manner to alleviate the problem. For example, GM has incorporated into some of its current vehicles, such as the Trailblazer, a seat design that mounts the seatbelt system within the seat itself. Known as the "all belts to seat," this design allows the shoulder harness to stay in position even when the occupant reclines the seat. Another design incorporates an interlock within a vehicle's gearshift, preventing the driver from putting the car in gear if a seatback is reclined. Interlocks are not yet used in any vehicles. Automakers could also add a device that would warn the vehicle passengers of the hazards of reclined seats. In fact, years ago, a major manufacturer of seatbelts patented a device that would give a visual or audible warning if a passenger were to recline his seat to a dangerous degree.[1]

People are being needlessly injured and killed as a result of the automobile industry's inaction on this subject. The industry knows that the motoring public does not understand or recognize the danger of reclining the seat while the vehicle is in motion. The industry knows that millions of families drive millions of miles on the road every year. The industry knows that the occupants in their vehicles will recline their seats to take naps, and by doing so, face great risk of serious injury or death in an accident. Yet, the automobile manufacturers turn a blind eye to this danger even though there are simple approaches they could take to educate the public and prevent such needless injuries and deaths each year.

Marines To Deploy The Troubled Osprey Aircraft

Our firm handled a lawsuit in 2001 against the manufacturer of the aircraft known as the Osprey. It was my opinion at that time that the Osprey had serious design problems. I haven't seen anything to change my mind. You may recall that the Marine Corps grounded the fleet of the Ospreys in 2000. Now, it appears that the Marine Corps plans to send the troubled Osprey aircraft into combat zones within a year and is activating a squadron of the tilt-rotor planes. The squadron will be based at Marine Corps Air Station New River. The Osprey, which takes off and lands like a helicopter and flies like an airplane, had troubles from the outset. Four Marines died in a 2000 crash in North Carolina that was caused by a ruptured titanium hydraulic line. Nineteen others were killed in a crash that year in Arizona. We represented the family of one of the Marines who was killed in the North Carolina crash. The case was ultimately settled during mediation in Atlanta. We learned a great deal about the Osprey's problems while handling that case.

The Pentagon approved full production of the Osprey in a $19 billion program last year. Currently, there are about 250 people in the squadron and nine aircraft. The Ospreys will replace the aging, Vietnam-era fleet of CH-46E twin-rotor helicopters. The Marine Corps says the newer aircraft can carry more cargo and fly five times farther at speeds around 300 mph. I just hope that the Osprey will be able to carry out its mission in a safe manner. In the past, that hasn't been the case.

Source: *Associated Press*

[1] Emison, Kent J., "Reclining Seats Trade Safety for Comfort," TRIAL, Vol. 39 No. 2 (February 2003).

Pacifica Fuel Tank Punctures Are Being Investigated

The National Highway Traffic Safety Administration (NHTSA) is investigating complaints of fuel tanks being punctured by road debris on some models of Chrysler Pacifica sport utility vehicles. The investigation follows a recall in January of about 209,000 Nissan Murano vehicles from the 2003-2006 model years to install protectors in front of the fuel tank to prevent puncturing from road debris. Following the Murano recall, NHTSA reviewed similar vehicles. According to Chrysler, a division of DaimlerChrysler AG, a review of 217,000 Pacificas from the 2004-2005 model years found 18 consumer complaints about punctures in fuel tanks. The automaker also received field reports involving 120 vehicles with similar problems. DaimlerChrysler says the company is reviewing its data and working with the government on the investigation.

Source: Associated Press

Nissan Altima Recall Under Review

The National Highway Traffic Safety Administration (NHTSA) is reviewing a 2003 recall of some models of the Nissan Altima because of problems with an engine sensor that could lead to stalling or prevent the vehicles from starting. The 2003 recall involved 2002 Altimas and a limited number of 2003 models. NHTSA has recently received 29 complaints of similar problems from owners of 2003 Altimas that weren't initially included in the recall and the agency is now looking into the matter.

Verdict Against DaimlerChrysler In Minivan Lawsuit

A jury has ruled that DaimlerChrysler AG must pay damages to the family of a small child who died when she was run over by her mother's minivan. The child, who had been left alone in the van, inadvertently shifted the vehicle out of park. A federal court jury in Atlanta had awarded a total of $4.5 million in the case, but since the jury determined the mother of the two-year-old child was partially responsible for the accident, the amount of the verdict will be reduced. The trial judge will determine the final judgment against DaimlerChrysler. The automaker says that regardless of the reduction, it will appeal.

The child was playing in her mother's 1991 Dodge Caravan in 2002 when she shifted the vehicle out of "park." As the vehicle was rolling backward, the child fell out of an open door and was run over. It was proved at trial that DaimlerChrysler should have installed a brake shift interlock, which prevents vehicles from being shifted out of park without depressing the brake pedal. DaimlerChrysler was said to have known of almost 200 incidents in which people were injured or died in similar accidents before it installed the device in its minivans in 2001. All other major automakers installed brake shift interlock in their vehicles by 1995. The jury also found that DaimlerChrysler should have warned consumers that children could shift gears in the vehicles.

The manufacturer claimed that even though the minivan was parked, the key had been left in the ignition in the "on" position. If that is true, it would have disengaged the safety device that locks the vehicle's gear shifter into "park." It was also contended by the defendant that the mother failed to use the parking brake even though the minivan was parked on a slope. At the time of the accident the vehicle was being washed and vacuumed. The child, who was inside, apparently struck the automatic transmission lever, allowing the minivan to roll down a 120-foot driveway. When the van struck a small tree, the child fell out, was pinned under the right front tire and died from compression asphyxiation and trauma. While the mother may have been careless, the simple fact is that the hazard easily could have been eliminated by the carmaker.

Source: *Associated Press*

IX. MASS TORTS UPDATE

Our Mass Torts Section

With hard work and some dedicated employees, our firm has established a national reputation as a leader in the area of product liability litigation. In recent years we have also developed one the 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. In order to develop specific expertise in certain areas, we have allowed lawyers and their support staff personnel to focus on certain types of cases within the Section. As I have mentioned previously, Andy Birchfield heads up the Section, which includes the following lawyers: Ted Meadows, Leigh O'Dell, Jerry Taylor, Frank Woodson, Paul Sizemore, Roger Smith, Melissa Prickett, Navan Ward, Chad Cook, and Ben Locklar. These lawyers, with the able assistance of their experienced staff personnel, are currently handling cases involving the following products:

- **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 Kaufmann

- **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 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 that causes muscle cells to breakdown. We are currently taking cases involving rhabdomyolysis or kidney failure.

Primary Lawyer: Melissa Prickett
Primary Contact: Ann Kaufmann

- **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 a subset of devices may experience a gradual degradation, resulting in a higher than normal moisture content within the pacemaker case. We are currently litigating claims involving these types of devices.

  Primary Lawyer: Ted Meadows
  Primary Contact: Amy Brown

- **Hormone Therapy (HT):** For years, women have taken Hormone Therapy (HT) to reduce the symptoms of menopause. Studies now show that HT medications such as Prempro can increase the risk of breast cancer, ovarian cancer, stroke, heart attack, venous blood clots and Non-Hodgkin's lymphoma. We are currently litigating these types of cases against the manufacturers of HT medications.

  Primary Lawyers: Ted Meadows &
  Melissa Prickett

  Primary Contacts: Amy Brown &
  Ann Kaufmann

- **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 litigating claims involving these 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 or committed suicide.

  Primary Lawyer: Frank Woodson
  Primary Contact: Cathy Perry

- **Ortho Evra:** Ortho Evra is a popular contraceptive that is widely used by women in this country. There have been a number of lawsuits filed thus far. The drugmaker failed to warn users about the risks of developing blood clots. We wrote on this drug in the March issue on page 29.

  Primary Lawyer: Chad Cook
  Primary Contact: Tabitha Dean

- **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 these drugs.

  Primary Lawyer: Chad Cook
  Primary Contact: Tabitha Dean

- **Smith & 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 devices, which were implanted between February of 2002 and September 2003.

  Primary Lawyer: Ted Meadows
  Primary Contact: Amy Brown

- **Statins (Lipitor, Pravachol, Lescol, Mevacor & Zorcor):** 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 (SJS):** 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 NSAIDs, non-steroidal anti-inflammatory drugs.

  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 non-steroidal anti-inflammatory drug (NSAIDs). 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. 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, Lisa Bruner, Angela Upton, Audrey White, Stacie Kicklighter, and Lynette Burkey

- **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 for 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, liver failure, and death, all of which have been reported by persons taking this drug.

  Primary Lawyer: Chad Cook
  Primary Contact: Tabitha Dean

The New Jersey Trial

At press time the Vioxx case being tried in New Jersey seems to be going very well for the two plaintiffs. Judge Higbee has kept Merck's witnesses in check, and that has certainly been good to see. The plaintiffs' expert witnesses were correctly allowed to testify on specific causation, and that is a definite plus for the plaintiffs. I believe that the jury will return substantial verdicts for each plaintiff even though the case is being tried in Merck's backyard.

Dr. Graham Will Be Allowed To Testify

Judge Eldon Fallon, who is the federal judge in charge of the Vioxx MDL, has ruled that Dr. David Graham, the government whistle-blower who criticized the Food and Drug Administration's handling of Vioxx, will be allowed to give a deposition. I believe that Dr. Graham will provide evidence that will finally let the whole truth about Vioxx be known. I was not surprised that the FDA tried to stop the deposition. But, Judge Fallon correctly refused to grant the government's motion to quash the subpoena of Dr. Graham. You will recall that Dr. Graham, a top drug reviewer for the FDA, testified at a 2004 congressional hearing that Vioxx had at that time caused as many as 160,000 heart attacks and strokes. He put the known deaths caused by the drug at 40,000. Dr. Graham says that his testimony will "serve the public interest" and that he will counter Merck's "spin" around the Vioxx data.

Dr. Graham has again reiterated his belief that the FDA failed the public in its handling of Vioxx. As a key FDA employee, Dr. Graham literally destroys a substantial part of Merck's defense — that is, its claim that Vioxx was safe because the agency approved it — and that is most significant. In rejecting the government's motion to quash the subpoena, Judge Fallon said that it was "vitally important" that plaintiffs know the truth about Vioxx, including what the FDA knew about the drug and when, whether it had all the facts, and whether it concealed anything from the public. This is a most significant development in the Vioxx litigation and has to be considered a major blow to Merck. We are looking forward to hearing what Dr. Graham had to say.

NEJM Publishes More Criticism Over Vioxx

The New England Journal of Medicine has published more criticism of the Merck VIGOR study on Vioxx. Journal editors suggest that if researchers had disclosed all the heart-related side effects back in 2000, it would have been appar-

ent that a painkiller meant to be gentler on the stomach wasn't worth the risk of serious heart trouble. The Journal says at least two researchers knew about "adverse cardiovascular events" more than four months before the article was published. As you know, Merck removed Vioxx—a $2.7 billion annual seller—from the market in 2004. Two letters to the editor were also published in defense of the Merck scientists. Both say the reporting of the data was handled properly, and that any heart attacks that were noted happened after the study's specified cutoff date. Obviously, the NEJM doesn't agree with Merck's defense.

Latest Study On Celebrex Confirms Cardiovascular Risk

The Medicines and Healthcare Products Regulatory Agency (MHRA) in the United Kingdom is the equivalent of the FDA in the U.S. A new study was reported by MHRA on March 1, 2006, regarding Celebrex. It lists a new study by several authors, including Dr. Brent Caldwell, citing a medical journal. The website summarized, stating the new study is based on data already assessed by regulatory agencies within Europe. The finding of the authors is entirely consistent with the conclusions of the former Committee on Safety of Medicines (CSM) and the European Medicines Agency (EMEA), which reviewed the cardiovascular safety of the selective Cox-2 Inhibitors in 2005. The new study provides evidence that the use of Celebrex is associated with an increased risk of heart attack when compared with the use of placebo or other non-steroidal anti-inflammatory drugs. Following the review in 2005, the European agencies issued updated advice to prescribers as follows:

- Selective Cox-2 inhibitors must not be used in patients with heart disease and/or stroke, patients with moderate-severe heart failure, or patients with peripheral arterial disease;
- Prescribers should exercise precaution when prescribing Cox-2 inhibitors to patient with risk factors for heart disease;
- The lowest effective dose should be used for the shortest necessary period. Periodic re-evaluation is recommended, especially for osteoarthritis patients who may only require intermittent treatment.

The study reveals that people taking Celebrex were at nearly twice the risk for heart attacks as those using rival treatments. As you most likely know, Celebrex, which is manufactured by Pfizer Inc., is the only Cox-2 inhibitor left on the market in the U.S. While Celebrex now has a black box warning—the strongest warning available, that really is inadequate considering the health risks involved.

The research reviewed six studies of 12,780 patients in an attempt to determine whether the increased risk of cardiovascular problems with Vioxx was also present with Celebrex®. It found a 1.88-fold increased risk of heart attack when Celebrex® compared with the other arthritis treatments. These results indicate that Celebrex® is similar in magnitude to Vioxx®'s risk of cardiovascular events. Dr. Richard Beasley, the Institute's director, stated: "These findings are critical" because Celebrex's risk is similar in magnitude to Vioxx's risk. The research was published in the Journal of the Royal Society of Medicine. Dr. Beasley observed further: "Given the popularity of celecoxib (Celebrex®) in the treatment of arthritis ... drug regulatory authorities need to urgently re-examine the assessment of the drug in light of these findings." He indicated further that this study's findings concerning Celebrex® are consistent with a class effect of Cox-2 inhibitors increasing the risk of heart attacks.

Given the fact that Celebrex® is the only Cox-2 drug that remains on the market, the FDA should take steps to reexamine their assessment of this drug based on these findings. Celebrex® will post sales of more than $2 billion in 2006, which is up from $1.7 billion in 2005. Last December, the U.S.-based Cleveland Clinic announced it would lead an international study to determine whether painkillers taken for arthritis, including Celebrex®, Ibuprofen and Naproxen, are safe for those at risk of heart problems. That study is apparently underway. The latest study is available on the agency's website at www.mhra.gov.uk/home.

The FDA Should Know Better

The Food and Drug Administration protects the public health, or at least that is what the regulatory agency is supposed to do. Based on the agency's track record, however, I have to wonder sometimes whether it really understand its mission. When small amounts of benzene, a known cancer-causing chemical, were found in some soft drinks 16 years ago, the FDA never told the public. That's because the beverage industry told the regulatory agency it would handle the problem, and the FDA apparently believed that the problem was solved. But, benzene has turned up again. The FDA has found levels of benzene in soft drinks higher than what it found in 1990, and two to four times higher than what's considered safe for drinking water. How can this be since the problem was supposed to have been handled years ago?

Of the 60 or so varieties of sodas, sports drinks, juice drinks and bottled waters that the FDA has tested so far, benzene levels have ranged from two and three parts per billion to more than 10-20 parts per billion. The Environmental Protection Agency's safety standard for benzene in drinking water is five parts per billion. If it exceeds that, authorities are required to notify the public. The Environmental Working Group, a nonprofit, nonpartisan scientific research group, and health safety watchdog organization, said the FDA should inform the public, particularly because so many soft drinks are marketed to children. Jane Houlihan, vice president for research at EWG, which studies toxic chemicals, observed:

> *Most people would prefer there are no known human carcinogens in what they drink. This is a case where industry agreed to get it out of the products, and all the evidence says they didn't.*

When benzene first turned up, FDA officials met with representatives of the beverage industry who "expressed their concern about the presence of benzene traces in their products and the potential for adverse publicity associated with this problem," according to an internal FDA memo from 1990. The FDA should have done its job and had it done so, the problem—one that the beverage industry said it would handle—would not be with us today. I am afraid that the FDA has not learned to date that the dog is supposed to wag the tail and that it shouldn't work the other way around. Somebody should let the agency know that it is the regulatory body and that it should do its job. We have seen far too much evidence of how the FDA depends on those companies it is supposed to regulate.

Too Many Promised Drug Studies Are Still Pending

The Food and Drug Administration (FDA) says that drug manufacturers have launched barely one-third of the follow-up studies the companies agreed to undertake once their new medications were on the market. Often the drugs received expedited approval from federal regulators on the condition that the studies be carried out. The FDA's annual report notes that, as of September 30th, 65% of the 1,231 "post-marketing" studies that companies had pledged to carry out were still pending. While the 797 pending studies represent a slight reduction from 812 a year earlier, the large number still is unacceptable. Dr. Jerry Avorn, a Harvard Medical School professor and author of "Powerful Medicines," believes that the system is broken. Dr. Avorn criticized the FDA's post-marketing system:

> *This new information is an embarrassing continuation of similar reports issued by FDA each year on the appalling state of the medication safety studies it has 'mandated' drug manufacturers to perform. It is scandalous that of the supposedly active studies, about two-thirds haven't even been started yet.*

The report contains clear evidence of just how poorly the post-marketing commitment requirements are being enforced by the FDA. A full 65% of all commitments are listed as "pending," meaning that they have not even been initiated. This can be possible only if companies are given extremely long times to initiate studies or if studies have never been initiated but are not listed as "delayed." Moreover, 14% of commitments are listed as "submitted," without any indication of whether they have been submitted late. Thus this annual report gives little indication of the true fate of post-marketing commitments. The underlying problem is that the FDA has little ability to enforce these commitments, short of withdrawing approval for the drug—an outcome that may not serve the public health well. Because the great majority of post-marketing studies address safety issues, at least in part, patients and medical doctors are denied critical safety information when these studies are not completed in a timely fashion. The FDA needs the ability to impose civil monetary penalties against companies that fail to complete their commitments in a timely fashion. Simply put, the agency needs to do its job and protect the American people!

An Effort To Ban The Sale Of Darvon

In a petition to the FDA, the consumer group Public Citizen has petitioned the FDA to remove from the market the drug Propoxyphene, sold by Xanodyne Pharmaceuticals under the brand name Darvon. This drug has been linked to 2,110 deaths between 1981 and 1999. This was almost 6% of all drug-related fatalities recorded by the FDA. A large proportion of these deaths occurs because most of the drug is converted into a metabolite that is highly toxic to the heart and lasts longer in the body than the original compound, resulting in cardiac depression. Although the drug has been around for decades, British health authorities announced last year a phased withdrawal, and the U.S. advocacy group called on the FDA to follow suit. The petition argues that the risks outweigh the minimal benefits of the drug, which may also be addictive and has repeatedly been shown in controlled clinical trials to be a relatively weak pain killer. Privately-held Xanodyne also sells this drug as Darvocet, which is a combination of Darvon and Acetaminophen. Public Citizen first petitioned the FDA in the late 1970's with regard to this medication. The petition seeks U.S. withdrawal of Darvon, Darvocet and generic versions immediately, although Public Citizen states it should be done in phases to accommodate patients, many of whom may have developed a dependence to the drug.

Data from the Federal Drug Abuse Warning Network, which provides autopsy information from medical examiners in the United States, have shown that 5.6% of all drug-related deaths were related to Propoxyphene during the past 19 years. In 2004, 23 million prescriptions for Propoxyphene were filled, making it the 12th most commonly prescribed generic drug in the United States. Four companies account for more than 91% of prescriptions in the U.S. Adverse cardiac events associated with Propoxyphene include an interruption of heart transmission of electrical impulses, slowed heartbeats, and a decreased ability of the heart to contract properly. The petition states that "the number of deaths involving Propoxyphene in the U.S. alone is striking." The petition, filed by Public Citizen and two Swedish experts on Propoxyphene, Drs. Ulf and Birgitta Jonasson, can be viewed at www.WorstPills.org.

Propoxyphene has been deemed inappropriate for prescription for the elderly because of central nervous system-related adverse events—such as sedation and confusion—that have been found to increase the likelihood of falls and fall-related fractures in the elderly. Studies have shown that Propoxyphene use is widespread in the institutionalized population, in emergency rooms, and in community-dwelling older people—populations in whom Propoxyphene is most dangerous. As stated above, there is a good reason why Public Citizen is

calling for the drug to be phased out, rather than banned immediately. That's because of the drug's addictive quality. Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, says:

> *The Food the Drug Administration should immediately begin phasing out the use of propoxyphene. Millions of people, many of them elderly, are being put at risk when using this drug when there are safer, more effective alternatives available. We agree with the British government's conclusion that the efficacy of this product 'is poorly established and the risk of toxicity in overdose, both accidental and deliberate, is unacceptable.'*

The FDA should be on top of health issues and specifically those issues that deal with prescription drugs. Public Citizen has a strong track record of identifying dangerous drugs well before federal regulators take action to ban or put warnings on these drugs. For example, Public Citizen warned consumers about the dangers of Vioxx, ephedra, Bextra, Rezulin, Baycol, Propulsid, and many other drugs years before the drugs were pulled from the market. In effect, Public Citizen is doing the government's job.

Source: Public Citizen

Another Latest And Greatest Diet Drug

Diet drugs—for obvious reasons—will always be in great demand in this country. Other promising anti-obesity drugs like Xenical, Meredia and Phentermine (of Phen-Fen fame) have proven to have troublesome side effects, disappointing millions of dieters around the world. On February 18, 2006, the FDA issued Sanofi-Aventis an approvable letter for its weight loss drug Acomplia, marking a preliminary step towards possible final approval of the French drug company's newest drug. The FDA also issued a non-approvable letter for use of the drug, formerly known as Rimonabant, as a stop smoking aid.

The new drug acts by blocking the same pleasure centers in the body activated when marijuana smokers get "the munchies." Presumably people taking the drug eat less. Some of the results of a clinical trial involving Acomplia were discussed in the February 15, 2006 issue of JAMA. Investigators in that clinical trial wrote that 51% of patients assigned as taking the drug dropped out after a year. This high attrition rate led Dr. Xavier Pi-Sunyer, of the Obesity Center of St. Luke's Roosevelt Hospital, and his colleagues to conclude that more study is needed to confirm a long-term benefit for Acomplia. In an editorial that accompanied the publication of the study, Dr. Denise G. Simons-Morton, who along with colleagues of the National Heart, Lung and Blood Institute, wrote that an "overriding concern is the failure to obtain weight measurements on about half of the randomized participants. The psychological effects are a concern."

The clinical trial reported a 2.7-fold higher rate of psychiatric disorders among those receiving the 20 mg dose compared with those receiving placebo (6.2% vs. 2.3%). In the editorial, which the independent researchers noted may give an inflated picture of Acomplia's benefit, the drug helped the average participant who sticks with the drug lose 4.5% of their body weight. Participants were also required to reduce calorie intake from the very beginning. Thus the Acomplia weight loss is no more than the weight loss you see with life style changes, according to Dr. Simons-Morton. So why risk side effects when you can safely get the same effect by working on your diet and engaging in physical activity?

Diet drugs have come and gone, and the latest and greatest seems to be just another way for another giant pharmaceutical company to make money. You lose weight with diet and exercise and life style changes. In my opinion, people need to stop looking for the easy way out and drug companies need to stop looking for the easy and quick dollar that their drugs provide. There is a sensible way to lose weigh and keep it off, and that requires will-power, good eating habits and regular exercise.

Nutraquest Settles Ephedra-Related Suits

Nutraquest Inc. and other companies have agreed to a multimillion-dollar settlement of injury claims related to the use in diet pills of ephedra, an amphetamine like herbal substance, which was banned in 2004. The settlement comes two years after Nutraquest filed for Chapter 11 bankruptcy protection. Documents related to the bankruptcy reorganization plan of the Manasquan, New Jersey-based company, indicate a $34.2 million payment will settle 138 lawsuits filed by supplement users or their survivors. Nutraquest will pay at most $4.35 million of that money. I understand that dozens of other businesses and insurance companies will contribute the rest of the settlement funds.

Source: *National Law Journal*

More On The Welding Rod Cases

Our firm has handled a number of cases involving welding rods and claims that workers contracted serious illnesses. There have been several jury trials involving claims that working with or around welding rods causes severe health problems. These cases are usually decided on questions of medical causation. We will take a look at a few of these cases.

New York Jury Verdicts

A New York jury awarded the estate of Daniel Tucker $3.5 million in a welding rod case. The plaintiff's contention in that case was that the welding rods contained asbestos and caused the worker's death. In a separate case, a worker, Angel Gomes, sued AC&S, inc., Lincoln Electric Co., and Hobart Brothers Co. The allegations in the Gomes case were that the same as in the Tucker case regarding the welding rods. The jury in the Gomes case returned a verdict for $3.19 million. The verdict was reduced by the trial judge by 25% because the plaintiff was a smoker. The issue in both cases was whether the asbestos and welding rods caused

the death and injury. The juries found liability in each case and the defendants appealed the verdicts. The cases were consolidated on appeal and the New York Supreme Court, Appellate Division, affirmed each verdict.

An Illinois Jury Verdict

Larry Elam, who suffered from a central nervous system diagnosis injury diagnosed as Parkinson's Disease, sued Lincoln Electric Co., Hobart Brothers Co., and BOC Group, alleging that the defendant's failure to investigate and warn about the dangers of manganese in welding rods. After hearing the evidence, the Illinois state court jury returned a $1 million verdict for Elam. The defendants, who are welding rod manufacturers, appealed the case to the Appellate Court of Illinois. Elan had worked for Lincoln Electric Co. (which later became American Corp.) starting in 1967. Most of his work career, especially in the latter years, was as a welder. The appellate court held that the evidence supported the claim that the defendants failed to warn Mr. Elam, who retired in 1996, of the dangers. The defendants put warning on the rods packaging—not the rods themselves—and welders did not see the packaging. The court also found that the welder's assistants and other bystanders at work within the plumes of the welding fumes didn't receive any warnings about the manganese in those fumes.

It was significant that the welding industry knew that manganese would cause the disease, but the industry never conducted any epidemiologic studies. Manufacturers control and dominate safety and health activities in the welding industry. The plaintiff in this case presented numerous studies showing that for decades the welding industry knew about the problems and withheld the information from the public and workers in particular. Manganese is a known neurotoxin that penetrates the blood-brain barrier and harms the basal ganglia. The appellate court held specifically:

> *There is significant evidence in the records showing a link between Parkinson's Disease and manganese in welding fumes and there is significant evidence the plaintiff's claim that the defendants breached their duty to investigate the health hazards associated to welding.*

A Significant Welding Rod-Lawsuit Allowed To Go Forward

A federal judge in Cleveland has issued a ruling that will allow victims' welding rods claims to go forward. U.S. District Judge Kathleen O'Malley ruled that the causation issue is for a jury to decide, stating in her opinion:

> *The evidence so far presented is sufficiently reliable to support the assertion that exposure to low-manganese welding fumes can cause, contribute to, or accelerate a movement disorder, including a parkinsonian syndrome that some doctors will diagnose as PD [Parkinson's disease].*

This ruling is significant because it allows a jury to decide the issue of specific causation. I don't know how the ruling will affect cases in other jurisdictions, but it is most encouraging.

Pfizer Asks Court To Vacate Its Preemption Ruling

We have mentioned previously that courts routinely reject efforts by drug companies to get favorable rulings on preemption. Pfizer is now trying to get a federal judge's ruling rejecting Pfizer Inc.'s preemption argument in a case vacated. If that effort fails, the company wants the court's order certified for appeal before the U.S. Court of Appeals for the Third Circuit. Pfizer contends that the Food and Drug Administration's recently-filed Final Rule should control the issue. As you know, it says that state law failure-to-warn claims conflict with the agency's regulations. I believe the courts will have to follow well-established law and will reject Pfizer's request in this case. For your information, the New Jersey case is McNellis v. Pfizer Inc.

Celexa Use During Pregnancy Caused Is Said To Cause A Child's Death

In what is believed to be the first lawsuit of its kind, an Oklahoma woman has sued the manufacturer of Celexa, claiming that her use of the antidepressant drug during her pregnancy caused her child to die nine months and four days after birth. The case is filed in a federal court in New York. This case will be watched with interest.

FDA Panel Recommends That Tysabri Be Put Back On Market

A federal advisory panel has unanimously recommended that the multiple sclerosis drug Tysabri, which was withdrawn about a year ago for causing a deadly brain disease, be returned to the market. In making its decision, the scientists and doctors advising the Food and Drug Administration (FDA) said, in effect, that patients and their doctors should have the right to decide whether the considerable benefits the drug offers outweigh risks that can perhaps be reduced but not totally avoided. If the FDA goes along with the recommendation, as it is expected to do, the approval would be only the second instance of a drug being returned to the market after having been withdrawn for safety reasons. Three people who took Tysabri in clinical trials, or about one in 1,000, developed progressive multifocal leukoencephalopathy (P.M.L.), which is

a rare brain disease caused by a virus. Two of the three patients died and the other was severely disabled. The issue confronting the advisory panel was that there is no good way to predict who would get the brain disease, which has no proven treatment.

About 400,000 Americans have multiple sclerosis, which can cause paralysis, blurred vision, and other problems. Experts say tens of thousands of them are not helped by the existing drugs. Apparently, Tysabri did better in preventing relapses when compared to placebos than the older drugs did when they were compared to placebos in separate clinical trials. That suggests Tysabri is better, although proof of that would require testing it directly against the other drugs in order to get a better reading.

The committee voted 7 to 5 that the drug could be used as an initial therapy, rather than only after one or more other drugs had been tried without success. All patients getting the drug will be entered in a registry. The patients and their doctors will have to sign forms acknowledging the risk. Biogen had proposed making the registry voluntary, which obviously should not be allowed. I understand that drugs under the registry will be distributed directly to authorized infusion centers. Before each monthly infusion a nurse will go through a checklist with patients to make sure they have no new symptoms that could indicate P.M.L. This appears to be a drug that when prescribed with a proper and adequate warning, should be available for use.

Source: *New York Times*

X. BUSINESS LITIGATION

Morgan Stanley Settles Overtime Suit For $42.5 Million

Securities firm Morgan Stanley has agreed to pay $42.5 million to settle a lawsuit by California brokers who demanded overtime pay. The suit, filed on behalf of some 5,000 current and former brokers and trainees in California, alleged that Morgan Stanley failed to pay them overtime. The suit, filed in federal court in San Diego, also alleged that the firm deducted money from paychecks to cover administrative expenses. New York-based Morgan Stanley, which currently has about 9,500 brokers, maintained that brokers should not be paid on an hourly basis. The settlement follows similar overtime suit victories by stockbrokers for UBS and Merrill Lynch.

Source: *Reuters News Service*

AOL Sues Groups Under Anti-phishing Law

America Online has filed suit under a first-of-its-kind anti-phishing law in Virginia against three international groups that allegedly stole information from unsuspecting AOL users by sending e-mail that appeared to be legitimate messages from the company. The three lawsuits, filed by AOL, a unit of Time Warner Inc., in federal court in Alexandria, Virginia, seek $18 million for the theft. The suits allege that the 30 phishers, who were not identified by name, violated the 2005 Virginia anti-phishing act, which covers AOL because it is based in Dulles, Virginia. The suits also cite federal computer fraud law and the Lanham Act, which protects trademarks.

The "phishers" named in the suits are accused of sending tens of thousands of e-mails and setting up websites that purportedly were from AOL customer service. According to an AOL spokesman, it is unclear how many members were victimized. The victims gave up screen names, passwords, and financial information to the phishers, who are believed to be part of a multinational network spanning the United States, Germany, and Romania. These lawsuits follow similar efforts by AOL and other Internet service providers to go after e-mail spam artists and online scammers. Last March, for example, Microsoft Corp. filed 117 federal lawsuits against alleged phishers. To date AOL has won at least 35 such cases for tens of millions of dollars. But, I am not sure how much it has actually collected.

Source: *Associated Press*

Nortel Settles Shareholders' Lawsuits

The proposed settlement by Nortel Networks Corp., mentioned last month, is now a done deal. Nortel will pay $2.5 billion in cash and stock to settle two shareholders' class action lawsuits over an accounting scandal in 2004. The proposed settlement would include $575 million in cash and payment of shares representing a 14.5% stake in the global company. The Canadian-based company is known for its telecom gear and Internet systems.

Mediation resulted in a settlement with lead plaintiffs in two significant class action lawsuits pending in the Southern District of New York. An accounting scandal in 2004 resulted in the firing of major executives (including CEO Frank Dunn), several lawsuits, and regulatory investigations. Nortel's previous earnings reports had to be revised and several executives, including Dunn, are now being sued. Shareholders filed numerous lawsuits against Nortel for allegedly violating U.S. and Canadian securities laws after it issued revised financial expectations for the 2001 fiscal year. To its credit, Nortel has been working hard to recover from the scandal. The settlement hinges on several other terms, including that Nortel resolve other shareholder litigation involving its past financial guidance and restatement in 2003. In addition, the proposed settlement must get court, regulatory, and stock exchange approvals to become final. That is expected to happen.

Source: *Associated Press*

Settlement Reached In BlackBerry Case

The case involving the patent over the BlackBerry portable e-mail device has been settled after a lengthy court battle. Research In Motion, which is the maker of the device, will pay $612.5 million to continue its wireless business without any further threat of litigation from patent holder NTP Inc. The settlement was reached on March 3rd in the case, which was filed against Research in Motion Ltd. by NTP Inc. in federal court in Virginia.

Florida Attorney General Sues Marsh & McLennan

Florida Attorney General Charlie Crist has filed a civil lawsuit against Marsh & McLennan Companies Inc., alleging that the company illegally manipulated insurance markets to obtain improper commissions and engaged in bid-rigging. In a joint action, the Attorney General's Office and the Department of Financial Services (DFS) charged the corporation and three of its affiliated and subsidiary companies with numerous violations of Florida's Racketeer Influenced and Corrupt Organization Act and antitrust statutes. According to reports, a joint investigation by the Attorney General's Antitrust Division and DFS led to allegations that Marsh and its affiliates manipulated insurance markets to improperly steer business to insurers that paid Marsh the highest commissions, rather than to insurers that would offer the best prices for Marsh's clients. The complaint also alleges that Marsh engaged in bid-rigging, with active participation from numerous insurers. Does all of this sound familiar?

Marsh and its affiliates (Marsh USA Inc., Marsh Inc., and Marsh Placement Inc.) brokered approximately 15,000 insurance contracts in Florida from 1998 through 2004. Marsh's clients included more than 50 public entities in the State of Florida as well as some small businesses and individuals, although the majority of the clients were large corporations. The General's Office issued subpoenas in November 2004 to Marsh and several other insurance brokers and insurers. Investigations into the other companies are ongoing. It appears that after contracting to provide services for only a fixed fee, Marsh received hidden commissions from insurers amounting to more than $320,000. A spokesperson for Marsh contends that Florida had already settled this claim and says the case should be thrown out.

Supreme Court Requires Proof Of Market Power

The U.S. Supreme Court has ruled that a patent does not automatically confer market power upon a patentee. The High Court said that, in the context of a tying arrangement, proof of market power must be proven and not presumed. The decision was handed down last month in a case styled Illinois Tool Works v. Independent Ink Inc.

Supreme Court Throws Out Gas Prices Suit

The U.S. Supreme Court has thrown out a lawsuit that accused two oil companies of inflating gas prices by at least $1 billion. The justices unanimously said gas distributors did not prove that ChevronTexaco Corp. and Shell Oil Co. violated antitrust laws in the joint venture, which ended four years ago. Justice Clarence Thomas, writing for the court, said the companies had a legal partnership. He stated in the opinion: "The pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is per se unlawful (under federal law)."

At the time of the deal in 1998, ChevronTexaco was still Texaco. The company joined with Shell to form enterprises to handle refining and marketing of their gasoline. Gas distributors filed a class action lawsuit in California, alleging that Texaco and Shell had used the partnership to fix gas prices in violation of antitrust provisions of the Sherman Act. A ruling in favor of the gas distributors would have had broad implications for business mergers beyond the oil industry.

As we all know, gas price-fixing has been a sensitive subject over the past year for Americans who experienced surging prices that exceeded $3 a gallon in many parts of the country. A trial court judge had dismissed the lawsuit against the oil companies. But the U.S. Court of Appeals for the Ninth Circuit ruled there was evidence that the ventures had improperly restrained trade and reinstated the case. However, the High Court has now reversed that decision, and the result is a win for the oil industry.

Source: *Associated Press*

Glaxo Sues FDA To Block Sale Of Generic Flonase

GlaxoSmithKline Plc, has sued the U.S. Food and Drug Administration (FDA) to block the sale of a generic form of the company's Flonase allergy drug, saying the copy may not work the same as the branded drug. The lawsuit, filed in U.S. District Court in Baltimore, alleges that the FDA failed to establish that the generic copy of Flonase worked the same way as the original nasal spray. On February 22nd, the FDA had approved Boehringer Ingelheim GmbH's application to sell the generic version. Boehringer already is shipping the drug and apparently, from news reports, plans to continue sales in the U.S. Glaxo, Europe's largest drug maker, filed petitions to block Boehringer's application for the copy of Flonase twice during the more than three-year approval process. Glaxo says in the suit that the FDA doesn't have a way to determine whether the generic is absorbed in the body the same way as Flonase. Most generic drugs are approved on that basis, known as bioequivalence.

The lawsuit alleges that the amount of nasal spray that has been absorbed is difficult to measure because the drug isn't intended to enter the bloodstream, which is how absorption typically is measured. It is alleged that Flonase is different from many other nasal sprays because its active ingredient is held in a suspension, which is a solid dispersed throughout a liquid. As you probably know, most sprays are solutions. The FDA hasn't come up with guidelines for determining whether two nasal sprays are equivalent, according to Glaxo. The company also says it believes the generic didn't have to meet the same quality standards as Flonase. It says further that regulators have ordered Glaxo to make changes to Flonase since it was approved in 1994, and that the generic makers haven't had to make the same changes. Roxane Laboratories, the Columbus, Ohio-based subsidiary of Germany's Boehringer Ingelheim, is selling the generic Flonase in the U.S.

Source: *Bloomberg News*

Class Action Status Granted In Suit Filed Against Bridge Terminal Transport

A lawsuit filed in New Jersey by the Owner-Operator Independent Drivers Association (OOIDA) against Charlotte, North Carolina-based Bridge Terminal Transport (BTT), one of the largest transportation companies in the world, has recently been given class action status by a federal judge. OOIDA filed the lawsuit, along with seven of its owner-operator members, against BTT, alleging that BTT violated federal truth-in-leasing regulations by failing to disclose or properly document compensation provisions in its lease agreements. BTT also allegedly charged truckers for fuel and fuel-related transaction fees and illegally charged truckers for insurance-related administration fees. The federal judge who has the case ruled that OOIDA met all of the conditions for the case to receive class action status.

BTT, owned by the A.P. Moller-Maersk Group of Denmark, is one of the largest marine drayage companies in the world, with 37 terminals and 30 container yards. The company started up in 1982 with the opening of a terminal in Port Newark, New Jersey. BTT operates with owner-operators rather than employee drivers by contracting with independent owners of trucks who either drive their own trucks or employ drivers for the contracted trucks. BTT, which currently has a fleet of over 2,400 contracted owner-operators, ranks 73rd in an industry listing of trucking companies based on annual revenues.

OOIDA, along with the seven owner-operator members serving as co-plaintiffs, could lead a class that could potentially include as many as 6,000 current and former drivers who have had lease agreements with BTT since 2000. OOIDA has also recently brought truth-in-leasing actions against C.R. England and Landstar, which have also received class action status.

Nine States Settle Bid-Rigging Case With Zurich

Nine states have settled their claims against Zurich American Insurance Co. The parties reached a $171 million settlement relating to bid-rigging and price-fixing in the commercial insurance market. Policyholders in the nine states will receive more than $150 million in refunds. Zurich will pay an additional $20 million in investigative costs to the nine states. The states involved are Texas, California, Florida, Hawaii, Maryland, Massachusetts, Oregon, Pennsylvania, and West Virginia. The final terms of the settlement are subject to court approval and will be enforced through a judgment in state court in Texas. The case is one of several that emerged from initial investigations by New York officials into practices at Marsh & McLennan, the giant insurance broker. Zurich is presently engaged in discussions with other state authorities.

The states' probes revealed that Zurich failed to disclose it paid "contingent commissions" to insurance brokers and conspired with brokers at the center of the conspiracy in a "pay-to-play" scheme to overcharge commercial policyholders for their insurance policies. Zurich participated in a scheme said to have been devised by broker Marsh to give commercial policyholders the illusion of a legitimate competitive bidding process on policies. In fact, Marsh had secretly pre-designated certain insurers to win bids, but the results for the policyholders were actually inflated rates, not best bids. Zurich submitted fake quotes and was rewarded with protection from competition so it could set artificially high premiums and profit on other lucrative accounts. The brokers also engaged in anti-competitive conduct by steering contracts away from insurance companies that refused to participate in the scheme. The victims of the bid-rigging scheme were large and small companies, nonprofit organizations, and government offices that purchased commercial lines of insurance from Zurich. In addition to making restitution, Zurich has agreed to disclose contingent commission payments in the future and reform the company's business practices. Zurich will implement a pre-binding disclosure mechanism whereby brokers and agents inform customers of any compensation arrangements, along the lines of an NAIC task force-approved model.

The settlement with the nine states is meant to work in conjunction with a proposed settlement between Zurich and plaintiffs in a nationwide class action against commercial insurers and brokers now pending in U.S. District Court of the District of New Jersey. In October, 2005, Zurich and lead plaintiffs in that suit entered into a memorandum of understanding under which Zurich would pay $100 million into a settlement fund, as well as pay lawyers' fees. This latest nine-state agreement increases the size of that settlement fund to $151.7 million. In addition, Zurich will pay $20 million to the state attorneys general for costs incurred.

Source: *Associated Press*

XI. INSURANCE AND FINANCE UPDATE

Significant Mississippi Lawsuit Sent Back To State Court

The lawsuit filed by Mississippi Attorney General Jim Hood to force insurance companies to honor their policies and pay for damage caused by storm surge has been remanded back to the Chancery Court of Hinds County, Mississippi. Because the state is seeking injunctive relief, the case will now be expedited, according to the Attorney General's Office. Attorney General Hood observed:

> *As I stated when the insurance companies moved this to federal court, their attempt was nothing but a delay tactic. The insurance industry is using delay tactics in hopes that many Mississippians will give up on their claims and take whatever the insurance companies offer. I hope people will hold on just a little bit longer and let us get a decision on this case. The insurance companies have already caused a six-month delay by*

taking this to federal court under a false premise. I think it is shameful that the insurance industry would drag this out while people are living in limbo. I just want to know how much money they've saved themselves holding on to these people's money?

Attorney General Hood filed a civil action in the Chancery Court of Hinds County, Mississippi, First Judicial District, on September 15th against the insurance industry to protect Mississippi's property owners who incurred damage from Hurricane Katrina. The Attorney General, by way of his lawsuit, simply wants the insurance industry to honor their contracts to pay for losses caused by Katrina. Specifically, he wants wind damage to property to be paid by the companies. It is good to see a public official standing up for citizens against powerful interests. I hope the Attorney General will be successful in this effort.

Oil Company Sues Marsh

We have written a great deal about all of the litigation involving Marsh & McLennan Cos. Inc. Sinclair Oil Corporation has become the latest client to sue the brokerage and its subsidiary, Marsh Inc., over their use of contingent commission to steer business and fix prices. The case, which was filed in a Utah federal court, is styled Sinclair Oil Corporation v. Marsh & McLennan Companies, Inc., and Marsh, Inc.

Insurers For Lead Paint Makers Move To Limit Costs In Rhode Island Cleanup

We wrote on the lawsuits against former lead paint manufacturers in other sections of this issue. Now we learn that liability insurance companies are seeking to drop or limit insurance policies held by the paint companies. A lawsuit filed by underwriters at Lloyd's of London in New York State Supreme Court in February—after the Rhode Island jury verdict—appears to be an effort to head off an attempt by the companies to collect from their insurance policies to fund the cleanup. Lloyd's officials say in the lawsuit that evidence from the Rhode Island trial demonstrates the former lead paint makers didn't disclose the dangers of lead paint when they purchased their policies.

Arkansas Insurance Agent Wins His Case

A circuit court jury in Pulaski County, Arkansas, awarded a Little Rock insurance agent more than $2.55 million dollars last month in unpaid salary and commissions in a case involving Aon Risk Services of Arkansas Inc. and Aon Risk Services of Illinois Inc., subsidiaries of Aon Corporation of America Inc. The agent, John M. Meadors, filed suit against the companies in 2002 alleging that he had been underpaid or shorted when he brought in major accounts to the Arkansas and Illinois Aon companies. The largest account concerned employee benefits packages for more than 20,000 employees of Dillard Stores. The agent brokered the entire five-year Dillard's contract through Aon's Combined Insurance subsidiary.

The bulk of the award, $2.5 million, was against Aon Risk Services of Arkansas relating to unpaid salary and transactions brokered by the agent for Dillard's, J.B. Hunt and Pace Industries. The jury also awarded a separate verdict in the agent's favor against Aon Risk Services of Illinois for $44,500. The agent had been in the insurance business in Little Rock since 1964, starting his career with Fireman's Fund. He has been co-owner of a local insurance brokerage business, which was sold in 1984 to E.H. Crump and Company of Memphis, a regional insurance brokerage company. The agent is now vice president of Rebsamen Insurance, based in Little Rock.

Source: *Insurance Journal*

More On The World Trade Center Insurance Coverage Matter

Insurance companies have asked a federal appeals court in New York to reject a jury verdict that would enable developer Larry Silverstein to obtain an extra $1.1 billion to rebuild the World Trade Center complex. Meanwhile, Silverstein's lawyers have asked the U.S. Court of Appeals for the Second Circuit to order a new trial so he can attempt to recover more money from the largest insurers of the Trade Center, which as we all know was destroyed by terrorists on September 11, 2001. The appeals court panel is being asked to take a new look at the outcomes of two separate trials arising from disagreements over nearly two dozen insurance policies.

Before September 11, 2001, Silverstein had purchased insurance policies with $3.5 billion in insurance benefits. He is now trying to recover double that amount, claiming that the Trade Center's twin towers were victimized by two hijacked airplanes, which amounted to two separate attacks. In a trial that ended in April 2004, a federal jury found the majority of the insurers, holding more than $1.8 billion of the policy, were bound by a form that defined the destruction of the twin towers as one event. In a second trial, which ended in December 2004, however, another jury concluded that nine insurance companies were bound by insurance form language that defined the destruction as two events. That verdict meant Silverstein will get another $1.1 billion to rebuild. Now his lawyers are asking the appeals court to find that there were two separate events, thus allowing him to double his recovery.

Source: *Insurance Journal*

XII. PREDATORY LENDING

Predatory Lending Study Concludes That State Laws Help Consumers

States with laws against predatory lending have seen decreases in the high-interest loans targeted at consumers with poor or nonexistent credit ratings, according to a study by a nonprofit research group. Researchers for the Center for Responsible Lending said the laws did not limit the availability of credit despite threats by lenders that

they would pull out of the market if the laws passed. Predatory lending reforms are weeding out loans with abusive terms, according to the North Carolina-based group. State laws accomplished this without cutting off credit to families who borrow in the subprime market.

The North Carolina center examined more than 6 million high-interest loans in 28 states from 1998 through 2004. It concluded that the states with the strongest laws—Massachusetts, New Jersey, New Mexico, New York, North Carolina, and West Virginia—showed the largest declines in loans with predatory terms, which can include excessive fees and prepayment penalties, unnecessary insurance, and kickbacks to brokers. Predatory loans in many of the 28 states with reform laws dropped by almost a third in the six-year period, the study concluded. In Massachusetts, that meant almost 600 fewer abusive loans a month, the group said. Iowa has also cracked down on predatory lending. It enacted a law in 2003 that eliminated prepayment penalties in high-interest loans. Tom Miller, Iowa's Attorney General, says:

> *The study indicates that reform took place, that credit remained available and even the interest rates declined at least marginally. Iowans are so much better off because of that reform.*

The study found that the new laws—many of them enacted in the last five years—didn't decrease the number of loans available. The results refute industry claims that legislation chokes off loans to people with bad or no credit. The Center has pushed for defeat of a bill in Congress that would pre-empt local and state laws on predatory lending, saying it would override state laws and weaken protection for consumers. Consumers would be harmed if federal law pre-empted state regulation. The Center, consumer groups, and civil rights organizations support a bill proposed by Representative Barney Frank, (D-MA), because it would strengthen federal law and allow states to go further if they think it's necessary.

Source: *Associated Press*

North Carolina Attorney General Works For Consumers

Attorney General Roy Cooper of North Carolina has done excellent work on behalf of consumers. He recently announced that the last three major out-of state payday lenders agreed to stop making illegal loans in North Carolina. Attorney General Cooper successfully argued in front of the state Commissioner of Banks that Advance America violated North Carolina usury laws by providing loans at interest rates in excess of 400%. Commissioner Joseph Smith, State Commissioner of Banks, ruled that since 2001, Advance America operated illegally in North Carolina by establishing a partnership with an out-of-state bank to undermine state laws. Advance America is the largest payday lender in the United States, operating more than 2,600 lending stores across 37 states with sales exceeding $570 million.

As a result of Attorney General Cooper's tough stance, working families in the state will save almost $100 Million a year. As we have written before, payday lenders make small loans and charge interest rates as high as 500%, trapping families in a cycle of debt from which many never recover. This milestone in North Carolina should be an example for other states where payday lenders still do business. Stopping this industry in North Carolina did not happen overnight. It was a tough battle that took five long years.

There were numerous groups that joined in the fight to stop this horrendous practice. The North Carolina Council of Churches, the AARP, the NAACP, the North Carolina Justice Center, the Community Re-investment Association, the North Carolina Fair Housing Center, organizations representing military families, and many others helped to stop this terrible practice. To begin this five year fight, the North Carolina legislature had to admit that the payday lending was bad—that borrowers were trapped in a cycle of debt and that this should have been prohibited by North Carolina law. Legislators resisted incredible lobbying pressure to enact tough laws to stop these loans.

Some out-of-state payday lenders thumbed their noses at North Carolina's new prohibition against payday lending. Strong persistent state officials—specifically the Commissioner of Banks and the Attorney General—sought to enforce the will of the state legislature and the rights of North Carolina citizens. Federal banking regulators also joined in by ending sham partnerships between out-of-state banks and out-of-state payday lenders seeking to evade North Carolina's law. Some reputable lenders, such as the State Employees Credit Union, emerged as strong leaders to offer alternative products that actually met the need for emergency credit without gouging the consumers. All are to be commended for their great work.

Unfortunately, in Alabama the predatory lending industry is alive and thriving. It seems like every strip mall in Alabama has a predatory lender in it. I hope the Alabama Legislature will pay attention to this growing trend in this state that allows these and other predatory lenders to thrive. We all know that Alabama has the weakest consumer protection laws in the entire country. It is time our legislature did something to protect our consumers in this regard. I believe that a good starting point is to end payday lending as we know it. I am very glad that the leadership in North Carolina stood up against these powerful forces. Hopefully, other states will follow suit.

XIII. PREMISES LIABILITY UPDATE

Jury Finds For Woman Hurt On Amusement Park Ride

An Ohio jury has awarded $3.6 million to a forty-four year old Wisconsin woman who was hurt while riding a roller coaster at a northeast Ohio amusement park. Terry Wang suffered a fractured skull and broken nose in July 2000 when she was hit while riding the Villain roller coaster at the former Six Flags Worlds of Adventure in Aurora. Ms.

Wang's arms were raised and her eyes closed when she was hit by an item as the coaster went down a hill at 60 mph. Doctors removed a piece of her skull to relieve pressure on the brain and removed bits of bone from the brain. Ms. Wang still has headaches and numbness in her face and needs reconstructive surgery on her forehead. The jury awarded $1.1 million for her medical and other expenses and the remaining $2.5 million as punitive damages.

Source: Associated Press

Settlement Reached In 2001 Chicago Fire Deaths

Family members of a woman killed with her 1-year-old son in a 2001 fire have settled their lawsuit against the Chicago Housing Authority and one of its contractors. The fire inside the Harold Ickes Homes, an apartment complex located on the South Side of Chicago, started after two children began playing with matches. The mother and child were sleeping inside one of the apartments. Both died from carbon monoxide poisoning. Five other children were injured in the fire. The fifth-floor unit had no smoke detector, and that was a big problem for the defendants. During a pretrial deposition an inspector with a CHA contractor managing the property admitted to falsifying a report filled out before the fire showing that there was a smoke detector. Clearly, there should have been a detector in the apartment. Had there been one that was in working order, chances are the victims would have survived the fire. The case was settled for $5.75 million.

Source: *The Chicago Tribune*

Electrocution Lawsuit Filed Against Baltimore Gas And Electric Co.

The family of a Baltimore woman who was electrocuted when a power line fell onto a parked recreational vehicle filed suit Wednesday against Baltimore Gas and Electric Co. (BGE). A buzzing sound inside the vehicle awoke Gloria Wilson and Gary L. Dart in the early morning hours of February 12th—the day of Baltimore's biggest snowstorm this season. Ms. Wilson was electrocuted when she touched a metal handle as she tried to get out of the vehicle. Mr. Dart was not seriously injured. The vehicle, which was Dart's home, was legally parked outside the location of his employer in Southeast Baltimore and was ruined in a fire ignited by the downed line.

BGE is a subsidiary of Constellation Energy Group. The victim's two adult children are suing in Baltimore Circuit Court and allege that BGE "negligently serviced, maintained, inspected, monitored and improperly secured the high-voltage power line." Some of the utility poles at the site were at 45-degree angles and the lines were "in disrepair." Mr. Dart said he saw the orange glow of the electrical current as Wilson opened the door. He watched helplessly as the force of the electrocution propelled her 10 feet across the street. A Baltimore Fire Department spokesman confirms that Ms. Wilson had been electrocuted by a downed power line.

Source: *The Baltimore Sun*

XIV. WORKPLACE HAZARDS

OSHA's New Standard On Hexavalent Chromium Is Inadequate

The Occupational Safety and Health Administration's new standard to reduce worker exposure to hexavalent chromium is seriously inadequate and will fail to protect the safety of hundreds of thousands of workers who are exposed to the metal in the workplace. OSHA has published a final standard in the Federal Register, which is designed to reduce worker exposure to the carcinogenic metal used in chrome plating, stainless steel welding and the production of chromate pigments and dyes. The new standard will lower the permissible exposure limit for hexavalent chromium from 52 to 5 micrograms of chromium per cubic meter of air, which is still an unsafe level for workers exposed to the carcinogen. Public Citizen and other consumer and safety groups have been fighting hard for a better standard. In fact, Public Citizen has been campaigning for a decade for a permissible exposure limit of .25 micrograms per cubic meter.

The agency itself estimates 10 to 45 lung cancer deaths per 1,000 workers over a lifetime at the 5 micrograms per cubic meter level, compared to the .53-2.3 deaths per 1,000 workers over a lifetime at the Public Citizen-requested standard of .25 micrograms per cubic meter. Even the now-abandoned 1 microgram level proposed by OSHA in October 2004 would have led to 2.1-9.1 lung cancer deaths per 1,000 workers over a lifetime. Thus, hundreds of extra lung cancer deaths will occur if the weak OSHA-proposed standard is allowed to stand.

It is interesting to note that the great majority of chromium-exposed workers work at sites that are already in compliance with the new proposed standard. OSHA has denied additional protections to these workers, apparently because it may be more difficult for a small minority of employers to meet a lower standard. This lowest common denominator approach to rulemaking—in which all chromium-using sectors need only meet the standard that can be met by the sector having the greatest difficulty complying with a stronger standard—leaves OSHA highly vulnerable to a court challenge. This is because the agency has failed to set a limit that eliminates significant health risks to the maximum extent technologically and economically feasible in each affected industry, as required by law.

The only reason this final rule was issued in the first place was because Public Citizen sued OSHA and forced the agency to act. The resultant rule is so weak that the lives of chromium-exposed workers will remain endangered. This is why Public Citizen is taking the agency back to court on this important issue. OSHA has issued no chemical health standard since 1997, and that's impossible to justify. It is significant that Public Citizen and the

Project on Scientific Knowledge and Public Policy revealed that that the chromium industry had hidden from OSHA crucial study data that support a stricter standard for workplace exposure. As you may know, Public Citizen provided these data to the agency last year.

Let's take a look at what has brought us to the present state. In 1993, Public Citizen petitioned OSHA to set a new standard. It took nine years and two lawsuits for OSHA to take initial action and it took a federal court order to get the agency to finally act. Scientists working for the chromium industry actually withheld data about the metal's health risks while the industry campaigned to block strict new limits on the cancer-causing chemical. This was confirmed in a scientific journal report published in February. The allegations, by researchers at George Washington University and the Public Citizen Health Research Group, are based on secret industry documents. Ironically, the OSHA announced its new standard for workplace exposure to hexavalent chromium—a known carcinogen—handled by 380,000 U.S. workers in the steel, aerospace, electroplating and other industries a few days after a report was published in the peer-reviewed online journal Environmental Health.

Documents in the report show that the industry conducted a pivotal study that found a fivefold increase in lung cancer deaths from moderate exposures to chromium, but never published the results or gave them to OSHA. Company-sponsored scientists later reworked the data in a way that made the risk disappear. The OSHA standard will allow five times more exposure than it had initially proposed—a shift that would be a victory for the industry, saving it billions of dollars in upgrades and plant closures. David Michaels, director of the Project on "Scientific Knowledge and Public Policy" at George Washington University's School of Public Health, who was a senior author of the report, compared the industry's behavior to that of tobacco and pharmaceutical companies that were found to have withheld damning evidence of risks associated with their products. Dr. Michaels says "participants in proceedings before OSHA and other regulatory agencies should be required to provide all relevant data." Scientists have known for decades that inhaled particles of hexavalent chromium, or "chromium VI"—made notorious in the movie "Erin Brockovich"—can cause lung cancer. But exposure limits for workers have not changed since 1943, when the metal dust was considered a mere skin irritant.

The decades-old "permissible exposure level" is 52 micrograms per cubic meter of air. On the basis of the few large studies done in recent years, advocates sought a new level of 0.25 micrograms. In 2004, OSHA released a proposed limit of 1 microgram. According to OSHA, the 1 microgram limit would result in two to nine excess deaths in every 1,000 exposed workers over a 45-year lifetime of work. That is more than the one-death-per-1,000 standard the agency aims for. OSHA's view is that is reasonable because of the high costs and technological challenges involved. OSHA calculated that a less stringent limit of 5 micrograms per cubic meter would result in 10 to 45 excess deaths per 1,000 workers. When OSHA released its proposal, it asked industry to provide any new data that might bring more precision to its calculations. It especially asked for data relating to the relatively low exposures common in modern factories, so the agency would not have to extrapolate from the very high exposure levels in earlier studies. While no data were delivered by the industry, they certainly did exist. They were in the hands of the Industrial Health Foundation, a nonprofit organization that for years served as the legal agent for the Chromium Coalition, a group of representatives of about a dozen companies.

David Michaels, who is mentioned above, and Peter Lurie of Public Citizen, learned of the existence of this information last spring after the Foundation filed for bankruptcy. The Chromium Coalition made a legal claim to three boxes of its records. Fortunately, Michaels and Lurie managed to get copies of some of them. Among what they obtained are the 1996 minutes of Chromium Coalition meetings describing a decision to hire scientists to create and analyze data that would "challenge" OSHA's effort to impose low exposure limits. One of the documents contained this information:

> *Although this route is expensive and success is not guaranteed, the longer we wait the more difficult the task becomes.*

The 153-page report, summarizing an industry-sponsored study of workers in chromium plants in the United States and Germany, was most revealing. The study was the most thorough ever to include workers exposed to low levels—just what OSHA had asked for. You will likely be shocked to learn that the results of this study had never been released. The report concluded that exposures ranging from 1.2 to 5.8 micrograms resulted in a fivefold increase in deaths from lung cancer. The contract scientists who led the study had gone on to divide the data into two sets and changed the way they grouped the workers. As a result, one study—published in 2004—found no increased risk, and the other—soon to be published—found an increased risk only in those with very high exposures. Those manuscripts were submitted to OSHA. I hope Public Citizen's lawsuit will result in OHSA being required to make the latest rule much stronger. This is an important public health issue, and OSHA must be made to act.

Sources: Public Citizen, The Environmental Working Group and *Washington Post*

U.S. Is Reducing Safety Penalties For Mine Flaws

I don't guess it should come as a surprise, but the Bush Administration has decreased major fines for safety violations at coal mines since 2001. In nearly half the cases the government hasn't collected the fines, according to a data analysis by The New York Times. Federal records also show that in the last two years the federal mine safety agency has failed to hand over any delinquent cases

to the Treasury Department for further collection efforts. This is supposed to occur after 180 days. With the deaths of 24 miners in accidents so far in 2006, the enforcement record of the Mine Safety and Health Administration has come under sharp scrutiny. Safety has suffered as a result of the Bush Administration policies in this area. But, this is entirely consistent with the Administration's position on safety issues as a general rule.

According to the *New York Times*, federal records indicate that few major fines are issued at the maximum level. In 2004, the number of major fines issued at maximum level was one in 10, down from one in 5 in 2003. Since 2001, the median for penalties that exceed $10,000, described as "major fines," has dropped 13%, to $21,800 from $25,000. Fines are regularly reduced in negotiations between mine operators and the agency. From 2001 to 2003, more than two-thirds of all major fines were cut from the original amount that the agency proposed. Most of the more recent cases are enmeshed in appeals, so it is impossible to know whether that trend has continued. A good example involves the January disaster at the Sago Mine in West Virginia. The operator of that mine had been cited 273 times since 2004. None of the fines exceeded $460, roughly one-thousandth of 1% of the $110 million net profit reported last year by the current owner of the mine, the International Coal Group.

In February, Senator Arlen Specter (R-PA), introduced a measure in the U.S. Senate to raise the maximum penalty that the mine safety agency can assess for failing to eliminate violations that cause death or serious injury to $500,000, from the current $60,000. The law would also prohibit administrative law judges from reducing fines for violations deemed flagrant or habitual. Cecil E. Roberts, president of the United Mine Workers of America, told the Times that changes in the law were vital, but so were changes in the agency. Cecil, who is an Alabama resident, observed: "If you don't have enforcement along with a strong law, then you don't have a law. The current agency mentality is to cooperate with mine operators rather than watchdog them, and safety suffers as a result."

Source: *New York Times*

Lockheed Settles Lawsuit Over Meridian Plant Shooting

Lockheed Martin has settled one of several lawsuits arising out of a shooting at its Meridian, Mississippi, plant in 2003, that left seven people dead and eight others wounded. Three Alabamians were among the victims. Doug Williams, a longtime Lockheed employee, shot 14 people before turning a gun on himself. Victims and their families say Williams—who worked at the plant for almost two decades—had regularly harassed and threatened his black co-workers. The families of several victims sued the company. They contended that Lockheed's management knew Williams' racism had created a volatile work environment. Lockheed denies that it had any way of knowing Williams would go on such a rampage. But, Lockheed has settled one of the lawsuits. That's according to an annual report filed with the Securities and Exchange Commission. The case was settled, according to a court document filed on January 23rd. Court records in the case of Tammie Lynn Fitzgerald, against Lockheed show that a compromise settlement was reached. Ms. Fitzgerald's husband, Mickey Fitzgerald, was one of Williams' victims.

Source: *Associated Press*

Jury Rules In Favor Of Wal-Mart Worker

A jury in Jackson County, Mo., has ruled in favor of a Kansas City Wal-Mart employee and awarded $13.9 million verdict against the company in a false-imprisonment lawsuit. Roslyn Campbell alleged that she had been detained and mistreated by a company security guard in October 2002 at a Wal-Mart Supercenter. The jury awarded Ms. Cambell $2 million in compensatory damages and $11.9 million in punitive damages. The store security guard detained and roughed up Ms. Campbell after a customer complained to the guard that the counter at Campbell's cashier station was wet. The customer's loud cursing and the guard's violent reaction against Ms. Campbell attracted the attention of numerous other customers, who provided their names to the store. Three of these customers testified against the store at trial.

Source: *Kansas City Business Journal*

Asbestos Trust Fund Approved

A federal judge has approved a reorganization plan for a subsidiary of ABB Ltd. that includes setting up a $1.43 billion trust fund to settle asbestos claims. As expected, U.S. District Judge Joseph E. Irenas approved the reorganization of the subsidiary, Combustion Engineering. The ruling becomes final if there are no appeals. Swiss-Swedish ABB has been in court for more than a decade on asbestos claims. The parent company avoided bankruptcy even though its Combustion Engineering unit filed for bankruptcy protection in 2003. The U.S. Bankruptcy Court in Pittsburgh approved the plan on December 19th, and recommended approval to the U.S. District Court. That has now happened.

Source: *Newsday*

Injured Railroad Worker Wins His Case

An injured Union Pacific Railroad worker won a key victory before the Colorado Supreme Court last month when the appellate court ruled that the trial judge was right to let jurors know the railroad may have intentionally destroyed evidence. Unfortunately, the court did not reinstate the $6 million judgment won by the 27-year employee who sued after he tripped on a loose rubber mat and fell down a steep flight of locomotive stairs. Instead, the appellate court sent the case back to the Colorado Court of Appeals to resolve some remaining issues, including whether the trial judge properly excused an inattentive juror during the trial. There was also an issue concerning a statement made by a lawyer during closing arguments.

The court's decision is very important because the justices clarified to what extent trial judges can tell jurors about lost or destroyed evidence. Union Pacific's lawyers claimed that the documents - which included inspections and maintenance performed on the locomotive both before and after the employee's fall - were lost because of a turnover in claims agents and were not intentionally destroyed. But Justice Nancy Rice wrote in the opinion for the appellate court that the employee didn't have to prove the railroad destroyed the evidence "in bad faith" because the employee suffered the same negative consequences whatever the circumstances.

The employee, a freight conductor, claimed he suffered brain, shoulder, neck, and lower back injuries as a result of his fall. The suit against the railroad was brought under the Federal Employers Liability Act. Union Pacific appealed from the lower court judgment and claimed the trial judge injected his views by telling the jurors several times that they could infer the lost evidence would have been unfavorable to the railroad. The Colorado Court of Appeals had agreed, saying the judge had become an advocate for the employee. But, the unanimous Supreme Court decision held that the trial judge acted properly. The Supreme Court said that the instruction should "deter others from destroying evidence" and that it helped restore the employee to the place in which he would have been if the evidence were not destroyed.

Source: D*enver Post*

Verdict Against Associated Security In Sex Harassment And Retaliation Suit

A jury in federal district court in Tallahassee, Florida, has returned a $1.34 million verdict in a sexual harassment and retaliation lawsuit brought by the U.S. Equal Employment Opportunity Commission (EEOC) against Associated Security Enforcement, Inc., The lawsuit, brought under Title VII of the 1964 Civil Rights Act, was filed in 2004. It charged the security company with subjecting four female former employees to a sexually hostile workplace from May 2002 until July 2003 at the company's location in Tallahassee. The harassment reportedly took the form of egregious acts of verbal and physical sexual conduct on the part of one of the company's owners. The EEOC says that Associated Security failed to take necessary steps to stop the harassment, despite complaints to the company's co-owner.

After a two-day trial, the jury rendered an award in favor of the EEOC and private plaintiffs, providing $35,000 each to two of the four women and $25,000 each to the other two women to compensate them for the emotional pain and suffering they endured. The jury also assessed punitive damages against Associated Security in the amount of $300,000 each for all four women. In addition, the jury granted plaintiffs' request for back pay totaling approximately $17,000 for two of the women. The harassment included the company's owner reportedly groping one of the women's breasts; requesting sex in exchange for money; inviting the women for overnight stays; and frequently requesting oral sex. The EEOC claimed that the women repeatedly rebuffed the owner's sexually offensive conduct and complained directly to the co-owner of the company. According to the EEOC, the corporate defendant failed to implement corrective action. Further, one of the female victims was the company's former human resources officer. She testified that the company owner tried to cover up the illegal conduct by ordering her to falsify the personnel records of the claimants who had filed sexual harassment charges with the EEOC. Employers must be vigilant in their efforts to adopt policies and procedures that prohibit sex discrimination and retaliation in the workplace—which benefits employers and employees alike. Simply put, this sort of thing has no place in the workplace.

Source: *Insurance Journal*

XV. TRANSPORTATION

Trucker Fatigue Costs Lives On Our Highways

As we have reported in previous issues, driver fatigue has become a most serious problem, primarily in causing violent interstate vehicle accidents. Data from state records reveal that tired truck drivers were responsible for 104 deaths on Alabama roads in a three-year period. We are seeing an inordinate number of truck crashes caused by fatigue. Most of the ones we have seen happened on interstate highways. The state troopers in Alabama are cracking down on drivers and their log books. Captain Harry Kearley, who is Alabama's Chief of Truck Inspections, is leading the charge for the state. From 2002 through 2004, the latest year for which statistics are available, there were 10,797 accidents in which the truck driver was listed on the wreck report as being at fault. According to state records, 104 people died in those crashes.

The Federal Motor Carrier Safety Administration (FMCSA) says 15% of all truck crashes nationwide are caused by fatigue. Based on that percentage, 1,619 of the Alabama crashes during the three-year period were attributable to drowsiness. A driver is over his limit if he or she has driven for 11 hours straight. The driver must rest for 10 hours, according to federal regulations. A national survey of 18-wheeler drivers found that one-third of drivers say they drive beyond the legal 11 hours because they cannot find a safe place to park and rest. There are more than 125,000 trucks on Alabama interstates daily and 718 public truck parking spaces, which are located in the back of highway rest areas. In Alabama, truck stops fill up around 3 p.m. and, with parking spots at public rest areas hard to find, many truckers park on interstate ramps, which is illegal. A fatigued truck driver on the highway is a hazard to the motoring public. As you know, a log book is a record of a trucker's driving time, off-duty time, and sleeping time. Unfortunately, a number of drivers don't keep

accurate log books. Some truckers who drive for large companies have electronic log books. Company officials can tell from the home office when a driver on the road is out of hours. We find that an even larger fatigue issue is when companies encourage their drivers to violate hours of service for the sake of productivity.

The federal government's rule detailing how many hours truckers may drive before taking a break is clearly flawed and should be changed to help reduce fatigue-related crashes. In a petition filed in the U.S. Court of Appeals for the District of Columbia Circuit, five organizations recently asked the court to review the final hours-of-service rule issued August 25, 2005, by the FMCSA. The petition is the first step in legally challenging the rule. You may recall that three of the groups—Public Citizen, Citizens for Reliable and Safe Highways (CRASH), and Parents Against Tired Truckers (PATT)—successfully sued the government over the rule in 2003. This time those three are joined by Advocates for Highway and Auto Safety, which filed a critical amicus brief in the previous case, and the International Brotherhood of Teamsters.

Like the nearly identical rule issued by FMCSA in April 2003, which the court struck down in 2004, the 2005 rule dramatically increases both the number of hours that truckers may drive without a break and the number of hours truckers may drive per week. Before 2003, truckers were permitted to drive no more than 10 consecutive hours before taking a break. Now, truckers can drive for 11 hours straight. Before 2003, drivers were barred from driving after they had worked 60 hours in the previous seven days or 70 hours in the previous eight, depending on the company schedule. Under the new rule, truckers can now drive 77 hours in seven days or 88 hours in eight days—a more than 25% increase. On-duty hours during which truckers may drive have also climbed, so that a driver working 14-hour shifts under the new rules can now work as many as 84 hours in seven days or 98 hours in eight days—a 40% increase over the old limits. Further, the 2005 rule, like the 2003 rule, fails to require electronic onboard recorders, which would provide reliable data on how many hours truckers drive and permit effective enforcement of the rule. Our experience tells me that cheating on paper logbooks by drivers is rampant.

In the first lawsuit, the U.S. Court of Appeals for the District of Columbia Circuit said that FMCSA had failed to consider the effect of the new rules on the health of truck drivers as it was required to do under law. The court severely chastised the agency for permitting dramatic increases in driving time and for failing to make other important improvements to the rules that the agency initially proposed but later abandoned in the final regulation. Public Citizen President Joan Claybrook says:

> *More than 5,000 people are killed each year in large truck-related crashes and more than 110,000 are injured. That FMCSA chose in both rules to expand driving hours is astounding given its statutory mandate to make safety its highest priority and Congress's specific directive to the agency to reduce fatigue-related incidents. We fully expect the court to find once again that this rule violates the agency's clear assignment to put safety first.*

In 2004, after the new rules were first adopted, the number of large trucks involved in fatal truck crashes climbed by 4%—from 4,669 to 4,862—with deaths mounting from 5,036 to 5,190, according to statistics compiled by the National Highway Traffic Safety Administration (NHTSA). In 2004, 761 truck occupants were killed, again up from 2003, according to NHTSA data. Trucking remains one of the nation's most dangerous professions, according to the Bureau of Labor Statistics. Despite the court's harshly worded ruling, FMCSA issued a virtually identical rule in 2005. Public Citizen, PATT, CRASH, Advocates for Highway and Auto Safety, the Trauma Foundation, and the International Brotherhood of Teamsters jointly petitioned the agency last September to reconsider its rule. After waiting five months without an answer from FMCSA, the groups withdrew their petition for reconsideration and now have filed with the court. Jackie Gillan, vice president of Advocates for Highway and Auto Safety, made this observation concerning FMCSA:

> *With the lives and safety of truck drivers and the driving public on the line, we could not afford to wait indefinitely for the agency to respond.*

Source: Public Citizen

A Driver Falls Asleep And Two Teenagers Are Killed

A Fairfax County, Virginia, jury awarded $8 million last month to the family of a high school student who was killed in 2002 when a truck driver fell asleep behind the wheel of his rig and crushed the car the teenager was riding in. Two teenage friends had just finished their first day of school and were driving home mid-afternoon on September 3, 2002, when they stopped at a traffic signal. A truck driver for Danella Construction Corp. was heading to his home in West Virginia after a day of laying cable in the District. The driver told police he "nodded off once," but kept driving the truck and trailer, with a combined weight of more than 34,000 pounds. Witnesses testified that the truck crashed into the Nissan Altima without braking. The Altima was knocked into another car and then crushed by the truck. It was obvious that the truck driver had gone to sleep at the wheel. He last remembered passing a gas station nearly three quarters of a mile away. The truck driver was sentenced to serve a year in jail and to pay a $2,500 fine. He also was ordered to speak to young drivers about the dangers of drowsy driving. That hasn't happened.

The family of the second victim settled out of court with Danella Construction. The jury in the case that was tried found both Danella and its driver liable for the wrongful death. The jury awarded $3 million to each of teenager's

parents and $2 million to his sister. The award to the family members was solely for their pain and suffering, not for punitive damages or economic losses.

Source: Washington Post

Jury Awards $5.25 Million To Victim's Children Against Drunk Driver

The two children of a Miami-Dade judge killed by a drunk driver were each awarded $2.125 million last month by a jury. Circuit Judge Steven Levine and a passenger in his vehicle were killed instantly when a pickup truck ran a stop sign and smashed into the judge's car at an intersection in rural South Miami-Dade County in December 2001. The children sued Jose Hernandez, the driver of the pickup, who was convicted of two counts of manslaughter and two counts of culpable negligence. He is now serving a 24-year prison sentence. There was another person, Ruben Soto, in the pickup. At the 2004 criminal trial of the two men, it was disputed which man was the driver. Soto was sentenced to 30 years in prison. The judge's children will now sue Hernandez's automobile liability insurance company, United Automobile Insurance Co., in an attempt to collect the money. A bad faith lawsuit will be filed against the insurance company for refusing to make any offer of settlement. Soto was dismissed as a defendant in the criminal trial and Hernandez was said to be the driver and was the sole remaining defendant.

Source: *Associated Press*

Highway Work Zone Safety Should Be A Top Priority

Highway work zone safety is one of the most perplexing of road safety problems. Experts have known for at least three decades how to make significant improvements in work zone safety for motorists, workers, and pedestrians. Yet such life saving knowledge is frequently ignored by government agencies, contractors and utility companies. In the mid 60s, California Division of Highways became concerned about the substantial rise in fatal and injury accidents in work zones and set out to identify causes and ways to alleviate the problem. Their study, "Detour Ahead," published in 1972, showed that work zones did not have to be hazardous. But, the study, was practically ignored by the rest of the nation until the mid 1970s.

An accident investigation by the National Transportation Safety Board of a fiery death of a mother and her two babies in a work zone in Washington D.C. focused attention on the failure of not only the Virginia Highway Department, but the Federal Highway Administration as well. The Federal Highway Administration Office of Safety subsequently launched a major effort to improve work zone safety. As a result, some improvements were made, but these fell far short of what was needed. Over the following decade, numerous research projects have been completed, training courses were created, and most importantly, changes were made in the Manual of Uniform Traffic Control Devices (MUTCD).

While the Manual of Uniform Traffic Control Devices and its companion Traffic Control Devices Handbook contain substantial guidance, they do not provide all of the answers to maintaining work zone safety. Perhaps the most significant provision in the Manual of Uniform Traffic Control Devices deals with the fundamental management principles. Compliance with these principles will result in major improvements in work zone safety. Until these basic principles are accepted and practiced by those responsible for work zone safety, no significant improvement will be achieved. The Manual stresses that work zones present unexpected or unusual situations in traffic operations, for the traveling motorists. It emphasizes that special care must be taken in applying traffic control techniques in these areas. The basic management principles include the following:

- Traffic safety in construction zones should be a high priority element of every project from planning to design and to construction. Similarly, maintenance work should be planned and conducted with safety of motorists, pedestrians, and workers foremost at all times.
- Traffic movement should be inhibited as little as practical. This includes minimizing the that time, construction and maintenance operations occupy the roadway and make the transitions as smooth as practical with the recognition that it is difficult to get motorists to reduce their speeds unless the real need is perceived.
- Motorists should be guided in a clear and positive manner while approaching and traversing work areas. Traffic control devices to guide motorists should be installed at old markings that are obsolete or could mislead a motorist should be removed.
- Monitoring the traffic control plan and identifying and correcting problems are extremely important for the duration of the project.
- The need for constant attention to maintain roadside safety includes the safe storage of equipment, material, and debris.

The management of all organizations responsible for work zone operations must be committed to the basic concept of safety as a top priority if the hazards of work zones are to be significantly reduced.

XVI. ARBITRATION UPDATE

A Victory For Consumers On The Arbitration Front

KB Home has agreed to drop binding arbitration from its customer warranties as part of a class action lawsuit settlement. Plaintiffs in the lawsuit filed in Laredo, Texas, in 2003 claimed that the Los Angeles-based homebuilder violated federal orders by selling home warranties that required binding arbitration as an alternative to litigation in warranty disputes. The settlement has been given tentative approval by the court. Binding arbitration puts an unfair burden on buyers because the arbitration is very expensive and the proceedings do not afford the same rights to parties as a

court would. The economic power of a corporation over a consumer makes binding arbitration grossly unfair. KB Home agreed to modify the existing warranties of tens of thousands of homeowners, who will be notified by mail. The option of arbitration will remain available to owners. The settlement makes KB Home the only builder in the nation barred from requiring binding arbitration.

Source: *Laredo Morning Times*

Federal Appeals Court Says Orkin Must Pay Punitive Award

A federal appeals court has reinstated a large punitive-damage award to a Florida homeowner in a lawsuit against Orkin Inc. The U.S. Court of Appeals for the Eleventh Circuit in Atlanta has approved a 2003 arbitration-panel award of $2.25 million in punitive damages for Collier Black, a homeowner, from Ponte Vedra, Florida. The Black house sustained severe termite damage while under a lifetime contract with Orkin. As you know, Orkin is one of the country's largest pest-control companies. The arbitration panel's total award for Mr. Black and against Orkin was $4.2 million, which includes $750,000 in compensatory damages and $1.2 million in attorneys' fees.

Orkin appealed the panel's decision to the U.S. District Court. In 2004 a federal judge had removed the punitive damages, while upholding the arbitration panel's findings and its other damage awards. Mr. Black appealed to the Eleventh Circuit and asked for the punitive damages to be reinstated. In its ruling, a three-judge panel of the Eleventh Circuit said "there is ample factual support for the [punitive damage] award," citing the arbitration panel's "explicit findings that would support gross negligence and fraud on the part of Orkin." Orkin, a subsidiary of Atlanta-based Rollins Inc., has few options available to it. I suppose an appeal to the U.S. Supreme Court is possible. Interestingly, Mr. Black, a 53-year-old retired publisher, and his wife have sold their $1.5 million home—after fully disclosing its termite history.

This case spurred a racketeering investigation against Orkin by the Florida Attorney General's Office, which began in April 2004. A spokeswoman for the Attorney General's Office says that the investigation is still in the works, stating that Orkin has been "foot-dragging." Roughly half of all Florida homes have termite contracts, though many do not include the repair guarantees that the Blacks had in their agreement. This is the largest punitive award in the history of the pest-control industry assessed through arbitration. Unlike Orkin, the vast majority of pest-control operators carry maximum liability insurance of only $1 million, which is grossly inadequate. This ruling should send a strong message to all pest-control companies that punitive damages are a real possibility if they defraud consumers. It is said that this decision is causing the pest-control industry to take stock of the situation.

XVII. NURSING HOME UPDATE

Jury Awards $160 Million In Nursing Home Suit

A jury in San Antonio, Texas, has returned a $160 million verdict against Summit Care Corp. in a nursing home case. After hearing claims that the nursing home knowingly paired a frail 81-year-old man with a violent, mentally ill roommate who viciously pummeled him, the jury responded with one of the largest civil judgments ever awarded in San Antonio. Finding that Summit Care Corp., its Texas affiliate, and two nursing home employees shared the blame for the beating and its after-effects, the jury made the award to the estate of Tranquilino Mendoza, who died less than three years after the attack from unrelated causes.

Witnesses testified at trial that Mendoza's roommate was involved in 30 assaults before he was paired with Mendoza at the Comanche Trail Nursing Center. Two days after they were assigned to live together, the roommate beat Mendoza with a water pitcher, a glass, and his fists. Mendoza was seriously injured and never recovered from the trauma.

Michigan Attorney General Sues Nursing Home Chain

Michigan Attorney General Mike Cox has filed suit against Metron Integrated Health Systems and three of its nursing facilities located in Michigan. Eight employees at the Metron nursing facility located in Big Rapids were recently charged by the Attorney General with a variety of criminal offenses, including involuntary manslaughter, stemming from the death of an oxygen-dependent resident in January 2005. Nursing facilities that serve Medicaid patients are required to comply with state and federal laws designed to promote high quality care. These Michigan facilities are also subject to yearly inspections by the Michigan Department of Community Health. Inspections of the Big Rapids facility by the Department of Community Health in 2004 and 2005 led to 27 and 12 deficiency citations, respectively, which are significantly above the state norm of seven deficiencies per inspection. Evaluations of Metron's two other Michigan nursing homes, Allegan and Kalamazoo, also reportedly established that these two facilities have been operating in a manner that could endanger their residents. After receiving 6 deficiencies in 2004, Metron of Allegan was cited for 21 deficiencies in 2005. Similarly, Metron of Kalamazoo's evaluation was worse in 2005, with an increase from 8 deficiency citations in 2004 to 15 in 2005. General Cox started when the lawsuit was filed:

> *The Metron facilities in Michigan received more than $32 million from the State of Michigan Medicaid program last year. But even if they didn't get one penny from the taxpayers, Metron still has an obligation to protect the heath and safety of all of their residents. No one should have to check their dignity at the door of a nursing facility. Michigan's seniors and vulnerable adults deserve a safe and*

healthy place to live. Nothing that is said or done can bring Sarah Comer back to life. But what we can do is take strong legal action to help ensure that no one else needlessly loses a life or suffers injury or neglect at any of the nine Metron facilities in Michigan. All men and women in nursing facilities deserve to be treated with dignity and respect, and their heath and well-being needs to be safeguarded from the moment they enter the front door.

In addition to requesting damages for Medicaid funds paid for care that was deficient, the Attorney General's complaint seeks injunctive relief against Metron, designed to improve its operations and bring the three nursing homes into compliance with state and federal laws. It is most encouraging to see the state Attorney General in Michigan take action to make nursing homes safe for residents.

XVIII. HEALTHCARE ISSUES

Safe Housing Is An Environmental Issue

Pollutants in our environment directly affect our health and that's largely undisputed. While we usually think of the environment as the outside world, scientists have long known that indoor exposures far exceed outdoor levels for most pollutants. Because toxic substances such as lead and asbestos and harmful gases such as carbon monoxide and radon build up in confined spaces, indoor levels are at least 10 times higher than outdoors for many pollutants of concern. Protecting our air, water, and land from environmental pollution has long been, at least in political talk, a top national priority. In contrast, environmental health risks in our homes have been largely overlooked. Infants and toddlers, whose developing systems make them most sensitive to pollutants, are prime targets of pollutants in the home. The elderly also tend to stay at home more than other age groups, putting them at heightened risk for health hazards in the home environment.

While homes of any age and value can pose serious environmental hazards, older, low-income properties that are in substandard condition typically present the greatest risks. These homes are more likely to contain toxic substances, such as asbestos and lead-based paint. In addition, deferred maintenance in these properties often results in moisture and water leaks that encourage the growth of mold, mildew, dust allergens, cockroaches, and other pests. Millions of American families live in physically substandard homes or have insufficient income to support basic property maintenance. Substandard housing therefore is the nation's number one environmental health threat to young children. The fact that older, substandard housing is often concentrated in low-income communities of color makes housing-related health hazards a pressing environmental justice priority as well.

Children At Risk In Their Homes

Although housing-related health hazards are a concern for people of every age group, as stated above, young children are at special risk from health hazards in their homes. Young children spend the vast majority of their time in the home and they are most vulnerable biologically. Children's bodies take in proportionately greater amounts of environmental toxins than adults. Their rapidly developing organs are especially vulnerable to pollutants. Because children naturally crawl and play on the floor, they are in direct contact with areas where contaminants accumulate. As a result, they are likely to ingest those contaminants through their normal hand-to-mouth behavior and play.

Sadly, our most vulnerable children face the greatest risks for hazards in their homes. Low-income children are at a significantly higher risk for lead poisoning than children from upper-income families; African-American children are at a two times higher risk than white children. In some distressed neighborhoods, almost one-third of preschool children suffer from elevated blood lead levels. Asthma is the most common chronic disease of childhood, and health records show that African-American, Hispanic, and low-income children suffer higher rates of hospitalization, emergency room visits, and deaths from asthma. Even after accounting for socioeconomic differences, African-American children are twice as likely to have asthma and six times more likely to die from it than white children.

Rabies-Infected Transplant Lawsuit Filed

The parents of a teenager who died after receiving a kidney that was infected with rabies have filed a lawsuit in an east Texas court against those involved in the transplant, including a Dallas hospital and the Dallas Transplant Institute. The lawsuit, filed in state district court in the family's hometown of Gilmer, Texas, asks for monetary damages related to the death of 18-year-old Joshua Hightower, who died in 2004 after the transplant at Baylor University Medical Center in Dallas. The young man was one of three people who died of rabies after receiving organ transplants in what government officials said was the first documented case of the disease being spread through organ donation.

A fourth patient also died from rabies after receiving an artery from the same donor. Another organ recipient died from complications during surgery. It is hoped by the Hightower family that their lawsuit will help change the way organs for transplant are screened. A man's lungs, liver, and kidneys were donated to four patients in Dallas and Alabama after he died of a brain hemorrhage. It was later discovered that the man suffered from rabies. Any information relating to problems that any donor had must be made known to the recipient transplant centers. Any significant signs of infection in the organ donor surely had to have been known by somebody in the chain. It is significant that the infected man, who weeks before his death had been in jail for up to two weeks, had also been hospital-

ized for ingesting rock cocaine. The defendants failed to warn this family of the dangers that were involved with that particular kidney, which came from a very high-risk donor, and that's totally unacceptable.

Source: *Associated Press*

XIX. ENVIRONMENTAL CONCERNS

$554 Million Award In Nuclear Plant Lawsuit

A $554 million verdict was returned recently in a class action suit against two companies that ran a government-owned nuclear weapons production plant until its closure in 1989. The jury in the federal district court in Denver found in favor of nearly 12,000 neighboring property owners whose health and property values were affected by plutonium that was leaked on the plant site. The site is owned by the U.S. Department of Energy (DOE), but has been run by Rockwell International Corp. and Dow Chemical Co. since its opening in 1952. Although Rockwell and Dow were the defendants, the DOE will have to pay the final amount assessed as damages amount. The DOE has paid all of the legal expenses for the defendants. The award could possibly be reduced to as low as about $354 million under Colorado law.

The jury awarded $176.8 million for a nuisance claim and $176.8 million for a trespass claim, both of which were for compensatory damages. It appears that there can't be a duplicate-damages award. It is still unclear whether the judge will view the two awards of $176.8 million as double damages or as two separate awards for different claims. If the compensatory damages are found to be double damages and reduced to one award of $176.8 million, then the punitive damages, which totaled more than $200 million between the two companies, would have to be reduced under Colorado law to no more than the compensatory damages, or $176.8 million. While it is also possible that pretrial interest will be allowed, that issue hasn't been raised at this time. The DOE took a hard line in this matter and was "determined to fight all of these cases and viewed them all as frivolous."

The plaintiffs argued that Rockwell and Dow knowingly stored plutonium in barrels and cardboard boxes that rotted on the Rocky Flats plant site, allowing the windy environment to blow the plutonium across an approximate six-mile radius. Rocky Flats and its surrounding area are approximately 17 miles outside of Denver. Although there was a 10-year, $7 billion clean-up project of the site—paid for by the DOE—that ended last year, it was contended by plaintiffs that animals, plants and other natural forces could bring the plutonium back to the surface. The DOE contended that a scientific investigation of the land concluded that there had not been, nor will there ever be, a health risk from the spilled plutonium. The defense also argued that there was no evidence of a decrease in property values. An increase in the incidence of cancer among area residents has been shown by some studies. People still live on the land, but some of the plaintiffs have moved away.

Rockwell pled guilty in 1992 to violations of the Resource Conservation and Recovery Act and the Clean Water Act as part of a plea deal and paid an $18.5 million fine. Rockwell was the last company to run the facility until it was shut down in 1989. Dow ran it from 1952 to 1975. The class included all of those people who owned land in the designated area as of 1989. Previous landowners were not included. Interestingly, it took almost 16 years to get this case to trial. I found that hard to understand regardless of how complicated the case might have been.

Source: *The Legal Intelligencer*

Possible Ramifications From The Rhode Island Lead Paint Verdict

As reported, on February 24th, the Rhode Island suit against lead paint makers was successful. This was the paint industry's first defeat in a lead contamination suit. It was alleged and proved in New Jersey that peeling paint is a public nuisance, an inherently hazardous condition, that can be expected to attract children to touch and possibly ingest lead. Adoption of the public nuisance doctrine in New Jersey could make it possible for more suits to use that theory against the paint makers. The public nuisance doctrine certainly appears to be applicable in cases of this sort, and it requires no showing of culpability by the defendants.

In 1999, Rhode Island's attorney general, on behalf of state residents, sued five companies that produced the lead additive used in paint pigment before it was banned in 1978. The suit originally included counts of unfair trade practices, negligence, strict liability, and civil conspiracy, but all counts were dismissed other than the claim that the presence of lead paint in public and private buildings is a public nuisance. The Rhode Island case was originally tried in October 2002 and resulted in a hung jury. Subsequently, one of the manufacturers, E.I. du Pont de Nemours & Co., agreed to pay $12.5 million to nonprofit children's health groups last July in settlement.

The second trial began in November and, as reported, the liability phase ended with a jury verdict in the state's favor. A damages trial will be held. The state will seek compensation for abatement costs and medical treatment. The unit cost of removing lead paint from a dwelling has been estimated at $9,000. But, the defendants argue that a coat of nonleaded sealing paint is sufficient remediation, which is questionable at best. In any event, the costs for treatment of residents exposed to lead paint still have to be determined.

The five manufacturers, that were defendants in the Rhode Island case—DuPont, Sherwin Williams, NL Industries, Millennium Holdings, and Atlantic Richfield—are defendants in the New Jersey case, along with three other companies: American Cyanamid Inc., Cytec Industries Inc., and ConAgra Grocery Products Co. There are several plaintiffs in the suit, including the cities of

Newark, Camden, Jersey City, and Passaic and 22 other city and county governments.

In 2002, a Superior Court Judge in Middlesex County granted a motion to dismiss in the New Jersey case, finding local government action precluded by New Jersey's Lead Paint Statute, which sets out a procedure for lead paint abatement, and the Hotel and Multiple Dwelling Law, which imposes a duty on landlords to abate lead paint in rentals. The Appellate Division reinstated the suit last August, finding the Legislature did not intend the cited statutes to be the sole means of abating lead paint hazards. It will be most interesting to watch this case as it moves through the system.

Source: *New Jersey Law Journal*

Paint Manufacturers Face California Class Action Lawsuit

A Santa Clara County, California, appeals court has reinstated a class action lawsuit alleging several paint manufacturers for decades knowingly sold lead-based products that polluted the environment and harmed human health. In 2003, a Santa Clara County Superior Court judge dismissed the class action lawsuit. The appeals court held that the dismissal rulings "were erroneous" regarding allegations of public nuisance, liability, negligence and fraud. The decision by the three-judge panel found that the products of three former lead paint manufacturers created a **public nuisance** that continues to poison children.

The suit names as defendants the Lead Industries Association, Atlantic Richfield Co., American Cyanamid Co., Conagra Grocer Products Co., E.I. DuPont, O'Brien Corp., Glidden Co., Sherwin Williams Co., and NL Industries.

The suit was filed as a class action lawsuit on behalf of public entities statewide, including cities and counties. These entities are now facing the costs of removing lead-tainted paint and treating those harmed by exposure.

A Research Scientist Releases A Damaging Report

A research scientist who was formerly with the Minnesota Pollution Control Agency (MPCA), has released a 79-page report that outlines contamination from a problematic family of chemicals that were manufactured by 3M Company. The report also recommends ways to research the issue further. The scientist, who recently left the state agency, presented the report to the state Senate Environment and Natural Resources Committee. At press time, hearings on this issue had been held by the committee, with more hearings likely.

The report details work the scientist did as the agency's Emerging Contaminants Coordinator and recaps how the MPCA has dealt with perfluorochemicals (PFCs) at eastern metropolitan sites in the Minneapolis/St. Paul area. This report includes some of the most detailed findings to date of fish and sediment contamination in the Mississippi River near 3M's Cottage Grove plant, where an estimated 50,000 pounds of PFCs were once discharged into the river each year. Until 3M phased out these chemicals in 2002, they were used in a range of consumer products, such as Scotchgard©. The company continues to maintain that these chemicals pose no threat to people or the environment.

The report documented exceptionally high levels of PFCs, mostly perfluorooctane sulfonate (PFOS), in fish found in the Mississippi River. Most of the readings are from the fish livers and blood. One fish, a white bass, had the highest level of PFOS blood contamination ever found. The collective concentrations, according to the scientist, indicate contamination from the 3M plant. State Senator John Marty has stated, "For someone with her expertise to be doing this on her own time for an agency that kicked her in the teeth is amazing." This scientist has recommended that the fillets of these fish be tested, an action that the MPCA says will be done soon. She also recommends a broader look at more fish, as well as other aquatic species, mammals and birds that consume the fish, and sediment further downstream, so that there can be a better understanding of how the contaminants affect people and wildlife.

Source: *St. Paul Pioneer Press*

Monsanto Settles Lawsuit Over Hormone

Monsanto Company will pay the University of California more than $100 million dollars to settle the school's claim that the biotechnology company infringed on its patent related to a hormone that makes cows produce more milk. St. Louis, Missouri-based Monsanto agreed to pay the school $100 million dollars in upfront royalties and will pay 15 cents a dose, or at least $5 million dollars annually, to license the patented technology. The University's patent rights expire in 2023.

The University alleged in its lawsuit that three researchers at UC-San Francisco first isolated the DNA that is used to make the hormone, Posilac. The lawsuit said Monsanto knew about the research as early as 1985, but sold the product anyway. The hormone has stirred debate since it was approved for commercial use by the U.S. Food & Drug Administration in 1993. Consumer groups are concerned that the hormone could affect human health, and many milk brands carry labels advertising that they are Posilac-free.

Class Action Over Damaged Gas Gauges Settled

A notification program has begun about a proposed settlement of litigation against Shell Oil Company and Motiva Enterprises, L.L.C. The notification, ordered by a United States District Court in Louisiana, is to alert people who used or bought Motiva gasoline from certain gasoline stations in Louisiana, Mississippi, Alabama and Florida, from May 11 2004 to June 2 2004. The lawsuits center around the discovery that certain batches of Motiva gasoline were sold with some amounts of elemental sulfar and/or hydrogen sulfide. Although the total sulfur content was below the applicable government regulations, these particular sulfur com-

pounds can damage fuel sensors in some makes and models of vehicles, causing gas gauges that measure the fuel in the vehicle's gas tank to break or malfunction. Problems with gas gauges usually occurred within a few days after the gasoline was used or not at all. The gasoline was supplied to a number of oil companies who, after adding their own additives, sold the gasoline at their retail outlets. The vast majority of the gasoline was sold at some Shell and Texaco gas stations in the four states mentioned above.

McWane Fined $3 Million For Clean Air Act Violations

Industrial pipe maker McWane's scrap metal foundry in Utah was fined $3 million, the largest criminal environmental fine ever, for lying about the foundry's emissions results. The plant conducted measurements of particulate matter in order to verify that the foundry was in compliance with its EPA permit. However, McWane and its former vice president Charles Matlock melted pig iron instead of shredded scrap metal in the plant's furnace in order to lower the amount of emissions and pass the September 2000 compliance test. McWane pleaded guilty to two counts of false emission test results and Matlock pleaded guilty to inaccurate testing required by the Clean Air Act. The Alabama-based McWane has been in trouble before. The company has already been ordered to pay $5 million in fines and has been ordered to perform a $2.7 million community service project for its Alabama plant's Clean Water Act violations. Union Foundry, a division of McWane located in Anniston, Alabama, was sentenced to pay $4.25 million in criminal fines for violation of federal environmental and workplace laws. McWane's Tyler Pipe Co., in Tyler, Texas, was also ordered to pay $4.5 million for its Clean Air Act violations.

Source: *Environmental Litigations Reporter*

XX. TOBACCO LITIGATION UPDATE

U.S. Supreme Court Denies Review Of Tobacco Case

The U.S. Supreme Court has declined to review a $50 million damage award to the family of Richard Boeken, a two-pack-a-day smoker, who died of cancer in 2002 at age 57. Philip Morris USA had asked the justices to declare the award unconstitutionally excessive and to rule that the company should have been shielded from some of the smoker's claims. The Justices, without comment, declined to accept the case for review. The verdict in the case included $3 billion in punitive damages. Mr. Boeken died a year after a California jury found the tobacco company guilty of negligence, misrepresentation, fraud and selling a defective product. The damage award was first reduced to $100 million by the trial judge. It was then cut in half by an appeals court. Lawyers for the Boeken family had asked justices to consider "Philip Morris's immensely reprehensible, immensely profitable fraud scheme perpetuated for decades."

Many observers believed that the high court would use the case to clarify the formula for deciding punitive damages if any clarification was needed. Three years ago the Supreme Court said that punitive damage awards should be "reasonable and proportionate to the amount of harm" someone suffers. Significantly, justices did not give a specific formula at that time. Since then it appears that lower courts have been correctly deciding the punitive damages issue in individual cases on a case-by-case basis.

Source: *Associated Press*

Big Tobacco Wants To Cut Payments To States

Philip Morris, R. J. Reynolds Tobacco Co., and other major tobacco companies want to cut payments to the states that were parties to the national tobacco settlement by $1.2 billion. They are citing an "adjustment" provision in the settlement agreement that allows them to cut their payments, after a two-year waiting period, if their collective market share drops below certain thresholds. The companies say that they hit such a threshold in 2003. The companies' collective share of the market dropped eight percentage points, from 99.6% in 1997—the year before the settlement—to about 92% in 2003 according to the companies. Interestingly, the companies inserted the adjustment provision into the agreement without any opposition, according to sources.

While the states will certainly fight for the full payments, they've already been hit with one setback. An independent arbiter's preliminary ruling, rendered March 1st, found that the "burdens of the settlement agreement were a significant factor in the market-share loss," and that's not good news. States had until March 13th to submit comments and arguments to the arbiter, the Brattle Group, whose final decision was due March 27th. At press time, we didn't have access to that information. At least Massachusetts and California, and perhaps others plan on suing companies for the full payments. Notice by a state is required under the settlement agreement before a suit can be filed. The money from the tobacco companies has helped finance healthcare programs, education and public works, as well as fudning general operating expenses. Obviously, most states, including Alabama, couldn't stand the loss of this money.

Source: *Wall Street Journal*

XXI. THE CONSUMER CORNER

Safety Of Chrysler Vehicles Probed

U.S. safety regulators are investigating about 1.16 million minivans, sport utility vehicles, and pickup trucks from DaimlerChrysler AG's Chrysler division for possible defects ranging from faulty airbag sensors to loose steering wheel coupling bolts. The U.S. National

Highway Traffic Safety Administration (NHTSA) has escalated a preliminary evaluation of the problems to the status of an "engineering analysis," a move that often precedes a safety recall. Vehicles affected by the investigation include 805,000 2005 and 2006 model-year Dodge Caravan, Dodge Grand Caravan and Chrysler Town and Country minivans. NHTSA has received complaints about the failure of front airbag crash sensors in the minivans, possibly because of corrosion. A corroded sensor can set a fault code, illuminate the airbag warning lamp, and become disabled, according to NHTSA. The agency is also probing a total of 358,455 Dodge Durango SUVs from 2004 to 2006 model years and 2005-2006 Dodge Dakota pickup trucks after receiving complaints about loose steering wheel and shaft coupling bolts

The Alliance For Healthy Homes

I would like to acquaint our readers with The Alliance for Healthy Homes, which was founded in 1990 as the Alliance To End Childhood Lead Poisoning. A name change came about in July of 2003, and it reflects the expansion of the Alliance's work on lead poisoning prevention to address other housing-related health hazards. The Alliance's Board of Directors voted in June 2001 to enlarge the group's core work on lead poisoning into a broader healthy homes and communities agenda and to provide more proactive support to community-based and local advocacy organizations. Their mission is to build upon the group's work to protect children from lead hazards in their homes. New strategies were needed to address the changing landscape. The persistent high prevalence of lead hazards in low-income communities of color despite the dramatic decline in national prevalence required the changes. Properties that contain the worst lead hazards typically pose other health risks as well, such as mold, pesticides, and carbon monoxide.

Protecting children's health requires solutions that address all hazards in their home environment. Addressing lead hazards in substandard housing offers natural opportunities for tackling the other health hazards that contribute to higher asthma rates and other health disparities burdening low-income families. Presently, the Alliance works to achieve:

- **Primary Prevention** — The only way to fully protect people from environmental health hazards is to find and fix problems before they cause harm.
- **Practical Solutions** — Low-income communities urgently need accessible and affordable approaches to make every home healthy.
- **Environmental Justice** — All people deserve to live in housing that is decent, affordable, and environmentally safe, and to live, work, and play in healthy communities.
- **Holistic Approaches** — Comprehensive strategies that address multiple hazards and their underlying causes hold the greatest potential to maximize resources and results.
- **A Record of Achievement** — As the Alliance To End Childhood Lead Poisoning, the Alliance for Healthy Homes helped shift the focus of national policy from reaction—treating children after they were lead-poisoned—to *primary prevention*.
- The Alliance promotes effective federal programs and standards, while helping community advocates, local and state agencies, and other stakeholders strengthen prevention policies and practices.

The Alliance brings both experience and a fierce commitment to finding solutions that are affordable and practical for the highest risk housing in low-income communities. They anchor a network of 200 community groups across the country working on lead poisoning prevention, affordable housing, healthy homes, and children's environmental health. I commend the Alliance for its hard work and dedication to a worthy cause. If you want additional information concerning the Alliance, you can go to its website: www.allianceforhealthyhomes.org.

Shredding Documents Can Be Dangerous For Children

Document-shredding machines have become hot items for purchasing by people for use at home and at work. As worries about identity theft have driven millions of Americans to buy these shredders, safety officials and pediatricians are warning they can be hazardous, particularly to children and pets, when used in the home. Since 2000, the U.S. Consumer Product Safety Commission has received 50 reports of injuries from home-shredder machines, including lacerations and amputated fingers. Almost two-thirds of the incidents involved children younger than 5, and some occurred even when there was adult supervision, prompting the agency to issue a safety alert warning parents to never allow children to operate a shredder. George L. Foltin, director of the Center for Pediatric Emergency Medicine at the New York University School of Medicine, was the co-author of an article in *Pediatrics*, the official journal of the American Academy of Pediatrics. The *Pediatrics* article urged doctors to ask parents about the presence and accessibility of home shredders. It warned parents to keep shredders in inaccessible locations above toddler height, to keep them unplugged when not in use and to never allow children to operate them, even with adult supervision. The CPSC says it is aware of at least five incidents in which dogs had their tongues caught in shredders. Some of the dogs had to be euthanized, Dr. Foltin says. He added that considering dogs have been hurt "tells me how amazingly easy it is to injure yourself."

From 2000 to 2004, shredder sales grew an average of 5% a year, to $350 million from $280 million, according to the School, Home and Office Products Association. But in 2005 alone, sales grew by 16%, to $406 million. According to the association's president, Steven Jacober, "The industry is very much aware of the potential hazard." Several firms already have redesigned their shredders to

reduce risks, while the industry as a whole is working with CPSC officials and the independent testing organization Underwriters Laboratories Inc. to develop a new voluntary safety standard for shredders sold in the United States. Thus far there have been about 10 lawsuits filed against Royal Consumer Information Products Inc., which sells about 25% of shredders nationwide. Most of these lawsuits have been settled.

In a study of shredder injuries, the CPSC say that young children use the machine differently than adults. According to the agency, adult users tend to let go of the paper to permit it to complete its travel. In contrast, pre-logical-thinking children are not conscious of hazards to themselves. As a result, they may not let go of the paper—holding onto it as it is being pulled in. Until recently, the shredder was primarily used in offices, and there were "never any problems because adults were cognizant of what they were doing," according to John Drengenberg, Underwriters Laboratories' consumer affairs manager. The UL safety standard for shredders was not designed with toddlers in mind. Shredders were supposed to be designed in such a way that it was impossible to insert a finger-sized probe into the opening. The CPSC staff said the probe used in the test was too large to protect small children's fingers. While UL says its test was adequate, it is working with the agency and manufacturers to develop a new test that uses a smaller and thinner probe. The standard is expected to be approved very quickly by the industry. Even so, it won't take effect for at least another 15 months. While some machines may already meet the standard or will meet it before that deadline, there are still millions of older shredders in homes that do not.

Warranty Law Upheld For Car Leases

The New Jersey Supreme Court, in a recent decision, ruled that people who lease motor vehicles are covered by a federal warranty protection law. The court rejected arguments that the 1975 Magnuson-Moss Warranty Act protects only those who buy consumer products, not those who lease them. The decision reinstates a lawsuit against American Honda Motor Corp. claiming serious engine defects in a 1999 Honda Passport that was a new vehicle when the plaintiff leased it. But it will have a far broader impact by providing additional protection to the drivers who lease, rather than buy, their vehicles. It appears to be a very important decision for consumers.

Because the federal law applies to all consumer products backed by a written warranty—not just motor vehicles—the ruling should protect those who lease other products, such as boats, for their personal use. A key protection of the Magnuson-Moss Act forces the manufacturer of a defective product to pay the consumer's legal fees. In many of the "lemon-law" cases, consumers who get stuck with a defective automobile could not afford to sue if the consumers could not collect their attorneys' fees from the manufacturer.

The Alliance of Automobile Manufacturers had filed a friend-of-the-court brief supporting Honda's position that Congress never intended to protect leased vehicles when it passed the law three decades ago. About a quarter of all vehicles financed in the United States are done through leases, according to the alliance. The alliance represents BMW, DaimlerChrysler, Ford, General Motors, Toyota, Volkswagen, Mazda, Mitsubishi, and Porsche. Six justices of the New Jersey Supreme Court in a 6-1 decision ruled the federal law protects those consumers who sign a motor vehicle lease giving them the right to enforce the manufacturer's warranty.

The plaintiff in the case sued to enforce the warranty under the Magnuson-Moss Act but a trial judge ruled that a consumer who was a lessee was not entitled to its protection. It should be noted that courts around the nation have reached conflicting conclusions as to whether the Magnuson-Moss Act covers leased vehicles. It is likely that the question in this case will go to the U.S. Supreme Court because of its "great effect on commerce."

Ban Sought On Children Riding In Large ATVs

For over a year, the Consumer Product Safety Commission has been considering banning children 16 and younger from riding in adult-sized all-terrain vehicles. During that time more than 100 youngsters have died in ATV-related accidents. A group of parents seeking to ban younger children from riding in larger size ATVs believe that these deaths make it urgent that the Commission act. The Commission is still evaluating whether a ban should be imposed. Within the last three months, the issue—which has been dormant for months—has finally begun to get needed attention. The commission invited statements about a petition seeking the ban. The rising death toll has been reported by a group of parents, Concerned Families for ATV Safety, based in Brockton, Mass. The group's members, all of whom lost children in ATV accidents, have been monitoring accidents and fatalities involving ATVs around the country.

Since the group organized, ATV-related deaths involving children have continued to be reported across the country. At least 100 children died between Memorial Day 2005 and the past several months. Of the nearly 6,000 deaths on ATVs reported to the Consumer Product Safety Commission since 1982, children under 16 accounted for 1,846 or nearly one-third of the deaths. In California during the same period, there were 324 deaths, the most in the nation. Fatalities in ATVs increased from 617 in 2002 to 740 in 2003. The Commission has not completed tabulations for 2004 and 2005.

It is significant to understand why the CPSC has been dragging its feet on this issue. The agency hasn't conducted a detailed study of the problem in the past year. Neither does the agency have a timetable indicating when it may act on the petition. It first considered the petition last March. These heavy vehicles are much too difficult for young children to handle. Opponents of the petition—including ATV manufacturers—say they prefer more educational programs instead of governmental regulations.

The Commission has been evaluating a petition filed by the Consumer Federation of America, a consumer advocacy group, that seeks a government ban on children under 16 from riding in adult-sized ATVs. In February 2005, the Commission staff recommended that the panel deny the petition, noting that it already has a voluntary procedure in place that directs major ATV distributors not to sell ATVS for use by children. The consumer groups say the ban is ineffective and I agree with them. In 1988, the CPSC eliminated three-wheel ATVs because of the dangers to children. The estimated number of four-wheel ATVs in use has grown by 3.8 million from 1998 to nearly 7 million in 2004. I hope that the CPSC will take prompt action on the pending petition and ban children under 16 from riding on adult-sized ATVs. The risk is too great for the agency not to do so.

XXII. RECALLS UPDATE

900,000 GM Pickups Recalled

General Motors Corp. has recalled about 900,000 pickup trucks worldwide to fix problems with tailgate cables that can corrode and break when loads are placed on them. The recall involves 1999-2000 models of the Chevrolet Silverado and GMC Sierra trucks. GM says there have been 84 injuries, most of them minor scrapes and bumps, but no crashes or deaths linked to the problem. The galvanized, braided-steel support cables that keep the tailgates in place can corrode or fracture over time because of moisture seeping through cracks in the plastic sheathing of the cable or entering between the cable's metal strands.

GM had recalled about 4 million 2000-2004 pickups worldwide in March 2004 because the tailgates could break without warning. The recall involved a broader range of vehicles, including the Chevrolet Silverado, GMC Sierra, Chevrolet Avalanche, and Cadillac Escalade EXT trucks. The vehicles covered by the new recall had different materials used in the support cables and involved fewer complaints, according to GM.

American Suzuki Motor Corp. Recalls All-Terrain Vehicles For Fire Hazard

American Suzuki Motor Corp. has recalled the Suzuki 2005 Model Year Eiger ATVs. This includes 1,900 ATVs that were distributed by American Suzuki Motor Corp. of Brea, California. Certain 2005 Eiger model year ATVs were assembled with an improperly manufactured plastic fuel tank. The thin portion of these tanks could develop a fuel leak, posing a fire hazard. Suzuki has received no reports of incidents or injuries. The recall involves certain Suzuki 2005 model year LT-F400FK5 and LT-A400FK5 (Eiger) ATVs. These models are available in yellow, green, or red color. They were sold at Suzuki ATV dealers nationwide from March 2005 through February 2006 for between $5,200 and $5,350. Consumers with recalled ATVs are being sent direct notice from Suzuki. Consumers should stop using these vehicles immediately and contact a local Suzuki ATV dealer to schedule an appointment for a free repair. For more information, consumers can call Suzuki toll-free at (800) 444-5077 between 8:30 a.m. and 4:30 p.m. PT Monday through Friday, or visit the firm's Web site at www.suzukicycles.com

Consumer Products Recalls

In this issue, we are going to emphasize consumer products that have been recently recalled. As you may know, there have been a number of consumer products recalled over the past several weeks. Consumers should immediately stop using a recalled product and follow specific instructions given in a recall notice. Many of these recalls don't get very much attention, and that's unfortunate for consumers. Hopefully, the information set out below will be of some benefit to our readers. The following are just a few of the products that have been recalled recently:

Board Game Recall

The consumer product safety commission has announced it's recalling the "Chicken Limbo Electronic Party game." The game, made by Milton Bradley, is sold nationwide. The safety commission warns the two side poles do not fit into their bases properly, causing the game to fall apart if touched. The recall affects more than 460,000 games some of which have already caused a good number of injuries. If you own one of these games, take it away from your children immediately and contact Milton Bradley for a repair kit.

Toy Mobile Phones Recalled For Choking Hazard

The U.S. Consumer Product Safety Commission has announced a voluntary recall of the following consumer product iPlay My First Mobile Phones. There were about 50,500 of these phones, distributed by International Playthings Inc., of Parsippany, New Jersey, sold. The toy phone's yellow antenna can detach, posing a choking hazard to young children. No injuries have been reported to date. CPSC has received one report of the antenna breaking off. My First Mobile phone is a red and blue flip style mobile phone with a yellow bear on the cover and a yellow hard plastic antenna. Inside the flip phone are five round orange numeric buttons, as well as a sun button. The phone sounds with various ring tones when the buttons are depressed. On the inside top cover on the phone are a mirror and a spinning star with a lady bug button. "Made in China" is printed on the back of the battery cover. These phones, which were manufactured in China, were sold at specialty toy stores nationwide from August 2002 through November 2005 for about $13. Consumers should contact the firm to receive information on returning the product to receive a free replacement item of similar value. You can contact International

Playthings at (800) 445-8347 or you can visit the firm's website at www.intplay.com/recall.htm.

Recall Of Youth Hooded Fleece

The U.S. Consumer Product Safety Commission and Next Marketing Inc., of Wabash, Indiana, have announced a voluntary recall of Youth Hooded Fleece with Drawstring. The garments have a drawstring through the hood, posing a strangulation hazard to children. In February 1996, CPSC issued guidelines to help prevent children from strangling or getting entangled on the neck and waist by drawstrings in upper garments, such as jackets and sweatshirts. The recalled youth hooded fleece garments have drawstrings. They were sold in a variety of colors and many of them have the names of colleges and universities printed or embroidered on them. A sewn-in tag reads, "Lil Fan" or "LF 2." The hooded jackets were sold at web retailers, college book stores and department stores nationwide from September 2003 through December 10, 2005 for about $15. Consumers should remove or cut the drawstrings to eliminate the hazard. Better still, you should return the garment to the store where purchased for help in removing the drawstring. For additional information, contact Next Marketing Inc. toll-free at (866) 871-9978 during business hours.

Remote Control Flying Saucers Recalled For Fire Hazard

Creative Innovations & Sourcing LLC, of Pittsfield, Massachusetts, has recalled about 180,000 Pro Flying Saucer (Radio Control). The flying saucers were sold exclusively by QVC Inc., of West Chester, Pa., nationwide from November 2005 through December 2005 for about $30. The battery charger cord sold with these flying saucers can overcharge and cause the toy to overheat, posing a risk of fire. There have been at least 56 reports of overheating, smoking, melting and fire including eight reports of minor damage to furniture, carpeting or countertops. There have been seven reports of minor burns to hands or fingers. The Pro Flying Saucer is about 13 inches in diameter and comes in blue or yellow. It is made of Styrofoam and has a plastic propeller. The Pro Flying Saucer comes with a controller unit, launch pad and a battery charger cord. The item number of the recalled product, M12037, is found on the product's packaging. Consumers should stop using the product immediately. Purchasers of the product should return the battery charger cord to receive a new battery charger cord. For additional information, contact QVC Inc., toll-free at (800) 367-9444 anytime or log on to the company's website at www.qvc.com under the product recall section.

Barbeques Galore Inc. Recalls Gas Grills Posing Risk Of Gas Leaks Recalled

The U.S. Consumer Product Safety Commission has announced the recalls of Turbo Sport Portable Infrared LP Gas Grills by Barbeques Galore Inc., of Lake Forest, California. The grills have faulty regulators that can release too much gas to the burner causing an excessive burner flame. There is a risk of gas leaks, fires and explosions if an ignition source is present. There have been 18 reports of excessive flame or the regulator shutting off. Thus far, no injuries have been reported. The Turbo Sport Portable Infrared LP Gas Grill is model number IR600; the model number is not identified on the grill. The Turbo Sport measures 16.5-inches long by 14-inches wide and 12-inches high. The portable grill is constructed of stainless steel with an attached stainless steel hood. The "Turbo Sport" nameplate is on the front panel of the grill. No other barbecue with the "Turbo" name is affected by this recall. The grills were sold at Barbeques Galore Inc. stores nationwide from August 2004 through August 2005 for between $170 and $200. Consumers should stop using these grills and return the regulator to a Barbeques Galore retail store for a replacement, or contact Barbeques Galore Customer Service can be contacted for a replacement regulator. You can call Barbeques Galore Inc toll-free at (800) 752-3085. For additional information on this product, consumers can visit the Barbeques Galore Web site at www.bbqgalore.com

Metal Charms Recalled For Lead Poisoning Hazard To Children

Provo Craft & Novelty Inc., of Spanish Fork, Utah, has recalled Art Accentz™ Changlz™ Metal Charms. The recalled charms contain high levels of lead, posing a serious risk of lead poisoning and adverse health effects to young children. The charms are small silver-colored metal shapes that include flowers, bugs, pumpkins, and picture frames. "Art Accentz," "Changlz," "Provo Craft," and "For ages 3 and over" are printed on the charm's packaging. The charms were sold as decorations for craft projects such as scrapbooks, home décor and jewelry making. The charms were sold at small craft and scrapbook retails outlets from April 2004 through July 2005, and at Pamida Stores from January 2005 through April 2005, for about $3. Consumers should immediately take the charms away from children and ensure any charms being used are not accessible to children. Call Provo Craft for a full refund. For additional information, contact Provo Craft at (800) 955-9490, or you can visit the firm's Web site at www.recall.provocraft.com

Paintball Markers Recalled

About 243,000 Turbo™ and Paintball Breakout Players Kit™ have been recalled. The carbon dioxide (CO2) cartridges can be forcibly ejected out the back of the paintball marker and break the plastic screw-on cap. This poses a serious risk of injury to the paintball marker's operator who can be hit forcefully by the CO2 cartridges or the plastic screw-on cap. Overtightening the screw-on cap after the cartridges are pierced can result in a serious impact injury. The firm has received reports of at least 73 incidents involving the recalled paintball markers. Seven injuries have been reported including an eye injury, facial bruises, and lacerations. The recalled Blade Turbo™ paintball marker is bright blue with a black handgrip on the nozzle. Two carbon dioxide cartridges are inserted into the back of the marker covered by a clear plastic screw-on cap. The silver-colored carbon dioxide cartridges are about three-inches long. The Paintball Breakout Players Kit™ includes a Blade Turbo™, black mask and CO2 cartridges. "Blade Turbo" is printed on the side of the paintball marker. Paintball markers are sometimes referred to as paintball guns. The Blade Turbo™ was sold at Wal-Mart, Kmart and sporting goods retailers nationwide from January 2005 through January 2006 for about $20. The Paintball Breakout Players Kit™ was sold at Wal-Mart from October 2005 through January 2006 for about $25. Consumers should contact Brass Eagle to receive a free replacement screw-on cap, which is black, instead of clear. For additional information, contact Brass Eagle toll-free at (866) 363-8241, e-mail Brass Eagle at recall@brasseagle.com, or you can visit the firm's Web site at http://www.brasseagle.com

Black Dog Children's Hooded Sweatshirts With Drawstrings Recalled For Strangulation Hazard

The Black Dog Tavern Company Inc., of Vineyard Haven, Massachusetts, has recalled Children's Hooded Sweatshirts with Drawstrings. The garments have a drawstring through the hood, posing a strangulation hazard to children. In February 1996, CPSC issued guidelines to help prevent children from strangling or getting entangled on the neck and waist by drawstrings in upper garments, such as jackets and sweatshirts. The recalled sweatshirts have a black dog on the front and are sold in youth sizes up to size 12 with drawstrings through the hood. Sweatshirt colors include navy blue, gray, red, pink, black or oatmeal. "The Black Dog," "Est. 71," or "The Black Dog/Martha's Vineyard" are printed on the back of some of the sweatshirts. A tag sewn on the inside of the garment reads, "The Black Dog." Style numbers are K086, K088, K090, K062, or K063 are printed on the garment's hang tag. They were sold exclusively through Black Dog retail stores, catalog, and Web site from May 2004 through January 2006 for between $30 and $50. Consumers should immediately remove the drawstrings from the sweatshirts to eliminate the hazard. For additional information, contact Black Dog at (800) 626-1991, or visit the firm's Web site at www.theblackdog.com

SFC America Recalls Fire Extinguishers

The U.S. Consumer Product Safety Commission has announced a recall of 50,900 Dry Chemical Fire Extinguishers. The fire extinguishers were manufactured by Strike First Corp., of Scarborough, Ontario, Canada and imported by Strike First Corporation of America (SFC America), of Front Royal, Virginia. The fire extinguishers can fail to discharge properly when the trigger is activated, which puts consumers at risk of fire-related injuries. SFC America has received three reports of the fire extinguishers failing to discharge properly when activated. No injuries have been reported. The recall includes Strike First 2.5 lb and 5 lb dry chemical fire extinguishers with model numbers WBSF-ABC110AP, WBSF-ABC210AP, and WBSF-ABC340AP. The model number is located under the manufacturer's address on the far right hand side of the instruction label. The fire extinguishers are red, and designed for commercial, industrial, multi-residential and vehicle applications. They were sold at fire extinguisher dealers nationwide from December 2002 through April 2004 for between $13 and $21. Consumers with fire extinguishers included in the recall should immediately contact SFC America for information on how to arrange to have their extinguishers repaired. You can call SFC America at (800) 255-5515, or visit the SFC America Web site at www.strikefirstusa.com

DESA Heating Products Recalls Portable Propane Convection Heaters

DESA Heating Products, of Bowling Green, Kentucky has recalled about 54,500 "40-80,000 BTU Portable Propane Convection Heaters." The burners on these heaters can "flashback," which is when fire burns inside the burner tube rather than out the end. This can cause the lower portion of the burner tube to get hot enough to ignite combustible material under the heater. DESA has received 40 reports of incidents possibly caused by the flashback hazard, including six reports of fires. The other 34 reported incidents involved minor property damage, including scorching of the flooring under the heater. There have been no reports of injury. DESA 40-80,000 BTU Portable Propane Convection Heaters generate from 40,000 to

80,000 BTUs an hour. The following model names and number are involved in this recall: Reddy Heater (RCP80VC), All-Pro (SPC-80CC), MASTER (TC80VC), Universal (80-CC), and Dayton (6BY73). These heaters have serial numbers between 017390000 and 017632220. The model and serial numbers are on the carton and on labels attached to the heater. The designation "Made in China" is on the carton and model label attached to the heater. These products were sole at home centers and hardware stores nationwide from August 2005 through December 2005 for between $100 and $130. Consumers should stop using this heater immediately and return it to the store where purchased for a free replacement, refund or store credit. If you have any questions concerning this recall, you should contact their local retailer, or contact DESA toll-free at (866) 279-3225, or visit the DESA Web site at www.desatech.com

SunTome Recalls Baby Walker Due To Stairway Fall Hazard

SunTome Trading Corp., of Los Angeles, California has recalled about 600 Baby Walkers, which were manufactured in China. It should be noted that SunTome Trading Corp. *originally recalled* these baby walkers on July 20, 2001. The walkers can fit through a standard doorway and are not designed to stop at the edge of a step. Babies using these walkers can be seriously injured or killed. No injuries or incidents have been reported to date. The recalled walkers have eight wheels and are sold in various colors including dark blue, pink and white, or pink and red. The activity trays on the baby walkers have a steering wheel, various rattles and a mirror or animal themes. The trays play music when the baby pushes a button. "Baby" is printed on a sticker on the tray or the walker's base. They were sold at retail toy stores nationwide from March 2001 through January 2006 for about $20. Consumers should stop using the recalled walkers immediately and return the walkers to the retailer where purchased for a full refund. For additional information, contact SunTome Trading Corp. at (888) 786-8663.

Boilers Recalled

Weil-McLain Company, of Michigan City, Indiana has recalled 1,131 GV Series Boilers. The blower assembly is not properly sealed. Gas can leak during operation and accumulate. If an ignition source is present, a fire or explosion could occur. No reports of incidents or injuries. Weil-McClain GV water boiler Models GV-3, GV-4, GV-5 and GV-6 with a serial number/date code range of CP5075477 to CP5221234 and built from April 1, 2005 through October 31, 2005. Serial numbers and date codes are located on the left side of the jacket, above the boiler rating label. They were sold at plumbing and heating wholesale companies to independent plumbing heating contractors. The price to consumer (not installed) may range from about $2,200 to $3,200. Weil-McLain repaired all recalled boilers at no cost to consumers. You can call Weil-McLain at (219) 879-6561 and ask for Consumer Relations, or visit the firm's Web site at www.weil-mclain.com

Reebok Bracelets Recalled For Lead Danger

Reebok is recalling 300,000 children's charm bracelets. A 4-year-old child died from lead poisoning after swallowing a piece of the jewelry. The silver-colored bracelets, bearing heart-shaped charms engraved with the "Reebok" name, were given away from May 2004 through this month with the purchase of children's shoes in major shoe stores across the country. The Consumer Product Safety Commission says that they bracelets contain high levels of lead. CPSC officials said a child from Minneapolis died after reportedly swallowing part of one of the bracelets. The bracelets were manufactured in China by a contractor. Reebok is investigating how the bracelets reached the market despite the lead risk.

Reebok learned of the child's death on March 10th from Minnesota health authorities. Sales employees from Reebok began notifying retailers three days later to stop distributing the bracelets. Consumers should take the Reebok jewelry from children immediately. You can call the CPSC at 800-638-2772 or Reebok at 800-994-6260, for more information.

Dollar Tree Recalls

The CPSC said about 580,000 necklace and ring sets, imported by Dollar Tree Distribution Inc., are also being recalled for a lead poisoning danger. The silver-colored, adjustable rings come in a variety of designs with a toy "gem" in the center. The necklaces have a black string with silver-colored clasps and a silver-colored charm with a "gem" in the center. The packages are printed with "Mood Necklace," Mood Ring," "Glow in the Dark Necklace," "Glow in the Dark Ring," "UV Necklace" or "UV Ring." The "UV" jewelry packaging reads, "The Sun's Energy Will Change The Color." Printed on the back of the packaging is "SKU.815485" and the name "Mannix." The jewelry was sold at Dollar Tree, Dollar Bills, Dollar Express, Greenbacks, Only $1 and Super Dollar Tree stores nationwide from September 2003 through February 2006. Consumers owning the Dollar Tree jewelry should take it from children immediately. For more information, call the CPSC at 800-638-2772, or Dollar Tree at 800-876-8077.

XXIII. FIRM ACTIVITIES

Jubilee CityFest

Our law firm will once again sponsor a segment of the annual Jubilee CityFest to be held in Montgomery on May 26th, 27th, and 28th, which is Memorial Day weekend. All of the events will be held along the Riverfront in an area of town that covers 16 blocks. Again, our part of Jubilee CityFest will feature Christian music with two tremendous acts coming to town. One of the acts this year will be Kim Hill and her band from Nashville. Kim, who is a friend of my family, is a noted and well-known Christian music artist. Kim is one of the best singers in the country. The other act is Caldmon's Call, one of the best known groups in the Christian music field. The Houston, Texas-based band was formed at TCU in 1992. Their first album was released in 1994 and since that time the group has become one of the very best. We believe this will be a very good show and will add greatly to the success of Jubilee CityFest this year.

At the outset, the mission of Jubilee CityFest was to become a premier tourist attraction by creating a family weekend festival. In my opinion, those responsible for putting on the festival have done an excellent job and have achieved their mission goal. Based on all of the talent that has agreed to come this year, I believe it will be the best year ever. I would encourage our readers and their families to attend the festival this year. Having talent such as Kim Hill and Caedmon's Call on one stage will be hard to duplicate. Hearing these performers will be a real blessing—don't miss it!

XXIV. A Special Recognition

Coach Joe Whitt

My good friend, Joe Whitt, who coached football at Auburn University for 25 years, resigned in February from the coaching staff after a long and highly successful career. Joe, who coached under Pat Dye, Terry Bowden, and Tommy Tuberville, was a great coach and one of the best recruiters in the business. As a coach, the Mobile native was tough, but fair, and Auburn players who were there during Joe's tenure liked and respected him. Twenty of his players went on to play professional football after leaving Auburn. During the time Joe spent at Auburn, the University's teams won 5 SEC championships and went to 18 bowl games. While coaching linebackers, he helped Auburn lead the nation in scoring defense and rank fifth in total defense in 2004.

Joe, who is now working in development for Tigers Unlimited, will be responsible for fund-raising and other activities for Auburn University, primarily in Alabama. There is one thing for certain—Joe Whitt is an "Auburn man," and that's enough said. Only one coach has coached for more than 25 years at Auburn University and that was Coach Ralph "Shug" Jordan. That tells you something about my friend Joe Whitt. In my opinion, while he will be missed as a coach, Joe will do an outstanding job in his new undertaking. As a matter of interest, the Alabama Legislature passed a joint resolution honoring Joe Whitt and it was signed by Governor Riley on March 7th. Even legislators who are Alabama fans voted for the resolution. Some reportedly said they were glad to get him out of the coaching ranks and wanted to make his departure official. In any event, this was a tribute to a good man, who has been good for Auburn, and I am proud to call him a good friend.

The Alabama Shakespeare Festival

The Alabama Shakespeare Festival (ASF), located in Montgomery - Alabama's state capital - is the sixth largest Shakespeare festival in the world and attracts more than 300,000 annual visitors from all 50 states and over 60 countries. Thus far, during its existence ASF has attracted 3 million visitors from all 50 states and 60 foreign countries. The Alabama Shakespeare Festival was originally located in Anniston in a high school auditorium, where it was a summer theatre festival — plays ran for six weeks during summer months. When the Festival faced bankruptcy in the early 1980s, the State of Alabama was about to lose a great cultural asset and did little, if anything, to save it. Fortunately, Red Blount, at the request of his wife, Carolyn, stepped up to the plate and agreed to build a new home for ASF, set in a 250-acre park. The only condition he put on his gift was that the theatre had to pack up and move to Montgomery. After moving to the capital city, ASF began year-round operations with more than 400 performances scheduled each year. The Blount gift of the theatre complex was the largest single donation in the history of American theatre.

The $21.5 million Carolyn Blount Theatre, designed by Thomas Blount and Perry Pittman, is based on the theories of Andrea Palladio and houses two theatres (the 750-seat Festival Stage and the 225-seat Octagon), production shops, rehearsal halls, and administrative work spaces. ASF operates year-round, producing 14 world-class productions annually, including three works of William Shakespeare. The remainder are classics of the stage—works by playwrights such as Moliere, George Bernard Shaw, Anton Chekhov, Tennessee Williams, Thornton Wilder, and Eugene O'Neill — along with musicals and new works commissioned by the Festival. Productions such as "Forever Patsy Cline," "The Lost Highway," and "Big River" are examples of ASF's diversity, which I think is very good. In fact, coming from Barbour County, Alabama, those productions are more in keeping with a country lawyer who grew up in Clayton listening to "The Grand Ole Opry."

The Southern Writers' Project (SWP) was founded by former Artistic Director Kent Thompson in 1991 as an exploration of the South's rich cultural heritage and is dedicated to creating a theatrical voice for Southern writers and topics. SWP connects our audience directly with the work produced at the Alabama Shakespeare Festival. Children's Theatre and SchoolFest, ASF's widely acclaimed student matinee pro-

grams, entertain and educate more than 36,000 schoolchildren each season from throughout the region. On Saturdays during the entire season, ASF offers Theatre in the Mind, a free adult humanities program featuring lectures, author talks, and actor discussions designed to help audiences learn more about the plays. In conjunction with the University of Alabama, ASF educates students through Master of Fine Arts programs in acting, stage management, and theatre administration. These students work and train at ASF while earning MFA degrees.

Today the funding for ASF depends almost entirely on individual and foundation sources and that's good. But, the State of Alabama provided funding for ASF for years until it was recently "dropped" from the budget. That cost ASF some $800,000 per year, which was a real blow. In my opinion, the state's failure to recognize the value of ASF was a major mistake. ASF is something that all Alabama citizens can be proud of. It has helped sell Alabama to the world. People from all over the U.S., as well as from many foreign countries, have visited ASF over the years. In my opinion, we can't afford to allow ASF to lose anything that is presently a part of their total operations. ASF is too valuable to our state and really to the entire nation, for that matter. We simply can't allow anything to happen that would weaken ASF in any respect. Few institutions in our state have the capacity or even the potential to influence perception about Alabama as does ASF. For example, ASF was a key factor in Hyundai selecting Montgomery for its plant site. That alone should make our state officials, who apparently don't recognize who valuable ASF has been to our state's economic and cultured well-being, a little bit ashamed of what they allowed to happen when the budget cut took place. It's not too late for them to repent and restore the funding.

I encourage all of our readers, if not already believers in ASF, to become familiar with all it has to offer, and get involved. I can assure you it's much more than just Hamlet and the like. Geoffrey Sherman, the new artistic director, has some great ideas on how to make ASF even better. Out-of-town visitors may request hotel and restaurant guides from the box office. Also, season subscription packages and group discounts are available. For tickets, call the ASF Box Office toll-free at 1-800-841-4ASF or (334) 271-5353 locally. You can also visit ASF's website at www.ASF.net.

XXV. SOME CLOSING OBSERVATIONS

The Political Change Of Heart

I have always felt that most politicians, especially those in Washington, don't make a move on a real controversial issue until public pressure builds to a point where it finally gets their attention. The recent reaction in Congress to the infamous ports deal is a case in point. The American people spoke out loudly on this issue—a deal that was backed strongly by President Bush—in a manner that hasn't been experienced in several years. The public's strong and almost universal opposition, which was nationwide in scope, was heard loud and clear by most all of the politicians in our nation's capitol. To their credit, members of the House and Senate stood up to the President and blocked a deal that had to be one of the worst and most dangerous to come along in recent history.

All of this points out clearly, in order to overcome the vast power of the ultra-large corporations and their army of lobbyists that control government in Washington, folks back home have to get actively involved. Had this not happened on the ports deal, our ports and port security would have been turned over to a foreign country that has a history of being very friendly to terrorist groups. The fact that the American people wouldn't stand for something that obviously was a serious threat to our national security, not only killed the deal. But it also will now result in our political leaders taking a closer look at the state of our nation's overall security, including airports and air transportation, chemical facilities, public utilities, and our borders, as well as the ports. This one event may wind up being a turning point in our nation's history. It may be sort of like the sneak attack on Pearl Harbor in 1941, an event that **awakened** a sleeping giant!

To Kill A Mockingbird

I had the opportunity to see "To Kill a Mockingbird" at the Alabama Shakespeare Festival last month. While, I had read the book by Harper Lee on more than one occasion and had seen the movie adaptation with Gregory Peck as Atticus, I was never as deeply moved by either as I was by this production. Seeing the play put the events in a small Alabama town back in 1935 in a context that really told the story in an unforgettable way. It made me fully realize how human beings can lose sight of right and wrong and can go blindly down a wrong path in life with little-if-any regard for the consequences of their actions or inactions. The play—and especially the roles of Atticus and his children –made me realize that what I do for a living is an honorable profession—when the work is done for the right reasons—and when one doesn't compromise principle. We need more men and women like Atticus today in my opinion.

I would encourage all of our readers to take the time to see this excellent play. I sincerely believe it will help you keep things in the proper perspective as you deal with folks with whom you will come in contact in your home, your work, at church and in your social life. It definitely made me realize how extremely important the entire judicial system is for all American citizens. We must keep it alive and strong!

XXVI. SOME PARTING WORDS

As a follow up to last month's parting words, I am going to borrow a powerful prayer from Max Lucado and pass it on

to you. I hope you will take the time to read it. It is important to know that our **real** battle in this world has **already** been **won**.

His Final Prayer Was About You

As Jesus stepped into the garden, you were in His prayers. As Jesus looked into heaven, you were in His vision. As Jesus dreamed of the day when we will be where He is, He saw you there.

His final prayer was about you. His final pain was for you. His final passion was you.

He steps into the garden, and invites Peter, James, and John to come. He tells them His soul is "overwhelmed with sorrow to the point of death," and begins to pray.

Never has He felt so alone. What must be done, only He can do. An angel can't do it. No angel has the power to break open hell's gates. A man can't do it. No man has the purity to destroy sin's claim. No force on earth can face the force of evil and win—except God.

"The spirit is willing, but the flesh is weak," Jesus confesses.

His humanity begged to be delivered from what His divinity could see. Jesus, the carpenter, implores. Jesus, the man, peers into the dark pit and begs, "Can't there be another way?"

Did He know the answer before He asked the question? Did His human heart hope His heavenly father had found another way? We don't know. But we do know He asked to get out. We do know He begged for an exit. We do know there was a time when if He could have, He would have turned His back on the whole mess and gone away.

But He couldn't.

He couldn't because He saw you. Right there in the middle of a world which isn't fair. He saw you cast into a river of life you didn't request. He saw you betrayed by those you love. He saw you with a body which gets sick and a heart which grows weak.

He saw you in your own garden of gnarled trees and sleeping friends. He saw you staring into the pit of your own failures and the mouth of your own grave.

He saw you in your Garden of Gethsemane—and He didn't want you to be alone.

He wanted you to know that He has been there, too. He knows what it's like to be plotted against. He knows what it's like to be confused. He knows what it's like to be torn between two desires. He knows what it's like to smell the stench of Satan. And, perhaps most of all, He knows what it's like to beg God to change his mind and to hear God say so gently, but firmly, "No."

For that is what God says to Jesus. And Jesus accepts the answer. At some moment during that midnight hour an angel of mercy comes over the weary body of the man in the garden. As He stands, the anguish is gone from his eyes. His fist will clench no more. His heart will fight no more.

The battle is won. You may have thought it was won on Golgotha. It wasn't. You may have thought the sign of victory is the empty tomb. It isn't. The final battle was won in Gethsemane. And the sign of conquest is Jesus at peace in the olive trees.

For it was in the garden that He made His decision. He would rather go to hell for you than go to heaven without you.

Max Lucado

For those of you who don't grasp the real significance of this prayer, I encourage you to ask your Pastor to explain it for you. Better yet—through a personal prayer—let God give you its real meaning. Once you understand, you will never be the same. It will definitely change your life for the better, regardless of your present circumstances. In effect, this powerful prayer tells us how much God loves us by giving up his only Son for us. It also tells us that Jesus Christ paid the ultimate price and took on the sins of the world, including those of all of you and mine. All of us will spend **eternity** in one of two places—**Heaven** or **Hell** and that's a certainty. Jesus is the answer and He is the gateway to the place where all Christians will land.

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