



THE  
**JERE BEASLEY REPORT**

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

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# I. CAPITOL OBSERVATIONS

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## *A WOLF IN THE CLOTHES OF A LAMB*

The Christian Coalition of Alabama, a political organization that has been heavily involved in Alabama politics for the past several years, is at it again. In fact, the group has been a real political force in statewide races and especially those involving judicial candidates. They have been heavily funded by special interest groups over the years and most recently I hear from some good sources that some very large “gifts” have come in from some of the giants in Corporate America. Interestingly, among their big donors are organizations heavily involved in gambling enterprises.

It is rather interesting to note that the Christian Coalition of Alabama enjoys special privileges under the federal tax code. They are a 501(c)(4) tax-exempt organization. It is also most interesting that the organization enjoys the privilege of being tax exempt and yet is up to its ears in politics. Because of its status, they don’t have to identify donors or reveal the huge amounts some of them are giving. Neither do I believe they have to reveal how and where their money is spent. In fact, the huge sums received from gambling interests would never have been known by the public had it not been for the discovery of a string of e-mail messages. Some of the demeaning remarks made by Ralph Reed relating to the Christian community were shocking to say the least. As you know, Reed was one of the early leaders of the national organization

Recently, the organization put out a mass mailing to hundreds of thousands of Alabama citizens. Since the group uses the name Christian you probably figured that mailing was an Easter message. In reality, it was one of the worst smear sheets ever devised and distributed in the history of Alabama politics. I really feel sorry for those responsible for that document—which had to cost well over \$100,000—and

actually I have pity for them. My first impulse was to react by responding to John Giles—who had to know better—but then I asked myself “how would Jesus react to such a personal attack?” It was only then that I came to realize that those responsible for these vicious attacks really need the prayers of all Christians. So I encourage all of our readers who agree with me to earnestly pray for John Giles and his small group of political advisors. I am told by a very good source that the architect of the smear sheet was none other than Karl Rove. So I am also adding him to the prayer list and I must confess—that was a real test of my faith!

## *ALABAMA GOOD FOR BUSINESS*

The National Tort Reform Association, which was set up originally to protect wrongdoers in Corporate America, has targeted a number of states, including my home State of Alabama, and has made claims that lawsuits are hurting these states. In fact, this group claims that frivolous lawsuits are actually keeping business out of the states. Apparently, either none of them have bothered to check the economic development records in Alabama or those who are responsible for making the claims are just flat out lying about our state. While I don’t have firsthand knowledge of each state listed, I’m reasonably sure that the information given is equally misleading in those other states. Nevertheless, because it is the political season, I suspect we will be seeing much more of this sort of thing as we approach the fall elections.

As for Alabama, I suggest that our readers consider what has been happening in our state for the past 10 years. According to a recent survey by Pollina Corporate Real Estate Inc., Alabama ranks 5<sup>th</sup> among the fifty states in terms of business climate. Pollina Corporate, an economic analysis firm, compiled a top 10 list of states with leadership that truly understands the importance of producing the best job opportunities available for their constituents. Over the past several years, there have been a number of similar studies that show

basically the same thing. The simple truth is that Alabama is very good for business and all who are willing to take an objective look at the state will have to agree.

I am on the Board of Directors of the Montgomery Chamber of Commerce and regularly attend board meetings and functions. As a result, I am constantly hearing glowing reports about our state’s business climate. Considering how good things are for business in Alabama, why would a tort reform group put out information that they know is totally false? I have learned that those who are in charge of the move-

## IN THIS ISSUE

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I.	Capitol Observations . . . . .	2
II.	Legislative Happenings . . . . .	4
III.	Court Watch . . . . .	5
IV.	The National Scene . . . . .	8
V.	The Corporate World . . . . .	11
VI.	Campaign Finance Reform . . . . .	13
VII.	Congressional Update . . . . .	13
VIII.	Product Liability Update . . . . .	13
IX.	Mass Torts Update. . . . .	18
X.	Business Litigation . . . . .	22
XI.	Insurance and Finance Update . . . . .	24
XII.	Premises Liability Update . . . . .	28
XIII.	Workplace Hazards. . . . .	31
XIV.	Transportation . . . . .	32
XV.	Healthcare Issues . . . . .	35
XVI.	Environmental Concerns. . . . .	36
XVII.	The Consumer Corner. . . . .	38
XVIII.	Recalls Update . . . . .	42
XIX.	Firm Activities . . . . .	44
XX.	Special Recognitions. . . . .	46
XXI.	Some Closing Observations. . . . .	46
XXII.	Some Parting Words . . . . .	46

ment designed to destroy our court system don't mind misleading the public, as well as the news media, and that's really sad. I will have more to say on this subject in other sections of this issue.

#### **MORE TORT REFORM MYTHS BY THE CHAMBER OF COMMERCE**

It also appears that the U.S. Chamber Institute for Legal Reform is back at their old tricks. That group, which is well-financed and totally controlled by the "tort-reformers" in Corporate America, sent out a **ranking** of all states' judicial systems recently. Tom Donohue, president and CEO of the U.S. Chamber of Commerce, who is a paid lackey for the "tort-reformers," doesn't even try to hide his real mission and that is to destroy the jury system in the U.S. This new ranking of the best and worst state legal systems in the U.S. were released with no legitimate basis for its rankings. The 2006 State Liability Systems Ranking Study, supposedly conducted by Harris Interactive, polled more than 1,400 senior lawyers to explore how reasonable and fair the tort liability system is perceived to be by U.S. businesses. While these lawyers are paid by barons of big business, I respect their right to have opinions. But, I do question their objectivity in this instance. Without a doubt, they are being used to push an agenda designed by the giants in Corporate America.

For example, a full page ad, appearing in the USA Today last month, was nothing more than a direct attack on the jury system. In my opinion, this was the beginning of a national advertising campaign, launched at a tremendous cost and designed to help them shut the courthouse door to ordinary citizens. I suspect it is also a part of a master plan to elect ultra-conservative judges to office around the country. Alabama, a state with one of the most conservative court systems in the country, was listed as the 5<sup>th</sup> **worst** state. If I served as a judge in Alabama, and especially as a member of the Alabama Supreme Court, I would be greatly offended by this ranking. I would challenge anybody

who is interested in learning the truth to check the official records. Those who check will find that it is extremely difficult today for a victim of corporate wrongdoing to win a case with merit in Alabama. To do so, you first have to overcome a strong bias that has developed over the years and created by the "myth of tort reform." I question why the Chamber of Commerce would allow its good name to be used in such a manner. It certainly doesn't help Alabama's economic development efforts for the U.S. Chamber to put out false information concerning the business climate in our state.

#### **RON SPARKS STANDS UP FOR ALABAMA FARMERS**

Agriculture & Industries Commissioner Ron Sparks has asked the Alabama Department of Public Safety to either extend until 2007 the deadline for compliance with the Federal Motor Carriers Safety Regulations that would add certain requirements for commercial vehicle registration. The Commissioner really wants the government to allow an exemption for Alabama's farmers from these federal regulations.

In 1987, federal regulations were adopted by the State of Alabama as part of the Federal Motor Carrier Safety Regulations. These regulations require any truck with a gross vehicle rating or a gross combined weight rating of more than 10,000 pounds used commercially on state highways to be registered as commercial vehicles with visible registration numbers and the name of the business posted on the vehicle. In the past, these regulations for intrastate carriers have not been enforced by the state. The Alabama Department of Public Safety has given notice that as of July 1, 2006 all commercial interstate and intrastate carriers must be in compliance with federal regulations.

This would mean that our farmers who haul their own product would have to register as a commercial hauler. In my opinion, there is a big difference between a farmer taking his cows or produce to market and a professional driver who is hauling for hire. We need

to make sure we protect our farmers from being treated unfairly.

The Alabama Legislature has passed a bill which provides that the license and registration on any pick-up truck used for personal or agricultural use would be based on gross vehicle weight, or the empty weight of the truck, instead of usage. This will give farmers some assistance, but Commissioner Sparks hopes that the Department of Public Safety will also provide Alabama's farmers with a reprieve from the federal regulations. I don't believe this is an unreasonable request. In any event, Ron Sparks is a strong voice for Alabama farmers and he is to be commended for standing up for them.

#### **REPUBLICAN CANDIDATE WANTS LEGISLATIVE REFORM**

George Wallace Jr., a Republican candidate for lieutenant governor, believes that the most paramount issue of his campaign is **meaningful legislative reform** that would remove the **powerful influence** lobbyists have over the state legislature. George, who is seeking the Republican nomination in the June primary for what some still say is Alabama's second highest position, recently told a civic club in my home county, Barbour County, that he intends to clean up the current situation. He pointed out that currently a lobbyist can spend \$250 per legislator per day wining and dining legislators.

Currently, there are more than 600 lobbyists who court the favor of legislators and others in state government and who in my opinion exercise undue influence on the affairs of the state. It appears that George is serious about reforming the lobbying system. He says the state needs a non-political **ethics commission** comprised of representatives from each congressional district in the state. It will be good to see what the other candidates for Lt. Governor have to say on this important issue.

While the Lt. Governor presides over the Senate, the power and authority of the office have been largely stripped away by the Senate. This would be a good time to change the law and take

the Lt. Governor totally out of the legislative process. But, that's a request for another day. If lobbyists can be put under a strong law governing their activities, and thereby controlled, it will be a good day for Alabama.

### **THE BEST POLITICAL ADS SO FAR**

Luther Strange, another candidate for Lt. Governor, has some very good television ads that have been showing on all Montgomery stations for the past several weeks. I believe these ads are designed to gain name recognition. Regardless, they are the best ads I have seen so far during this political season. It appears that Luther, a Birmingham lawyer who has been politically active in former Attorney General Bill Pryor's campaigns, is off to a very good start. It appears he will be a definite factor in this race.

### **LITTLE JIM RETURNS TO THE ARENA**

Jim Folsom, Jr., who is unopposed in the primary, will be the Democratic nominee for Lt. Governor. Jim has been away from the Alabama political scene since he lost his bid for reelection as Governor to Fob James in 1994, some 12 years ago. Many believe that his entry in the race will liven up things in the fall. Frankly, I was surprised that Jim ran for Lt. Governor. I always figured if he attempted a come-back, it would be for Governor or the U.S. Senate against Jeff Sessions. Nevertheless, Jim has been through the political wars and knows lots of folks around the state and for that reason he will be a factor in the fall.

## **II. LEGISLATIVE HAPPENINGS**

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### **THE REGULAR SESSION ENDS**

The regular session of the Alabama Legislature has now ended and most give the legislators a passing grade. Some even say that it was the best elec-

tion-year session in years. Most observers believe the members performed very well under difficult circumstances. Actually, I really believe that the vast majority of the members of both the House and Senate performed extremely well. Of course, there were some exceptions. In my opinion, passing both the Education and General Fund Budgets early made the session a good one. Clearly, that was the right thing to do. However, most of the major problems were put off for the next group of legislators. Even so, there were also a significant number of bills which became law that should be good for Alabama citizens. There were also a few major failures and I will mention a few of those in this section.

### **AN ATTACK ON EMINENT DOMAIN FAILS**

The biggest surprise of the session was when the Legislature failed to approve a proposed constitutional amendment that would have placed new restrictions on government use of eminent domain to obtain private property. Since it was a constitutional amendment, this legislation would have taken effect only if approved by Alabama voters in the general election in November. However, all of that is now a moot question since the Legislature failed to pass the bill on the last day of the session. While you don't hear much from ordinary citizens on this issue, it quickly became a political issue around the country, and certainly in Alabama.

Last year the U.S. Supreme Court made a ruling that allowed a city in Connecticut to use eminent domain to acquire an aging neighborhood for commercial development. This set off a **firestorm** of sorts among a number of political groups. Simply put, eminent domain lets governments acquire private land for public use from folks who don't want to sell their property. Under the general law, an owner must receive "just compensation," but that really doesn't matter much to a property owner who simply doesn't want to sell. Over the years, this doctrine has traditionally been used for building roads, schools, parks and utilities, but it has

become much more controversial in recent years when some governments started using it for industrial and retail development.

The Alabama Farmers Federation, one of the strongest proponents of the movement to curb eminent domain, backed a constitutional amendment rather than being satisfied with an act passed by the Legislature. Interestingly, a few groups, such as Eagle Forum, opposed the legislation, saying it had too many exceptions to provide real protection for homeowners. Another group, called the Alliance for Citizens Rights, also opposed the proposed amendment. It will be very interesting to see if this legislative failure will become a real political issue this fall. I predict that the voters will hear lots on the legislative failure in the House and primarily from Alfa.

### **ANTI-TERRORISM ACT**

Commissioner Ron Sparks helped push Senate Bill 308, which amends Alabama's current Anti-Terrorism Act of 2002, through the Legislature. Governor Riley signed the bill into law on April 18<sup>th</sup>. This new Act makes endangering Alabama's food or water supplies an act of terrorism. Endangerment will now include any act intended to contaminate, destroy, or seize water or food resources. Commissioner Sparks, commenting on the new Act, stated:

*We want to send a clear message that if you harm food or water supplies in Alabama, you will be charged with a felony. I commend Senator Roger Bedford and Representative Jack Page for the leadership they have shown by taking this step to help protect the farmers and consumers of Alabama. They understand that we shouldn't wait until after an act of terrorism occurs to react, but we should instead be proactive and prepared.*

For some reason, this bill didn't generate a great deal of attention as it passed through the system. Personally, I believe it is one of the highlights of the session.

All who were responsible for its passage should be commended.

### **ALABAMA MINE SAFETY GETS A BOOST**

The Alabama Legislature has finally stepped up to the plate and appropriated more money for mine safety. Obviously, the combination of out-of-state mining disaster, a lawsuit in Alabama and a Statehouse rally got somebody's attention. In any event, legislators approved Alabama's largest budget ever for mine safety inspections. The state operating budget includes about \$2 million for The Mining and Reclamation Division of the Alabama Department of Industrial Relations, which is the state's mine safety office, an increase of \$1.5 million over last year's budget. However, I believe even more money is needed for regulators to fully comply with the inspections that are needed under state law. However, this budget increase is "a step in the right direction."

We mentioned in a previous issue that the state mining safety office was badly understaffed and as a result couldn't do the job of inspections properly. This division is responsible for overseeing 572 sites statewide, including 63 coal mines; 62 rock quarries; and 447 sand and gravel pits. This budget increase will certainly help by giving the state a greater capacity to do the job of inspecting our miners.

### **LEGISLATURE VOTES TO GIVE ALABAMA EARLY PRESIDENTIAL PRIMARY**

Alabama voters will now have one of the first presidential primaries in the nation. The Senate voted 28-1 to approve the presidential preference primary bill sponsored by Representative Ken Guin, D-Carbon Hill. The bill had passed the House earlier in the session by a vote of 54-20. The legislation — endorsed by the state chairmen of Alabama's Democratic and Republican parties — will move Alabama's primary from the first Tuesday in June to the first Tuesday in February. Alabama will go from having one of the nation's latest primaries to one of the first. It will

come shortly after the Iowa caucuses and the New Hampshire primary. I believe that this will prove to be a good move for Alabama. Instead of being ignored—and taken for granted—candidates will now have to come to our state and campaign. It will be good for Alabama and the entire country. For one thing, the Republican Party will no longer be able to take the Deep South for granted and it will make the National Democratic Party pay attention to the Southern states for a change.

### **A FEW OF THE GOOD THINGS DONE**

As I mentioned above, the Legislators should get high marks for this session. The following are a few of the other good things that our Legislature did during the session:

- Department of Forensic Science will finally get more badly needed money;
- Passage of the Brady bill, which is good news, will make killing an unborn child a crime;
- The Tax Reform Legislation that passed is a tribute to the "never give up" attitude of Representative John Knight and Alabama Arise;
- Passage of the Landlord Tenant Act, which was long overdue, will be good for Alabama;
- More State Troopers will finally be hired;
- Creating a sales tax holiday on the first weekend in August for back-to-school purchases is just plain good;
- Expanding Alabama's requirements for using child booster seats is a good safety measure for small children;
- Some additional funding for VOCAL; and
- Passage of a bill allowing a pardon for Rosa Parks and hundreds of others who fought for civil rights and were arrested for violating segregation laws was the right thing to do. This is true even though Mrs. Parks and many others did absolutely nothing wrong.

## **III. COURT WATCH**

### **COURT RACES IN ALABAMA**

There will be five seats up for election on the Alabama Supreme Court this year. Interestingly, most of the contested primaries are in the Republican Party's primary. The race that has the greatest potential for getting the public's attention is the one pitting Chief Justice Drayton Nabors and Associate Justice Tom Parker against one another. Both men currently serve on the high court, which should make the court's closed conferences rather interesting. The other judicial races in the Republican primary will take second fiddle to the Nabors-Parker race. The Democratic primary won't have any contested statewide judicial races. My hope and prayer is that one of these days the leaders of the Republican and Democratic Parties will do what's right and jointly sponsor legislation that will make all judicial races non-partisan. Since I still believe in miracles, they might also decide to promote campaign finance reform for all judicial races.

### **THE ALABAMA SUPREME COURT HAS AN OPPORTUNITY TO RIGHT A WRONG**

Alabama courts have to deal with laws on occasion that are badly in need of change. One such law deals with the current statute of limitations that applies to toxic tort litigation. Legislation proposed in the Alabama Senate would have extended the time people have to sue over illnesses resulting from long-term exposure to toxic substances. Plaintiffs normally have two years from the date of an injury to file a lawsuit. But, as we all know, diseases often do not show up until long after a person has been **exposed** to cancer-causing substances. As a result, people exposed to toxic substances have a very **short** time in which to file suit after the last exposure. When the sickness doesn't manifest itself until after the two year limitation period has expired, such suits have been barred by our courts.

A 1979 ruling by the Alabama Supreme Court declared that the statute of limitations in such cases **begins** when the person is **exposed** to the chemicals, not when he or she **becomes ill**. That decision—which was clearly wrong—effectively bars many people from filing otherwise valid lawsuits when they get sick as a result of the long-term exposure to a cancer-causing substance. Interestingly, a year after that 1979 decision, the Alabama Legislature passed a law giving potential litigants two years from the date they **discover an illness** caused by **asbestos**. The Legislature also has correctly created exceptions for fraud, medical liability, product liability and legal services liability and properly so.

A bill, sponsored in the regular session by State Senator Hank Sanders, would have treated all other toxic chemicals like asbestos. The bill cleared a Senate committee, but never got a chance to pass the full Senate. It died and the reason it died without a vote by the full Senate was because of the powerful lobby groups that opposed it. However, the Alabama Supreme Court has an excellent opportunity to correct the existing problem that currently takes away the legal rights of victims of toxic torts. A case, which arose out of Jefferson County, is currently before the court. This case was filed in state court by Jack Cline, a resident of Vance, Alabama, who had been diagnosed with the dreaded disease acute myelogenous leukemia (AML), decades after his last exposure to benzene. Mr. Cline, who had used benzene to clean oxygen valves as a part of his job for years, now has a disease which has been linked to benzene and radiation. As a matter of interest there are currently about 10,000 new AML cases each year.

The Supreme Court ruled against Mr. Cline last year without comment, saying the existing statute of limitations barred his lawsuit. A first request to rehear the Cline case was rejected by the court. However, a second request was granted. The case on rehearing was argued last month and it received a great deal of media attention. Our Supreme Court can now correct the 1979 mistake. The justices should do so because the 1979

decision is legally incorrect and morally wrong. Alabama is the only state with a two-year time limitation from the last day of exposure to a toxic substance. No other state in the U.S. penalizes toxic-tort victims in such a manner. How could a person, who was exposed to a chemical like benzene and who showed no adverse effects or systems for years, file a suit based merely on the fact of exposure to the chemical? Once that person becomes sick and the sickness is medically connected to the toxic substance from a causation perspective, the victim should have two years from the date the sickness first appeared to file suit.

Hopefully, our Supreme Court will do the right thing and change the existing law. In an interesting development, the Court has asked for the Alabama Trial Lawyers Association and the Business Council of Alabama to file legal briefs in the case. That was a **first** for the court. Regardless of how you feel about lawsuits or the courts generally, all of us should commend Jack Cline for fighting the good fight. Mr. Cline has shown tremendous courage in waging this battle. Robert Palmer, his lawyer, has hung in there with him all the way and has never given up. I am very proud of each of these men regardless of how their case comes out. Nobody can deny that Jack Cline is a real American hero!

#### **ALABAMA SUPREME COURT REJECTS APPEAL**

The Alabama Supreme Court has rejected an appeal by video game makers and sellers in a case involving the popular game “Grand Theft Auto.” In this important case, defendants had asked a judge to throw out the lawsuit blaming the game for the murders of the three police officers in Fayette, Alabama. The justices denied the companies’ appeal of the trial judge’s decision allowing the suit to go forward. The suit was filed in state court over the murders of two police officers and a radio dispatcher in Fayette, Alabama. The video game manufacturers challenged whether Alabama courts have the legal authority to hear the case. The suit was filed by relatives of the three men who

were shot to death by a teenager who has since been sentenced to death. In my opinion, this case will get national attention and with good reason. The lawsuit claims the murders mimicked video violence in “Grand Theft Auto.” It is most significant that the young boy played this game obsessively and appears to have been strongly influenced to commit violent acts.

This will be the nation’s first trial over killings blamed on video games. The families filed suit against Take-Two Interactive, (the game manufacturer), Rockstar Games Inc. (a subsidiary), Sony (manufacturer of the PlayStation game system), and two Alabama stores (one being Wal-Mart) where the teenager allegedly bought games. Circuit Judge James W. Moore Jr., an experienced and highly respected jurist, rejected claims by the companies that they had a right under the First Amendment to sell the games. The families who filed the lawsuit correctly contended that our free-speech laws don’t protect the sale of mature-rated video games to minors. There must be clearly defined restrictions on free speech rights in certain cases and this appears to be a case where a restriction is clearly appropriate.

Let’s take a look at what happened that led to the lawsuit. In June 2003, Devin Moore, who was 18 at the time, was being booked on suspicion of car theft when he grabbed an officer’s gun and started shooting inside the Fayette Police Department. As stated above, two officers and a radio dispatcher were killed. Two games in the “Grand Theft Auto” series have sequences where players can **shoot police officers**. These games are the focal point of this lawsuit. Evidence showed the teenager told investigators after his arrest: “Life is a video game; everybody has to die sometime.” The courts in Alabama will have the opportunity to take a stand on a most important issue. Those who profit on these videogames—which incite persons to commit violent acts—must be taught a lesson.

## JUDGE GIVES FINAL APPROVAL TO EXXON SETTLEMENT

A federal judge has given final approval of a \$1.075 billion settlement between Exxon Mobil Corp. and thousands of gasoline dealers. These dealers had sued the company, had a very strong case, and finally won. However, the giant oil company was able to keep things tied up in court for 14 years. As you will recall, the case went all the way to the U.S. Supreme Court. Exxon must now deposit the total amount of money into a settlement fund by May 12<sup>th</sup> as part of the final approval. The 10,000 dealers involved will collect 100% of the damages that were sought on their behalf plus prejudgment interest through October 2005. This was a terrific result for the dealers who put their trust in Exxon Mobil and found out the hard way that the trust was badly misplaced.

The December settlement of the case came as a court-appointed official was assessing the claims of the more than 10,000 service station owners involved in the lawsuit. This final approval means that the giant oil company will now have to pay—finally—and that's good. Exxon and Mobil corporations merged in 1999 and have become the world's largest publicly traded oil company. Exxon announced that its 2005 profits topped \$36.13 billion—the highest ever for a U.S. company. Previously, Exxon apparently believed that they own the courts. Thus, they display an arrogance that no cases where they are found to be at fault should be resolved. Maybe things are beginning to change!

## GLAXOSMITHKLINE AND STATES SETTLE PAXIL DISPUTE

Under a recent settlement, the maker of the anti-depressant Paxil will pay \$14 million to the Medicaid programs of 48 states, including Alabama. It was claimed that the drug company, GlaxoSmithKline, blocked generic versions of the drug from being made, causing the state's Medicaid programs to pay higher prices for the drugs. It was further alleged that GlaxoSmithKline used frivolous patent-infringement lawsuits against generic

drug makers. The lawsuits helped extend the patent for Paxil by delaying generic versions of the drug from being put on the market. Critics call the patent extension "evergreening," but drug makers say they were just trying to protect their interests after costly research programs. As you know, Paxil is an anti-depressant used to treat several psychological problems, including depression and anxiety. It hurts all tax payers when a state is overcharged by a drug company. It's good to see Attorneys General doing something about it.

Source: Associated Press

## STATE LAWMAKERS DON'T LIKE FEDERAL PREEMPTION

State lawmakers have never really liked for the federal government to intrude into matters historically reserved by and for the states. These local lawmakers are now beginning to let it be known that they don't want such federal preemption over matters traditionally reserved to their respective states. A classic example of their disdain is the current fight over insurance regulation. As Senate Banking committee members in Washington begin the debate over creating a new federal regulatory scheme for what is now state-regulated insurance, state lawmakers across the country voiced their dislike. They objected to the growing trend of federal regulatory preemption in insurance, product liability, tort liability and other areas. Georgia Senator Don Balfour, chair of the National Conference of State Legislatures' Standing Committees, made this astute observation:

*Federal preemption of state authority is a growing concern. These unwarranted power grabs by the federal government subvert the federal system, choke off innovation and ignore diversity among states.*

Of particular concern to state legislators is the rise of federal preemptions through the regulatory process. State lawmakers say that federal regulators are preempting state laws without even giving states an opportunity to

comment on the regulations. New York Senator Michael Balboni, a member of NCSL's Executive Committee, observed:

*Federal regulatory preemption is nothing more than a backdoor, underhanded means by which unelected federal bureaucrats impose their will on the states. No single, unelected individual should be able to wield such power with the stroke of a pen.*

Insurance regulatory proposals are just a small part of this growing debate over federal versus state authority. Regulatory agencies, such as the National Highway Transportation Safety Administration and the FDA, are the worst offenders. Far beyond insurance, there are lots of other proposals that concern state lawmakers. The NCSL released an updated Preemption Monitor highlighting 72 bills or amendments that would step on the toes of state policy makers. This represents a 35% increase over the number of bills and amendments in the previous Preemption Monitor issued in January 2006. State legislators point to a rule proposed by the NHTSA, which was supposed to improve automotive roof-crush standards. The proposed rule, however, would preempt all state common and product liability laws that now hold automobile manufacturers to a stricter standard than prescribed in the generally weak regulations. The roof-crush standard is woefully inadequate.

A study commissioned by state lawmakers says that the federal preemptions contained within the NHTSA rule will cost states \$60 million per year. The report indicates that, not only will the automotive industry get **immunity** from state tort claims through the issuance of the rule, but the states will incur **higher costs** to care for those who become permanently disabled and have no recourse to recover their medical costs. Among other items on NCSL's list of attempts to circumvent state liability laws or regulations are proposals for immunity:

- from civil liability for nonprofit charitable organizations;

- Consumer Product Safety Commission rules on product liability standards;
- the federal driver license identification act;
- a waiver of all liability for producers of antifreeze and coolants;
- legislation to create association health plans that skirt state regulations;
- bills on notification of breaches of data confidentiality;
- bills to ban lawsuits in state courts against food manufacturers for obesity claims; and
- immunity for vaccine manufacturers and medical malpractice tort reforms that pre-empt state laws.

The opposition by state lawmakers to federal preemption is nationwide. Texas Senator Leticia Van de Putte, who is NCSL President-elect, stated:

*Federal preemption is nothing more than a one-size-fits-all approach to public policy. Our federal system of government was designed so that each state could address the needs of its own people. These blanket solutions to multifaceted problems just don't work.*

As you may already know, NCSL is a bipartisan organization that serves the legislators and staffs of the states, commonwealths and territories. Their voice is one that should carry a great deal of weight in our nation's capitol, but unfortunately, they have formidable opponents in this fight. The highly paid and influential lobbyists representing the powerful special interests have an agenda are determined to carry it out. Fortunately, it appears that NCSL is dead serious about winning this battle. Hopefully, they will have an effect in the pre-emption battle.

## IV. THE NATIONAL SCENE

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### **DEMOCRATS OFFER A PLAN—FINALLY—AND THAT'S PROGRESS**

I made the observation last month that the National Democratic Party needed to do more than just spot problems facing our country. I wasn't the only one who felt that the party needed a "plan" designed to solve the many problems facing our nation. It was most evident that people expected a real plan of action and not just criticism. Democrats have now proposed a wide-ranging strategy for protecting Americans at home and abroad. Commenting on the plan, Senate Minority Leader Harry Reid, (D-NV), said:

*We are uniting behind a national security agenda that is tough and smart, an agenda that will provide the real security President Bush has promised, but failed to deliver.*

The challenges facing America today are quite different than those our nation faced prior to the 9/11 terrorist attacks. We must now deal with a new set of problems. However, the old problems that were with us prior to those attacks are still around today. In any event, it's good to see Democrats finally stepping up to the plate and becoming a positive influence for change. Democratic leaders, in making their plans public last month, were joined by some of the Democratic Party's top authorities on national security, including retired Gen. Wesley Clark and former Secretary of State Madeleine Albright. In their strategy, Democrats promised to:

- lessen the United States' dependence on foreign oil;
- provide U.S. agents with the resources to "eliminate" Osama bin Laden;
- ensure a "responsible redeployment of U.S. forces" from Iraq in 2006;
- rebuild the U.S. military so that it can do its job;

- implement the recommendations of the September 11th commission;
- make 2006 a year of significant transition to full Iraqi sovereignty;
- require the Iraqis to assume primary responsibility for security and governing their country; and
- bring about the responsible redeployment of U.S. forces.

It will be interesting to see how hard the Democrats in the House and Senate work to bring about the positive changes our country badly needs in the areas mentioned. However, it will take more than just holding news conferences and appearing on talk shows. The Democrats have now made specific promises and the public will expect those promises to be kept. I just hope and pray that those in power will work hard to make these promises a reality.

Hopefully, the National Democratic Party will also propose specific plans to combat other issues—other than those relating to national security. I believe that's what folks want both parties to do. Democrats need to broaden the scope of their planning in my opinion. Had I been asked to help come up with a broader platform, including domestic issues, I would have included the following items for the National Democrats to support:

- Stopping the excessive prices being charged for gasoline by imposing price controls and by ordering a sharp reduction in prices;
- A complete reform of the ethics laws governing the members of Congress;
- Stopping the massive corruption in the federal government and especially Congress;
- Strong and meaningful campaign finance reform;
- A revision of the ill-conceived national Medicare prescription drug plan;
- Putting a stop to deficit spending;
- Reversing the massive imbalance in our international trade;

- Full support for programs that would benefit consumers;
- Reform of the current tax structure, which favors the ultra rich and powerful; and
- Better protection of our environment.

We should all realize that it will take both political parties—working together or at least in some sort of harmony—to solve the many serious problems facing our country. We must put our nation’s best interest first and make politics a distant second in Washington. If that could ever happen, we would all be much better off for it.

### ***THE DEMISE OF TOM DELAY IS JUST THE BEGINNING***

Public Citizen, with the help of other consumer groups, was largely responsible for bringing all of the current scandals in Washington to light and to the public’s attention. The group, under the able and tireless leadership of President Joan Claybook, set out on a mission to clean up Washington. Personally, I believe that they have done our nation a tremendous favor. While getting rid of Tom DeLay is certainly good for America, that major victory should be just the beginning. Even though DeLay was forced to leave Congress in disgrace, the war against corruption in our nation’s capitol and the halls of Congress hasn’t yet been won. DeLay has been dethroned, but the **corrupt structure** this politician carefully designed and built remains. Destroying that corrupt structure will require more hard work. I believe that Public Citizen’s far-reaching campaign to Clean Up Washington can topple the fortress that **corporate moneyed interests** have built using **campaign contributions** to gain access to lawmakers.

In order to be successful in this war, Public Citizen needs support from interested persons all over the country. They can help clean up corruption in Washington and restore public trust in governmental officials, but it can’t be done unless the public really supports them. In order to win this war, Congress must:

- Make the institution accountable to voters—not corporate moneyed interests—by removing lobbyists from the fundraising equation. Specifically, lobbyists must be prohibited from making campaign contributions to the politicians they lobby and from fundraising for lawmakers’ campaigns, whether by soliciting contributions from others or organizing fundraising events.
- Ban privately funded travel and ban all gifts. Special interests and lobbyists can’t be allowed to pay for gifts or lavish trips for lawmakers and their staffs. The ban must be permanent and with no loopholes.
- Create an Office of Public Integrity, an independent ethics watchdog. The current system is broken beyond repair; an independent, non-partisan authority is needed to monitor compliance with the law and investigate wrongdoing.

The corrupt system that politicians like Tom DeLay built took years and millions of dollars from special interest groups to construct. I will be the first to admit that it will be difficult to tear the system down. You might ask: What can private citizens—who don’t have powerful lobbyists working for them—do to make a difference? The following are a few suggestions:

- You can tell your elected officials in Washington that you demand they restore accountability to Congress;
- You can support Public Citizen financially;
- You can take a minute to let these officials know you are supporting Public Citizen’s Clean Up Washington campaign; and
- You can become a Corruption Watchdog. By becoming active in your congressional district, you can keep up with what the elected officials in your area and state are doing or failing to do. Find out who is putting up the political money for them. Also, find out who refuses to help in the clean up.

Public Citizen, which has been a “bell-

cow” in the reform movement, has lots of work to do in the coming months. There is an opportunity to take back Washington from corporate moneyed interests today that hasn’t existed in years. But groups such as Public Citizen need your support. Because Public Citizen doesn’t have access to the big money from the giants of Corporate America, they must depend on ordinary citizens to keep them going. Please make a generous contribution to Public Citizen today in support of this Clean Up Washington campaign. It will be a very good investment with your return being a government that actually works as it was intended to work—free and independent of special interest control—and for all Americans. You can get more information on the clean-up campaign by visiting their website, [www.citizen.org](http://www.citizen.org).

### ***THE ABRAMOFF SENTENCE HAS TO CONCERN SOME IN WASHINGTON***

As all Americans probably know by now, the one-time powerhouse lobbyist Jack Abramoff was sentenced in a Miami federal court to a prison term of five years and 10 months. This sentence came in the first of many fraud cases pending against him. A fraudulent loan deal to buy a South Florida fleet of casino ships in 2000 was the basis for this case. Abramoff’s partner in the \$147.5 million SunCruz Casinos purchase, New York businessman Adam Kidan, also received the same sentence. Both were charged last summer with lying to lenders. It was interesting that both Abramoff and Kidan were allowed to remain free on bail, considering the vast number of charges against Abramoff. Apparently, this was so he could cooperate with state and federal authorities on other investigations.

Abramoff, who pleaded guilty to public corruption charges in January in a separate Justice Department probe partly linked to the SunCruz case, is said to be helping both Florida and federal prosecutors in Washington with the broader influence-peddling investigation in the nation’s capital. Abramoff has admitted to allegations about the bribery conspiracy, as well as his receive-

ing tens of millions of dollars in fraudulent fees from his Indian tribal clients, and his payoffs to congressmen in the form of lavish meals, foreign trips, golfing outings, and campaign donations. Abramoff faces up to 11 years in prison in relation to the Justice Department corruption case, but his deal with prosecutors allows him to serve the time concurrently with his SunCruz prison term. The SunCruz deal allowed Abramoff and Kidan to pay themselves \$500,000 salaries and to divert \$310,000 in SunCruz money for Washington-area sports skyboxes for GOP fundraisers orchestrated by Abramoff. I suspect there are lots of nervous politicians in Washington these days. It will be most interesting to see who winds up being implicated in the ongoing investigations. I am told that we have only seen the tip of the iceberg thus far.

Source: *Knight Rider Newspapers*

#### **DESIGN FAILURE SAID TO BE THE CAUSE OF THE LEVEE BREACH IN NEW ORLEANS**

The commander of the Army Corps of Engineers told a Senate committee recently that a “design failure” led to the breach of the 17<sup>th</sup> Street Canal levee that flooded much of the New Orleans during Hurricane Katrina. Lt. Gen. Carl Strock says the Corps neglected to consider the possibility that floodwalls atop the 17th Street Canal levee would “lurch away from their footings under significant water pressure and eat away at the earthen barriers below.” A botched design has long been suspected by independent forensic engineers probing the levee failures. A panel of engineering experts has confirmed that the “I-wall” design couldn’t withstand the force of the rising water in the canal and triggered the breach. Lt. Gen. Strock told the panel that the Corps was unaware of the potential hazard before August 29th. He said the Corps is now evaluating all the levees to see whether they, too, could fail in the same way. With all of the advance knowledge of how a major hurricane could virtually destroy New Orleans, it is difficult to justify why the federal government hadn’t checked the design and construction of the levees long before Katrina hit.

Source: *Associated Press*

#### **EXXON MOBIL HAS SHOCKED THE PUBLIC**

As we all know, Exxon Mobil Corp. became the most profitable company in history last year. Thus far in 2006, there certainly doesn’t seem to be any slowdown for the company. The public was shocked to learn that Lee Raymond, who retired as chief executive, received a total compensation package of approximately \$170 million last year. His retirement package was valued at over \$400 million. Lots of Exxon stockholders are none too happy about that development. In his defense, Raymond wasn’t the only big boss in the oil industry to do very well. The heads of most major oil companies got big pay increases last year. But, as in prior years, the Exxon chief’s pay package was substantially higher than that of his counterparts at several other oil firms.

When American citizens are having difficulty paying the excessively high prices for gasoline at the pump, it is impossible to justify Raymond’s pay or the company’s record profits. When I filled up my pick-up at a local station recently and saw that gasoline was selling on that day for \$3.06 per gallon—having seen earlier on CNN that oil was now selling for more than \$70 a barrel—I wondered when the Bush White House was going to use their close ties to the giant oil companies and force action by the industry and protect American citizens for a change.

#### **THERE SHOULDN’T BE ANY “TORT REFORM LIES” IN BASEBALL**

I am a rabid baseball fan and have been for years. Since my early years, the game has been one of my real passions. In fact, I have followed the Boston Red Sox since I was about 12 years old and am still one of their most loyal fans. I played one year of college baseball and spent two summers playing semi-pro ball in the old Conecuh River League. I loved the game then and only wish I could have been a better player. For those reasons—among many others—I really hated to see the tort-reformers in Corporate America try to bring baseball stories into their “bag of tricks” designed to help sell the myth of tort reform.

Jay Miller, the president of the Round Rock Express, a Texas baseball team, wrote an op-ed piece for a Texas newspaper entitled “Striking out lawsuit abuse.” He claimed that many lawsuits are filed by spectators injured at ballparks every year resulting in large payouts by team owners. For the uninformed that really sounds bad and appears to be a problem that needs fixing. Miller claimed that baseball fans are “looking for every opportunity to hit a grand slam jackpot at the expense of the team or even its players.” The problem with what Mr. Miller was saying is that it simply wasn’t true.

Randy Howry, who is President of the Austin Bar Association, responded to Miller’s claims. Randy, who—like me—is interested in addressing the myths of tort reform, asked this question: “Where in the world are you being sued?” Randy had checked the court records and found that neither the Round Rock Express, nor its owners, has ever been sued by anybody for any reason. Certainly, they haven’t been sued for “spectator injury,” as claimed, during the five years the team has called Round Rock home. In fact, nobody in baseball has paid out any money as the result of personal injury lawsuits.

If you check the records, you will find that there have been about a dozen baseball-related lawsuits across the country in the last 50 years. Almost all of these were related to **contract disputes** or other **business-related matters**. In fact, most states have had laws on the books for years that protect athletic teams from lawsuits related to known consequences of attending sporting events. Why would an owner like Mr. Miller make a statement that he had to know was untrue? His motive becomes more apparent when we learn that Miller is a member of the board of directors of Citizens Against Lawsuit Abuse of Central Texas. This is one of the shadow groups formed in several states by Karl Rove when he first started to sell the myth of tort reform years ago. We have a similar group in Alabama that has been very active.

Organizations such as the Texas group have had a mission and that is to destroy the jury system in the U.S.

Blaming lawyers and lawsuits for all of society's ills is a way of life for folks like Miller who belong to groups which have a definite agenda. These so-called "tort reformers" play fast and loose with the truth and use catchy phrases such as "Frivolous lawsuits," "Tort hell," and "Lawsuit Abuse" with very little—and in some cases nothing—to back up their claims. Interestingly, the term "reform" implies that there is a problem that needs fixing. I have to give Rove credit on that one—he has all of us now using the term "tort reform."

As far as the "problem" goes, the truth is that over the past decade, there has been a 50% reduction in the number of non-family-law cases filed. The monetary awards, reflected in jury verdicts, have steadily decreased during that same period. This downward trend started long before Karl Rove and his "tort reformers" began their so-called "reforms." There have always been checks and balances built into the legal system to protect against jury verdicts that are deemed excessive. The jury system has been part of the American democratic process for more than 200 years. Properly constrained by rules of evidence and established judicial procedures, it has served our nation extremely well. There never seems to be public outcry when ordinary citizens, who serve as jurors, are asked to determine whether a criminal defendant should live or die. But when asked to determine the culpability of a defendant in a civil case involving monetary damages, these same ordinary citizens are suddenly rendered incapable of making such a decision. While it has been said that "there is no crying in baseball," neither should we allow "lying" by persons trying to use our national past time to promote an agenda that has nothing to do with baseball or sports.

Source: *Austin America-Statesman*

### **IT'S NO SURPRISE THAT LARGE INSURANCE COMPANIES ARE BIG WINNERS IN NEW MEDICARE DRUG PLAN**

The new Medicare prescription-drug benefit plan is working extremely well—but for the wrong folks. Since

January 1<sup>st</sup>, when the plan first took effect, insurance companies have been very busy signing folks up. There have been some clear winners and losers in connection with the new drug plan. The early winners include some of the nation's largest health plans, which are busy peddling the drug coverage. The plans have signed up roughly 15 million new customers and in the process will get healthy government subsidies. Another set of the big winners are the drug makers, which have increased their wholesale prices since January 1<sup>st</sup> by about 12% across the board. There is another group—the pharmacy benefit managers—who will make a killing financially in their role.

The drug benefit, passed by Congress in 2003, is funded largely by the government, but offered to Medicare's elderly and disabled beneficiaries by **private health insurers**. A standard package is written into law, but insurers design and market their plans with government **approval**. The various plans have different costs and cover different medications. It was sold as being the answer for seniors and others who would supposedly benefit under the new plan.

But not everyone is faring well under the plan. The losers include the independent pharmacists, who have really been hurt and are suffering cash-flow problems. Some say the plan will put many of them out of business. New government enrollment data show that, as of April 18, nearly 20 million people are enrolled in Medicare drug plans. Another 6.8 million are in retiree plans getting a subsidy for drugs from Medicare. More than 10 million Medicare beneficiaries have drug coverage from other sources, such as former employers and benefits programs for veterans and Native Americans. By far, the biggest winner in the race to sign up seniors is UnitedHealth Group Inc., which has gotten more than 3.9 million new customers. Humana Inc. and Well-Point Inc., come in a distant second and third. While 86 companies are offering drug plans, these three insurers combined have signed up roughly two-thirds of Medicare enrollees in the new drug-only plans, according to an analysis

by Lehman Brothers. Close behind them are Caremark Rx Inc. and Member-Health Inc., with more than one million enrollees each.

At this point, I would put the so-called beneficiaries, including seniors, as losers under the plan. Hopefully, that will change in time. I believe the overwhelming majority of people affected are totally confused and many were signed up for a plan that is totally wrong for them. Finally, the cost of this new drug plan will be much more than the Bush White House promised Congress it would be. You will recall their original numbers were badly off by design and now it appears that the costs will greatly exceed all projections. When you consider that the **authority** was taken away from the federal government to **negotiate** prices with the drug companies, you can figure out who the real **winners** and **losers** will be. Without a doubt, the American taxpayers have been taken to the cleaners once again!

## V. THE CORPORATE WORLD

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### **DRUG COMPANIES PAY FOR FDA STAFF TRAVEL**

Over the years it has become quite apparent that the powerful drug industry has enjoyed tremendous control over the Food and Drug Administration. We now learn that, through an apparent loophole in agency rules, the FDA has allowed its employees to receive more than \$1.3 million in **sponsored travel** since 1999 from groups closely tied to pharmaceutical and medical device companies. Interestingly, FDA policy clearly bars employees from taking trips **paid for** by the drug, medical device and other companies the agency regulates. This ban also applies to their trade groups. But the Center for Public Integrity has identified nonprofit associations that draw their members, their boards and even some of their funding from medical and pharmaceutical-related companies paying for the travel

of hundreds of FDA employees.

The sponsor of the most trips was the Drug Information Association (DIA), which paid for more than 600 trips taken by FDA employees. The nonprofit group, which interestingly is made up of pharmaceutical and medical device manufacturers' employees, academics and government regulators, has 13 members on its board of directors who presently work for the industry or its consulting groups. Many observers believe that the FDA, which is the sole regulatory agency responsible for controlling drug companies, is much too close to the industry it oversees to impartially and effectively police the roughly 10,000 drugs on the market. I totally agree with that assessment.

At Congress' request, the Inspector General of the Department of Health and Human Services has investigated ties between the industry and the agency that oversees it. Many of the top sponsors have membership or financial ties to medical and pharmaceutical-related companies. According to a report, nonprofit groups and universities with such ties paid for roughly a third of the more than 3,600 trips taken by agency officials, suggesting that the industry is indirectly subsidizing the travel taken by FDA employees.

It certainly appears that the sponsored travel should be curtailed. It involves employees with the FDA who simply must not be allowed to get indebted to the very industry they are called on to regulate. The Center for Public Integrity analyzed all of the FDA's available reports of privately sponsored trips taken by agency officials between October 1999 and September 2005 that cost more than \$250. The ranks of travelers included many key employees such as division and department directors. In fact, the travelers included two members of the FDA's new Drug Safety Oversight Board. That safety board was established last year to **independently** monitor approved drugs. According to the *Washington Post*, seventeen of the board's 29 members have taken one or more of a combined 160 privately sponsored trips, at a total cost of more than \$220,000. Remember, this is the board that was established because of

the recall of Vioxx and other potentially dangerous medications.

The Post reported that more than a quarter of all of the trips reported were sponsored by five groups with ties to the pharmaceutical, biologic and medical device industries: the Drug Information Association, the American Association of Pharmaceutical Scientists, the Parenteral Drug Association, the International Society for Pharmaceutical Engineering, and the Regulatory Affairs Professionals Society. They were responsible for close to 1,000 excursions, spending more than \$1.3 million to fly and host agency employees. Consumer and government watchdogs worry that trips sponsored by those with financial ties to regulated companies provide opportunities for pharmaceutical, medical device and other related industries to set the agenda for the FDA. Dr. Peter Lurie, deputy director of Public Citizen's Health Research Group, which monitors the FDA and the health industry, stated:

*There is no countervailing perspective. They mostly become schmooze-fests for people from industry.*

Bill Vaughan, senior health policy analyst with Consumers Union, who also believes there is a major problem, says: "It contributes to the revolving door." There are numerous examples of where FDA officials and staff members have gone on to industry jobs. Currently, several former FDA officials now work for the very industry they policed while working for the agency. Some are involved with groups that formerly funded their travel. The Center identified 20 former FDA officials who took trips sponsored by one of the five associations that went on to work for medical and pharmaceutical-related companies. This sort of thing must be stopped for obvious reasons. Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, who has been critical of the FDA's reliance on travel sponsorship by DIA and other nonprofits, said:

*It sounds like they're violating the spirit of the law, if not the letter of the law.*

The rules were actually toughened in 1988. This came about after several FDA employees were caught taking payoffs, expensive trips and pricey meals from generic drug companies. As a result, outside groups were barred from sponsoring travel. But the tide turned in 1992, when Congress passed the Prescription Drug User Fee Act, which actually required drug companies to fund the drug approval process. DIA was again permitted to sponsor travel around that time. Restrictions on travel sponsorship by several other groups were also relaxed after passage of the PDUFA legislation. While the FDA and the drug companies may not be breaking the law, this surely does look like massive conflicts of interest. At the very least—this sort of thing doesn't pass the smell test where I come from!

Source: *Washington Post*

#### **NURSING HOMES' OWNER TO SETTLE MEDICARE ISSUE**

The owner of several skilled nursing homes has agreed to pay the federal government \$1.2 million to settle allegations of overcharging Medicare. Cullman-based USA Healthcare Inc. was accused of failing to disclose on its cost reports that it did business with vendors that were related to it by common ownership or control. According to U.S. Attorney Alice Martin, the health care provider's action caused Medicare to pay higher reimbursement amounts. Medicare regulations require that a provider must alert the Medicare Program if the provider and vendor have such a relationship. The regulation is in place to make sure taxpayers do not pay artificially inflated costs. The investigation of USAH stemmed from a Mutual of Omaha audit into cost reports filed by several of the skilled nursing homes. I have always believed that many of the nursing home owners had closely connected companies supplying various goods and services to them. This case appears to be one instance where that was the case.

Source: *Birmingham News*

## VI. CAMPAIGN FINANCE REFORM

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### REMEMBER - THIS IS AN ELECTION YEAR

Since this is an election year, we can forget campaign finance reform until next year. I am realistic enough to know that even in off-years, it is **virtually** impossible to get meaningful legislation passed on this issue in Congress or a state legislative body. In an election year, it's **absolutely** impossible. So, let's keep working and try again next year. As a basketball coach at North Carolina said a few years ago—"we can never give up!"

## VII. CONGRESSIONAL UPDATE

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### THE AMERICAN PEOPLE DESERVED BETTER THAN THEY GOT

Because of the media attention given to the massive corruption that has been uncovered and all of the reported scandals in Washington, there had to be great expectations on the part of the public for some real reform. However, somewhere between stations the reform train left the track. Certainly, the American people had every right to expect much more than they got from members of Congress on the scandal-related reform legislation that was presented. The public surely believed that the members of the House and Senate would take strong actions because of the major scandals. There was a great deal of talk about reform, but unfortunately there wasn't enough action. Neither the United States Senate nor the House of Representatives did what should have been done on the reform front.

I concede that while some good things were passed in the Senate, the Senators failed to pass real, effective lobbying and ethics reform legislation when it was presented to the body. Clearly, they failed to address the biggest

lobbying and ethics problems facing the Senate. Ironically, Jack Abramoff was being sentenced to jail time in one of the criminal cases brought against him at almost the same time a majority of our Senators were choosing to ignore deep public concerns about the **corruption** and **lobbying scandals** in Washington, the exact things that Abramoff **symbolizes**. The public should be greatly upset over the Senate's failure to do what should have been done. But, if you believe the Senators were the only ones who let the American people down by failing to pass meaningful lobbying reform legislation, what has happened so far in the U.S. House of Representatives was really worse.

Lawmakers obviously haven't gotten the message from back home. Folks want real action—they don't want a charade that merely whitewashes corruption—they want it cleaned up. Instead of cheering loudly for a disgraced Tom DeLay—as he announced his departure from Congress—these public officials should be doing what the American people want—and that's a total clean up of all the corruption in Washington. If Congress is going to clean up its act, strong and independent enforcement of the law is necessary. If you agree, tell the Senators from your state and the House members from your Congressional district that they failed America by failing to support complete reform of a totally broken system. After stepping down as ethics panel chairman in the early 1990s, the late Howell Heflin, who was my friend and a very good man, observed:

*You censure someone, and the next day you're seeking their vote. There are just too many inherent problems with senators judging senators.*

Senator Heflin's assessment was just about as good as I have heard. You simply can't allow politicians to police themselves. However, in a spirit of fairness, let's give these Washington politicians another chance—tell them to finish the job they started and pass all of the reform package—and do it before Election Day in the Fall.

## VIII. PRODUCT LIABILITY UPDATE

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### RALPH NADER RETURNS TO HIS ROOTS

I have gotten to know Ralph Nader fairly well over the years and during that time I developed a great deal of respect for him. Ralph, who sort of drifted away in recent years, is finally returning to his roots. The longtime consumer advocate, who became a presidential candidate, is now again challenging the auto industry to take some steps that he believes are necessary to make their cars safer. Ralph says the industry has failed to push forward technology that will make vehicles safer, cleaner and more fuel efficient. He also accuses the government of acting as a "consulting firm" for U.S. automakers. I have to agree with his view of that situation. He wants to open an office in Detroit to monitor the industry. In a recent interview with The Associated Press, Ralph stated:

*My indignation level is rising again. The gap between the government's dereliction and these kinds of efficient, safe, clean technologies has never been greater. NHTSA's now a consulting firm for Detroit.'*

Ralph has urged the National Highway Traffic Safety Administration to improve a proposed roof crush standard, calling it insufficient. Last August, he urged the government to warn consumers about Ford pickups and sport utility vehicles that were under investigation for a defect that may have caused engine fires. Recently, a lengthy report was released describing several missed opportunities to improve fuel efficiency and safety in vehicles. The report, by his Center for Study of Responsive Law, argued:

- that automakers have suppressed technological advancements by suppliers;
- insurance providers have failed to offer incentives for safer vehicles; and

- the government has been reluctant to improve technology in its fleet vehicles.

Clarence Ditlow, executive director of the Center for Auto Safety, believes there are “too many issues” and “not enough consumer advocates.” He is absolutely correct on that point. While the auto industry has tremendous political clout and influence in Washington, consumers have very few groups fighting for them. The auto industry and regulators are not doing enough and that’s quite evident. Ralph plans to push for automotive technology improvements in the coming months, as well as an initiative to create a code of ethics for the Society of Automotive Engineers. It is good to see this pioneer in the effort to make the automobile industry make safer cars come home, where he belongs. In my opinion Ralph Nadar—a real pioneer—will be welcomed back by consumers nationwide. As a consumer advocate, Ralph has the ability, knowledge and credibility required to be a positive voice for needed change in the auto industry. If he will stay out of politics—as a candidate—more people will listen to his message.

#### **ROLL-OVER CASE SETTLED IN MONTGOMERY**

Our firm recently settled a case involving an SUV rollover that occurred in Montgomery County, Alabama. Our clients’ son was on his way home to Prattville after taking his final exam at AUM. This fine young man attempted to dodge a ladder that had been dropped in the roadway on I-85. Because of the instability of the SUV, the vehicle rolled over and, although he was wearing his seatbelt, our clients’ son suffered fatal head injuries as a result of the rollover. Claims were made against the SUV manufacturer and the seatbelt manufacturer for the vehicle’s instability, seatbelt design, and window glazing design. The case was settled for a confidential amount. The owner of the ladder was never located, even though exhaustive investigative efforts were undertaken. The case was handled for our firm by Greg Allen.

#### **SILENT RECALLS IN THE AUTOMOBILE INDUSTRY**

Until we handled a wrongful case against General Motors several years ago, I had never heard of the term “silent recall.” The tragic death of a small child, who was a passenger in a brand new Chevrolet pick-up truck manufactured by GM, resulted in a \$15 million jury verdict. We learned lots during that case about how the automobile industry really operates. GM had experienced significant stalling problems with several of its vehicles, all of which were equipped with the same engine, but never saw fit to inform its customers of the known problems. In fact, GM knew that its vehicles were stalling while being driven and actually knew exactly what was causing the vehicles to stall. In our case, a defective computer chip was the culprit in our case and all of the GM vehicles affected.

In our case, a brand new pickup truck, in which the young child was riding with his grandfather, stalled after entering an intersection and was struck by a log truck. Testimony from GM engineers and documentary evidence from the company’s own files proved conclusively that the company had known of many other prior stalling incidents. In fact, GM had put a “silent recall” of the vehicles into effect many months prior to the child’s death in our case. The general public, including purchasers of the GM vehicles that were affected, were never made aware of the “silent recall.” If a person brought in a vehicle that had experienced stalling problems, the dealer—because of the “silent recall”—would know exactly what to do. GM actually made their customers pay for replacing the defective parts unless a customer specifically requested that the company pay. After the jury verdict, and an appeal to the Alabama Supreme Court (which resulted in a \$7.5 million remittitur), GM quietly issued a recall of these models. However, through the time of the recall, General Motors had already profited to the tune of over \$42 million by utilizing a “silent recall.”

Interestingly, during oral arguments before the Alabama Supreme Court in

our case, GM’s Atlanta lawyers strongly denied the existence of any stalling problems. A few months later after our case was decided, GM issued a massive recall based on the identical problems that we had in our case. In my opinion, that case was a prime example of corporate deceit at the highest levels. It also indicated clearly that profits generally will win out over safety in the corporate boardrooms of many automobile manufacturers. Unfortunately, even with the passage of time since our “silent recall” case, things haven’t changed very much in that respect.

#### **UNDERRIDE PROTECTION ON TRUCKS**

My wife Sara has learned that all 18 wheelers on our highways should have underride protection. In our travels, especially on our trips to Atlanta on I-85, as we approach a big truck on the highway, she will observe that a truck has this type protective device or that the one in place on another truck doesn’t look very strong. Sara has picked up her expertise from listening to me discuss the need for this type safety protection. It didn’t take her long—being an Emory University graduate—to catch on. Unfortunately, many heavy trucks and trailers are defectively designed in that the vehicles don’t have proper rear underride protection devices. Properly designed, an underride protection device will extend below the trailer in order to prevent an automobile from riding under the trailer in the event of a rear impact.

The National Highway Transportation Safety Administration (NHTSA) issued a standard in 1996 that required new trucks trailers and semi-trailer to be equipped with a rear guard that was to prevent a vehicle following a truck from underridding it in a rear-end collision. In January 1996, NHTSA issued FMVSS 223 and 224. FMVSS 223 specifies the height, width, length, and strength requirements for rear impact guards for trailers and semi-trailers. FMVSS 224 establishes requirements for the installation of rear impact guard on trailers and semi-trailers with a GVWR of 10,000 pounds or more manufactured on or

after January 1998. We have represented numerous clients who have lost loved ones as a result of a defectively-designed underride protection guard. When a passenger car is allowed to underride a heavy truck or trailer, it will most likely result in severe injuries or death to occupants in the vehicle because passenger cars are substantially lower than the bed of a heavy truck trailer. When appropriate underride guards are in place, vehicles are prevented from underriding these trailers and severe injuries and deaths that occur in foreseeable rear end collisions are substantially reduced.

#### **JURY VERDICT AGAINST FORD MOTOR COMPANY**

A jury in Paterson, New Jersey, returned a \$26.2 million verdict recently against Ford Motor Co. and a New Jersey equipment installer. The case involved a man injured when his car slid under the back of a flatbed truck whose rear guard broke on impact. Michael Boyle, 24, suffered extensive facial injuries when the truck sheared off the hood and passenger compartment of his car. The jury found the Ford F-800 truck defective and the automaker 70% responsible for the injuries. The local company that installed the guard after the truck was bought was found to be 30% liable. Ford says it will appeal.

#### **CAB GUARDS SHOULD PROTECT OCCUPANTS**

Our firm is currently representing several families in death cases where the drivers of heavy trucks were killed as a result of defectively designed cab guards. As you may already know, cab guards, commonly referred to in the industry as “headache racks,” are required as front-end structures on 18-wheelers that pull flat beds, trailers and log trailers. Cab guards, if designed and manufactured properly, should prevent shifting cargo from contacting the cab of a heavy truck. However, many cab guards are designed using welded heat-treated aluminum which results in a

weakening of the cab guard over time. It is most significant that the weakening of a cab guard due to fatigue stress is something that will be unknown to the drivers of these trucks. We have discovered in previous cases that many welding requirements and standards established by national safety organizations are not followed by cab guard manufacturers. The failure to follow such guidelines results in poor welds, poor quality control, and poorly designed cab guards. This means that the cab guard may not protect truck occupants as intended. The end result is that deaths occur that could have been prevented.

#### **AUTOMOBILE ENGINEERS SHOULD ADOPT A CODE OF ETHICS**

I totally agree with Ralph Nadar’s request for the Society of Automotive Engineers (SAE) to have an ethics code for members. SAE, in its 102-year existence, has never adopted an ethical code such as those in place for other engineering associations. For example, there is a code for chemical engineers, which requires them to “hold paramount the safety, health and welfare of the public.” On occasion an engineer must decide between “an employer’s interest and the public interest” and that’s when that engineer needs some ethical guidance. Rob Cirincione, 26, wrote the report, “Innovation and Stagnation in Automotive Safety and Fuel Efficiency,” which deals in part with the need for ethical conduct by engineers in the automobile industry.

Engineers are subjected to the “conflicting pressures” of science and business, according to the report. The recommended ethics code, the report said, would help establish “a community of engineers who practice with degrees of independence and professionalism commensurate with their duty.” We have seen prime examples in product liability cases against automobile manufacturers where engineers clearly let allegiance to a company and their paychecks influence their decisions on design safety. Some of them who are litigation engineers make millions each year testifying

as experts for the companies. Many times these witnesses formally worked for the very same company who now uses them as expert witness.

#### **THE FIRST ROUND IN THE TEFLON LAWSUITS**

We have written in previous issues on the health problems caused by the use of Teflon. Now the first round of battles in the war over the safety of Teflon-coated cookware has started in Iowa. The first 16 Teflon lawsuits were transferred to a federal court in Des Moines, Iowa, earlier by a special panel of judges consolidating the cases for pretrial proceedings. The lawsuits cover people from 13 states, including Iowa. Cases that seek reimbursement for anyone who bought Teflon-coated products, and money to monitor claimants for possible health problems, are included in the MDL. The U.S. Judicial Panel on Multidistrict Litigation chose southern Iowa as the site for the Teflon litigation because of its “geographically central location,” a “lack of any comparably large cases” and because Iowa has “the present resources to devote” to a host of complicated pretrial matters.

It is alleged in the lawsuits that E.I. DuPont De Nemours & Co., the company that has sold Teflon since 1946, misled customers and withheld information about a chemical used to make Teflon. The lawsuits describe toxic gases that were emitted when the pans are heated to 464 degrees or higher. Documents allege that the chemical has been known to cause cancer in laboratory animals, and that fumes have killed pet birds kept in unventilated kitchens. It is a simple concept—when Corporate America has information relating to serious health risks—the public has a right to know about it and that’s the central issue in this case. The plaintiffs are seeking class action status in the cases. At press time that issue was still pending.

In 2004, DuPont Teflon agreed to settle a class action lawsuit relating to Teflon filed by about 50,000 people who lived near its West Virginia plant. The residents claimed the company contaminated local water supplies with

perfluorooctanoic acid and alleged the chemical was linked to birth defects and other health hazards. DuPont paid \$50 million to the residents and agreed to spend \$10 million on special water treatment facilities.

A panel of scientists assembled in February by the federal Environmental Protection Agency called perfluorooctanoic acid, which is used in the production process, a likely cancer risk for humans. But federal officials have also said the agency “does not believe there is any reason for consumers to stop using any products because of concerns” over Teflon. That decision followed DuPont’s agreement last year to pay \$16.5 million to settle government allegations that the company hid information about the chemical’s potential dangers. Environmental regulators had sued the company as a result of the West Virginia case mentioned above. I suspect the current Teflon litigation will be a lengthy process.

Source: *Associated Press*

### **THE KEY TO SURVIVAL IN A ROLLOVER**

Vehicle rollovers are major safety hazards in this country and have been far the past several years. Currently, more than 10,000 people die and 50,000 are injured each year in vehicle rollovers. Roof strength is of particular importance in a rollover accident because the roof is by far the most common point of principal impact in rollover accidents. The roof creates a safety cage that should protect occupants in a crash. The integrity of the roof is largely dependent upon the design and strength of its supporting components, i.e., the pillars, headers and side-rails, and also upon the design and selection of materials used in the roof itself.

In 1966, Congress enacted the National Traffic and Motor Vehicle Safety Act. This Act was in response to the motor vehicle industry’s refusal to develop and adhere to voluntary safety standards. The automobile manufacturers generally took the position that “safety doesn’t sell.” By 1971, NHTSA promulgated Federal Motor Vehicle Safe Standard 216, which is the roof crush

standard. This statute set the minimum strength requirements for vehicles’ roofs. The preamble states “the strength of a vehicle’s roof affects the integrity of the passenger compartment and the safety of the occupants. It has been determined; therefore, the improved roof strength will increase occupants’ protection in rollover accidents. 36 Fed. Reg. 23,299 (1971). The purpose of this standard is “to reduce deaths and injuries due to the crushing of the roof into the occupant compartment in rollover crashes.” 49 C.F.R. § 571.216 (s2.) Nevertheless, it is unbelievable that most manufacturers still deny the benefits of increasing the roof strength in vehicles to save lives.

As we all know, technology in our ever-changing world has increased by leaps and bounds over the past 20 years. Unfortunately, the current roof crush standards have not kept up with the dramatic increase in technology available. Using the technology that has been available, vehicles roofs can be strengthened without any significant increase in cost. However, with shrinking profit margins in the automobile industry—because of the increasing costs of pension plans primarily—safety is apparently getting pushed further down the agenda. One has to wonder if the old saying by auto manufactures that “safety doesn’t sell” is coming back in vogue.

FMVSS 216 requires the roof to withstand 1.5 times the vehicle’s weight and allows five inches of crush. However, this outdated test in no way replicates the real-world dynamics of a rollover. Vehicles are now built to go much faster and speed limits have increased to 70 mph on many of our highways. The standard also fails to consider the material that the roof is made of and how it is constructed.

The federal standard calls for testing just one side of the roof. This measures what happens only in the first two quarter-turns of a rollover. But, the most serious injuries occur in the third and subsequent quarter-turns. In short, the government standards have not kept up with the available technology. However, the government shouldn’t have to

police the industry and require reasonable safety steps to be taken by automobile manufacturers. They really should do it on their own, but that hasn’t happened.

Today, SUVs are the number one selling vehicles on the road. However, SUVs are much more prone to roll over than passenger vehicles. Since automobile manufactures know SUVs have a high propensity to roll over, should the manufacturers be required to increase the roof strength? The technology is available. The only barrier between increasing roof strength appears to be the increase in costs resulting in less profits for manufacturers.

What should manufacturers be required to do? Is it unreasonable to expect the industry to make safety a top priority? We will see a strong crush standard only when “the people” tell Congress that 60,000 deaths and injuries each year as a result of rollovers are unacceptable. Most all significant safety advances in the automobile industry have occurred because the American people spoke through jury verdicts, putting safety and human life over profits. Clearly, the technology exists to better protect occupants in rollovers. A study by the Highway Safety Research Institute, conducted way back in 1969, concluded that nearly all occupants can be protected from serious injury in rollover accidents. These findings are revalidated many times each year as racecar drivers walk away from high-speed rollovers. The public should demand that NHTSA do its job and require stronger roofs in all vehicles. We can’t depend on the automakers to do this voluntarily and we have learned that by experience over the years. If NHTSA fails to act, then we must again go to Congress for relief.

### **RALPH NADER CHALLENGES NHTSA**

In a significant and timely move, Ralph Nader has written Jacqueline Glassman, acting head of the National Highway Traffic Safety Administration, criticizing the proposed revision to the roof crush resistance standard. Ralph has requested that Glassman explain

her position on NHTSA's lack of technology-forcing rules. In his letter, the consumer advocate highlighted the fact that the proposed roof crush standard sets test requirements at a low level that most new cars already meet—and that will save a maximum of 44 out of about 10,000 rollover fatalities per year, according to NHTSA's own findings. Ralph asked the acting director: "Does this sound like the agency is implementing the motor vehicle safety law?" He also noted that this isn't the first time NHTSA has written an inadequate roof crush standard with anemic performance requirements. The first roof crush standard, issued in 1971, was so weak that NHTSA discovered decades later that cars of the 1960's had stronger roofs than those made after the roof crush standard went into effect.

Ralph asked the Acting Director Glassman to address this concern with the proposed roof crush rule, as well as others that he communicated to NHTSA in November 2005 (such as the absence of a dynamic test), to which NHTSA has not replied. He noted that the proposed rule doesn't require manufacturers to apply the best industry-wide practices, let alone push automakers to develop new technology (an authority which the courts have granted NHTSA). In asking Glassman to explain her position on this technology-forcing authority, Ralph wrote that "NHTSA must be a front end not a rear end mandatory standards regulatory agency." Hopefully, Ralph will stay in focus on this fight and knowing him, I am confident that he will.

#### **GENERAL TRACTOR SAFETY**

We discussed the Spivey case in the April issue because of the obvious impact it had on the tractor industry. Interestingly, I have had a tremendous response to this story, all commending the Spivey family for standing up for safety! That case involved a tractor manufactured by the Kubota Tractor Corporation and a tragic rollover accident. Even with the improvement brought about in the industry, tractor rollovers are still the single deadliest type of injury incident on farms in the United

States. The latest figures from the National Institute of Occupational Safety and Health (NIOSH) suggest there are still approximately 250 tractor rollover fatalities per year. NIOSH estimates that there are approximately 4.7 million tractors in use on U.S. farms. Unfortunately, one-half of these tractors still don't have rollover protection for the operator. That simply is indefensible. We will take an overall look at tractor rollover protection issues.

As stated above, over the last few years, there has been a great deal of improvement in overall tractor safety in the U.S. Although today's tractors are said to be the safest ever, they are still involved in a good number of farm accidents. Seat belts, power take-off (PTO) shields, traveling lights and automatic hydraulic oil shut-off are standard on most new tractors. Unfortunately, roll-over protective structures (ROPS), are still not standard on all new tractors. As the Spivey family found out, these are extremely effective in preventing fatalities and in my opinion any tractor manufacturer that fails to make ROPS standard equipment on all tractors will regret it. Currently, the Occupational Safety and Health Administration requires that employers provide employees with:

- a standard roll-over protection structure;
- a standard seat belt;
- protection from tractor fluid spillage; and
- protection from sharp surfaces.

Rollover Protection Structures (ROPS) are roll bars or roll cages designed for wheel-and track-type agricultural tractors. ROPS are designed to create a protective zone or safety cage around the operator when a rollover occurs. When used with a seat belt, the ROPS will prevent the operator from being thrown from the protective zone and crushed from an overturning tractor or from equipment mounted or hooked to the tractor. Three types of ROPS frames are currently available:

- a two-post frame (with solid fold down versions);

- a four-post frame; and
- a ROPS with enclosed cab.

All of these serve the same function and that is to protect the operator in case of a tractor rollover. No tractor should be used without ROPS in place. At last count 300 to 400 tractor-related deaths occur on U.S. farms every year. As stated, over 50% of tractor-related deaths are caused by tractor roll-overs. In my opinion, a roll bar or roll-over protective structure and seat belt usage would have prevented all of these deaths. Other fatalities are caused by falls, run-overs, crushes and PTO entanglement.

#### **BODY ARMOR LAWSUITS SETTLED**

There has been a nationwide settlement of class action suits that had been filed against a Florida subsidiary of DHB Industries Inc. over body armor vests that contained Zylon. The class action suits were filed against Point Blank Body Armor, Inc. and Protective Apparel Corporation of America, Inc. on behalf of purchasers of bullet-resistant vests containing Zylon. A court order in a Florida court gave final approval to the settlement which requires a product recall and replacement valued at \$45 million.

The settlement entitles all purchasers and owners of Point Blank, PACA and Galls brand vests containing Zylon to receive new non-Zylon replacement vests and other benefits. Additionally, the defendants must conduct substantial testing of their used body armor and make their testing data, protocols and other information available to consumers. Plaintiffs in the case, which was pending in a Broward County, Florida, court, included the Southern States Police Benevolent Association and members of the Ohio Troopers Coalition.

In September, DHB was hit with a number of shareholder lawsuits after it disclosed in August that it had set aside as much as \$60 million to replace vests made from Zylon, a fiber that a U.S. Justice Department testing division said did not meet federal safety standards. The suits allege that DHB must have known much earlier that the safety of

the Zylon vests was questionable. It was alleged that the company misled investors by failing to make such disclosures. DHB companies had manufactured over 80,000 vests containing Zylon between 2000 and 2005. The vests were sold throughout the country.

There have been previous settlements in cases involving Zylon vests. In October 2005, a settlement was reached with Armor Holdings Inc., providing a total economic value of \$65 million to purchasers of vests made by American Body Armor, Safariland, and Protech. In September 2005, there was another settlement of \$29 million with Toyobo Co., Ltd. and Toyobo America, Inc. on behalf of purchasers of vests by Second Chance. The Atlanta law firm of Carr, Tabb & Pope LLP handled all of these cases.

#### ADRIAN LUND IS PRESIDENT OF IIHS

We mentioned in a previous issue that there had been a change in management at The Insurance Institute for Highway Safety. Taking over from long-time president Brian O'Neill, there is a new top cop on the beat. Adrian Lund is now president of the IIHS and the affiliated Highway Loss Data Institute. Before becoming president in January 2006, Dr. Lund held numerous positions at the two Institutes. Lots of people are aware of this transition, but some who don't follow the Institute's work closely may not know about Mr. O'Neill's retirement and Dr. Lund's promotion. In any event, it will be good to know a little bit more about this president. Trained initially as a psychologist, Dr. Lund has been involved in health-related research since 1975. He joined the Institute in 1981 as a behavioral scientist, becoming senior vice-president for research in 1993, chief operating officer of the Institute and HLDI in 2001, and president in 2006.

Dr. Lund, a highway safety expert, is consulted frequently by print and electronic media reporters. He appears regularly on television news magazine shows and on network news programs. Dr. Lund is also the author of numerous scientific papers and has served on the boards and committees of many

highway safety groups. When accepting his new position in January, Dr. Lund said:

*I intend to further the Institute's mission of strong research and communications. This organization will continue to evolve in response to emerging highway safety issues.*

We know about the good work done by IIHS over the years and had great respect for Brian O'Neil. He did an outstanding job and worked hard for automobile safety. I am confident that Dr. Lund will follow in a similar manner. We wish him the very best.

## IX. MASS TORTS UPDATE

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#### MERCK FOUND LIABLE IN VIOXX TRIAL IN TEXAS

A jury in Texas has found Merck & Co. responsible for the death of Leonel Garza, a 71-year-old man, who took Vioxx for a short time. Mr. Garza had a fatal heart attack after taking Vioxx for a short time. The verdict was for \$32 million with \$7 million in compensatory damages and \$25 million in punitive damages. This was a tremendous victory, not only this family, but for all victims of Merck's wrongdoing. This drug company knowingly put a drug on the market that had a significant heart risk and continuously lied to the public, the medical community and the federal government about its known risk. Once they were caught, the company's defense strategy became promoting the myth that Vioxx causes heart attacks only if used continuously for more than 18 months.

The more Vioxx cases that are tried against Merck, the more jurors will find out about how truly bad this company has been and how the men running this once fine drug company have absolutely destroyed its credibility. They put profits and their own personal financial gain over the safety and welfare of the public.

As we pointed out, Merck set aside one **billion** dollars to pay its lawyers and hired gun experts and for other uses relating to trials. The public should be shocked to learn that not one dime was set aside to pay Vioxx victims. I predict that is going to change even though Merck continues to boast that it will try all of the cases filed against the company, regardless of their merit.

#### ANOTHER BIG WIN FOR ALL VIOXX VICTIMS

Merck & Co. had been telling the media for weeks that the two cases being tried together in New Jersey were real "losers" and that without a doubt there would be defense verdicts in each case. However, that turned out to be typical Merck pre-trial spin designed to be written in daily news accounts about the trial. As it turns out, Merck's spin was way off base. Not only will Merck have to pay John McDarby and his wife \$4.5 million in compensatory damages, but the jury returned a \$9 million punitive damages verdict in favor of Mr. McDarby, who had a heart attack while taking Vioxx. The punitive verdict came after the jury had earlier concluded that the drug maker had **knowingly misled** the FDA about Vioxx. In the first phase of the trial, the jury awarded the compensatory damages in the McDarby case for his heart attack, which the jury determined was caused by Vioxx. In the second phase, the jury was asked to determine what punitive damages, if any, Merck should pay Mr. McDarby. The burden of proof in the punitive phase was very high—as it should be.

You will recall that in the Thomas Cona case, which was the other case consolidated for trial, the jury found that Vioxx hadn't contributed to Mr. Cona's heart attack. However, even in that case, the jury found that Merck had not been truthful in its marketing of Vioxx. Merck will have to pay a small amount in compensatory damages in that case and attorney's fees, but no punitive damages. Despite the split verdict over the **cause** of the two plaintiff's injuries, the jury voted unanimously that Merck had **failed to warn doctors** about the drug's cardiovascular

risks. The jury also found that Merck had committed consumer fraud in its marketing of Vioxx.

Let's see what the a plaintiff must prove in the punitive phase of the trial of a drug case. Under New Jersey law, a plaintiff can't recover punitive damages for harm caused by an approved drug unless they can prove the drug maker **knowingly withheld material information** from the Food and Drug Administration. No New Jersey pharmaceutical company has ever been hit with punitive damages since the law went into effect. During the punitive damages phase, the plaintiff proved by clear and convincing evidence that Merck withheld from the FDA an analysis suggesting that Vioxx increased heart risks. Raymond Gilmartin, former Merck chairman and chief executive, who was called to testify in the punitive phase by the plaintiff, was a terrible witness and hurt the defense badly. His testimony helped make out a very strong case for the plaintiff. He couldn't even remember that he had sold over \$100 million of his stock before Vioxx was pulled from the market. Who could believe that a man educated at Harvard could forget such a deal?

These two plaintiffs were the first persons who took Vioxx for longer than 18 months to go to trial. Merck has painted itself into a corner by promoting the myth that only persons who took the drug for over 18 months could suffer Vioxx-caused heart attacks. Of course, as we know, Vioxx can cause a heart attack with short-term use as well as use over 18 months. I hope that those in the media will check this out and find out how Merck has misled them on this point.

There is another interesting feature to this case. Under New Jersey law, this case must now be presented to a prosecutor for a criminal investigation. At press time, it was uncertain how this would be handled. The law states:

*Upon the conclusion of any action in which punitive damages have been awarded, the court shall refer the record of that action to the prosecutor of the county in which the case was tried and to the Attor-*

*ney General for investigation as to whether a criminal act has been committed by the defendant.*

It will be interesting to see how this phase of the Vioxx story will play out. While the conduct by some top officials at Merck was very bad, I don't know if any criminal laws were broken. Regardless of whether the criminal probe goes forward, the fact that punitive damages were awarded by a jury in Merck's backyard is huge and will have national implications.

#### **NATIONWIDE VIOXX-RELATED CLASS ACTION UPHeld**

In a unanimous decision with national significance, the New Jersey Appellate Division has upheld a trial court's decision certifying a Vioxx-related nationwide class action against Merck. The case was filed on behalf of third-party payors. Merck has on two separate occasions tried to prevent the class action from proceeding forward. The Appellate Division concluded that New Jersey Judge Carol E. Higbee, who was the trial level judge in charge of the case, properly exercised her discretion in certifying a nationwide class. The class consists of all non-governmental health plans that paid for members' Vioxx prescriptions, and the lawsuit asserts claims against Merck under the New Jersey Consumer Fraud Act to recover losses incurred as a result of purchasing the now-withdrawn painkiller for their health plans.

On July 29, 2005, Judge Higbee, granted a motion by the class representative, International Union of Operating Engineers Local #68 Welfare Fund, a labor union health plan, to allow the lawsuit to proceed as a nationwide class action. It was alleged that Merck engaged in widespread and systematic concealment of information concerning the safety and serious health risks of Vioxx. Merck appealed Judge Higbee's ruling to the New Jersey Appellate Division. The appeal was rejected.

This decision applies to all non-governmental third-party payors in the country, including health insurers,

unions, and large employers, who paid for Vioxx prescriptions for their plan members. The decision also allows for all such third-party payors in the country to prosecute their allegations of being misled by Merck's misrepresentations and concealments concerning Vioxx in one class action. Merck charged premium prices for Vioxx, compared to similar prescription pain-killer drugs, with absolute knowledge of the heart attack risk. Merck hid this risk from the FDA, the medical community, the public and the third party payors referred to in the class. Besides seeking reimbursement for their expenditures to make the arthritis and painkiller drug available to their health plan members, the third-party payors would be entitled to triple damages if ultimately successful on their claims under the New Jersey Consumer Fraud Act. This clearly was a major blow to Merck and a tremendous victory for those who are attempting to bring the makers of Vioxx to justice.

#### **FEDERAL JUDGE RELEASES MERCK DOCUMENTS**

U.S. District Judge Eldon Fallon, the judge overseeing all federal lawsuits involving Vioxx, has ruled that advertisements, press releases and studies already admitted into evidence were among hundreds of thousands of documents which Merck and Co. claimed were privileged and could not be released. The Judge went through nearly 500,000 documents and will release most all of them to the MDL steering committee. Eighty-one boxes—each holding 5,000—6,000 Vioxx documents—will be released to the plaintiffs' committee. Andy Birchfield from our firm is co-chair of this committee and believes this is a major victory for Vioxx victims.

#### **ANOTHER MERCK DRUG IN COURT**

According to a lawsuit filed on April 10th in a Florida federal court, Merck was negligent in promoting Fosamax, which is its osteoporosis drug. Fosamax is a defective product because it can

cause osteonecrosis of the jaw, or a rotting of the jaw bone, according to the complaint. The suit, which seeks class action status, alleges that Merck concealed and continues to hide Fosamax's potentially dangerous side effects from patients and doctors. Fosamax is Merck's second best-selling drug with last year's revenue being \$3.2 billion.

Fosamax belongs to a category of drugs known as nitrogenous bisphosphonates. Some other drugs in that category are used for chemotherapy. According to the lawsuit, medical journals had been reporting a connection between those medicines and the jaw condition. The suit contends that since Fosamax is in the same class of drugs, Merck should have known its product could lead to such problems. The lawsuit further alleges that the Food and Drug Administration had asked Merck to add a warning to Fosamax's label in August of 2004, and that the company has yet to comply with that request. Merck says it has complied.

Oral surgeons and dentists began noticing the link between jaw decay and bisphosphonates five years ago. At first they thought that only the potent, intravenous versions of the drugs, such as those administered to cancer patients to stop cancer cells from dissolving bone, posed a risk. In the past two years, some oral surgeons have become convinced that oral bisphosphonates such as Fosamax can also cause jawbone death when taken for a long period of time. Last month, the American Association of Endodontists issued a position statement recommending that dental surgeons should check whether patients are on bisphosphonates and consider those taking the drug to be at some risk for osteonecrosis of the jaw, ONJ. Our firm is currently investigating a number of potential claims involving this Merck drug. We are looking at each case on an individual basis and not as a class approach.

#### **CARDIOVASCULAR RISK ASSOCIATED WITH ADHD DRUGS**

Approximately two million children in the United States have Attention

Deficit Hyperactivity Disorder ("ADHD"), which is characterized by increased activity, inability to concentrate and poor school performance. Drugs such as Adderall and Ritalin are commonly prescribed to treat ADHD and have been criticized as being overprescribed. Concern is growing over the dangers of these drugs. In February of 2005, Health Canada, the Canadian drug regulatory agency, temporarily suspended sales of Adderall in Canada following reports of heart attacks, strokes and sudden death in children. Of the twelve deaths reported, all occurred between 1999 and 2003 and were children between the ages of 7 and 16. Some of the children had known pre-existing heart defects, which may have put them at a greater risk of severe side effects. In August of 2005, Health Canada allowed Adderall back on the market with new warning labels describing the danger to those with existing heart abnormalities and of the dangers of abuse of the drug.

For the past couple of years, the FDA has been monitoring cases of sudden death and cardiovascular injury in patients taking these drugs. Many cases of severe cardiovascular events and over 50 deaths have been reported according to the FDA's Adverse Event Reporting System database. On February 9, 2006, after reviewing the drug-related events, an advisory committee of the FDA voted to recommend a "black box" warning describing the risks of these drugs. Although no definitive causal relationship has been proven between the use of ADHD drugs and death, it clearly suggests that the dangers of the drugs are more serious than once believed.

*Source: New England Journal of Medicine*

#### **WYETH SETTLES FEN-PHEN CASES**

More than 8,000 claims relating to the diet drug fen-phen against drug maker Wyeth have been settled. The cost of the settlement is confidential. As a part of the settlement, these claimants agreed to withdraw their outstanding motions, joinders, oppositions attacking the enforceability of a previous settlement agreement and trust established in 2000

settlement were to be withdrawn by the plaintiffs. If so, the sealed agreement may well be one of the last episodes in the litigation arising from Wyeth's promotion of their new diet drug, Redux. As you may know, the component of Redux was fen-phen. Redux was approved by the U.S. Food and Drug Administration in 1996. The drug was recalled in 1997, and since that time Wyeth has paid out billions in settlements. It is also significant that the U.S. Department of Justice in Jackson, Mississippi, has been investigating alleged fraud that resulted from the withdrawal of fen-phen. Over 600,000 claims were made against Wyeth.

*Source: PimeZone*

#### **WYETH WINS TEXAS DIET DRUG TRIAL**

Before the settlement mentioned above in the fen-phen cause was reached, Wyeth had a victory in Texas. A jury found in favor of Wyeth in the case of a woman who claimed she suffered heart valve damage from taking Pondimin, one of Wyeth's withdrawn diet drugs. The Beaumont, Texas, jury decided that Wyeth was not responsible for the health problems of the woman who had taken the drug. The drugs Redux and Pondimin, which were components of a diet drug cocktail known as "fen-phen," were recalled in 1997 after being linked to heart valve damage. In early March, another Texas jury—in Midland—also found in favor of Wyeth in the case of another woman who claimed to have been harmed by taking Pondimin.

#### **SOME QUESTIONS RELATING TO AUTISM AND THE CDC**

There has been a great deal of debate over whether vaccines cause autism. The debate seems to have intensified recently. A group founded by parents according to its website, PutChildren-First.org, believes that there is a relationship. This group was formed to let the world know that the Centers For Disease Control (CDC), a division of the Department of Health and Human Ser-

VICES, is covering-up the relationship between a near-tripling of vaccinations for children in the 1990s and the epidemic of autism and other neurodevelopmental disorders that began at exactly the same time. In 1999, the world was made aware that children were receiving dangerous levels of mercury through vaccines as part of the Childhood Immunization Schedule. Soon thereafter, the CDC's own internal analysis showed a correlation between autism and injected mercury.

The CDC has now been accused of not being truthful relating to whether the old-style vaccines containing a mercury preservative caused autism in thousands of children. The agency has been accused of cover-ups and scientific manipulations by the autism advocate group. In addition, the CDC is now facing questions from some high-profile members of Congress. The American Academy of Pediatrics and the CDC say there is no evidence to support a connection between autism and the mercury-based preservative thimerosal, which had been used in the past in vaccines. As you may know, it is no longer used in most pediatric vaccines.

A letter sent on February 22<sup>nd</sup> by Senator Joseph Lieberman (D-CT) and seven other members of Congress has gotten a great deal of attention. The bipartisan group has requested that the CDC not take the lead on a new study examining the vaccine-autism issue. The National Institute of Environmental Health Sciences, a part of the National Institutes of Health, will convene a panel later this month to discuss how to analyze a key CDC database to determine whether autism rates have dropped since thimerosal was removed from vaccines.

Many public health officials who work with CDC believe that the Center is being unjustly attacked. Frankly, I have always believed that the CDC had done its job well in other areas. I will have to be convinced that they haven't done so on the vaccine issue before I change my mind. I realize that autism has become a most serious problem in this country. Parents of many autistic children believe strongly that thimerosal caused the dis-

order. This is primarily because it appeared around the time their children received vaccinations. Advocates also point to what they say is intriguing new research in animal models indicating that some individuals may be more sensitive to thimerosal than others.

A sophisticated website, [www.PutChildrenFirst.org](http://www.PutChildrenFirst.org), includes links to CDC documents, e-mails and transcripts which the groups say support their contention of an agency cover-up. A CDC spokesman Glen Nowak says that many of the documents on the site have been in the public domain for years and are presented out of context and in ways that may "look quite ominous"—when they're not. You can get more information from the CDC by calling 1-800-232-4636 or going to its website [www.cdc.gov](http://www.cdc.gov).

#### ***THE GOVERNMENT IS FOCUSING ON ILLEGAL PHARMA PROMOTION***

After decades of illegal activity, it appears as though the Department of Justice is finally attempting to curb the off-label promotion of prescription drugs by pharmaceutical companies. "Off-label" promoting is the term used to describe the practice of promoting or recommending a FDA-approved product outside of its approved indications. Recently, the government announced two settlements that seem to show a shift in attitude toward off-label promoting and that the Department is attempting to alter the way companies will promote and market their pharmaceutical products in the future.

The most recent settlements involve drug manufacturer Eli Lilly and Co. and a Swiss biotech company called Serono S.A. In December 2005, Eli Lilly agreed to plead guilty to a single misdemeanor count related to the marketing of Evista. Evista has been approved by the FDA for the treatment of osteoporosis in post-menopausal women. In addition to pleading guilty, Eli Lilly also agreed to pay \$36 million to settle both criminal and civil charges stemming from the company's marketing of Evista. In October 2005, Serono agreed to plead

guilty to two felonies related to the off-label marketing of its drug Serostim, which is an AIDS-wasting drug. Serono was also required to pay \$704 million to settle the criminal and civil charges stemming from the illegal marketing of Serostim—currently, this is the largest settlement for charges stemming from illegal off-label promotion.

In the situation involving Eli Lilly, which is a major U.S. pharmaceutical company, the government alleged that the company sought to broaden the market for Evista by promoting the drug for unapproved uses because the first year's sales of the drug were well below the company forecasts. According to the government, Lilly's brand team and sales representatives promoted Evista for the prevention and reduction in risk of breast cancer and for the reduction of cardiovascular disease. Lilly did this even after the FDA rejected such labeling proposals by the company. Specifically, the information filed by the government against Lilly alleges that the company engaged in the following illegal activities:

- Sales pitches used by sales representatives to promote off-label uses by physicians—the sales representatives were trained on how to prompt questions by doctors on unapproved uses;
- Encouraging representatives to send unsolicited medical letters to physicians in their territory to promote Evista for unapproved uses;
- Discussing unapproved uses for Evista at a "market research summit" organized by Eli Lilly;
- Creating and distributing to sales representatives a video that claimed that Evista is the best drug for the prevention of osteoporosis, breast cancer, and cardiovascular disease; and
- Organizing "consultant meetings" for physicians and discussing unapproved uses at such meetings.

In addition to the monetary penalties imposed upon Lilly for the criminal acts, the company also had to enter into a consent decree with the government, which imposed several obligations on

Lilly. For instance, Lilly will be required to implement effective training and supervision of its marketing and sales staff for Evista and ensure that any future off-label marketing is detected and corrected. Also, the company agreed to be permanently enjoined from promoting Evista for any unapproved use and to use an independent review organization to make sure the company's policies and procedures are proper with respect to Evista. Perhaps most importantly, Lilly will have to submit to the government any market research that is conducted in an effort to measure physician reaction of marketing messages by sales representatives for Evista. Finally, the company has to obtain quarterly information on the interaction between their sales representatives and physicians and present it to the government.

While these measures should have already been in place at Eli Lilly to make sure the company's sales representatives were acting properly, hopefully these penalties and obligations levied against the company by the government will result in a change in policy at the company that will put the safety of patients before profits. We also hope that these recent investigations and resulting settlements indicate that the government is "cracking down" on the very pervasive practice of off-label promoting.

It should be noted that our experiences in pharmaceutical litigation tell us that the examples above are just the tip of the iceberg. Indeed, there are many companies that have been promoting their pharmaceuticals off label and they have intensified their efforts it seems. The off-label promotion of Evista is but a very small example of a practice that has been pervasive in the hormone drug industry going back to the 1960s with Premarin and carried forward to today with Prempro. Such off-label promoting results in over prescribing and in patients taking unnecessary risks. It is a dangerous and unsafe practice that must be stopped.

Source: *The National Law Journal*

## **A NUMBER OF ASBESTOS LITIGATION CASES ARE DISMISSED**

About 4,200 asbestos cases, which were pending in an Ohio State Court, have been dismissed. These cases, involving diagnoses by two doctors whose testimony in litigation over silicosis claims is being questioned, were filed along with numerous others. The two out-of-state doctors refused to testify under oath in a recent appearance before a congressional subcommittee. Their actions made it most unlikely that they would testify in the asbestos cases pending in Cleveland. The three judges handling these cases set new priorities for dealing with thousands of asbestos claims. Cancer claims were placed on top of the list. The rest of the cases won't be allowed to go to trial unless the plaintiffs can prove they are actually sick. The "non-malignant" claims—numbering about 30,000—will go to the bottom of the list.

You may recall that questions regarding the very same doctors' diagnoses became an issue last summer when a U.S. District Judge in Corpus Christi, Texas, recommended throwing out all but one of about 10,000 diagnoses of silicosis, a rare lung disease related to mining, sand blasting and rock drilling. The judge, who is in charge of consolidating federal silicosis claims, focused on mass X-ray screenings and questionable diagnoses by a small group of doctors, including the two involved in the state court cases pending in Cleveland. The federal judge's strong action led to a hearing in Congress of the House Oversight and Investigations Subcommittee. It was interesting that the two doctors invoked their Fifth Amendment rights against self-incrimination. In dismissing the cases, the Cleveland judges left the door open for the original plaintiffs to re-file their claims if they are diagnosed with the lung condition by another doctor.

## **X. BUSINESS LITIGATION**

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### **JURY FINDS FOR A FORMER BANKER IN FRAUD CLAIM**

A Portland, Maine jury recently awarded \$7.4 million in damages to Darrell Mayeux, a former Fairchild Semiconductor executive who blamed the former Fleet Bank's Private Client Group for causing the loss of his **fortune** once valued at \$27 million in stock and cash. When Fairchild went public in 1999, Mayeux served as vice-president of sales and marketing. He claimed that Fleet Bank failed to properly advise him on his assets, particularly after he retired in 2001. Bank of America, which acquired Fleet, contended that Mayeux repeatedly ignored their sound advice. Apparently, the complaint was that the bank's biggest failure was in not revisiting Mayeux's financial arrangement after he retired.

Eventually, Mayeux's \$4 million line of credit became out of sync when the stock's value dropped. Fleet responded by selling off stock, causing a downward spiral that eliminated the entire value of Mayeux's portfolio within a year. Bank of America, which denied any wrongdoing, says it was considering an appeal. Testimony during the trial had painted a picture of Fleet Bank's Private Client Group actively courting Mayeux and his fortune with multiple presentations. He even got an invitation to join its president in a golf tournament. It was claimed and apparently proved that Fleet made a lot of promises to the man that they couldn't keep. If nothing else, the case demonstrated in dramatic fashion just how fast money can be won and lost. Mayeux had received 667,000 shares of the company's stock when the company went public. It was worth \$12.1 million on the first day of trading and the value eventually went to \$27 million. The bank says it recommended a mechanism for protecting Mayeux from fluctuations in the stock's value. Apparently, he turned it down initially because he still worked for Fairchild

and felt that the strategy would send the wrong message to investors. A year later, however, Mayeux retired, but Fleet never changed its strategy.

There are at least two interesting features to this case. First, banks in the U.S. had lobbied for regulatory changes that allowed them to become financial advisers. With that change came clear responsibilities to follow through and be advisors in the true sense. The second thing of interest is that the lawsuit never would have materialized if Fleet hadn't pressed for an additional \$182,000 it claimed it was owed by Mayeux. When Fleet pressed the issue, Mayeux decided to proceed with the lawsuit. The jury ruled in his favor and against Fleet. On second thought, I guess there is one more matter of interest—it's not just ordinary folks who need the protection of our judicial system—it also protects bankers.

Source: *The Insurance Journal*

### **BASF CORPORATION LOSES POAST CASE**

The class action case against BASF Corp. for fraudulently marketing and pricing the expensive Poast herbicide has overcome another legal hurdle. The Minnesota Supreme Court has again ruled in favor of the farmers who filed the suit and against BASF. The national class action case involves damages and claims that total approximately \$62 million, including interest, against BASF. Among other things, the Minnesota court underlined that the "fundamental debate is how the farmers' claims are accurately characterized." BASF claimed that the case was about the company's right to label a product.

The case involves chemical purchases by farmers from 1992 to 1996. BASF marketed a substantially identical product, Poast Plus, and priced it lower to compete in an expanding and competitive soybean market, while charging "minor crop" users more. The case was filed in 1997 by 11 farmers in Minnesota, Montana and North Dakota. All were sugar beet growers. The more expensive marketing involved other minor crops, including fruits and vegetables in California. As presently consti-

tuted, class members now come from all 50 states.

This case has been around for several years. On December 6, 2001, a Norman County jury in Ada, Minnesota, found in favor of the farmers. The initial judgment was entered on April 2, 2002. In 2004, BASF appealed the case to the U.S. Supreme Court. In June 2005, the High Court sent the case back to the Minnesota Supreme Court for that court to assess the impact of another chemical-related case. Now the Minnesota high court has said the ruling in the other case supports the ruling in this case.

### **GOOGLE TO PAY \$90 MILLION IN "CLICK FRAUD" CASE**

Google Inc., the nation's leading on-line search engine, has agreed to pay \$90 million to settle a lawsuit alleging that the company overcharged thousands of advertisers who paid for fraudulent sales referrals generated through a scheme known as "click fraud." The lawsuit, filed by Lane's Gift and Collectibles on behalf of all Google advertisers, revolves around one of the primary methods that both Google and its competitor Yahoo, Inc. generate revenue. According to allegations raised in the lawsuit, Google makes virtually all of its money from text-based advertising links that trigger commissions each time they are clicked on. Generally, this form of advertising has been lucrative for advertisers whose sales are boosted by increased traffic from prospective buyers.

However, the plaintiffs alleged that scam artists repeatedly click on specific advertising links even though they have no intentions of buying anything. As a result, advertisers, such as Lane's Gift and Collectibles, allege that they end up paying for bogus web traffic. The lawsuit alleged Google had conspired with its advertising partners to conceal the magnitude of click fraud to avoid giving refunds. Google executives have repeatedly maintained that the existence of click fraud on its ad network is minor. The \$90 million settlement is equivalent to less than 1% of the \$11.2 billion Google has received in revenue during the last four years.

The proposed settlement would apply to all advertisers in Google's network during the past four years and any web site showing improper charges dating back to 2002 would be eligible for an account credit that can be used to purchase future ads with Google. The proposed settlement still requires final court approval. Yahoo, which is also named in the lawsuit, announced that it intends to defend the lawsuit and will fight the lawsuit's allegations.

Source: *Associated Press*

### **JURY AWARDS \$9.25 MILLION TO CATTLE RAISERS**

A federal court jury in South Dakota recently awarded \$9.25 million to cattle raisers who claimed that large meat packing companies had underpaid producers for live cattle. The class action lawsuit, filed by three men, sought damages from Tyson Fresh Meats Inc., Cargill Meat Solutions Corp. (which does business as Excel Corp.), Swift Beef Co. and National Beef Packing Co. The jury found in favor of plaintiffs and against defendants, awarding damages in the amount of \$4 million from Tyson, \$3 million from Cargill-Excel and \$2.25 million from Swift. The jury ruled in favor of National Beef. Because it was a class action lawsuit, damages are to be shared by cattle producers nationwide who chose not to opt-out as plaintiffs. How the money will be distributed will be determined later.

From April 2, 2001, to May 11, 2001, the U.S. Department of Agriculture misreported the boxed beef cutout prices for choice and select cuts of meat. The lawsuit alleged the meatpackers knowingly used that information to pay less to cattle producers than they would have if the cutouts were correct. The packers denied knowing about the faulty reports before the USDA acknowledged them. The erroneous reports were the result of a flawed computer program that took into account a lesser quality of beef when calculating cutouts for choice and select cuts. As a result, the choice and select cutouts were too low.

Source: *Houston Chronicle*

## **H&R BLOCK AND BENEFICIAL NATIONAL BANK SETTLES CLASS ACTION**

H&R Block Inc. and Beneficial National Bank have agreed to pay \$39 million to settle a 1998 nationwide federal class action lawsuit in Chicago involving Block's refund-anticipation loans. The proposed settlement requires Kansas City-based Block and Beneficial National Bank to pay \$19.5 million each to settle the class action's claims. The proposed settlement was filed last month in the U.S. District Court for the Northern District of Illinois. The case had been scheduled to go to trial on May 15<sup>th</sup>. The proposed settlement covers Block's refund-anticipation loans that Beneficial National Bank had financed through a Block office from April 8, 1994, through December 31, 1996. The settlement would make available at least \$30 million in cash payments to about 1.7 million class members who made about 2 million individual refund-anticipation loan transactions.

The proposed settlement is subject to review and approval by U.S. District Judge Elaine Bucklo. If Judge Bucklo grants preliminary approval, Block will mail notices to class members within 45 days. Class members have the right to exclude themselves from the settlement, subject to certain limitations, or to object to its terms at a fairness hearing that would be held later this year. On January 27<sup>th</sup>, the court in the Chicago case reduced the size of the class to an estimated 1.7 million clients served mainly during the 1995 and 1996 tax seasons. The initial plaintiffs' case against Block had sought a class of about 17 million clients from 13 tax seasons.

There have been other cases against Block over the refund-anticipation loans. On February 15<sup>th</sup>, California Attorney General Bill Lockyer sued the company in San Francisco Superior Court, alleging that it had violated 15 state and federal laws in marketing and providing high-cost, refund-anticipation loans mainly to low-income families. The company agreed to pay \$62.5 million to settle four state class action lawsuits involving more than 8 million consumers related to the loans in West Virginia, Ohio, Alabama and Maryland, and

potential claims in 22 other states and the District of Columbia. A 1992 Pennsylvania case involving the loans is pending. In November 2002, the company agreed to settle a Texas suit involving the loans that cost the company \$25.7 million.

Source: *Kansas City Business Journal*

## **XI. INSURANCE AND FINANCE UPDATE**

### **ZURICH SETTLES WITH CONNECTICUT, ILLINOIS AND NEW YORK OFFICIALS**

We wrote last month on a settlement reached by Zurich Financial Services Group with several states. Zurich has now reached a \$153 million settlement with the states of New York, Connecticut and Illinois. This will settle charges relating to bid-rigging and account steering charges initiated by New York authorities. In addition, Zurich has reached a parallel settlement with the New York Insurance Department. Out of the settlement, \$88 million will be paid to Zurich policyholders harmed by bid-rigging activities. In addition, Zurich will pay penalties of \$39 million to New York and \$13 million each to Connecticut and Illinois. This most recent settlement is in addition to the prior multi-state settlement of \$171 million reported last month. The two latest agreements, which are collectively known as the "Three-State Agreement," relate to industry-wide investigations into broker compensation, insurance placement practices and "non-traditional" products. The "Three-State Agreement" calls for:

- payments of approximately \$88 million in restitution to excess casualty policyholders and \$65 million in fines;
- requires the implementation of new producer compensation disclosure and compliance regimes;
- prohibits Zurich from paying contingent commissions on excess casualty business in the US through 2008;

- establishes a mechanism whereby Zurich would stop paying contingent commissions on other lines of business if 65% of the U.S. market for a particular line of business is not paying such commissions; and
- requires additional reporting obligations on reinsurance transactions.

The Zurich settlement agreements relating to broker compensation and insurance placement practices, now includes 10 state Attorneys General and three state insurance departments. The total cost to Zurich will be approximately \$325 million with the payment of lawyers' fees to be determined by the court.

Source: *The Insurance Journal*

### **ASTROS' INSURANCE CLAIM ON BAGWELL DENIED**

Being a rabid Boston Red Sox fan, I remember back when Jeff Bagwell was a raw rookie in 1990, with great potential, but who was struggling to make the roster. Instead of becoming a member of the Red Sox, however, he was traded to the Houston Astros for an established pitcher named Jack Anderson. After being traded to the Astros, Bagwell went on to become a really great player. A four-time All-Star, he holds the franchise record in Houston with 449 home runs. He has 1,529 RBIs and 1,517 runs and is the only first baseman with 400 home runs and 200 stolen bases in his career. Bagwell has been the Astros' first baseman on opening day for the past 15 seasons. However, it now appears that his playing days are over. It's sort of sad to see Jeff Bagwell's career end in such a manner.

Nevertheless, the Astros star is still making news. An insurance claim was filed by the Astros to recoup more than \$15 million owed by the club to their injured first baseman. That claim was denied by the insurance company, Connecticut General. The National League champions filed the claim in January to recoup about \$15.6 million of the \$17 million Bagwell is guaranteed this season in the final year of his contract. The Astros management says Bagwell is

too hurt to play because of a chronically injured right shoulder. The 37-year-old Bagwell began the season on the disabled list and he has acknowledged that he might never play again.

Dr. Jim Andrews, a noted sports medicine doctor located in Birmingham, Alabama, one of the very best in his field, says that Bagwell is “totally disabled to play baseball.” Bagwell, perhaps the best hitter and most popular player in the history of Astros, missed 115 games last season following shoulder surgery. He returned in time to play in the postseason, but was limited to duty as a pinch-hitter and designated hitter in the World Series against the Chicago White Sox. When Bagwell went 1-for-8 in the Series with one RBI, it was quite obvious that the former star was not up to par. Now it appears that he is unable to play baseball because of his injury and that should mean that he is disabled.

The Astros took the position that Bagwell was totally disabled in January 2006, even though he had played as late as October 2005. Connecticut General said it determined that there had been no adverse change in Bagwell’s condition between the end of last season and the date the policy terminated on January 31, 2006. Bagwell’s position in the insurance policy was listed as “professional baseball player-non-pitcher.” Apparently, this matter will go to court if the insurance company doesn’t change its position. It will be interesting to see how all of this plays out. Regardless, as far as his baseball career goes, I really hate to see him go out this way—Jeff Bagwell was a great one!

#### **COURT UPHOLDS \$7.9 MILLION BAD FAITH AWARD**

A federal court in Pennsylvania has upheld a \$7.9 million award against an insurer for its bad faith in failing to offer the full limits of a liability insurance policy to plaintiffs in a lawsuit. Interestingly, the insurance company had assigned one lawyer to represent two of its insured’s who were defendants in the same medical malpractice case. The recent award included \$1.6 in compen-

satory damages and \$6.6 million in punitive damages. The Medical Protective Co. was found to have acted in bad faith when it failed to tender its primary policy limits of \$200,000 to settle a medical malpractice claim against its insured, a dermatologist. The doctor also maintained \$1 million in excess coverage through the CAT/MCARE fund, but the insured could not tap into that policy without a complete tender of the \$200,000 primary policy first.

The medical malpractice lawsuit filed by the plaintiffs went to trial, resulting in a jury verdict of \$2.5 million against the doctor in April 2002. The verdict was \$1.3 million in excess of the doctor’s total malpractice insurance coverage. In lieu of paying the excess verdict from his personal assets, the doctor assigned his right to bring the bad faith lawsuit involving his representation against MedPro to the plaintiffs who had sued him. By Medical Protective’s own admission, the malpractice case was likely to result in damages exceeding the \$200,000 policy limits. But Medical Protective never offered more than \$50,000 from the \$200,000 line of coverage. This failure to tender its coverage limits meant that the CAT/MCARE fund could not draw any money from his \$1 million line of malpractice insurance coverage to settle the case.

The Medical Protective employee who assigned the same lawyer to the two doctors testified that he did so despite knowing that appointing them the same lawyer created a conflict of interest for the lawyer in violation of ethical rules. After a six-day trial, a jury returned a verdict in favor of the plaintiffs, finding that Medical Protective acted in bad faith, and that its bad faith conduct was a substantial factor in the doctor suffering an excess verdict. The jury awarded \$1.6 million in compensatory damages and \$6.25 million in punitive damages. MedPro appealed, but it was rejected.

The appellate court maintained that the issue of the dual counsel might have been sufficient on its own to justify a bad faith finding by the jury, although it appears the jury based its finding on both the medical malpractice and the legal counsel issue. The court stated:

*There was {also} sufficient evidence for the jury to find that this bad faith action deprived Dr. Marcincin of his ability to vigorously assert his best defense (the liability of Dr. Edelman) and thereby caused the excess jury verdict against Dr. Marcincin alone in the underlying litigation.*

Pennsylvania’s bad faith statute “authorizes punitive damages on an insurance company found to have acted in bad faith.” The jury in this case found that Medical Protective acted in bad faith, and caused an injury to its insured. Therefore, as the lower court instructed, it was proper for the jury to award punitive damages to punish and deter such conduct if the jury also found that Medical Protective’s behavior was “outrageous.” That’s exactly what the jury did. Medical Protective attempted to defend itself by arguing that the punitive damages—almost quadruple the compensatory damages, minus attorney’s fees and costs—were grossly excessive and therefore unconstitutional. However, the Pennsylvania appeals court noted that the U.S. Supreme Court has twice declined to impose a “bright-line ratio” which a punitive damages award cannot exceed. The Court, finding that the ratio was not excessive in this case, upheld the jury’s award of punitive damages in its entirety.

Source: *The Insurance Journal*

#### **THE KATRINA INSURANCE CLAIMS**

As you already know, there have a tremendous number of insurance claims arising as a result of Hurricane Katrina. Since the insurance companies are either denying claims in mass or are simply failing to pay full value on the claims that are accepted, there have been thousands of lawsuits filed. Because of the volume, there has been a great deal of recent activity in the courts of Mississippi and Louisiana. I am including a number of the most significant events in this section.

## Mississippi Attorney General Claims Companies Using “Delay Tactics”

Mississippi Attorney General Jim Hood believes that Allstate Insurance Company and State Farm Insurance Company are causing undue delay in having his state’s Katrina-related lawsuit against those insurers heard. Allstate and State Farm have asked a federal judge to reconsider his decision to have the case heard in state court. Attorney General Hood filed the lawsuit on September 15th in a Mississippi state court. The insurance companies, in a typical delay tactic, had the case removed to Federal Court on September 16th. A federal Judge signed an order on March 7th sending the case back to state court. The lawsuit is seeking to make the insurance companies honor their policies and pay for damage caused by storm surge. Concerning the companies’ action, the Attorney General stated:

*It is a shame that they (the companies) continue to try to delay this case, knowing all the while that people’s lives are on hold. We need a decision in this case so people can start re-building their lives.*

Source: *Insurance Journal*

## State Farm Suit Claims Fraud In Claim Denial

In another interesting development relating to Katrina insurance claims, a couple that got conflicting reports from an engineering firm regarding how one of their homes was destroyed during Katrina has filed a lawsuit accusing State Farm Insurance Company of manipulating those reports to deny their claim. Mississippi’s Attorney General is investigating insurance companies for what he calls their “fraudulent” handling of post-Katrina claims. This is another case—one of many—with the issue being whether homes were

destroyed by the hurricane’s wind or by water. In this latest case, Terri and William Mullins have two conflicting reports done by the same engineering firm.

The first report, dated October 23<sup>rd</sup>, found the couple’s two-story home in Kiln, a rural community near the Mississippi-Louisiana border, was destroyed by hurricane-force **wind**, damage their policy **covered**. On January 3<sup>rd</sup>, however, the same firm issued a second report that blamed the damage on the storm’s **flood waters**. Interestingly, State Farm used the second report as the basis for denying the Mullins’ claim. Insurance companies say their homeowners’ policies do not cover damage from rising water, including wind-driven water, but policyholders argue that storm surge should not be considered flooding. It is alleged in the lawsuit:

*State Farm’s actions show that it believes that it should be able to pick and choose which proof it relies upon in evaluating the validity of a claim. State Farm will only accept reports from engineering firms that support a denial of coverage.*

A copy of the first engineering report was obtained from the office of the Mullins’ local insurance agent in December. A month later, employees of a State Farm office in Biloxi showed the Mullins the second report. The Mullins are seeking unspecified damages from State Farm and Forensic Analysis & Engineering, the Raleigh, North Carolina-based firm that prepared both reports. Such disputes with insurance companies over the wind versus water debate have been commonplace for many homeowners in the path of Katrina’s destruction, particularly those without federal flood insurance.

It appears that some companies are pressuring engineers to alter their conclusions on storm damage so claims can be denied. A whistleblower—a “highly placed insider” at

a major insurance company—has furnished copies of “coerced and altered engineering reports” that companies tried to keep “under lock and key.” It may be that these companies will have much more to answer for than just denying valid insurance claims.

## A Case Involving Allstate

In another wind versus water lawsuit, a federal judge in Gulfport, Mississippi, first refused to throw out a lawsuit that a Gulfport couple has filed against Allstate Insurance Co. The insurer had refused to cover damage to the plaintiffs’ home from Hurricane Katrina. U.S. District Judge L.T. Senter Jr., said the question of how much damage to the couple’s home was caused by wind and water is a “fact-specific” inquiry that must be decided at trial by a jury.

The couple, who bought their Gulfport home in June 2005, claim the Allstate agent who sold them their policy told them they didn’t need to purchase “flood coverage” because they didn’t live in a flood plain. Allstate paid the couple \$2,600 for damage caused by wind, but the plaintiffs say their home sustained up to \$100,000 in damage. Allstate, the second-largest U.S. personal-lines insurer behind State Farm, argues that its policies do not cover damage from “storm surge,” or wind-driven water.

Judge Senter, in a subsequent order, ruled that provisions in Allstate Insurance Company’s policies that exclude flood damage are valid and enforceable. This ruling could represent a setback for these plaintiffs and other Gulf Coast policyholders whose claims were denied by the insurer. The plaintiffs in this case argued that the wording of their policy’s flood exclusions are ambiguous and cannot be enforced. Judge Senter ruled that the terms of Allstate’s policies are clear and unambiguous in excluding flood damage. I believe that cases will still

be decided on factual evidence on whether damage to an insured structure was caused by wind or flood waters or a combination of the two. For that reason, I don't see this ruling as being that significant.

### **State Farm Will Have To Produce Key Documents**

State Farm Insurance Company has until May 26th to turn over documents for a grand jury's probe of allegations that the insurer fraudulently denied policyholders' claims after Hurricane Katrina. A judge in Harrison County, Mississippi, made that ruling in a pending case. During a hearing, Special Assistant Attorney General Tim Howard told the court that State Farm was twisting the arms of engineering firms to produce reports that will allow the company to deny Hurricane Katrina claims. Mississippi Attorney General Jim Hood's office had wanted all the records by March 23rd, but the court ruled that State Farm had to start producing the documents by April 6<sup>th</sup> and must complete the process by May 26<sup>th</sup>.

### **State Farm Accused Of Destroying Papers**

U.S. Senator Trent Lott, who incidentally believes that lawsuits aren't so bad when he is a victim, also believes that State Farm Insurance Co. has been destroying documents relating to claims arising out of Katrina. In his lawsuit, Senator Lott says these documents would have shown that the insurer has fraudulently denied thousands of claims by the Senator and other policyholders whose homes were destroyed by Hurricane Katrina. Senator Lott has what is described as a "good faith belief" that several State Farm employees in Biloxi are destroying engineering reports that gave conflicting conclusions about whether wind or water was responsible for storm damage.

Mississippi Attorney General Jim

Hood is also investigating allegations that State Farm manipulated engineering reports to deny claims after the hurricane. A judge ordered State Farm to turn over copies of its Katrina engineering reports to Hood's office. Interestingly, the judge also ordered Hood's office to set up a "Chinese wall" that would keep the documents out of the hands of lawyers with civil cases against State Farm. Because Attorney General Hood also has filed a civil case on behalf of the state against State Farm and other insurance companies, State Farm has asked the judge to bar the Attorney General from actually seeing the records. Senator Lott is asking a federal judge to order State Farm to turn over his entire case file, as well as records for other policyholders' claims and that hasn't yet been ruled on.

### **Federal Judge Sues Nationwide For Denying His Claim**

A federal judge in Gulfport, Mississippi, who would have presided over homeowners' Katrina-related lawsuits against insurance companies, is waging his own battle against the insurer of his Gulf Coast home. U.S. District Judge Louis Guirola sued Nationwide Mutual Insurance Co. for refusing to cover damage to his storm-demolished home in Long Beach, Mississippi. The judge's lawsuit, like many others, is over whether it was Katrina's wind or water that caused damage to tens of thousands of homes. The judge recused himself from hearing all Katrina-related insurance cases to avoid any conflict of interest.

In conclusion, it is obvious that the litigation over Katrina-related claims will be long and drawn out. I had hoped that the insurance companies involved would do the right thing and not try to avoid paying legitimate claims. Based on what we have seen so far, however, that is certainly not happening,

### **INSURERS EXPERIENCE RECORD GAINS IN 2005**

The insurance companies which provide homeowners and automobile insurance made a record \$44.8 billion dollar profit in 2005. This was in spite of the Hurricanes Katrina and Rita and the other storms which hit the U.S. during 2005. The 2005 record profit was an 18.7% increase over 2004. Even with their record profits, insurers contend that they face massive problems because of the storm damage experienced in 2005 by many Americans. As expected the companies say that those problems can only be fixed by increasing premiums. In addition, some are scaling back coverage commitments in the disaster-prone areas of the country.

It should be noted that the insurance industry, as a whole, covered most of its claims and expenses in 2005 with premiums earned during 2005 rather than with surplus funds retained by the industry. Surplus is the money retained as a cushion by insurance companies to prepare for unusually high claims at certain times. During 2005, the insurance industry raised its surplus by more than 7% to nearly \$427 billion. The obvious question is how, in a year of record disaster-related claims, does the insurance industry end up with a record year of profits? You may be surprised to learn that most major U. S. insurance companies purchased **disaster insurance** of their **own** before the 2005 storms hit. Interestingly, much of the disaster insurance purchased by the U.S. insurers came from foreign firms. Insurance companies, which insure other insurance companies, are known as "reinsurers." Most of these companies are based on the island of Bermuda or in European countries. During Hurricane Katrina the insurance industry only covered about 30% of claims which were filed. The companies said most of the claims were flood damage claims and thus not covered.

Source: *Los Angeles Times*

### **JURY FINDS AGAINST INSURANCE COMPANY ON DISABILITY CLAIM**

A Marion County, Indiana, jury has awarded more than \$1.5 million to

Donna Combs, a woman who said an insurance company **wrongfully terminated** her disability insurance benefits after she became ill with a blood disease. It was contended that Lumbermens Mutual Casualty Co. showed bad faith in stopping the payment of Ms. Combs' benefits. She worked as a radiology technician at a local hospital until 2001, when her medical condition, including the blood disorder, left her unable to work. Interestingly, members of the jury told Ms. Combs after they had reached a verdict in her case that they "wanted to make sure companies can't treat people this way." That is a sure sign that the company's conduct wasn't justified in this case.

#### **A JURY IN GEORGIA FINDS AGAINST INSURANCE COMPANY**

A jury in DeKalb County, Georgia, returned a \$5.6 million judgment recently in a case against Atlanta Casualty Co. The basis for the claim was the bad-faith practices by the Atlanta Casualty involving an 86-year-old woman who had automobile insurance with the company. This case arose out of a motor vehicle collision involving the lady and another vehicle in November 1992. An occupant of the other vehicle sued Atlanta Casualty and received a \$60,000 judgment. The company refused to pay, claiming it had not been notified of the accident. Atlanta Casualty then filed suit against the lady, claiming that it didn't have to pay her claim because of the lack of notice.

In court, it was shown that on March 18, 1996, Atlanta Casualty had signed for a certified letter giving Atlanta Casualty notice of the accident. The company failed to provide a defense for its policyholder and failed to pay the judgment of \$60,000 returned in the case. The insurance company, not only denied coverage to the elderly lady after she had paid her premiums to them for several years, but it elected to file suit against her. The policyholder, who worked as a housekeeper at a local hotel for 27 years, had used her life savings to buy a house in her hometown of Decatur, Georgia. She had lived there alone until 1999 when

her granddaughter began taking care of her. All during this time the lady continued to drive her car, kept her liability insurance in place, and depended on Atlanta Casualty to protect her in the event of an automobile accident.

#### **CLASS ACTION STATUS GRANTED IN SUIT AGAINST FARMERS GROUP COMPANIES**

A federal judge in Oklahoma has granted class action status in a lawsuit involving the use of credit information in insurance rating against Farmers Insurance Companies. The suit names as defendants the following companies: Farmers Insurance Company Inc.; Farmers Group Inc.; Farmers Insurance Exchange; Fire Underwriters Assoc.; Fire Insurance Exchange and Mid-Century Insurance Company. The plaintiffs are seeking to recover statutory damages, costs and attorneys' fees based upon defendants' alleged willful violations of the Fair Credit Reporting Act.

It is claimed that the Farmers companies improperly used consumer report information on their applicants and insureds and intentionally failed to give those persons the required notice of adverse action against them. The potential class members include all who received, renewed and/or purchased personal auto and/or homeowners policies from the named companies and "were charged more than the lowest premium available for such insurance" based on credit history contained in the consumer report.

Source: *The Insurance Journal*

#### **LIBERTY NATIONAL SETTLES A CLASS ACTION LAWSUIT**

Liberty National Life Insurance has settled a class action lawsuit relating to the sale of insurance to black persons. A federal judge approved the settlement involving claims that the company charged African-American policyholders higher premiums for burial insurance. The class consisted of about 2,000 people who contended that their family members paid more for industrial life insurance, or burial policies, than white

customers of the same age. The policies were sold by Liberty National prior to January 1, 1966. The settlement resolves most of the "class action issues in race-distinct pricing litigation at Liberty National." There are a number of individual cases that remain and are pending. The lawsuit was filed in 1999 by a group of Dekalb County residents. Under the settlement, the company will pay a total of \$6 million to the class members and will pay all attorneys' fees to the lawyers who represented the class plaintiffs. Our firm currently represents over 500 persons, who were sold over 1500 policies, and who still have individual claims against Liberty National. These claims weren't included in the class action settlement.

## **XII. PREMISES LIABILITY UPDATE**

#### **FAMILIES OF FIRE VICTIMS WIN IN NORTH CAROLINA**

Our firm represents multiple families who lost loved ones in a jail fire that occurred in Mitchell County, North Carolina on May 3, 2002. In addition to our clients, a number of other individuals lost their lives and/or were injured during this jail fire. Ben Baker is the lawyer from the firm who has handled this case. We brought suit on behalf of our clients against the State of North Carolina who was responsible for bi-annual fire safety inspections to insure that the jail was up to code for the safety of persons being held in the facility. Following the fire, the North Carolina Department of Labor conducted an investigation into the fire and determined that the Department of Health and Human Services, the state department responsible for conducting the bi-annual inspections, had failed to properly perform their inspection in accordance with North Carolina regulations and had failed to properly train their fire inspectors to conduct jail inspections.

The investigation also obtained state-

ments made by the head of the department responsible for inspecting the jails as well as the inspector, both of whom stated that portions of the jail where the fire started were never inspected and that inspectors had never been trained to inspect jail facilities to make sure they conformed with proper building code requirements for fire safety. However, a state sponsored investigation into this fire conducted by the State Bureau of Investigation (SBI) has remained sealed and not made public despite lawsuits from local media trying to obtain a copy of the investigation report.

Our clients brought suit through North Carolina Department of Industrial Relations, the administrative agency required by law to handle claims of this nature, against the State of North Carolina. The State, through the Attorney General's office, filed motions to dismiss our client's claims along with other claims filed and consolidated in this matter. The deputy commissioner for the Department of Industrial Relations denied the state's motion to dismiss finding that the state did not have immunity as it claimed. The state appealed this decision to the Department of Industrial Relations Full Commission. This Commission also denied the state's request to dismiss the claims.

Finally, the state appealed the denial of its motions to dismiss to the North Carolina Court of Appeals. After oral argument was held, the Court, found in favor of the families of the fire victims and ruled that their claims could go forward. The Court of Appeals specifically found that the state was not immune from liability under the North Carolina Tort Claims Act. The Court of Appeals also found that a special duty had been created between the state and the persons being held in that Mitchell County jail due to the bi-annual duty to inspect the facilities for the health, safety and welfare of those detained in the facility. The state has now appealed to the North Carolina Supreme Court. Hopefully, we will be able to start the discovery process soon so we can help the families find out what actually happened on the night of the fire.

### ***NATIONAL STUDY ON INJURIES AND DEATH IN CHILD CARE FACILITIES***

According to a recent study by two sociologists from the City University of New York Graduate Center, more than 8 million children are in a paid child care each day. Sociologists Julia Wrigley and Joanna Dreby from the City University of New York Graduate Center compiled a comprehensive database of child care failures, including deaths of children between the years of 1985 and 2003. The study, which appears in the October issue of *The American Sociologist Review*, was funded by the Foundation for Child Development.

The study was the first known systematic national data on fatalities and serious injuries in child care. It found that fatality rates largely varied across the different types of child care, primarily based on the differences in organizations and operation in the manner of care. There is no known agency which collects national data on documenting serious injuries or deaths occurring in child care. While state data may be found, it is often quite limited. The study did not account for the rare occurrence of children dying from natural causes while in child care. Excluding care given by family members or relatives, there are 3 forms of child care: child care centers, nanny's moving into a child's home, and family day care providers working out of their own home.

The media search recognized 3,681 cases of child care failures. Of those 3,681 43% occurred in family day care, 24% in day care centers and 16% in in-home care. The legal database found 777 cases resulted in jury verdicts, civil settlements, and administrative law judge ruling in licensing cases. Of these cases, 47% occurred in family day care homes, 28% in child care centers and 10% in in-home care. The media and legal records used as data were those involving bad events which were publicized. Data from state records were limited and taken from the following states: Colorado, Delaware, Georgia, Maryland, Michigan, Oklahoma, and Oregon. The study looked at 826 state records and included 54% family day care centers, 38% child care centers, and

5% in in-home care centers. It is important to note that many cases of injury and death in child care do not reach the media and/or do not result in civil or criminal cases; therefore, the data is limited.

The study found that the fatality rate for children who received child care in private homes was 16 times higher than the fatality rate of children in child care centers. Wrigley and Dreby analyzed reports of 1,362 fatalities (of 4,356 child care failures) during the time period mentioned above. The study found that the infant fatality rate kept by Nanny's or family day care providers was more than 7 times higher than that of day care centers. The fatality rate of infants resulting from accidents and/or violence was nearly 7 times higher than that of children from the ages of 1-4 years old.

According to the sociologists who authored the study, day care centers were the safest form of child care because they afforded children different forms of protection and because multiple staff members watched the children. Also, the centers had more training for teachers and in most instances were supervised by professionally trained directors. We are currently handling a tragic case in Tennessee where a small child died in a day care center that was in violation of several state rules and regulations. The facility was not only understaffed, but also had far too many children on the premises. The child in our case was neglected and died as a result. A grand jury has indicted the owner on criminal charges. Our civil case is currently pending.

### ***ANOTHER DEATH AT DISNEY WORLD***

Another death has occurred at Walt Disney World on its "Mission: Space" attraction. On April 12<sup>th</sup> a woman, who became ill after leaving the ride, died at a local hospital. It was the second death in less than a year related to the Epcot Center ride, which spins riders in a centrifuge that subjects them to twice the normal force of gravity. The ride is considered so intense it has motion sickness bags and signs warning people

with heart, back and neck problems not to board it. The 49-year-old woman who died had reported dizziness and nausea after stepping off the ride. It appears likely that the woman had high blood pressure and other unspecified health problems.

#### **LANDOWNERS LIABILITY FOR LIGHTNING STRIKES**

Most folks believe that lightning strikes that result in injury or death to victims have no business in the courts. The perception, or maybe misperception, is that lightning strikes are rare events for which landowners, public and private clubs, and other sponsors of outdoor activities simply have no duty to their business invitees or guests to take reasonable precautions to prevent injury and death. While lightning may be termed under the law as an **Act of God**, the recent trend of court opinions around the Country indicate that when the negligence of a private and/or public landowner combines with a lightning strike and a severe injury or death occurs, the private and/or public landowner can be legally responsible for injuries or deaths that occur as a result.

At anytime, there are nearly 2,000 thunderstorms in progress somewhere around the world. Lightning from these storms strike the earth 6,000 times a minute. This amounts to almost 9 million lightning strikes each day. Over 300 people are killed in this country each year by lightning strikes alone. As many as 1,500 more are seriously injured. Lightning causes more death and injuries than tornados and hurricanes combined. The reality is that when lightning hits a human being, an electrical current shoots through a person's body at 300 miles per second. The electrical current fires off a secession of up to 40 different electrical peaks—each peak carrying up to 50 million volts of electricity. In determining whether the landowner can be held responsible for injury or death from lightning, there are two basic questions that must be addressed:

- Does the landowner owe a duty to the person who is on the premises; and

- Is lightning an Act of God under the law which would give the landowner immunity from liability?

The traditional rule is that if the injury producing hazard is foreseeable, the landowner, especially involving invitees or business guests, owes a duty of reasonable care to guard against the dangerous condition if the landowner knows or should have known of the hazard. Some Courts are beginning to apply a different test, however, and have acknowledged that the question of whether the landowner will owe a duty of reasonable care is dependant on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances. The inquiry involves identifying, weighing, and balancing several factors:

- the relationship of the parties;
- the nature of the risk; and
- the opportunity and ability to exercise care.

The analysis should be very fact and case specific and rightfully so. Most of the Courts which have analyzed whether a landowner owes a duty to its business invitees or guests to take steps designed to help prevent lightning injuries, have acknowledged that while a particular lightning strike is unpredictable, technology has advanced to an extent where lightning producing storms can be predicted and followed so that injury from lightning to at least a great extent, is foreseeable. Accordingly, in instances or cases where the facts demonstrate that the potential for lightning strikes was foreseeable to the landowner, that landowner will most likely have a duty to take reasonable steps to help prevent potential injuries to persons on the premises from lightning. Further, in situations such as guided hunts or fishing trips where the landowner or lodge has almost all of the control over the hunting or fishing location and means in and out of the outdoors, basic fairness mandates that the landowner have a duty to exercise reasonable care in protecting its patrons from dangerous weather elements such as lightning. Another example would be

outdoors camping sponsored by groups such as the Boy Scouts.

The second question concerns whether lightning is an act of God under the law which would give the landowner totally immunity from legal responsibility and lawsuits. Traditionally, an act of God is available as a defense only if the injury was caused by a purely natural force that could not have been prevented by any amount of foresight and the exercise of reasonable care by a landowner. Obviously, while lightning strikes can't be prevented, landowners can take **reasonable** steps to protect their business invitees and guests from the potential hazards it can cause. In addition, where there has been a finding of wrongdoing or the lack of care, the wrongdoer is not shielded from liability by proof that an act of God was a concurring cause.

For example, in instances where a lightning strike seriously injures or kills a paying guest on a golf course, a chartered hunting or fishing trip or some other organized outdoor activity, the landowner may very well owe a duty to take reasonable steps to assure that their business invitees or guests are offered some protection or means of escape from the lightning. This is particularly true when the landowners control the manner in which the outdoor activity is conducted, has recognized the risk and has taken some steps to provide a safe outing, but does so in an unreasonable manner. Certainly, the risk and extreme danger poised by lightning is foreseeable. Certain landowners, such as privately owned golf clubs and swimming pools, which profit from outdoor activities, have a duty to take reasonable precautions to protect their patrons from the danger of lightning. Obviously, they can't stop the lightning, but there are things that can be done to protect folks who are using the premises.

## XIII. WORKPLACE HAZARDS

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### **FAMILY DOLLAR VERDICT INCREASED TO \$33.2 MILLION**

You will recall that we wrote last month on the jury's verdict against Family Dollar Stores Inc. That verdict has now been increased from \$19.1 million to \$33.2 million. It was found that the North Carolina company **purposely misclassified** hourly workers as salaried managers to **avoid** overtime payments. Chief U.S. District Judge U.W. Clemon, in a post-verdict ruling, added to the jury's verdict. A jury in Tuscaloosa ruled that Family Dollar, a discount retailer, had violated the Fair Labor Standards Act and awarded back pay to 1,424 workers dating to 1998.

Clearly, Judge Clemon, under well-established law, had the option of increasing the judgment amount. It was proved that managers at Family Dollar stores worked as much as twice their scheduled time of 40 hours per week. They performed duties such as mopping floors, unloading trucks, stocking shelves and running cash registers. Allen Schreiber and Bob Childs, Birmingham lawyers, represented the plaintiffs and did a very good job for their clients and the class members. Family Dollar admitted by their own testimony at trial that the managers spent 80 to 90% of their time doing manual labor. Based in Matthews, North Carolina, Family Dollar has more than 6,000 stores in 44 states. The company says it will appeal.

### **OUR CASE AGAINST DOLLAR GENERAL SET FOR TRIAL**

We have a case pending in federal court against Dollar General Stores that is very similar to the Family Dollar cases referred to above. Our case, which is a class action, has been set for trial in Tuscaloosa, Alabama, and will start on July 31st. Judge Clemon has told both sides that the case will be tried in two weeks. Dee Miles, Roman Shaul and I

will try the case for our clients.

Dollar General is the largest company in the dollar store market. Presently, they have over 8000 stores in 31 states. Based on their most recent annual report, they have over 8.6 billion a year in annual net sales. Based on what we have learned in this case, it appears that one of the reasons Dollar General has remained so dominant in the market over their other competitors is that they are saving millions of dollars each year by not compensating their store managers properly. Discovery has revealed that a Dollar General store's labor budget, or payroll, is the largest expense in each individual store. Therefore, every dollar a store cuts from its payroll is another dollar in the corporation's pocket. Unfortunately for the store managers, who are on a straight salary, they are left to handle all of the work in the store, often times working in a store alone with no help. Many of our clients have worked 70-80 hours each week. When you divide the number of hours the store managers work each week into their weekly salary, they appear to be making almost the same hourly rate as the other non-managerial employees in the store.

Typically, the work the Store Manager spends the majority of her time performing involves manual labor type duties. These things include stocking the shelves, cleaning the store, and running the register. It is our position, based on the applicable law, that this is not the kind of work the Fair Labor Standards Act intended to be "exempt" from over time pay. We believe that a true salaried executive, who is not entitled to over time pay, should have more "managerial" duties than in the case with the Dollar General store managers. If we are successful in obtaining a just verdict for our clients, we are hopeful that the verdict will change the way many retail establishments treat their employees. It is not right to take advantage of these store managers and to ultimately require them to spend 70-80 hours a week in their stores, which is time spent away from their families, just to receive the same hourly rate as everyone else who works in the store.

### **LAWSUIT AGAINST NIKETOWN EXPANDS**

Class action status has been granted in a race discrimination lawsuit brought by 18 current and former African-American employees of a Chicago Niketown store. In an order, a federal judge in Chicago expanded the base of plaintiffs in the case to include more than 230 African-Americans who have worked in a store since December 17, 1999, which is four years before the case was originally filed. At issue is whether Niketown systematically discriminated against these workers in hiring, promotions, benefits and workplace discipline, thus subjecting them to a hostile environment.

The suit, filed in 2003, also makes embarrassing allegations that African-American customers, including professional athletes such as the Chicago Bulls' Tyson Chandler and three Green Bay Packer football players, were subject to greater scrutiny and monitoring at the Chicago store, which is one of 15 Niketown stores owned by the Beaverton, Oregon-based company. The Chicago Niketown is a flagship store. Nike, like most companies, has corporate policies addressing discrimination and harassment. But, as Nike corporate representatives said in depositions in this case, the enforcement of such guidelines is left to managers at the store level. In Chicago, that resulted in African-American employees being singled out for poor treatment, plaintiffs said. The allegations include:

- Segregating African-Americans into lower-paying stockroom and cashier positions.
- Denying opportunities for promotions to sales positions by failing to post job openings.
- Hiring African-Americans into part-time rather than full-time positions that received benefits, such as health insurance and paid vacation.
- Subjecting African-American employees to searches when leaving the store, while Caucasian employees were free from such searches. Work rules regarding attendance, sick leave

and employee discounts also were unequally applied, the suit said.

In granting class status, a U.S. District Judge rejected Nike's arguments that the allegations of poor treatment were isolated and random. There are a number of allegations in dispute. The plaintiffs claim that between January 2001 and May 2003, fewer than 25% of the commissioned sales specialists, the highest-paid employees, were African-American. Nike countered by saying that its employment data from 1999 to 2004 show that more than 63% of the sales positions were filled by African-Americans. The class is seeking an unspecified amount of damages, including lost wages and benefits.

Source: *Chicago Tribune*

#### **LAWSUIT OVER ELECTRICIAN'S DEATH SETTLED**

The widow of an electrician, who was killed in 2002 when a cherry-picker truck tipped over, has settled a wrongful-death lawsuit arising out of the incident. The settlement also provides for the payment of legal fees and the repayment of a workers' compensation lien. The worker Dennis O'Neil was killed in November 2002 while he was stringing holiday lights from a cherry-picker truck at a place of business. The 38-year-old worker was nearly 70 feet in the air when the truck fell over. He was pronounced dead at the scene. The decedent worked for Brite Lite Electrical Co., a Weymouth firm contracted by the city of Waltham to install the lights.

The widow filed suit, alleging negligence by Colvin's Inc., (a Waltham company that leased the truck to Brite Lite) and Elliott Equipment Corp., (the truck's manufacturer). The lawsuit alleged that the companies failed to provide a safe and non-defective lift vehicle. The lawsuit also alleged the worker hadn't properly been trained to use the lift. A U.S. Occupational Safety and Health Administration investigation found that the accident could have been prevented if the truck had been properly positioned on a solid surface rather than on soft soil. The agency also

concluded the employee hadn't been properly trained, and said outriggers hadn't been extended to stabilize the truck. OSHA cited Brite Lite for four alleged violations of a federal worker safety law, but ordered a very small fine.

Source: *The Boston Globe*

## **XIV. TRANSPORTATION**

#### **NTSB RECOMMENDS INSPECTIONS OF ALL AIRBUS RUDDERS**

The National Transportation Safety Board has called for prompt inspections of all Airbus jets. This came after damage was found on an Airbus jet that could lead to the type of crash that killed 265 people in New York City in 2001. Airbus, the European jetmaker, told *USA Today* that it will work with the NTSB and other aviation agencies to ensure its A300 and A310 planes are safe. The NTSB rejected a plan by Airbus that it called "inadequate" and, instead, issued an "urgent" recommendation calling for all airlines to immediately examine the rudders on A300 and A310 jets. Last fall, FedEx maintenance workers found a 3-foot section of the rudder had started to break apart on one of its A300 jets. The tail fin, which keeps an aircraft stable, is critically important from a safety perspective. The resulting safety risks associated with the potential loss of the rudder or vertical tail fin are most severe and can't be allowed to exist on any of the jets.

The A300 and A310 rudders are made of composite materials, fibers held together by glue. While composites are lighter than metal and do not corrode, flaws are more difficult to detect. The rudders can also be susceptible to corrosive chemicals. Airbus had ordered its customers to inspect the rudders after 500 flights or six months. However, the NTSB said waiting that long was "unacceptable." The Board wants the inspections done much sooner.

The NTSB, which as you may know has no power to regulate, issued its recommendation to the Federal Aviation

Administration. Apparently, the FAA and its Canadian counterpart, The Canadian Transportation Safety Board, will issue requirements to immediately inspect the jets. Only American Airlines, with 34 A300s in service, carries passengers on the jet in this country. However, three cargo carriers use the A300 or the A310 in the U.S. Once issued, these new inspection requirements will apply to about 400 jets worldwide. Clearly, Airbus has a duty to the public to make sure that all of its jets are inspected carefully and any problems fixed.

Source: *USA Today*

#### **PILOT'S FAMILY AWARDED \$25.2 MILLION IN SUIT**

A Broward County, Florida, jury has awarded \$25.2 million to the family of a pilot killed in a collision of two planes near Deerfield Beach almost three years ago. The family of Steve Ross, a Boca Raton chaplain, filed the wrongful-death suit against Robinson Aviation, a private contractor operating the Boca Raton and Pompano Beach control towers. Ross was one of five people who died when two small planes crashed in the water off Deerfield Beach on the evening of June 16, 2003. Ross was survived by his wife and four children.

The jury verdict consisted of \$1.2 million for economic damages and \$10 million to the widow and \$3.5 million to each of the four children for pain and suffering. Steve Ross and a longtime friend were flying a Cessna 182 heading to the Boca Raton Airport in a northerly direction. They were returning from a missionary trip in the Bahamas and had just cleared U.S. Customs at Fort Lauderdale-Hollywood International Airport. A Cessna 172, with a family of three aboard, was headed south to Fort Lauderdale Executive Airport. A private pilot, who was learning to be an airline pilot at the Gulfstream Training Academy, was flying the plane. He was taking his wife and daughter for a ride along the coast.

The two planes crashed into each other about 1,000 feet above the Deerfield Beach International Fishing Pier and plunged into the water. The two planes collided moments after both

pilots had made contact with air traffic controllers in Pompano Beach and Boca Raton. Robinson Aviation was alleged to have failed to direct air traffic so as to avoid the midair collision of the two aircraft. Robinson contended it was “obligated to provide traffic advisory and traffic alerts only if they were actually aware of a potential danger.” Obviously, the jury didn’t buy that argument. The Ross family had settled with Gulfstream Training Academy for an undisclosed amount more than a year ago, contending that Willey was “not fit, qualified or properly trained.”

Source: South Florida Sun-Sentinel

### **SETTLEMENT IN NEW YORK FERRY CRASH CASE REACHED**

New York City has agreed to pay \$8,986,852 to settle a lawsuit brought by a former waiter who lost his legs in a 2003 ferry crash. Eleven passengers were killed and dozens of others injured. Thus far 99 of the 190 claims against the city have been settled for a total of \$3.6 million. The plaintiff in this case, who had been an avid hiker, will receive monthly payments for the next 50 years to cover medical costs and living expenses. He had sued in 2003, alleging that the crew of the Andrew J. Barberi and city officials “basically left him to die” after the ferry drifted off course and slammed full-speed into a concrete pier on Staten Island on October 15, 2003.

The plaintiff claimed that, as he lay immobilized and bleeding profusely, the crew and city employees did not assist him. A British nurse tied a belt around his limbs above the knee, stemming the blood flow. The man’s legs were later amputated. The former ferry captain received 18 months in prison for passing out at the helm before the crash. The city’s former ferry director got one year and a day for failing to enforce a rule requiring ferries be operated by two pilots whenever docking.

### **SLEEP-DEPRIVED TEENS ARE PROBLEM DRIVERS**

Driver fatigue is a major factor in causing motor vehicle accidents. A recent study indicated that any sleep-deprived person who drives a motor vehicle is a safety risk. A poll released recently by the National Sleep Foundation indicates that children fall into this category on a regular basis. According to the study, America is raising a nation of sleep-deprived young people. The study showed only 20% getting the recommended nine hours of sleep on school nights and more than one in four reporting dozing off in class. Some 51% of adolescent drivers reported being on the road while drowsy in the past year. Many are arriving late to school because of oversleeping. While for obvious reasons it’s not good to sleep in school, it’s a much more difficult situation when the person who is sleepy drives a car. Dr. Jodi A. Mindell, who is associate director of the Sleep Center at The Children’s Hospital of Philadelphia, stated:

*In the competition between the natural tendency to stay up late and early school start times, a teen’s sleep is what loses out. Sending students to school without enough sleep is like sending them to school without breakfast. Sleep serves not only a restorative function for adolescents’ bodies and brains, but it is also a key time when they process what they’ve learned during the day.*

School-age children and teenagers should get at least nine hours of sleep a day, according to the National Center on Sleep Disorders Research at the National Institutes of Health. The poll found that sixth-graders were sleeping an average of 8.4 hours on school nights and 12th-graders just 6.9 hours. Without enough sleep, a person has trouble focusing and responding quickly, according to the NIH. In addition to the highway safety issues, the agency said there is growing evidence linking a chronic lack of sleep with an increased risk of obesity, diabetes, heart disease and infections. The poll, taken in

November, interviewed 1,602 adult caregivers and their children age 11 to 17. It had a margin of error of 2.4 percentage points. Among the findings:

- Some 28% of high-school students said they fell asleep in class at least once a week. In addition, 22% dozed off doing homework and 14% arrive late or miss school because they oversleep.
- Four-fifths of students who get the recommended amount of sleep are achieving A’s and B’s in school; those who get less sleep are more likely to get lower grades.
- Some 28% of adolescents say they are too tired to exercise.
- Just 20% of adolescents said they get nine hours of sleep on school nights and 45% reported sleeping less than eight hours.

I suspect there is a very good reason for the lack of sleep by children. According to the study, nearly all youngsters—97%—have at least one electronic item in their bedroom. These include television, computer, phone or music devices. Adolescents with four or more such items in their bedrooms are much more likely than their peers to get an insufficient amount of sleep at night and almost twice as likely to fall asleep in school and while doing homework, the foundation reported. According to the NIH, sleep needs vary from person to person and change throughout life. For example, newborns sleep 16 hours to 18 hours a day; children in preschool sleep between 10 hours and 12 hours a day; school-age children and teenagers should get at least nine hours of sleep a day. Adults should get seven hours to eight hours of sleep each day. Obviously, parents need to make sure that their children are getting enough sleep each night.

Source: The Insurance Journal

### **DISTRACTED DRIVERS CAUSE MOST CRASHES**

Another new report indicates that distracted drivers are the leading cause of car crashes in this country. The report,

compiled by federal traffic-safety experts, indicates that cell phones are the most common driver distraction. However, according to the report, they weren't the leading distraction that causes accidents. The biggest problem was drivers "reaching for a moving object." In addition to using cell phones, such things as reading, applying makeup, eating, drinking, and playing with radios and CD players also distract drivers in many accidents.

All told, the National Highway Traffic Safety Administration says that distracted drivers accounted for 80% of crashes and 65% of near-crashes. The study was for NHTSA by the Virginia Tech Transportation Institute (VTTI) in 2003 and 2004. Experts had earlier estimated that driver distraction accounted for about 25% of crashes. The study tracked 241 drivers of 100 vehicles in northern Virginia and metropolitan Washington, capturing driver behavior using video and such devices as speed and radar sensors to monitor drivers in a natural setting. Traffic-safety experts said the model may be one of the best for gathering data on driver behavior. Particular types of behavior were linked that lead to crashes. As mentioned driver drowsiness is another leading cause of accidents. Hopefully, this study will help persons in the field of safety, including personnel from NHTSA and the Department of Transportation, to understand and prevent motor vehicle accidents.

#### **ALABAMA HIGHWAY SAFETY PANEL REVIVED**

The Alabama Legislature passed a bill during the regular session that brings back to life the State Safety Coordinating Committee, a highway safety committee charged with lowering the number of highway deaths. The committee will survey areas of Alabama where there have been multiple highway deaths and will recommend safety improvements. As we have reported, in 2004, there were 1,154 traffic fatalities in Alabama, which is far too many. The committee's goal is to reduce highway fatalities to fewer than the 2004 number.

Interestingly, the Alabama Department

of Community and Economic Affairs (ADECA) has had about \$1,000,000 on hand which could have been used. It has apparently been available for several years. The newly-formed 12-member committee will now have access to this money. According to reports, the defunct state safety committee was not active. Former Governor Don Siegelman had moved the committee's funds to ADECA. Hopefully, this committee will now do more than merely meet and will actually help save lives on our highways. I'm not sure what can be done with such a limited budget, but at least the committee has a worthy goal and that's to save lives on our highways.

#### **DEADLIEST DAY ON ALABAMA ROADS IS SATURDAY**

Based on my experience over the years as a lawyer, having handled a family good number of cases arising out of motor vehicle accidents, I already knew that Friday and Saturday were the days when most serious motor vehicle accidents occur. Now, a recent report has confirmed that fact. Actually, according to the data, while Friday afternoon is when most highway crashes occur in Alabama, Saturday is the **deadliest** day. Eighteen percent of 26,344 wrecks in 2004 happened on Fridays with the prime time for those accidents being 3 p.m. According to 2004 Alabama Traffic Crash Facts, the latest compilation of traffic statistics, there were 1,154 people killed on state highways in 2004. Of those, 208 fatalities (18%) occurred on Saturdays. More traffic is on the road during Friday afternoons. That day is a travel day and school classes let out on Friday around 3 p.m. The high number of fatalities on Saturday comes simply because of weekend activities.

The crash information is taken from city, county and state wreck reports and analyzed by the CARE Research and Development Laboratory at the University of Alabama. CARE stands for Critical Analysis Reporting Environment.

Information also is provided by the Alabama Department of Public Safety, the Department of Transportation, the Department of Economic and Commu-

nity Affairs and the Department of Education.

Traffic deaths are also on the increase in Alabama. The 2004 statistics show traffic deaths up 4% from 2003, injuries up 3% and the number of crashes up 3%. Since 1995, the number of deaths is up 3%, but the number of injuries is actually down by 5%. Significantly, the number of crashes is up 9% since 1995. These are a few interesting statistics: The number of vehicle registrations is up 10% and the number of licensed drivers up 28%; the number of miles traveled per year has gone from 49 billion in 1995 to 58 billion in 2004, (a 20% increase). New Year's was the deadliest holiday in 2004; the Thanksgiving holiday was the deadliest in 2003; and most crashes happened within 25 miles of home. The 2004 report also showed:

- The most deadly crashes, involving 78 deaths, happened around 2 p.m.;
- More crashes occurred in November, with April a close second. Most fatalities were in August. Sartain said November weather is usually wet, and August is filled with vacation travel;
- Pick-up trucks accounted for about one-third of all crashes;
- Drivers 20 to 24 years old accounted for the most traffic crashes, followed by those 15 to 19. Drivers 75 and older were third;
- Most wrecks happened on two-lane city streets in dry, clear daytime conditions; and
- The four top reasons for crashes were failure to yield right of way, driver not in control, misjudged stopping distance and driver under the influence.

#### **FAMILY AWARDED \$6.6 MILLION IN FATAL ACCIDENT**

A jury in Nebraska returned a verdict recently, awarding \$6.6 million to a family for injuries suffered in a 1999 traffic accident that occurred in that state. The jury returned its verdict in favor of Carroll Heatherly and his four

children. The following is a brief description of what happened in this case. Back in June 1999, at about 2:30 a.m., the Heatherly family was west-bound on an interstate highway, heading for Yellowstone National Park. The motor home they were traveling in was suddenly rear-ended by a stolen semi-truck being operated by Steven Alexander. The truck pushed the motor home off the road, where it collided with an illegally parked semi-truck, owned and operated by Midwest Specialized Transportation.

Mrs. Margaret Heatherly, who was 42 years old, was killed in the crash and her husband, Carroll Heatherly, suffered serious injuries. Their four children, who were in the rear of the mobile home, were physically uninjured. The driver of the stolen truck fled on foot and was not captured for months. The case had been tried once before. In the first trial, which named Midwest Specialized Transport and Alexander as defendants, it was claimed that Midwest played a substantial part in the injuries suffered by the family. Midwest contended Alexander was solely to blame. After a jury was unable to reach a verdict, a federal judge directed a verdict in favor of the defendants. A federal appellate court overruled the lower court's decision and ordered a second jury trial. The jury in the second trial found in favor of the plaintiffs and apportioned 60% of the blame to Alexander and 40% to Midwest. The award was distributed as follows: \$2 million to Carroll Heatherly for his injuries; and \$4.6 million to the family for the death of Mrs. Heatherly.

Source: *Chicago Sun Times*

## XV. HEALTHCARE ISSUES

### **LONG MOBILE PHONE USE MAY POSE BRAIN TUMOR RISK**

The use of mobile phones over a long period of time can raise the risk of brain tumors, according to a recently released Swedish study. This result contradicts the conclusions of other researchers.

For example, last year, the Dutch Health Council, in an overview of research from around the world, found no evidence that radiation from mobile phones and TV towers was harmful. In addition, a four-year British survey in January showed no link between regular, long-term use of cell phones and the most common type of tumor. But researchers at the Swedish National Institute for Working Life looked at mobile phone use of 2,200 cancer patients and an equal number of healthy control cases.

Of the 2,200 cancer patients—aged between 20 and 80—905 had a malignant brain tumor and about a tenth of them were also heavy users of mobile phones. “Of these 905 cases, 85 were so-called high users of mobile phones, that is they began early to use mobile and/or wireless telephones and used them a lot,” according to the authors of the study in a statement issued by the Institute. Published in the *International Archives of Occupational and Environmental Health*, the study defines heavy use as 2,000 plus hours, which “corresponds to 10 years’ use in the work place for one hour per day.” Early use was defined as having begun to use a mobile phone before the age of 20. There was also shown to be a marked increase in the risk of tumor on the side of the head where the telephone was generally used, said the study, which took into account factors such as smoking habits, working history and exposure to other agents.

Dr. Kjell Mild, who led the study, said the figures meant that heavy users of mobile phones had a 240% increased risk of a malignant tumor on the side of the head the phone is used. Dr. Mild told *Reuters*: “The way to get the risk down is to use hands-free.” He said his study was the biggest yet to look at long-term users of the wireless phone, which has been around in Sweden in a portable form since 1984, longer than in many other countries. I predict that eventually a connection between long-term use of mobile phones and brain tumors will be more conclusive. It makes sense that the radiation from the devices—used over a long period of time with heavy use on a regular basis—is not a good thing. Does

it cause brain tumors? Unfortunately, only time will tell.

Source: *Reuters News Service*

### **FDA FINDS BENZENE LEVELS IN SOFT DRINKS ABOVE TAP WATER LIMIT**

The FDA has acknowledged that cancer-causing benzene has been found in soft drinks at levels above the limit that are considered safe for drinking water. However, Laura Tarantino, the Agency’s Director of Food Additive Safety says there is no reason for the public to worry. Still, she says there needs to be an understanding of how benzene forms and to ensure that the soft drink industry is doing everything possible to avoid it. Interestingly, this was a turnabout from a previous announcement, where officials said the FDA had found insignificant levels of benzene. Benzene can form naturally and is found in forest fires, gasoline and cigarette smoke. It can also form in soft drinks made with Vitamin C and sodium or potassium benzoate, depending on heat, light and shelf life. A spokesman for the American Beverage Association says people consume far more tap water than soft drinks. However, the industry has a duty to make sure that the benzene levels are not a health hazard.

### **PUBLIC CITIZEN PETITIONS THE FDA TO BAN ORLISTAT**

Public Citizen has petitioned the Food and Drug Administration to immediately remove **Orlistat**, the prescription version of **Xenical**, from the market. The consumer group contends that this drug made by Roche Pharmaceuticals, an obesity treatment, has been known to cause a significant increase in aberrant crypt foci (ACF), which are widely believed to be a precursor to colon cancer. In early April, the FDA sent an “approvable” letter concerning the over-the-counter version of Orlistat to Glaxo-SmithKline, which has applied to market this version. Despite safety concerns, if GlaxoSmithKline meets the conditions set by the FDA—conditions that have not been made public—this

would make the drug eligible for final approval for over-the-counter sales.

Public Citizen's petition is based on findings from the pharmacology review of Roche's own data and a recent independent confirmation that Orlistat causes ACF in the colon of rats. There is a large amount of scientific literature that acknowledges the importance of ACF as the earliest identifiable neoplastic colonic lesion and a putative precursor of colon cancer. The FDA's own 1997 review of Orlistat indicated a concern with colonic cell proliferation, and the drug was not initially approved by the FDA because of clinical trials that found a four- to seven-fold increased risk of getting breast cancer while taking Orlistat.

In addition to cancer concerns, adverse events for patients taking Orlistat include a cluster of gastrointestinal symptoms and a loss of fat-soluble vitamins, including beta-carotene and vitamins A, D, E and K. Orlistat's efficacy has also been called into question because of two recently published clinical trials that showed only a 2.8% difference in weight loss after four years between patients taking Orlistat and those on placebo. Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, says:

*The failure to ban the prescription version of this drug or, worse, to make it much more widely available by allowing OTC sales, is a decision that is likely to increase cancer incidence.*

Public Citizen is joined in the petition by two professors of pathology at Case Western Reserve School of Medicine, Dr. Theresa Pretlow and Dr. Thomas Pretlow, who are both experts on ACF's link to colorectal cancer. Their work on this topic has been largely funded by the National Cancer Institute, whose director incidentally is now acting FDA Commissioner, and that should carry some weight. The petition alleges:

*The FDA should not allow a drug ... to remain on the market for the long-term treatment of a non-lethal condition when it combines so little efficacy coupled with a still unresolved potential to cause breast and*

*colon cancer. The FDA is now considering increasing the number of people exposed to the drug by allowing OTC use. There is no scientific justification for this decision.*

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. I only wish that the FDA worked as hard to protect the public as does Public Citizen.

Source: Public Citizen

## XVI. ENVIRONMENTAL CONCERNS

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### A LANDMARK WIN IN AN AIR POLLUTION LAWSUIT

The Sierra Club and the Alabama Environmental Council won a landmark air pollution decision several weeks ago against the Tennessee Valley Authority that didn't get a great deal of media attention. The Court of Appeals for the Eleventh Circuit ruled that the State of Alabama's policy not to enforce emission limits at TVA's Colbert power plant did not—and could not—change federal law, and that the citizens' suit to enforce the law against TVA should not have been dismissed by the Alabama Federal District Court. While this case received very little media attention, in my opinion, it was most significant.

In the case, the citizen groups alleged that TVA had over 8900 violations of rules prohibiting emissions of dark smoke ("opacity"). In its ruling the court of appeals knocked TVA's central defense was that because the state of Alabama gives TVA around 1,700 free air pollution violations every year before taking any enforcement action, citizens were prevented from suing TVA for those violations.

The court rejected that argument and described the situation this way: "It's a brassy argument. The court stated:

*TVA points to nothing in the record that gives the slightest support for the notion that ADEM in proposing the 20% opacity limitation, or EPA in approving it, counted on industries getting away with more pollution than stated in the limitation because of ineffective enforcement.*

### THE FDA ALLOWS CARBON-MONOXIDE TREATED MEAT

I don't believe many consumers know that carbon monoxide, which is a deadly gas, is being used to make meat look good in stores around the country. I must confess that I certainly didn't know it. According to a report by the Washington Post, the meat industry has begun to "spike" meat packages with carbon monoxide. While apparently harmless to health at the levels being used, the gas gives meat a bright pink color that lasts for weeks. It is said that the meat industry could save as much as \$1 billion dollars (that it claims to lose annually) from having to discount or discard meat that is **reasonably fresh** and they contend is **still safe**. Consumer advocates take the position that the use of carbon monoxide as a "pigment fixative" deceives shoppers who depend on **color** to help them **avoid** spoiled meat. Critics of the practice also are challenging the Food and Drug Administration and the Nation's very powerful meat industry, claiming that the FDA violated its own rules by allowing the practice without a formal evaluation on its impact on consumer safety. Many consumer advocates say, at the very least, carbon monoxide treated meat should be labeled so consumers will know that they cannot always trust their eyes.

The meat industry is adamantly denying that carbon monoxide is a "colorant," a category that would require a full FDA review. Additionally, the meat industry says color is a poor indicator of freshness as meat turns brown from exposure to oxygen long before it

spoils. Precept Foods, L.L.C., a joint venture between Cargill Meat Solutions Corp. and Hormel Foods Corp., helped pioneer the technology at issue. If reported figures are accurate, there is much at stake in this dispute.

The U.S. market “case ready” meats, that is those packaged immediately after slaughter thus eliminating the need for butchers at grocery stores, is approaching \$10 billion dollars and growing. For example, Tyson Foods one of three meat packagers that has received a green light from the FDA to use carbon monoxide, has just opened a \$100 million dollar plant in Texas to turn out more case ready “modified atmosphere” packaged meats. There appears to be no way to know how much carbon monoxide treated meat is being sold since figures are not yet available. The companies involved are privately held or keep that information from the public. Consumer groups are concerned about how the FDA has handled the issue. The core issue appears to be how the FDA has assessed companies’ requests to use carbon monoxide in their packaging.

The FDA has allowed the carbon monoxide approach to be used under the “generally recognized as safe,” regulatory category. This category, commonly referred to as GRAS, allows a firm to proceed with its plans without public review or formal agency approval. Pactiv, Precept Foods, and Tyson have received a letter from the FDA allowing the Carbon Monoxide approach. It appears significant that The European Union has banned the use of carbon monoxide as a color stabilizer in meat and fish. Their reasoning was that carbon monoxide did not pose a risk as long as food was kept cold enough during storage and transport to prevent microbial growth. But should the meat become inadvertently warmer at some point, the concern is that the presence of carbon monoxide may mask visual evidence of spoilage.

The FDA can deem something “generally recognized as safe” when there is enough scientific debate over the issue to warrant a ban. Opponents also say the FDA was wrong to consider carbon monoxide a color fixative

rather than a color additive, which they contend is a crucial decision because additives must pass a rigorous FDA review. They note that freshly cut meat looks purplish-red and that the addition of carbon monoxide, which binds to a muscle protein called myoglobin, turns it irreversibly pink.

Carbon monoxide supporters say that consumers should pay attention to “sell or freeze” dates as the best indicator of freshness. A spokesman for the FDA has defended the agency’s decision in a rather strange manner. It appears the FDA’s position is that the agency has never **formally approved** the use of carbon monoxide, but rather looked at information provided by the companies and “**decided not to object.**” That is absolutely mind-boggling when you consider the role of the FDA, which is to protect the public. However, a former head of FDA’s Office of Food Labeling has said, “The FDA should not have accepted carbon monoxide in meat without doing its own independent evaluation of the safety implications.” I have to agree with that assessment.

Source: *Washington Post*

#### **BUSH ADMINISTRATION ENVIRONMENTAL RULE OVERTURNED**

A U.S. Appeals Court has overturned a Bush Administration rule that gave power plants and petroleum refineries more leeway to expand facilities without triggering requirements to install more expensive pollution-control equipment. The rule had attempted to set a standard as what counts for “routine maintenance” under the New Source Review (NSR) provisions of the Clean Air Act. Construction projects that were deemed to be “routine maintenance” were exempt from pollution-control requirements. Compliance with these requirements can be costly and that’s the argument presented by the big-business side. Consumer advocates have countered that, even though they are more expensive, the requirements are worthwhile since the plants will operate more efficiently and the health and environmental impact of the plants will be lessened.

State officials and environmental groups contended that the exemption was too large and a violation of federal law. Fortunately, the U.S. Court of Appeals for the District of Columbia agreed. The court’s decision is that the EPA rule is “contrary to the plain language of the Clean Air Act.” The three-judge panel put great emphasis on the intent of Congress concerning the NSR requirements. New York Attorney General Elliott Spitzer led the states’ action, which resulted in a tremendous victory for clean air and the environment. Clearly, it is a total rejection of the Bush Administration’s efforts to gut the law. It has been estimated that the decision covers about 800 power plants and as many as 17,000 industrial sites nationwide.

Source: *Wall Street Journal*

#### **KERR-MCGEE BRINGS SUIT TO AVOID PAYING ROYALTIES**

Believe it or not, at a time of record oil-company profits, Kerr-McGee Corp. is actually suing the federal government to avoid the payment of about \$108 million dollars in royalties on its deep-water production in the Gulf of Mexico. Kerr-McGee, which produces oil and natural gas from seventeen deep-water fields in the gulf, filed suit recently in federal court in Louisiana seeking to overturn a January order by the government that Kerr-McGee and other oil companies pay more in royalties for the fields. Most oil companies, which appear to be making money hand over fist, complied with the order. Kerr-McGee was one or among three, however, that did not pay.

In 1995, Congress passed a law that exempted oil companies from royalty payments for millions of barrels of deep-water production for leases obtained from 1996 to 2000 as long as the oil prices did not exceed a certain level. The threshold for those leases last year was \$34.71 per barrel for oil and \$4.34 per million British thermal units for natural gas. In addition to the price threshold, Kerr-McGee argues the Act allowed the companies royalty-free production of tens of millions of barrels

regardless of the price of oil. For example, for fields deeper than approximately 2,600 feet, the companies could produce 87.5 million barrels of oil without paying a royalty. Kerr-McGee says its fields have not yet reached that maximum. Meanwhile, the company said it has placed \$108 million dollars in disputed royalties into a reserve account until the issue is resolved. The Minerals Management Service, a division of the Interior Department, says that the companies are obligated to pay royalties once the price threshold has been reached, regardless of how much oil they have produced.

It's hard for most Americans to believe that the oil companies could be this greedy. There are two other points that will concern most Americans. The Interior Department has estimated that the fall-out from the 1995 Congressional Act could ultimately cost the U.S. Treasury approximately \$7 billion dollars, depending on the price of oil and the level of oil-company production. I think most reasonable people would argue that oil companies do not need this type of "break" at this time. Additionally, recent disclosures by the Interior Department have confirmed that the price threshold in the 1995 Act was lifted for approximately 1,100 leases made in 1998 and 1999. That means that regardless of prices, oil could be drilled royalty-free in those fields. It is quite disturbing that the Interior Department officials can't explain why the price threshold was lifted in this circumstance. Any way you look at it, oil-companies are taking full advantage of consumers to the tune of billions of dollars.

Source: Wall Street Journal

## XVII. THE CONSUMER CORNER

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### **A MIS-FILLED PRESCRIPTION CAUSES A TRAGIC RESULT**

A jury in Middlesex County awarded Anton Weck, a young athlete, \$18.5 million in a misfiled prescription case.

After a final round of chemotherapy, the young man had beaten leukemia, overcoming three painful years of medical treatments and had a clean bill of health. But two weeks later, he was unable to walk. Weck soon learned that he would be spending the rest of his life in a wheelchair because of a sudden paralysis. This was the fault of Saint Peter's University Hospital, located in New Brunswick, and a pharmacist who improperly mixed up the patient's final drug treatments. Not only were the dosages wrongly prepared, but it was claimed by the plaintiff's lawyers that the hospital tried to cover up the error. This was denied at trial.

The case was settled out of court after the jury award. Weck, who is now 25-years-old, is a paraplegic. This settlement of the claim was the result of a high-low agreement reached while the jury was deliberating. This means the money will be paid with no post-judgment motions or appeal. The hospital and the pharmacist were held legally responsible for Weck's injury and were ordered to pay compensatory damages for future medical expenses, lost earnings, disability, pain and suffering and loss of his enjoyment of life.

Weck's tragic story began on February 3, 1998, his 17<sup>th</sup> birthday, when doctors told him he had acute lymphocytic leukemia. He began undergoing medical treatment that included chemotherapy accompanied by the usual bloating and hair loss. Weck, who was raised in New Jersey, has moved with his family to Chapel Hill, North Carolina. He endured the treatments, fully expecting that one day he would recover. About midway through the treatments, Weck graduated from high school and moved back to New Jersey to live with relatives in Toms River. He continued his medical care at St. Peter's and completed all but the final series of chemotherapy injections. He went to the hospital on May 15, 2001, and received the crippling dosage. The pharmacist, who prepared two cancer-fighting drugs, was supposed to keep Methothrexate and Vincristine separate, but cross-contaminated them. As a result, it was contended that a small amount of Vincristine was injected

along with the correct dosage of Methothrexate into Weck's lower spine, and he quickly lost the use of his legs.

### **GROUPS WANT WARNINGS OFF DRUG ADS**

I believe all of our readers know how I feel about direct-to-consumer advertising by the drug industry. A coalition of advertising and public relations groups are trying to strip most of the warnings from prescription drug ads that are aimed directly at consumers. A petition was filed last month by the Coalition for Healthcare Communication with the Food and Drug Administration. The petition claims that current direct-to-consumer advertisements "over warn and under inform," which is absolutely absurd and certainly not true. The organization represents trade associations specialized in medical advertising, communications, marketing and publishing. My guess is that you won't be shocked to learn that they also receive **financial support** from the drug industry. A consumer advocate countered that prescription drug ads should contain clearer, not less, warning language. Bill Vaughan, a senior policy analyst at Consumers Union, says:

*To pull away or remove those fine details, we are against that. I guess we are saying, 'more is better.' Have the key facts up front, but some of us would like to read to the end to be aware of the consequences and be sensitive to some of the things we might want to report to our doctors.*

The FDA has six months to respond to the petition. This is the latest of several petitions filed since the late 1980s that seek to alter how the agency regulates drug ads aimed directly at consumers. The agency held two days of hearings in November in response to those other petitions, which sought, to either ban direct-to-consumer drug ads or exempt them from federal regulation. There can be no logical justification for even allowing drug companies to advertise prescription drugs. A prime example of why direct-to-consumer ads should be banned is Merck's untruthful

and highly misleading ads promoting Vioxx. That drug had been heavily promoted, including ads featuring the Olympic skating medalist Dorothy Hamill, and never once did an ad warning of the heart attack risks that Merck certainly knew all about. As the public now knows, Vioxx was withdrawn because it causes heart attacks. Another reason to ban these ads is that doctors and pharmacists should be making drug choices for folks. In any event, there can be no justification for direct-to-consumer drug ads. Certainly, if ads are to be allowed, they should include warnings of known risks. Hopefully, this petition will be summarily denied by the FDA.

#### **MAJOR SPYWARE INTERNET COMPANY SUED OVER POP-UP ADS**

New York Attorney General Eliot Spitzer has filed suit against a major Internet pop-up advertising company. The company is accused of secretly installing spyware and sending ads through spyware already installed on personal computers. The Attorney General is trying to stop Direct Revenue from allegedly installing millions of pop-up ad programs that he said also monitors the Internet activity of users. When filing the suit, Attorney General Spitzer said:

*These applications are deceptive and unfair to consumers, bad for businesses that rely on efficient networks to do their jobs, and bad for online retailers that need consumers to trust and enjoy their online experience. We will continue to side with consumers in their fight for control of their desktops.*

As you know, the Attorney General has taken legal action against other companies that he says install spyware and adware—software that can be downloaded onto personal computers without the computer user's knowledge after they are attracted to Web sites or other actions.

Spitzer claims Direct Revenue or its distributors offered free games, browsers or software it but never men-

tioned the spyware that was attached in the downloads. Spitzer called them "drive-by downloads" and said his investigators documented 21 websites that included Direct Revenue downloads called VX2, Aurora and OfferOptimizer. After the download, Spitzer said the company can track consumers' Web activity and deliver pop-up ads. Spitzer said the company also thwarted consumers' attempts to remove the spyware, which sometimes reinstalled itself. Spitzer accuses the company in a civil suit under state business laws against deceptive business practices and false advertising.

Spyware and adware often land on computers, hitching a ride during visits to porn and gambling sites or in downloads of free games and screensavers. Often, the payload arrives with downloads of cartoon-character softwares aimed at children. Infected computers can become filled with pop-up ads and users can find the unwanted programs difficult to remove. In October, the former chief executive of Los Angeles-based Intermix Media Inc. agreed to pay \$750,000 in penalties after Spitzer accused the company of secretly installing adware and spyware on millions of home computers. Spitzer accused the former executive, Brad Greenspan, of directing employees to bundle adware with other free programs and to make the software difficult to remove.

The Attorney General says that Intermix also agreed to pay \$7.5 million in penalties over three years and stop distributing adware programs. Intermix ran Web sites featuring quizzes, games and jokes that it packaged for advertisers. This most recent lawsuit, filed in Manhattan, also names Direct Revenue's former CEO, Josh Abram. Interestingly, Abram told a distributor in a most telling e-mail:

*we have a very stealthy version of our adware product which we're happy to give u...Don't worry. If we do a deal \* a build together \* these will not be caught.'*

In another part of an e-mail, released by the Attorney General's office, the company's chief technology officer

stated that users "don't know how they got our software (this is both upgrade and recent install..." and that users "say that they are getting so many ads that it is annoying them." It is good to see the New York Attorney General going after companies that do this sort of thing.

Source: *The Insurance Journal*

#### **STOLEN FIDELITY LAPTOP HELD SENSITIVE DATA**

A laptop computer belonging to Fidelity Investments, the nation's largest mutual-fund manager, which contained sensitive data on about 196,000 retirement-account customers, was stolen in late March. The computer held information on participants in Palo Alto, California-based Hewlett-Packard Co.'s pension and 401(k) plans. The data included names, addresses, birth dates, Social Security numbers and other information that potentially could be used by identity thieves. Fidelity hasn't said exactly where the laptop was stolen from, but it was in the United States. Boston-based Fidelity, the sole provider of Hewlett-Packard's defined benefit and defined contribution plans, said it alerted those affected and offered them free credit monitoring for 12 months. It says it will reimburse account holders for any losses linked to unauthorized transactions connected to the stolen laptop. I understand that it's highly unusual to have so much information on one laptop. Reportedly, the computer in question was brought to a business meeting by a team of employees.

Fidelity says that the license to the software that contained the data has expired and, as a result, the scrambled data will be difficult to interpret. Hopefully, that's correct but it still leaves lots of unanswered questions. Fidelity has expanded the number of authentication steps required by HP plan members to access data about their accounts. Confirming that this isn't a problem that will go away soon, Fidelity has recommended that the affected Hewlett-Packard employees "remain vigilant for the next year or two, regularly review account activity and obtain a credit report from one or more of the national

credit reporting companies.” Should this make anybody whose personal information was stolen feel like this isn’t a real serious problem?

Source: *The Insurance Journal*

### **HOME DEPOT MUST LEARN RESPECT FOR THE LAW AND THE COURTS**

A reported case involving Alan R. Sporn, a California businessman, and Home Depot is quite interesting and tells us lots about the mentality of some in Corporate America. Home Depot has been involved in a court battle with one of its credit card customers and the case has taken several strange twists. First, Mr. Sporn discovered that something was wrong with his credit history when he was rejected for a low-interest loan to re-finance his home. When he looked into the problem, Mr. Sporn then discovered that Home Depot was accessing his credit report monthly and the “inquiries” on his credit report had driven down his FICA score. The man’s Social Security number had been stolen and it was being fraudulently used by someone in Virginia to apply for store credit at Home Depot. Mr. Sporn dutifully notified Home Depot and told them that someone in Virginia had stolen his identity. Even though he asked the company to stop accessing his credit report, Home Depot ignored the man’s request for nearly two years. The company refused to stop the wrongful use of his credit and damaged to his credit rating. In fact, Home Depot even refused to give Mr. Sporn, their own customer, the information he badly needed to identify the person who had stolen his identity. If this sounds weird—it’s because it really is.

After two years of no response, Mr. Sporn finally out of desperation filed a lawsuit against Home Depot. However, the company ignored the lawsuit and never even showed up for any of the court proceedings. When the case went to trial, a jury awarded compensation for Mr. Sporn for the financial damage done to him by Home Depot. But, believe it or not, Home Depot’s disregard for Mr. Sporn’s problems and his legal rights gets worse. Since the

company never responded to the verdict, Mr. Sporn’s lawyer started collection efforts on the judgment. This finally got Home Depot’s attention and the company promptly filed an appeal. The appeals court, in upholding the judgment against Home Depot, wrote:

*An obvious gap appears in the evidence... there is no statement that the [court papers sent to Home Depot] were lost, stolen, forwarded to the wrong person, or eaten by the dog. Home Depot’s apparent belief that they can persuade this court to somehow make up for the consequences of their conduct by the excessive use of noxious characterizations to describe the conduct of the plaintiff and his lawyer is mistaken and offensive.*

The appeals court deemed Home Depot’s filing as being “frivolous” and awarded sanctions against the company. I believe that this company must learn that the rule of the law in our country is sacred and that those who run Home Depot must also learn to respect it and the courts.

Source: ATLA

### **THE ABOVE EPISODE WASN’T HOME DEPOT’S FIRST RODEO**

It certainly appears that Home Depot really must believe that it is above the law. The company has a history of litigation that is disturbing. They have been held accountable by the civil justice system for its practice of stacking merchandise too high on store shelves— heavy merchandise has fallen, killing and injuring customers—and yet the company continues that practice. The Equal Opportunity Employment Commission has won a case against Home Depot for systematically discriminating against its female employees. The civil justice system allows consumers to hold corporations like Home Depot accountable for putting profits before safety and the company blames the system for its problems. It’s that mindset that fuels the engine that runs the machine whose mission is to destroy the jury system. Robert Nardelli, the big boss at Home

Depot, is one of the most outspoken proponents of “tort reform” and has been a major funder of the campaign to strip Americans of the constitutional right to hold wrongdoers accountable.

Source: ATLA

### **THE DISCLOSURE OF PERSONNEL INFORMATION IS WIDESPREAD**

As we are rapidly learning, the problems caused when personnel information is stolen can be most severe. Clearly, the incidents are becoming quite widespread and very numerous in number. They also affect tremendous numbers of persons. In 2005, at least 152 such incidents around the country were disclosed, potentially affecting more than 57.7 million individuals. The following are places listed by category, where personnel information has been stolen, giving percentages for each category:

- Educational institutions, 73 disclosures—48%
- Banking/Credit/Financial Services, 24 disclosures—16%
- Governmental/Military Agencies, 18 disclosures—12%
- Health Care Facilities/Companies, 17 disclosures—11%
- Data/Information Companies, 5 disclosures—3%
- Retail Companies, 5 disclosures—3%
- Other Companies, 10 disclosures—7%

### **POTENTIAL PROBLEM IN SOME GM CARS**

A simple component under the hood of some one million General Motors vehicles sold in Canada alone has the potential to cause huge problems for the GM vehicle owners. The component, an intake manifold gasket, was put in some GM makes and models between 1995 and 2003. According to GM’s own internal service bulletin, the part can “degrade”—causing coolant to leak—sometimes into the engine. In the worst case scenario, the coolant mixes

with engine oil—making the oil ineffective—and damaging the engine. In extreme cases, the engines will overheat and seize completely—which means the vehicles need complete engine replacements. According to reports some GM customers have been hit with repair bills of up to \$5000—after their warranties have expired. It appears that GM has known about the problem for years. Four GM internal service bulletins—from 2001 to 2004—warn General Motors dealers about the potential problem. For example, in 2001, GM wrote:

*Some owners may comment on excessive engine coolant consumption, or an engine coolant leak near or under the throttle body area of the upper intake manifold. Upper intake manifold composite material may degrade...and could result in an internal or external coolant leak.*

GM's service bulletins list several vehicles potentially affected—23 makes and models manufactured between 1995 and 2003. Since then, GM has come out with a new, improved intake manifold gasket. However, the old part continues to break down in vehicles that haven't had it replaced. GM should have recalled all of the potentially affected vehicles, when the company first identified the problem. Phil Edmonston, who writes the consumer car guide Lemon Aid, stated: "I really believe it's the biggest problem GM has ever had." There's an on-line consumer petition—with 11,000 signatures from GM customers—calling for a voluntary "goodwill" recall by GM. In Canada, the Automobile Protection Association has logged 800 complaints. There are class action lawsuits pending in the U.S. If you need a list of the vehicles affected let us know by contacting Shanna Malone at 269-2343.

#### **BAUSCH & LOMB HALTS U.S. SHIPMENTS OF LENS SOLUTION**

Bausch & Lomb has agreed to stop shipping its ReNu MoistureLoc brand contact lens solution in the United

States after some users were diagnosed with serious eye infections. Bausch & Lomb had suspended sales of all ReNu solutions in Singapore and Hong Kong in February after reports of similar infections. The company later contended that tests found no evidence to suggest its products were the cause of the infections. The FDA says that 109 preliminary reports of a rare fungal infection that may cause loss of vision have been reported to the Centers for Disease Control and Prevention from 17 states in this country.

The FDA said it was not aware of a direct link between the Fusarium fungus and any specific product, but in 26 cases so far, patients used Bausch & Lomb's ReNu MoistureLoc solution. Dr. Daniel Schultz, head of FDA's Center for Devices and Radiological Health, told reporters:

*We do not at this point have information that gives us a direct cause-and-effect link between any particular product or any particular action.*

Bausch & Lomb Chairman and Chief Executive Officer Ronald Zarrella says the data is "troubling and perplexing, as there is an apparent disproportionate representation of U.S.-manufactured ReNu with MoistureLoc." The halt in shipments was a further blow to Bausch & Lomb, which has delayed issuing its 2005 annual report as a result of internal accounting investigations. According to the FDA, the eye care product maker was not pulling any of its existing MoistureLoc product from U.S. stores, but urged the approximately 30 million Americans who wear soft contact lenses to keep their hands and lens cases clean. ReNu MoistureLoc generated U.S. sales of approximately \$45 million in 2005 for the company.

U.S. health officials have complete information for 30 reported cases. Of those, 28 people wore soft contact lenses, and 26 of them reported using Bausch & Lomb's ReNu brand in the month before the infection. Five patients reported using other solutions in addition to ReNu, including some made by Advanced Medical Optics Inc. and Alcon Inc. The fusarium infection

may lead to vision loss requiring corneal transplants. The FDA has asked doctors to be vigilant when testing patients who contract any eye infection.

The FDA was not made aware of the CDC's data on U.S. cases until March 8th. Both agencies are investigating the 109 reported cases, which occurred between June 15, 2005, and March 18, 2006. Tim Ulatowski, head of compliance for the FDA's device center, said agency inspectors have already been to Bausch & Lomb's manufacturing plants and warehouses testing various samples. At least two class action lawsuits have been filed against Bausch & Lomb. One is filed in New York and the other in Miami, Florida. I suspect there will be individual claims filed where the injury or disability is extensive. Of course, any injury to a person's eyes is a serious matter and can be disabling.

Source: Reuters

#### **FORD TO ASK NHTSA FOR TIRE AGE ADVISORY**

Ford Motor Co will ask NHTSA to advise car owners in this country to change their tires after six years of service—regardless of their condition. Ford and DaimlerChrysler already advise owners of their vehicles to discard tires after six years through their respective vehicle owner's manuals. Ford claims its testing and research shows that the effects of aging on tire reliability increases significantly after six years. Two tire companies Continental and Michelin, recently went on record saying that tire aging was a problem. These companies issued Technical Bulletins on tire aging. In 2005, Bridgestone-Fire recommended that all tires be removed after 10 years regardless of tread depth. In the overseas market, it is interesting to note that the tire manufacturers have been saying that very thing for years.

#### **OUTLET MALLS REALLY DO OFFER SAVINGS**

It is this time of year when many people are making plans to head to the beach or the mountains for a summer vacation. A traditional part of many vaca-

tions include a stop at one of the many popular outlet malls that seem to be popping up all over the place. Let's face it, no matter if you have children or not, everyone wants a good bargain on the clothes they buy and the merchandise they use on a regular basis. These outlet malls often include hundreds of brand name stores, conveniently in one location, and promise large savings over their retail counterparts that are closer to your home. But, just how much do we as consumers really save at these shopping bonanzas?

*Consumer Reports* has recently looked at the phenomenon of outlet shopping malls and surveyed more than 6,000 readers to find out the best way to get the most value in these stores. The results of the survey reveal that there are, in fact, many good buys to be found at the outlet malls—you just have to know how to find those deals and maximize the system they have in place. The *Consumer Reports* study also attempts to dispel certain myths surrounding the merchandise people buy at outlet malls. For example, *Consumer Reports* compares the quality of merchandise offered in the outlet stores versus those same items found in a retail store. They looked at the variety of merchandise offered in outlet malls, and perhaps more importantly, whether the discounted price of merchandise in outlet malls really is different than the price you could pay back home.

The survey results offered good news for consumers. First, most of the goods that are purchased at outlet malls appear to be made of the same high-quality material that is offered for sale in retail stores. Even when items were discounted for having minor blemishes, those defects were often only cosmetic and did not affect the overall quality or durability of the item. Secondly, the survey found a noticeable difference in savings and discount prices at the outlet malls. Although the survey didn't find the 70% off of retail rates that was often advertised, they routinely found 30%-50% lower prices compared to those same products offered in retail stores. Lastly, one interesting finding in the study revealed that a good bit of merchandise offered in the outlet malls

were made specifically for those stores. *Consumer Reports* explains that placing specialty goods in outlet stores is a way that some chains reach a broader base of customers that may not otherwise shop in their retail locations.

The *Consumer Reports* study also gives ideas on ways to maximize the benefits offered by outlet malls. First, they suggest that the consumer shop during the mid-week, when the stores are less crowded, better stocked and the consumer can receive better customer service. Secondly, many outlets have websites where a consumer can download coupons for additional savings. Thirdly, they suggest that the consumer join an outlet mall frequent-shopper program if it is a place that is frequented several times a year. Lastly, consumers should look for specialty discounts, i.e., military discounts, senior citizen discounts and/or AAA membership discounts.

One last thing to look for when shopping at an outlet mall is to pay close attention to each store's return and exchange policy. Many times the merchandise cannot be returned for a full refund, but can only be exchanged for like items. Similarly, most of the items purchased at the outlet store cannot be returned to the retail store that is closest to your home. Usually, the merchandise can only be returned to the outlet store where it was purchased.

Source: Consumerworld.org

## XVIII. RECALLS UPDATE

During the last few weeks, there have been a number of recalls of motor vehicles and other consumer products. The following are some of the recent recalls involving motor vehicles.

### **NISSAN RECALLS 44,000 FRONTIER PICKUPS**

Nissan North American Inc. has recalled about 44,000 Frontier pickup trucks because the fuel cap could come off and allow fuel to

spill if the vehicle were involved in a severe side crash. The recall affects 2005 and 2006 models of the Frontier King Cab pickup. Apparently, there have been no crashes, injuries or fires linked to the potential problem. The National Highway Traffic Safety Administration said in a severe side-impact crash, the fuel filler cap tether could be stretched and lead to the cap unscrewing. Without the cap, fuel could spill and potentially lead to a fire. The recall was supposed to begin in mid-April. Nissan was to notify owners and ask them to bring the vehicles to a Nissan dealer for repair. Dealers will replace the fuel cap tether and pin assembly at no cost to the owner. About 2,000 of the recalled vehicles are located in Canada and Mexico.

### **FORD RECALLING NEARLY 20,000 MUSTANGS**

Ford Motor Co. has recalled about 20,000 Mustang Cobra sports cars. The company had received complaints that the back of the accelerator pedal could become caught in the floor carpeting and lead to a crash. Ford told the National Highway Traffic Safety Administration in late January that it had received about 100 complaints and allegations of two crashes and one injury. The recall affects 19,140 Mustang Cobras from the 2003 and 2004 model years. According to Ford's report to NHTSA, the rear surface of the pedal could interfere with the carpeting during heavy throttling and make it difficult for the pedal to return to an idle position. The problem could be found in vehicles where the floor carpeting does not fit flush with the sheet metal.

Dealers are expected to install a bracket over the cutout in the carpet behind the pedal. Owners began to be notified of the recall in late April. They won't be charged for the repair. Last July, NHTSA opened an investigation into accelerator pedal interference in the

2003 and 2004 Mustang, and the 2003 model year of the Mustang convertible and Mustang GT. According to Ford, the automaker's investigation only found the issue in the Cobras because the high-performance model has a different pedal configuration than the other Mustang versions.

#### **FORD RECALLING 134,365 SUVs OVER CRASH PADS**

Ford Motor Co. is recalling 134,365 Escape and Mercury Mariner sports utility vehicles to adjust the padding on the driver's side to prevent injuries during a collision, according to U.S. safety regulators. The vehicles affected by the recall are from the 2005 model year, according to the National Highway Traffic Safety Administration. According to NHTSA, no injuries or accidents have been connected to the recall.

#### **FORD RECALLING NEARLY 150,000 SUVs**

Ford Motor Co. is recalling about 150,000 Ford Escape and Mercury Mariner sport-utility vehicles. The government and Ford reached different conclusions in safety tests measuring the driver's head protection in a crash. The recall affects some SUVs from the 2005 model year without side air curtains or moonroofs. Ford told the NHTSA that it did not know of any reported injuries linked to the recalled vehicles. In government testing, NHTSA found that the SUVs had a head injury score along the driver's side roofline near the front pillar that was marginally above the maximum allowed under federal regulations.

Ford conducted its own testing and found "a significant compliance margin." Ford says that the recall will make adjustments to reduce the stiffness of the energy-absorbing foam in the affected area. The Escape and Mariner are built on the same platforms and considered cor-

porate twins. Nearly 132,000 of the vehicles are in the United States and more than 15,000 are located in Canada. Owners, who will be notified of the recall by mail by late May, can call Ford at 800-392-3673 or their local dealership to learn whether their vehicles are subject to the recall.

#### **GM RECALLS VEHICLES**

General Motors Corp. is recalling almost 13,000 Buick Lucerne and Cadillac DTS sedans because of faulty power steering hoses. The hoses on some of the 2006 models of those GM cars equipped with V8 engines are prone to separate and leak steering fluid, regulators said. That could cause drivers to lose steering power at low speeds or trigger engine fires. GM will replace the defective parts, the NHTSA said.

#### **MAZDA RECALLS**

Mazda Motor Corp. is recalling about 2,600 MX-5 Miatas from the 2006 model year because the driver-side front airbags are prone to dislodge a horn assembly from the steering wheel. NHTSA says that problem, which is prone to happen at very cold temperatures, could injure drivers. Mazda will replace the front airbags on the cars at risk for the problem.

#### **TOYOTA RECALLS 57,000 LEXUS CARS**

Toyota Motor Corp. is recalling 11,000 Lexus cars in Japan and 46,000 overseas to fix a faulty seat belt part. Toyota will replace seat belts in both front seats, which can become jammed inside the holding due to a faulty part. The affected cars are Lexus GS and IS sedans. According to Toyota, no accidents have been reported due to the defect. Toyota has sold 15,000 Lexus GS and IS in Japan since it ushered in the 16-year-old Lexus brand to its home market in August 2005. At

press time we didn't have any further recall information.

I suggest that you go to the Consumer Product Safety Commission website ([www.cpsc.gov](http://www.cpsc.gov)) for a complete listing of all recalls of consumer products. The following are just a few of the recalls involving consumer products that should be of interest.

#### **TOY BUILDING SETS RECALLED**

One child died and four others suffered serious injuries after swallowing tiny magnets found in building sets sold nationwide, according to the Consumer Product Safety Commission. A recall of 3.8 million of the toy kits is presently underway. The commission has received reports of 34 incidents involving the small magnets included in the Magnetix magnetic building sets, including the Xtreme Combo, Micro and Extreme versions. The magnets are fitted inside the plastic building pieces and rods but can fall out, posing a danger to children who inhale or swallow them. A 20-month-old boy died after he swallowed magnets that twisted his small intestine and created a blockage. Three other children, between the ages of 3 and 8, suffered intestinal perforations that required surgery and hospitalization in intensive care. And a 5-year-old boy inhaled two magnets that had to be surgically removed from his lungs.

The Chinese-made sets were imported by RoseArt Industries Inc. and sold at stores including Wal-Mart, Target and Toys R Us. Attempts to reach RoseArt after business hours were unsuccessful. The CPSC says that consumers should stop using the sets and return them to RoseArt for a free replacement product. Consumers with questions can contact RoseArt at 1-800-272-9667 or visit the company's Web site at <http://www.roseart.com>.

#### **WAL-MART RECALLS ROCKING CHAIRS**

Wal-Mart Stores Inc. has recalled about 643,000 Mainstays love seat and porch rocking chairs because poor construction and over-curvature of the

chairs' runners can cause instability, imbalance, fracturing of the wood and tip-over during use, posing a falling hazard to consumers. Wal-Mart has received 45 reports of injuries, including a cut in the leg requiring 16 stitches, a shoulder joint tear and one incident in which a pregnant woman began having contractions after the chair in which she was sitting flipped over backward.

The recall involves three models of rocking chairs, the Mainstays Love Seat Rocker (model IT-13380) and the Mainstays Porch Rockers (models IT-13379 and IT-13270). The love seats are wooden and white and seat two people. The wooden porch rocker is sold in white and light brown and seats one person. The model number is printed on the rocker's packaging. The rockers were sold at Wal-Mart stores nationwide and on Wal-Mart's website. The love seats were sold from May 2004 through September 2005 for about \$100. The porch rockers were sold from April 2004 through March 2006 for about \$50. Consumers should immediately stop using these rocking chairs and return them to Wal-Mart for a full refund.

## **XIX.** **FIRM ACTIVITIES**

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### ***SPOTLIGHTED EMPLOYEES***

#### **LaBarron Boone**

LaBarron Boone, who joined the firm in 1994, has been very busy since that time representing clients whose cases involving product liability and personal injury. LaBarron, an Auburn University engineering graduate, has wide-ranging experience handling a variety of product liability cases including those involving such things as crashworthiness, seatbelt restraint systems, inadvertent airbag deployments, trucking accidents, and tire tread separation cases. He attended law school at the University of Alabama where he was schooled by one-of-the-best, Dean Charles Gamble. LaBarron was part of the Beasley Allen trial team for the

Whirlpool and Aultman cases that resulted in jury verdicts of \$581 million and \$116 million respectively.

LaBarron received the University of Alabama's BLSA Chapter Alumni Honoree Award for 2003. He was the recipient of the "Chairman's Award of Excellence" presented by MCDC Young Democrats. LaBarron, who has served as President of Kappa Alpha Psi fraternity, The Capital City Bar Association, and The Alabama Lawyers Association, is currently serving on the Executive Committee of the Alabama State Bar. LaBarron is involved in many community and social activities, such as serving on the Board of Directors for Child Protect. On September 22, 2005 LaBarron was the first ever recipient of the "Hands for Children" Award. He currently serves on the board of trustees of the Central Alabama Community Foundation, one of the largest charitable foundations in the State of Alabama.

LaBarron is married to the former Lori David and they have two fine children, Micah and Logan. The Boones are members of Resurrection Catholic Church where LaBarron serves on the Board of Trustees. Some say that of all of LaBarron's many accomplishments, the best day of his life was when Lori agreed to become his wife. I believe that LaBarron would agree!

#### **Anna Pender Pierce**

Anna Pender Pierce, who has been with our firm for almost 16 years, currently serves as a Legal Secretary for our Managing Shareholder, Tom Methvin. This is more than a full-time job. Anna assists Tom with the firm's daily operations and does an excellent job. Anna is married to John Pierce. She enjoys music trivia, baking and trying new recipes. Also, reading autobiographies and studying U.S. History occupies her spare time. Anna is very popular with all of the folks at Beasley Allen. One thing that I really like about Anna is that she will tell you exactly what she thinks and believes and I consider that a very good trait. Anna is a most valuable employee who does excellent work and we are mighty glad she is a part of the firm.

#### **Amy Brown**

Amy Brown began working at the firm in May of 2001 as a Legal Secretary for Ted Meadows in the Mass Torts Section. In September of 2004, she became Ted's Legal Assistant. Amy is currently working on knee and heart device cases, as well as the hormone therapy cases. As a Legal Assistant, she helps work the cases up for trial. Amy was born and raised in Montgomery. She married J.J. Brown 10 years ago and they now live in Sprague, AL. J.J. and Amy have three children, daughter Cadey, who is seven years old and twin boys, Zach & Tyler, who are 2 years old.

J.J. stays real busy. He manages 70,000 square feet of warehouses, owns Brown Construction and is co-owner of J&W Clear-A-Way. Cadey, who is a first grader at Pintlala Elementary School, is an USAG Level IV gymnast with the Armory Gymnastics Center in Montgomery. She also plays softball with the Suburban West Darlings. Zach and Tyler attend Hooper Academy Daycare and are typical two-year olds, which I understand means they are "real good children." Amy is a very good employee and we are fortunate to have her with us.

#### **Flora Johnson**

Flora Johnson, who came to our firm in July of 2002 as an Accounting Clerk, now handles Accounts Payable, Trust Accounting and Payroll. Flora is married to Leon Johnson and they have three children: Sandy, 24 years old; Jeremy a 17-year old senior at Booker T. Washington Magnet School and Hannah an 11-years old who attends Dalraida Elementary School. Flora, who enjoys going on mission trips and doing mission work, is a most valued employee. She does excellent work and we are pleased to have her with us.

### ***A FAMILY NIGHT WITH THE BISCUITS***

On Friday, April 7th our firm enjoyed the annual Beasley Allen Family Night Out with the Montgomery Biscuits baseball team. A special section of the ball park is set aside for these functions and it is a great place. Employees and their

families, who attended the game, enjoyed hamburgers, hot dogs and bar-b-q at the Box Car Buffet, which is located in an area behind right-center field. I have always enjoyed baseball and even played a little in college and semi-pro. So it was an honor to be asked to throw out the first pitch. However, after bouncing a "fast ball" in the dirt, I was advised by the Biscuits manager to "keep my day job."

Tom Methvin, who is our managing shareholder, is on the board of directors for Brantwood Children's Home. Tom invited the children from Brantwood to join us for the game. A total of 12 children and adults from Brantwood came and really enjoyed the outing and the game. As you may know, Brantwood Children's Home provides residential foster care, academic assistance and counseling for up to 30 youth, aged 10-20 and they do an outstanding job.

#### **BEASLEY ALLEN PARTICIPATES IN MINORITY PRE-LAW CONFERENCES**

This year, our firm continued its dedication to encouraging diversity in the legal profession by helping with the Alabama State Bar Young Lawyers Section's Minority Pre-Law Conferences. The Montgomery area Pre-Law Conference was held on April 7th at Alabama State University. A similar program was held for Birmingham area students on April 10th at Birmingham Southern College. The Young Lawyers and the Capital City Bar Association have jointly hosted the Pre-Law Conferences for over ten years in Montgomery. This was the first year for the program to be offered in Birmingham.

The Conference is a day-long event designed to introduce eleventh and twelfth grade minority high school students to the legal profession. Students gained valuable insight regarding the practice of law by listening to a panel discussion led by minority attorneys regarding the American civil and criminal justice system, the various specialty areas of the law, the day-to-day experiences of lawyers and the numerous career opportunities that a law degree can offer. In addition, students were given an opportunity to participate as

jurors in a mock trial performed by practicing attorneys.

The Honorable Eugene Verin, a Jefferson County Circuit Court Judge, addressed Birmingham area high school students during a luncheon attended by several other distinguished Jefferson County judges. Senator Quinton Ross of Montgomery addressed the Montgomery area students. Finally, students at each conference participated in small group discussions, led by lawyers from Montgomery and Birmingham. The topics covered college, graduate and law school preparation and the general practice of law.

The Capital City Bar Association, the bar organization hosting the Montgomery area conference in conjunction with the Young Lawyers, is led by two lawyers from our firm. Kendall Dunson is President and Larry Golston serves as Vice-President. The Diversity in the Law Committee of the Young Lawyers Section, which is the committee responsible for planning the Pre-Law Conference, is chaired by Kimberly Ward, another Beasley Allen lawyer. Each of these conferences was a tremendous success, hosting a total of nine high schools and approximately 350 students. We were glad to be a part of making it happen.

#### **EMPLOYEES WALK FOR GOOD CAUSES**

Employees from the firm were busy last month at various charity walks. On April 8<sup>th</sup> we had 27 employees join the American Heart Association for the annual Heart Walk in Downtown Montgomery. Our team raised a total of \$1,000. As you know, The American Heart Association is a national voluntary health agency whose mission is to reduce disability and death from cardiovascular diseases and stroke.

On April 29<sup>th</sup>, 11 employees joined the Arthritis Foundation at the Montgomery Zoo for the Arthritis Walk and raised over \$700. The Arthritis Foundation is the only national not-for-profit organization supporting the more than 100 types of arthritis and related conditions with advocacy, programs, services and research.

#### **BEASLEY ALLEN HOSTS SEMI-ANNUAL BLOOD DRIVE**

Beasley Allen held its semi-annual Blood Drive on March 24<sup>th</sup> with Life-South Community Blood Center. The event attracted a good number of donors from the firm. All donors received a free T-shirt and cholesterol screening. LifeSouth is a primary blood supplier for Montgomery, Autauga, Elmore and Crenshaw Counties. Between June 1, 2004 and May 31, 2005 they supplied 96% or more of the blood to our area hospitals.

#### **A PARTNER IN EDUCATION**

Our firm currently is a Partner in Education with Martin Luther King Elementary School in Montgomery. On April 13<sup>th</sup>, the firm sponsored a cookout for the students to celebrate the end of SAT testing. Circuit Judge Hardwick, Tom Methvin, our managing shareholder, Sheriff D.T. Marshal and Ricky Whitehead, a volunteer with the sheriff's office, did a great job of cooking hot dogs and hamburgers for the children. We are proud to report the school had 100% participation during testing and the students truly enjoyed the cookout. Partners In Education currently has over 500 Community Partners linked with Montgomery County's 60 public schools. Since this organization was founded in 1983, the equivalent of several million dollars in volunteer hours, materials and services have been provided by local businesses through Partners in Education for Montgomery Public Schools. By improving the schools, and the educational experience of the children, the entire Montgomery area is improved. We are grateful to have been given the opportunity to help children in our community.

## XX. SPECIAL RECOGNITIONS

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### A REAL INSPIRATION

On occasion Mrs. Dean Albritton, the wife of Walter Albritton, teaches our Sunday School class at St. James United Methodist Church. Dean regularly teaches several other classes at the church. Recently, Dean taught on a book in the Old Testament that dealt with overcoming problems and pitfalls in life. At the very start of Ecclesiastes, it is made clear that life lived without regard for God is of no value. Dean told us how, as a pastor's wife, she too has had her share of problems over the years. One of the dark times in her life involved the death of one of their children at a very early age. Dean told us that without her faith in Jesus Christ, she simply couldn't have made it through that crisis. She also related how her faith in Jesus carried her through other dark times in her life. Her message that Sunday morning really hit home with me and I believe with the entire class. Clearly, Jesus is the only answer when serious troubles come into our lives. My problem has been in really trusting Him at all times. Dean helped explain how trusting Jesus in good and bad times is—truly—the only way!

### A RECOMMENDED READING

Alvin Benn, who now lives in Selma, has enjoyed an outstanding career as a journalist and now he has become an author. Al's excellent book, *The Reporter*, is now available for purchase and I recommend it to you. The book, which covers a number of interesting chapters in Al's long and distinguished career, is very well done and is quite interesting. Al currently writes a daily human-interest feature in the *Montgomery Advertiser* which is very popular. Stepping on "political toes" has been a hallmark of Al's career. For any of those politicians who might consider taking Al on when he "misbehaves," and

"hurts their feelings," let me remind them that, according to my good friends from Selma—Senator Hank Sanders and Probate Judge Johnny Jones—Al is a former marine.

## XXI. SOME CLOSING OBSERVATIONS

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After being taken to task by John Giles recently for my being a lawyer who represents folks in lawsuits, I am more determined now than ever to continue fighting to uphold the jury system in our country and to fight hard to preserve the rights of regular people. It's a **tough** fight and sometimes it can be a real **lonely** fight. Clearly, being on the side of victims of corporate abuse and wrongdoing and fighting their battles, is much like it was centuries ago when **David** took on **Goliath**. The tough part of our fight is that the tort reformers don't even want us to use a sling shot in the battles. Nevertheless, I know that we represent right and that's the **important** thing to remember. The powerful kings of Corporate America, using men like Jack Abramoff, literally **control** the affairs of our national government. It is believed that the recent scandals in Washington are perhaps just the tip of a massive iceberg that has been growing for years. Certainly, the Abramoff story is symbolic of a corrupt system. Perhaps, we should listen carefully to the words of one of the great men in our nation's history, who was instrumental in its formation.

*"I hope we shall... crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and to bid defiance to the laws of their country."*

— Thomas Jefferson

## XXII. SOME PARTING WORDS

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Walter Albritton, mentioned briefly above, is one of the pastors at St. James United Methodist Church and a real good one. I have found Walter to be a man with tremendous insight, vision and great faith. Some say, that Walter has even acquired wisdom with age. The Elmore county native, who has had a most interesting ministry over the years, is truly a **righteous** man. Walter recently wrote something entitled **Ten basic principles that can change your life**. I this is something well worth reading. For that reason, I will pass it on to you.

*We already have Ten Commandments. God gave them to us and they need no improvement from me. They simply need to be followed so that we can live the way God wants us to live. I want to share some additional ideas that can help us live well. I prefer to call them suggestions or principles that can improve the quality of our lives. These are principles I have learned in the school of hard knocks. Since that is the way most of us learn how to live, you may be already using these principles in your own life. **One**, life should be lived in chapters. My forester son Tim tells me that the rings in a tree tell us the story of that tree. Each ring is a chapter of sorts. We can see what years there may have been a drought.*

*In reading a book I often look ahead to find out the length of the chapter I am reading. In life we all have times of transition, pain, and change. We cannot always choose the circumstances of our lives, but we can choose to put down a period and conclude some experience. We can put an end to one thing and begin something new. We may have a chapter of discouragement, but we can decide that it is over and begin a new chapter of celebration.*

**Two**, give up trying to be perfect. Progress, not perfection, should be our goal. Get off your own back. The demand for perfection is a burden you can give up for Lent and forever. Aim to make a little progress each day, and be at peace about your imperfections. Trying to be a “perfectionist” is unhealthy. It ruins life for yourself, your family, and your friends.

**Three**, celebrate your mistakes. You will make mistakes; we all do. But when you make one, especially a big one, consider it so excellent that you want to remember not to make it again. You celebrate it by injecting a little humor into your guilt. Then you can laugh at yourself and invite others to laugh with you. Such celebration helps you become the victor instead of the victim.

**Four**, cut “if only” out of your vocabulary. When we indulge in the use of “if onlys,” we are simply trying to dodge our responsibility for a problem. Try never again to begin a sentence with “if only.” Substitute the word, “because.” Here’s an example: “Because I am in charge of my life, I will not allow this problem to throw me.”

**Five**, don’t blame other people for your problems. How you react to what other people do and say is more important than what they do and say. You cannot control what other people do; you can decide how you will respond to their behavior. Accept the fact that sometimes you are your own biggest

problem. Then give other people a break and work on yourself.

**Six**, accept the reality that nobody is perfect, including you. Accept the imperfections of others. Doing this will help you not to blame them when things go wrong. Since other people are like you and me, they will sometimes say things that are insensitive and stupid. Go ahead and forgive them because that is what you want them to do for you when you are insensitive. When others do not measure up to your expectations, relax and remember that we live in an imperfect world. To survive we have to offer one another the gift of understanding. It is perfectly alright to be wrong sometimes.

**Seven**, laugh a lot every day. Humor is so important that we should look for it constantly. If you are having a really bad day, find something funny you can share with others to get a good laugh. If nothing else works, go look at yourself in the mirror. That works for me every time.

**Eight**, smile when people rain on your parade—and move on. Life is too short to let jerks jerk you around. Jerks are everywhere, ready to put a damper on anything you say. When they do, just smile and move on with your life. Refuse to let them get your attention because what gets your attention gets you.

**Nine**, if you fuss a lot, stop it. Complaining gets you nowhere. It is a choice you can make so make it.

Think about this: nobody ever wakes up in the morning and says, “Boy, I sure hope I run into somebody today who is complaining.” Believe me, if you fuss all the time people do not want to be around you. Do yourself a favor and quit fussing. You will live longer and have more fun.

**Ten**, when the bottom falls out of your life, pray for spring. Remember that winter doesn’t last forever. Bad times, winter times, come to us all. But things have a way of changing, like the seasons of the year. When it is wintertime in your life, hang on, for spring will come! It has again this year; it always will.

So there you have it—ten basic principles that can change your life. Keep God’s commandments. Then consider these suggestions too. They help me. They may help you too.

—Walter Albritton

These 10 recommendations from Walter are mighty good. I am going to make a special effort to follow his advice. I haven’t asked him—but plan to—if maybe his wife Dean helped him out a little on some of these 10 items. Whether she did or not, we would all do well to follow these 10 principles in our walk through this life. I have been blessed—more than they know—by knowing Walter and Dean Albritton over the past few years. May God bless each one of you and your families and I sincerely hope you have friends like the Albrittons to help you along life’s path from time-to-time!

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