I.
CAPITOL OBSERVATIONS

COMMENORATION OF THE 50th ANNIVERSARY OF BRODWER VS. GAYLE

On May 4, 2006, the Alabama State Bar, in conjunction with the Alabama Lawyers Association, organized a tremendous event celebrating the 50th anniversary of the Brodwer v. Gayle decision. The United States Supreme Court's decision in this most important case nullified a statute mandating segregation in public transportation. Most people are familiar with the Montgomery Bus Boycott and Rosa Parks' courageous refusal to give up her seat to a white male on a city bus. But, few people today can tell you who the judges were who decided the case, and who the lawyers were who represented the plaintiffs in the case. Even fewer folks know there were other Montgomery citizens who were instrumental in the filing of the case. The Law Day Commemoration of the 50th anniversary of Brodwer v. Gayle held in Montgomery, Alabama, focused on these unsung heroes.

Few people are aware that two other people had refused to give up their seats on a city bus before Rosa Parks' famous defiance. Two brave ladies, Claudette Colvin and Mary Louise Smith Ware, were both arrested for refusing to give up their seats on a Montgomery, Alabama city bus. They were plaintiffs in the case of Brodwer v. Gayle. Each of these ladies is still alive, and each participated in the morning session of the Law Day event by sharing her heroic experience with the audience. Their respective accounts of refusing to give up their seats on the city buses were moving and powerful. My longtime friend, Fred Gray, one of the lawyers representing the plaintiffs, introduced them as speakers and gave his own account of his role in the case and of his personal relationship with Rosa Parks and other civil rights workers of the time. In addition to hearing from Fred, Mr. Colvin, and Ms. Ware, there was another highlight when Wayne Greenhaw, a noted novelist, read excerpts from his book, Thunder of Angels: The Montgomery Bus Boycott. Wayne’s book, which is a great read, contains actual accounts of events leading up to the bus boycott.

A luncheon with a packed house followed the morning session. The Honorable U.W. Clemon, Chief U.S. District Court Judge of the Northern District of Alabama, was the keynote speaker. Judge Clemon’s keynote address, How One Person Can Change the Law: The Life and Work of E.D. Nixon, detailed the contributions of Mr. E.D. Nixon to the civil rights movement. Following the luncheon, the afternoon session included in-depth discussions about the three-judge panel that decided Brodwer v. Gayle, namely, U.S. District Judges Frank M. Johnson, Jr., and Seybourn H. Lynne, and U.S. Circuit Judge Richard T. Rives. The audience was treated to personal stories about the judges from their respective law clerks and family members. The afternoon session was followed by a reception at the Rosa Parks Museum.

Attendees traveled from the four corners of the state and from out-of-state to participate in this historic event. Buses from Huntsville, Tuscaloosa, Birmingham, and Mobile transported hundreds to the event. Those who attended these events were blessed with a wonderful and insightful view into this City’s and our Country’s past. Being reminded of the ugliness of segregation was more than offset by the unity and diversity of the event’s participants and organizers. I believe that it helped all of us realize that we still have more to do in this country, including my home state of Alabama, to complete that which was started years ago. We will all be better for it! The Law Day event is a perfect example of how we can reach back into our history to help guide us in shaping our future. The organizing committee, along with the Alabama State Bar, the Alabama Lawyers Association, and the event sponsors, are to be congratulated for a job well done.

CLASS ACTION LAWSUIT FILED AGAINST AXA EQUITABLE

Our law firm filed a most important class action lawsuit last month against AXA Equitable Life Insurance Company, formerly known as Equitable Variable Life Insurance Company. The suit was filed on May 16th in the U.S. District Court, Southern District of New York, on behalf of Larry E. Richards and other persons who purchased policies on the lives of their minor children (then under the age of 18).

New York City-based Equitable, a publicly traded company (AXF), used a "Juvenile Smoker Rate Scheme" to
deceive policyholders who were led to believe that their children's policy rate would be based on a non-smoking classification. Equitable, like other insurers, charges different rates and offers different interest and dividends for insureds who smoke and for those who do not smoke. Equitable priced all life insurance policies on minors, as represented in the lawsuit, as if the juveniles were 'smokers' even though the juveniles represented to Equitable that they did not smoke.

For example, Mr. Richards bought two Adjustable Life Plan policies from Equitable with face amounts of $25,000 to insure the lives of his two children, Vanessa and Shane. The two youngsters were minors at the time the policy was issued. This is true with the children of other class members who were insured when under 18 years of age. Equitable did not disclose to policyholders or to those insured that the life insurance policies for the juveniles were based on a smoker premium rate classification. Equitable actually priced its policies assuming that the insured would become a smoker by age 18. Based on what we have learned, Equitable was not "equitable," having a system in place that automatically classified all minor insureds as smokers. Once again, innocent consumers are the unfortunate victims of a greedy insurance company's deceptive practices. Charging smoker rates on the lives of children is not only a legal fraud, it's morally wrong and can't be tolerated. We will do our best to see that it isn't tolerated.

The lawsuit will be handled primarily by Jay Aughtman and Dee Miles, who practice in our Consumer Fraud Section for our firm. I will also be involved as the case gets closer to trial. We will be working closely with Hanly Conroy Bierstein Sheridan Fisher and Hayes, a very good New York law firm, our co-counsel in this case.

**Political Races In Alabama**

**The Race For Governor**

Thus far this year's governor's race in the Republican primary will have to go down in Alabama political history as one of the dullest in recent memory. At least that has been the expressed opinion of most "political experts." Most of these observers had predicted a hotly contested race in the Republican primary between Governor Bob Riley and Judge Roy Moore. For whatever reason, that never materialized and it now appears that Governor Riley will win rather handily. My uneducated guess is that the outcome will be a little closer than the polls have shown, but will wind up being about 57% to 43%. If the final count in the race turns out in that range, it will be a boost for Governor Riley as he moves on toward the general election. Interestingly, some political experts believe that Judge Moore would have run a better race as either a Democrat or an Independent. I'm not so sure about that – but it's an interesting analysis.

While the Republican primary has been dull, the Democratic primary has been a real weird one. In fact, it has been one of the strangest ever and I don't believe anybody can dispute that. Lt. Governor Lucy Baxley has been running what most political experts have labeled as a low-key race, apparently saving her best race for the fall. Her main opponent, former Governor Don Siegelman, has been splitting his time between a federal courthouse as a defendant in a criminal trial and on the political trial. No political candidate has ever received so much free publicity as Don has garnered because of the trial's daily news report. Don and his lawyers are on the nightly television news every night and we read about him on the front page each morning. Even the internet is full of news on the trial. All of this is a first for our state and it may be the first time that this sort of thing has happened anywhere. Regardless, all polls have indicated that this is still a very close race. But, I believe that will change by Election Day. I predict Lucy will win by a margin of 52% to 43% with the remaining 5% split between the other candidates. But, if Don's trial is completed by June 6th, and he is found not guilty on all counts, then the outcome could be much closer.

**The Race For Lt. Governor**

The Lt. Governor's race in the Republican primary has turned out to be the most hotly-contested of all races. Frankly, I still wonder why anybody would want to be Lt. Governor now that the Senators have stripped the office of all real power over legislative affairs. In fact, the next legislature may elect to take the Lt. Governor totally out of the Senate and put the office in the executive branch where it belongs. That would make the person holding the office in effect a deputy governor. In my opinion that's the function or role that the person holding the office should play. In any event, if I had to guess on the outcome of the Republican primary, I would say it will wind up something like this:

- Luther Strange 42%
- George Wallace 39%
- Mo Brooks 15%; and
- All others 4%

In the Democratic primary, Jim Folsom, Jr., who has served in the past as Governor, Lt. Governor, and as a member of the Public Service Commission, is running unopposed. Some say that Jim is running to get ready to run for Governor in 2010. Others say he simply wants to be ready to take over in the event the next Governor – whether it be Riley, Baxley or Siegelman – moves on to even higher office in 2009. Since I can't figure out any other reason for Jim to run for Lt. Governor, at least one of those options makes sense. Come to think of it, that might be why somebody is putting big bucks in the Strange campaign. In any event, if Jim will get totally dedicated to the task at hand, he can be a most effective campaigner and have an excellent chance to be elected in the Fall. Only time will tell if he can or is willing to do this.

**The Race For Attorney General**

In my opinion, Troy King, the incumbent, will very easily win his race in the Republican primary. Mark Montiel, the challenger, has run an aggressive campaign, but simply doesn't have the
money required to wage a real strong race. But even if Mark were heavily financed, I believe the incumbent would still win by a large margin. Troy has done a good job in my opinion and seems to be well-liked around the state. He is a good family man and a hard worker, which are good traits in my book. Another thing I like about Troy is that he is not a professional politician and instead seems to base his decisions as Attorney General on what's right for Alabama.

John Tyson will be the Democratic nominee because he only has token opposition in the primary. The Mobile County District Attorney, who is an attractive candidate, will run a fairly strong race in the Fall. But, he will have an uphill battle against the incumbent in my opinion. Some believe coming out of Mobile will help John because of its heavy voter base. Time will tell whether that proves to be an advantage.

**THE JUDICIAL RACES**

So far the race between Chief Justice Drayton Nabors and Justice Tom Parker has been the only statewide judicial race to get any real attention. It has been a knockdown-drag-out-affair. The Chief Justice appears to be extremely well-financed, and even though he was behind Parker in all of the early polls, he seems to have gained a little momentum in this race. But, I really can’t predict how this one will turn out since there is so little interest. A low voter turnout might make this race very close.

The other Supreme Court races simply haven’t gotten much attention. Nevertheless, Justices Lyons and Woodall seem to be safe - both in the primary and the general election - at this point. Although each of these men is considered a very conservative Republican, each of them is also known to be intelligent, fair, and a hard worker. It’s highly significant that lawyers from both the plaintiffs’ bar and the defense bar respect these two justices and believe they are doing a good job on the court. That should say lots for any judge. The polls indicate the other incumbent justice seeking reelection will probably win her race in the primary mostly by default. The remaining race, which is an open seat involving Glenn Murdock and Jean Brown, appears to be very close and should remain that way right up to Election Day. Either could be the GOP’s choice for place 4 on the Supreme Court.

The races for the civil and criminal courts of appeals have some very good candidates, but there simply hasn’t been much attention paid to any of these candidates. An exception is Judge Bill Shashy, a candidate for the Civil Court of Appeals, who has received very good media coverage as a result of his strong and badly-needed stand in the state prisoners’ lawsuit. There will likely be run-offs in several of these races. These primary races, with the exception of one, involve only Republicans.

**JUDGE REFUSES TO DISMISS JAIL BACKLOG CASE**

The State of Alabama has had a most serious problem in our prison system for the past several years and thus far very little has been done about it. In a recent development, however, Montgomery County Circuit Judge Bill Shashy refused to dismiss the jail overcrowding case and told the State officials in no uncertain terms that they haven’t done their job. As you know, the litigation over the backlog of state inmates in county jails has dragged on now for 15 years. After a contempt hearing in late April, Judge Shashy now has handed down a very tough ruling. The Alabama Department of Corrections was held in contempt for failing to comply with a December 2002 court order requiring state inmates to be moved from county jails to state prisons within 30 days. The recent contempt order was directed at Richard Allen, who was appointed by Governor Bob Riley in February. Under the judge’s order, the new commissioner will have to decrease the number of state prisoners in county jails as follows:

- From 585 to 400 by May 31, 2006;
- down to 200 by June 27; and
- to zero by September 5, 2006.

Clearly, because he is new on the job, Richard hasn’t been the problem. But, he did inherit a problem of the greatest magnitude and can’t be denied. It should be noted that state law requires that a state inmate be moved from a county jail to a state prison within 30 days. This has been ignored for years, which is inexcusable. Although some progress has been made, it is quite evident that the state has failed in its legal responsibilities and has much more to do. Now it will have to do it unless an appellate court reverses Judge Shashy’s order.

It is quite evident that governments at every level have an obligation to be tough on crime and that means putting criminals behind bars. But, that approach means there must be adequate facilities to house the prisoners. County jails can’t be the place where state prisoners are kept after sentencing for long periods of time. Simply put, the counties must be given relief and their prisoner population reduced to legal limits. Talking tough on crime - but not being willing to spend the funds needed to get the total job done - makes no sense and is most hypocritical. In any event, Judge Shashy should be commended for following the law and doing his job. The Commissioner has requested a stay of the order by the Alabama Supreme Court. By press time, there had been no response form the high court. It’s high time for the state to do its job and bring an end to this costly litigation. It’s time to stop talking and to get down to the business at hand.

**ALABAMA MUST PROTECT FAMILY FARMS**

The Alabama Department of Agriculture and Industries (ADA) will participate in the USDA Farm and Ranch Lands Protection Program by providing matching funds of over $500,000 to acquire development rights with conservation easements to keep productive farmland in agricultural usage. Commissioner Ron Sparks says that thousands of acres of Alabama’s farmland are being lost each year to urban sprawl and other non-agricultural uses. I believe that it is critically important to protect prime farmland. Through this program, the Alabama Farmland Protection Program
will provide funds that will protect farmland and also will help save family farms. Private landowners seeking the funds will receive assistance from the ADAI in developing proposals for the program. In announcing the availability of the funding, Commissioner Sparks observed:

We have to help farmers keep their land and also to keep the land in their family. This program will go a long way to help.

As you may know, a conservation easement is a legal document where the landowner sells the property development rights to the state for perpetuity, or forever. In exchange, the state pays the landowner the appraised fair market value of the conservation easement. The landowner can continue to farm the land, but the land can never be used for non-agricultural uses such as development. The funding comes from the Natural Resources Conservation Service's Farm and Ranchland Protection Program, and other public and private fund sources, which are then matched with the funding provided by the Alabama Legislature.

To qualify for the program, the land must be at least 50% prime farmland and at least 50% cropland, pasture, or hayland. Prime farmland is land that is gently sloping to level, and is highly productive. Other considerations for property selection include development risks, archeological and historical sites, remaining agricultural infrastructure, and percent prime farmland. The cut-off date for applications was May 2, 2006. Those applications not selected and those received after the deadline will be considered for future appropriation. If you are interested in applying for this program, visit the Department of Agriculture and Industries website at www.agi.alabama.gov, or call 334-240-7221 for more information.

**LNG Terminals In The Gulf Coast Raise Questions**

From all accounts, the Governors of Alabama, Mississippi, and Louisiana are the last line of defense relating to the approval of the liquid natural gas terminals proposed to be located off the coast of the three states. Apparently, a single objection from a Governor is enough to stop a proposal. Presently, only one LNG port exists in the Gulf, but several other ports are proposed off Louisiana's coast. One of the proposals calls for an LNG terminal to be located 11 miles off the coast of Alabama. Governor Riley will have to veto this proposal by June 11th according to the Mobile Register. The proposed Freeport-McMoRan terminal, to be located 16 miles off Louisiana, was vetoed by Governor Kathleen Blanco last month. Governor Riley says he agrees with that veto and that apparently means he will veto the Alabama proposal.

A proposal that isn't vetoed will go to officials within the Maritime Administration of the Department of Transportation for approval or rejection. I believe that the potential dangers associated with LNG terminals have to be considered and weighed against the economic benefits of locating terminals in the Gulf of Mexico. The biggest safety risk is that of fire from an explosion of a ship bringing the liquefied gas into port. There has been much debate over the nature and seriousness of this hazard but for some reason the discussion appears to have died down. Clearly, safety is something that should have been carefully studied before the proposals even got to this stage. I hope that has happened.

Officials with industries that rely on natural gas believe this new, imported source of the fuel could stabilize prices in this country and help the industries maintain a competitive edge in the global market. The major objections now are coming from the fishing industry that depends on the Gulf waters. I understand that one of the companies, ConocoPhillips, has provided a "guarantee" to Alabama officials, assuring that the company will spend more than $100 million in the state during construction of the terminal and a minimum of $15 million annually during operation. Alabama is also to receive a reserve of 200 million cubic feet of gas a day at an unspecified market price, according to the Register.

The fishing industry, which relies on the gulf waters for their economic existence, is totally opposed to locating any new LNG terminals in the Gulf. This is a factor that must be weighed in heavily the equation before a final decision is made. I understand that there is technology available that would protect this industry if the terminals are located in the Gulf. Reports indicate there will be a change in the proposal for the Louisiana location that may satisfy Governor Blanco's concerns that fisheries in the Gulf of Mexico could be harmed. In making her veto, Governor Blanco stated:

Until studies demonstrate that the operation of the open rack vaporizer will not have an unacceptable impact on the surrounding ecosystem, I will only support LNG terminals using a closed loop system having negligible impacts to marine life.

The companies behind the projects, including McMoRan, Shell, and ConocoPhillips, want to use a technology that uses billions of gallons of Gulf seawater annually to warm the gas, which is shipped by tanker in a supercooled state. There is another and perhaps more expensive way to accomplish the same goal that doesn't use the Gulf waters. It will be interesting to see how all of this works out. I am confident that Governor Riley will do the right thing and make sure all safeguards are in place before allowing the LNG terminal to be built off the Alabama coast.

Source: Mobile Register and Associated Press

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**II. LEGISLATIVE HAPPENINGS**

**A VERY GOOD LEGISLATIVE SESSION**

Having had an opportunity to review all that took place during the recently completed regular session, I have concluded that this really was one of the best and most productive sessions in recent years. The leadership of both the House and Senate should be commended for keeping things on track. Now that the session is over, those
incumbents who have opposition in either the primaries or later in the general election can get on with their 'political' activities. Fortunately, most of them kept politics out of the session. We are in the political season and that is the time for political promises. In fact, I encourage our Alabama readers to look carefully at the voting records and overall performance of all legislative incumbents. Also, voters should check out the newcomers to the political arena before making up their minds on a candidate to replace an incumbent.

STATE OF ALABAMA WILL FINALLY ADD NEW TROOPERS

The Alabama Department of Public Safety officials plan to hire 120 state troopers by mid-January of 2007. Trooper pay increases approved in the last legislative session mean entry-level salaries will move Alabama up, when implemented on June 1st, from 10th in the South to 5th. The Alabama State Trooper Association, under the able leadership of Captain Neal Tew, pushed the Legislature for the salary increase, saying entry-level salaries were too low to attract recruits. The Association was absolutely correct in that assessment. Obviously, we need more troopers on Alabama highways, but even with the additions to their ranks, we still won't have enough. Governor Bob Riley had this to say about the need for troopers:

Recruiting and retaining state troopers has become increasingly difficult because a growing number of sheriff's departments and local police departments are paying more than the state.

The Alabama State Trooper Association has worked long and hard with legislators to bring about the appropriation of funds needed for the hiring of new troopers. They should be thanked. As you know, state trooper manpower has declined since 1996, when Governor Guy Hunt refused to hire any troopers for the entire six years he held office. In 1998, the department lost 105 employees, including 55 in the patrol division, through an early retirement incentive plan. Currently, 70 to 100 troopers are eligible to retire, which could further reduce the ranks. Many employees with the department have left for better-paying jobs and you can't blame them. The state ranked 10th in a state Personnel Department survey of the South completed less than six months ago before the Legislature went into session. Then, the entry-level pay for a trooper was $27,994. As of June 1st, it will be increased to $31,641. Although that is a step in the right direction, we can't afford to stop there. I am convinced that paying adequate salaries to law enforcement personnel is absolutely the right thing to do. The reduction of deaths and serious injuries on Alabama highways should be a major priority for state officials. Obviously, putting an adequate number of troopers on the road is part of the answer.

Source: Birmingham News

STATE TAKES ACTION TO PROTECT SOCIAL SECURITY NUMBERS

One piece of legislation that I didn't mention last month is worthy of note. A bill was passed in the recently concluded regular session of the Alabama Legislature that will prevent a person's Social Security number from appearing on a public document without permission. I am hopeful the new law will make it harder to steal an individual's identity. Under the act, which was signed by Governor Riley, if a person does not give consent to reveal his or her Social Security number on a state government document, the state must remove or cover the number before the item is made public. The law contains exceptions for some documents, including leases and records of judgment, such as convictions and bankruptcy filings. I believe that passage of this new law is a good move by the Legislature.

Source: Associated Press

FEDERAL JUDGES THROW OUT POLITICAL LAWSUIT OVER LEGISLATIVE DISTRICTS

Three federal judges blocked a lawsuit filed by Republicans that sought to redesign Alabama's legislative districts and make them more likely to elect Republicans. The judges' decision leaves Alabama's current House and Senate districts in place for both the primary election and the November 7th general election. The three-judge panel said the Republicans' lawsuit can't proceed because it is too similar to earlier suits started by some of the same Republicans to challenge the design of legislative districts.

A group of Republicans filed the suit last year in federal court in Mobile after a redistricting suit in Georgia forced the redesign of districts in that state which helped the GOP take control of the Georgia Legislature. Republican Attorney General Troy King and Democratic legislative leaders opposed the lawsuit, contending that the Republican plaintiffs were simply repeating prior unsuccessful cases. It turns out they were absolutely correct. The judges said former state Republican Chairman Marty Connors, a Republican state Senator and the state Republican Party Vice Chairman were involved in past litigation over the legislative districts and in developing the new suit. The judges said the same three Republicans were driving the litigation, rather than the voters named as plaintiffs in the suit. They also noted that Mark Montiel, who was representing the plaintiffs, had handled the prior litigation. U.S. Circuit Judge Lanier Anderson III, District Judge Mark Fuller, and District Judge Callie Granade, wrote in an order released on May 22nd:

We find that the plaintiffs in this case were virtually represented by prior plaintiffs.

This is another example of an Attorney General who will follow the law regardless of the consequences. In this instance, Alabama law clearly requires the Attorney General to defend laws passed by the Alabama Legislature. This lawsuit was clearly a political one with no chance of success. I wonder if the tort reformers consider it a frivolous lawsuit?

Source: Associated Press

BeasleyAllen.com
III.

COURT WATCH

THE ALABAMA SUPREME COURT HANDS DOWN A WEIRD DECISION

I would encourage all of our readers to read the recent opinion in Ware vs. Timmons, a case that was decided by the Alabama Supreme Court on May 5th. Regardless of how you feel about the judicial system, I believe that after reading the opinion, you will agree that the majority opinion of the Court, which was written by Justice Harold See, was not based on the existing and well-established Alabama law that should have been controlling in the case. The court's majority created new law in the case. In fact, this opinion can't be justified or even satisfactorily explained from a legal perspective. It appears to be what court observers say an activist court would do. Justice Bernard Harwood, who is one of the most respected persons to have served as a judge in Alabama, having served both as a circuit judge and now as a member of the Supreme Court, wrote an extremely strong dissent in the case. In fact, it's as strong as any dissenting opinion that I have ever read. The following language comes from Justice Harwood's dissenting opinion:

The majority opinion agrees that "the only rational conclusion to be drawn from the evidence presented at trial was that Nurse Hayes was "under the supervision and control of Dr. Ware." So. 2d at __. The majority goes on to require, however, as an additional element, never before included in any of the formulations by this Court of "the ultimate test" for determining loaned-servant status, that it be affirmatively proved that the special master had the right to select the person serving as the loaned servant. Despite the fact that no opinion of this Court has ever included this element as a required feature of the proof of a loaned-servant relationship, the majority today presumes to reverse a trial court's judgment because the judge was not prescient enough to anticipate that the majority might seize upon this notion as an "indispensable" feature of the required proof. Certainly, the trial judge, assuming he had read all of our caselaw on point, would not have foreseen the importance the majority today attaches to this idea, which it has extracted from two "subagent" cases of the former Court of Appeals. As it is, the majority raises this issue of "right of selection" completely on its own, without even the most indirect allusion to its having been made before the trial court, without any reference to its being included in the appellants' briefs to this Court, and without any reference to its having been made by the appellants at oral argument. It is passing strange that a matter to which the majority now attaches determinative significance so completely escaped the attention of the defendants, so completely escaped the attention of the Court in all of its prior analyses of the elements of the loaned-servant doctrine, and so completely escaped the attention of this entire Court at oral argument that no Justice asked any question or offered any comment about it.

This decision should concern lawyers and, for that matter, all citizens, who truly believe in the rule of law. It is undisputed that the basis for reversing the trial judge was not raised at any stage of the proceeding by the defendants' able and experienced lawyers. As I understand it, neither was the issue even discussed by anybody -- including members of the court -- when the case was argued before the Supreme Court. At least that's what Justice Harwood says in his dissent. I have to believe that the majority of the Court just had a bad day on this one. In any event, the Court should grant a rehearing, review what they have done to the law by this decision, and then correct their mistake.

For your information, Justices Lyons, Woodall, and Parker joined Justice Harwood in the dissent. I understand that Chief Justice Nabor recused himself rather late in the proceedings and didn't participate in the vote on the case. A replacement justice was named who voted with the other four justices and thus broke the tie. I hesitate to criticize a court's decision, but this one was clearly wrong.

THE JUSTICES ON THE ALABAMA SUPREME COURT ARE NOT A LIBERAL GROUP

Some of the information put out by the "Tort Reformers" about the Alabama Supreme Court isn't truthful, which should come as no surprise. Since they say Alabama has a liberal court, let's see how liberal it was in 2005. A look at the cases decided by the court last year certainly reflects a different story. There were 18 cases involving money damages reviewed by the High Court in 2005. Of those cases, 16 were reversed outright, with only 2 being affirmed. I have to wonder why groups such as the U.S. Chamber of Commerce (which has turned into a purely political group) and the National Tort Reform Association (which has already been nothing but political) have criticized the justices on the court in light of their voting record. If I were on the court, I would be highly offended. I suppose the tort reformers want the members of the court to vote like they want them to in every single case. There is no other logical basis for their labeling the court as being the architects of what they refer to as tort hell in Alabama. Nevertheless, the attacks on our court system are unwarranted and totally out-of-line.

A REAL NEED FOR CHANGE

In Alabama we have a real need for politics to be taken out of judicial races to the extent possible. Maybe that will happen next year if voters are as concerned about the current state of affairs, as the polls show they are on this issue. The fact that the voters haven't shown any real interest in the judicial races this year isn't good. It may be because most Alabamians don't like the way judges are selected or at least don't like the political tone of most all of the campaigns for judicial office. Ordinary citizens -- according to the polls -- don't like the idea of justice being brought,
regardless of who they believe to be the buyers.

Watching the campaign commercials for most all of the candidates this year makes me realize that we badly need to change our method of selecting judges or at least to modify the current system. Most of what is said in these ads goes to political affiliation rather than real qualifications for a person who wants to serve as a judge. Also, the code words being used by candidates’ political advisors such as conservative mean different things to different folks. To some the term conservative indicates on fiscal matters only. To others it denotes racism. To even others it indicates a cautious or careful approach to things in general. I suspect the polls run tell the candidates’ advisors why they should be conservatives in Alabama - I know from experience that George C. Wallace certainly knew.

In any event, it doesn’t take poll results for me because I was already convinced that we badly need changes in the manner in which we select judges in Alabama and in campaign finance laws. It appears that most all Alabama citizens - as shown by the most recent polling - agree that we need:

- Non-partisan judicial elections;
- A restriction on giving money to candidates’ campaigns;
- A restriction on spending by the candidates and their campaigns;
- Banning of PAC involvement in judicial races totally; and
- Banning any third party group - including political parties - from promoting or attacking candidates.

IV.
THE NATIONAL SCENE

THE PLAYING FIELD FOR THE 2006 GENERAL ELECTION

With the general election just a few months away, the national Republican Party is fighting hard to retain its advantage in the halls of Congress in Washington. After the elections in 2004, had I been asked, I would have predicted that the GOP would be in no danger of losing seats this year in either the House or Senate. My thinking was based primarily on the tremendous sums of special interest money that the Republican Party has ready access to. I believed the Republicans with little trouble would definitely keep control of Congress. My thoughts were based in part on the complete ineptitude of the national Democratic Party in recent elections. The Republicans have been in power for 12 years and now they will have to defend their record and also dodge the record of a Republican President whose charmed life has began to show signs of distress. It is most significant that President Bush’s approval ratings dipped to a low of 29% recently. The GOP will now have to defy history to avoid losing the House of Representatives to Democrats. I also believe the U.S. Senate is now wide open for a change in leadership. History teaches us that in off-year elections - with an unpopular president - it is hard for that president’s party to hold on to its control of Congress.

Several key issues are shaping the landscape for competitive contests in both the House and Senate nationwide, driving down the standing of President Bush and Congress and creating awfully tough hurdles for the GOP. The public - once they learned the truth - is clearly very upset over the Iraq war. Add to that, discontent over record gas prices, divisions over immigration, and serious problems, not to mention the outrageous costs, with Medicare’s new prescription-drug plan. Perhaps the biggest issue of all is the massive wave of corruption that threatens the very fiber of the federal system. Regardless of how the GOP spins it, this election will be a referendum on President Bush and the direction he has taken our country. When President Bush’s approval rating fell to a record-low 29% last month, even Karl Rove had to be concerned. It probably even got Rove’s attention away from certain grand jury activity in our nation’s capitol.

Concerning the general election, the only question is whether Democrats can take advantage of what appears to be an excellent opportunity to make significant gains. USA Today had an interesting take on the historical picture and the prospects for the fall elections. In a recent edition the national newspaper wrote:

During the past three decades, three elections have taken place in a similar environment: One party controlling the White House and Congress, and both branches of government getting low approval ratings. In those elections, the party in power lost 15 House seats in 1978, 34 seats in 1980 and 54 seats in 1994. Democrats need to pick up 15 seats in November to regain control of the House, six seats for the Senate. Pelosi is confident that she’s begun discussing the Democrats’ agenda for their first week in power, from raising the minimum wage to reinstating deficit controls. Winning either chamber would enable the opposition party to more aggressively challenge Bush’s proposals, scrutinize his appointments and launch investigations. “I think of it as a ‘mood’ election or a ‘wave’ election,” says analyst Amy Walter of the non-partisan Cook Political Report.

It will be interesting to see whether massive sums of money - combined with political attacks like nothing we have ever experienced - will save the day for the GOP. Interestingly, it doesn’t appear that what happens in the national elections will have any effect on state races in Alabama. I doubt seriously, however, whether the president or vice-president will spend much time in my home state between now and November 7th. On the national level - if asked by the leadership of the national Democratic Party to come up with a winning campaign theme - I would suggest something fairly simple. How about “Have you had enough?”

Source: USA Today
PUBLIC JUSTICE DOES GREAT WORK

Trial Lawyers For Public Justice, a national public interest law firm, will now be known as Public Justice. This law firm has worked hard for 25 years to create a more just society for all Americans. In my opinion, they have done a tremendous job. Their fight for consumer and victims’ rights, environmental protection and safety, civil rights and civil liberties, and workers’ rights has been good for America. Public Justice has fought along with other consumer-friendly groups to save our nation’s judicial system. The firm’s foundation will now be known as The Public Justice Foundation. The name change to Public Justice will better reflect what the group actually does and who they are. Without a doubt, Public Justice is the nation’s leading public interest law firm, and what they do is badly needed in this country.

You may be interested to know that Public Justice has launched a major new project – The Class Action Preservation Project – to fight a growing attempt by corporations to deprive consumers and employees of their legal rights. Throughout America, corporations are trying to avoid accountability for cheating and discriminating against their customers and workers by slipping class actions bans into the fine print of their form agreements. The Class Action Preservation Project will battle this growing threat to Americans’ rights. Preserving class actions is essential. In many cases, class actions are the only way justice can be done. You may recall that Brown v. Board of Education was a class action. So have been numerous consumers’ rights, civil rights, workers’ rights, antitrust, securities, anti-discrimination, and toxic pollution cases. If class actions are eliminated, many of the rights of citizens will be lost.

FEMA HAS BEEN A TOTAL DISASTER

It’s now quite evident that FEMA was a total disaster in its handling of the many problems relating to Hurricane Katrina. Clearly, FEMA was a “symbol of a bumbling bureaucracy” so far beyond repair that it should be scrapped. That’s what I have believed from the very beginning. More importantly, it is also the opinion of a bipartisan committee of the U.S. Senate. In a report the Senators on this committee called for creation of a new disaster relief agency. The problem is that time is short since the next storm season is just around the corner. In any event, replacing the agency was the top recommendation coming from the Senate inquiry. When one looks at all of the waste of taxpayer’s money by FEMA much of which never went to the real needs of people and businesses all along the coast, a criminal investigation seems to be warranted. We could all use the mobile homes that were never used and are still around to house any folks who were convicted of a crime.

The Senate committee concluded that top officials all the way from New Orleans to Washington failed to adequately prepare for and respond to Katrina. Despite weather forecasts predicting its path through the Gulf Coast, FEMA was totally unprepared. The committee noted that “the first obligation of government is to protect our people.” The Senate Homeland Security and Governmental Affairs investigation concluded that governments at all levels failed to meet that fundamental obligation. It should also be mentioned that experts had predicted for years that a major hurricane hitting New Orleans would result in exactly what happened when Katrina finally struck.

The bipartisan report’s executive summary gives President Bush a mixed review for his performance. Although crediting him for declaring an emergency before the hurricane’s landfall, it faults the President for waiting until two days after it hit to return to Washington and convene top officials to coordinate the federal response. The summary concludes that “the White House shares responsibility for the inadequate pre-landfall preparations.” The inquiry’s final report faulted New Orleans Mayor Ray Nagin and Louisiana Governor Kathleen Blanco for failing to protect sick and elderly people and others who could not evacuate the city on their own. It also concluded that Homeland Security Secretary Michael Chertoff and Michael Brown, who then headed the Federal Emergency Management Agency, either did not understand federal response plans or refused to follow them. It is beyond comprehension that men like these two could be placed in high government positions. It’s most unfortunate that Chertoff is still around and even more unfortunate is that he is in a critically important position.

The bipartisan panel issued 86 recommendations for change that, taken together, indicate “the United States is still woefully unprepared for a storm of Katrina’s scope” with the start of the hurricane season little more than a month away. Nobody has to remind us that Katrina was one of the worst natural disasters in U.S. history. The storm killed more than 1,300 people in Louisiana, Mississippi, and Alabama; left hundreds of thousands of homeless; and caused tens of billions of dollars in damage. If our government handles other critical responsibilities like FEMA and the White House handled Katrina, we are in deep trouble. The Senate recommendations conclude that FEMA is crippled beyond repair by “years of poor leadership and inadequate funding” and call for a new agency – the National Preparedness and Response Authority – to plan and carry out relief missions for domestic disasters. In my opinion, FEMA should be an independent Cabinet-level agency – properly funded – with a highly qualified administrator in charge.

Source: Associated Press

KATRINA CONTRACTORS CHEATED TAXPAYERS

It now appears that a number of contractors who were paid billions of dollars for post-Hurricane Katrina cleanup have cheated the federal government out of large sums of money. Many of these contractors actually double-billed the government for debris removal, overstated mileage claims to get extra fees, and inflated prices by improperly mixing debris. Representative Henry Waxman, ranking Democrat on the House Government Reform Committee, compiled a telling report that was released last month. In the report, the U.S. Corps of Engineers was cited for lax oversight of contractors.
The report said contractors sometimes billed twice for removing the same debris. In other cases, they took advantage of extra payments of $2 per cubic yard for debris carried more than 15 miles. Auditors found mileage was overstated in more than 50% of the 303 trips they examined. All of this should be criminal - if it’s not - under the current laws in place. According to the report, contractors fraudulently mixed green waste with construction and demolition debris to inflate their billings by $2.84 per cubic yard.

Other instances of fraud found by auditors included double billing for housing trailers and abuse of government-issued credit cards. In blaming the Corps, the report said the Army’s officials “regularly credited contractors with hauling more debris to dumps than they actually carried.” The Corps also was blamed for allowing inflated charges in more than $300 million in contracts for temporary roof repairs using blue plastic sheeting. Interestingly, the government has indicted several contractors on fraud charges. It will be interesting to see how that goes.

While Congress has approved more than $63 billion for disaster relief, recovery expenses may ultimately top $200 billion. Thus far, many of the contracts have been awarded without taking competitive bids. Government officials at a hearing before the committee claimed that these contracts are being replaced with competitive awards. One committee member says that the sole-source contracts allowed an “unprecedented opportunity for fraud and mismanagement.” It is bad enough to have all of the misery and loss - of both life and property - without having contractors cheating the government agencies involved in the clean-up. This is difficult to even comprehend and must be dealt with harshly.

Source: Associated Press

LAWSUIT FILED AGAINST CORPS OF ENGINEERS OVER KATRINA

Five people whose homes were flooded during Hurricane Katrina have sued the U.S. Army Corps of Engineers. The agency is accused of ignoring repeated warnings that a navigation channel it built would turn into a “hurricane highway.” The lawsuit, filed in federal court in New Orleans, involves a 76-mile shipping channel built in the early 1960s as a short-cut to New Orleans. The Mississippi River Gulf Outlet has eroded enormous tracts of wetlands and increased the threat of flooding. It appears from media reports that the levy system was poorly designed and was totally inadequate to do the required job.

During Katrina, storm surge traveled up the channel and overwhelmed levees protecting St. Bernard Parish and eastern New Orleans. The Corps of Engineers has acknowledged that the channel contributed to the region’s flooding. Flood gates are being built in an attempt to guard against future flooding. The suit claims that if the agency had acted on warnings that the channel could cause severe flooding, the agency would have designed it differently. Had that been done, it is contended that “Katrina would have been an endurable event.” The plaintiffs, in addition to seeking compensation for themselves, also want Congress to set up a “Katrina Victims’ Compensation Fund” similar to that set up for families of the victims of the September 11th terrorist attacks.

Source: Houston Chronicle

HALLIBURTON STILL DOING EXTREMELY WELL

Halliburton, the giant government contractor with extremely close ties to the Bush White House, is still getting multibillion-dollar no-bid contracts with no slow-down from the federal government. This is true even though Halliburton has been found guilty of shoddy work, massive cost overruns, and fraudulent billings. Hundreds of millions of dollars of overcharges have been documented by a subsidiary of Halliburton for work in Iraq. However, none of that seems to matter to the federal agencies doling out the contracts. For example, Halliburton recently received a $385 million grant to build a network of detention centers in the U.S. Each of these centers will be run by Homeland Security forces and will be located on unused military bases. I am not sure exactly what these centers will be used for, but I suspect there would be a number of contractors who would have liked to have had a chance to get the business. But, it’s just business as usual in the nation’s capitol. That is keeping Halliburton busy and very happy.

A SLAP ON A POWERFUL HAND IN A DRUG CASE

Let me preface my remarks concerning Rush Limbaugh by saying that he has never been one of my favorite people. I have never had much use for phonies or bullies, and I hope I will never change in that regard. When the two traits are combined in one person, it makes things for others even worse.

Limbaugh, who was caught violating the law and with a major drug habit, has been under criminal investigation for months. Putting it mildly, it appears this famous radio commentator was violating the criminal drug laws in a big way. After working out a sweetheart deal to avoid going to jail, Limbaugh was finally arrested. He must submit to random drug tests under an agreement with the prosecutors and approved by a court. That agreement would result in the court dismissing the prescription fraud charge after 18 months if Limbaugh complies with the terms. Limbaugh also must continue treatment for his acknowledged addiction to painkillers and he can’t own a gun. Interestingly, the agreement didn’t call for Limbaugh to admit guilt to the criminal charge against him. As I understand it, the man was clearly guilty of obtaining prescriptions from at least four doctors in large quantities.

Limbaugh pleaded not guilty to all charges. Interestingly, he was not required to even plead guilty before the settlement was reached. As you may recall, prosecutors launched their criminal investigation in 2003 after Limbaugh’s housekeeper reported that he abused OxyContin and other painkillers. Limbaugh then entered a five-week rehabilitation program and blamed his addiction on severe back pain. According to the agreement, the Palm Beach County State Attorney’s Office may revoke or modify the deal if Limbaugh violates the terms. I wonder how lots of other folks - especially youngsters - who have become
addicted to drugs and are caught by the law feel about this deal. They might say that Limbaugh got off pretty light. Remember, this is the same man who has always been real tough on crime. When it came to criminals who violated the drug laws in this country, Limbaugh has consistently told his audiences that those found guilty should be put away in prison. In any event, life goes on for Mr. Limbaugh, but not in prison. It's pretty obvious that all he got was a mild slap on his powerful hand.

Source: Associated Press

**STATES SUE OVER FUEL ECONOMY RULES**

Ten states, led by California, have sued the federal government to try to force the Bush Administration to strengthen gas mileage requirements for sport utility vehicles (SUVs) and pickup trucks. The lawsuit, filed on May 2nd, contends the National Highway Traffic Safety Administration (NHTSA) failed to conduct a thorough analysis of the environmental benefits of fuel economy regulations and the impact of gasoline consumption on climate change. California Attorney General Bill Lockyer said in an interview with The Associated Press:

The federal agency has ignored the law that requires integrating environmental impacts into their standard-setting.

The states filed a petition for review with the U.S. Court of Appeals for the Ninth Circuit in San Francisco. The action follows the release of a government rule in late March setting tighter gas mileage rules for pickups, SUVs, and vans covering the 2008-2011 model years. The Bush Administration said the program, based on the vehicle's size, was expected to save 10.7 billion gallons of fuel over the lifetime of the vehicles sold during that period. NHTSA spokesman Rae Tyson defends the rulemaking process, saying the agency conducted a thorough analysis of fuel-saving technologies while balancing the need to raise standards with safety and economic ramifications. Connecticut Attorney General Richard Blumenthal says:

**The proposed upgrade in fuel economy standards is a complete sham and a gift to the auto industry.**

The 10 states that are plaintiffs in the lawsuit include California, Connecticut, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Vermont. The District of Columbia and New York City are also plaintiffs. It will be most interesting to see what effect this litigation will have.

Source: Associated Press

**THE RED CROSS AVOIDS BAD PUBLICITY**

The Red Cross has been under intense scrutiny over its response to Hurricane Katrina. There have been numerous accusations of fraud and theft of relief supplies, and volunteers say many of the incidents were ignored for months. Officials of the American Red Cross claim that they try to recover “every last dollar” lost to theft or fraud. But, a Connecticut case involving the theft of $120,000 has raised questions about that commitment when it carries the risk of bad publicity. In the Connecticut case, the Red Cross settled for less than half the money due from its insurance company, rather than go after the full amount through litigation.

The suspect in the case, Ronald P. McKeown Jr., served as the executive director of the southeastern Connecticut chapter of the Red Cross from July 2001 until he resigned on March 1, 2002. Eight months after he resigned, McKeown was charged with larceny, money laundering, and forgery in connection with the embezzlement of more than $120,000 collected by his chapter for the families of victims of the September 11th attacks. Almost a year after he was charged, however, and before he was scheduled for a trial, McKeown committed suicide. It appears that the Red Cross did not want any more bad publicity about the matter. Unfortunately, that may well be a pattern and practice for the organization. Kevin McKeown, the suspect’s brother, had actually contacted the Red Cross in Connecticut and urged officials to try to regain the money.

In recent months, critics of the Red Cross have questioned why it waited months to address accusations of theft and fraud in the New Orleans area after Hurricane Katrina. These charges have led to investigations by the FBI and the Louisiana Attorney General’s office. The insurance company involved in the Connecticut case, the Royal Insurance Company, paid the Red Cross $47,710.59 to cover the theft. This is about 40% of the amount due. I believe the Red Cross has a duty to collect – or at least attempt to collect – funds that are stolen or embezzled from any available source. Letting an insurance company off for a 40% payment on a legitimate claim simply doesn’t make sense. Folks who donate their hard-earned money to this organization deserve better. It appears that the Red Cross should tighten up its operations in several areas:

- The proper handling of donations;
- The aggressive prosecution of any person who steals from the Red Cross; and
- They should collect funds from any legitimate sources - such as insurance companies and the criminal’s assets - as repayment of the losses when theft or embezzlement occurs.

I know that the Red Cross has done a great deal of good work over the years. However, they have an obligation to do the right thing with the handling of donated funds. Refusing to prosecute a criminal who steals these funds simply because it would put emphasis on the theft is wrong.

Source: New York Times

**EXXONMOBIL IS RAKING IN THE CASH**

ExxonMobil Corp., which is the world’s biggest company by stock-market value, is currently on track to amass a record amount of cash. That would give Exxon bragging rights to one of the largest cash piles at a nonfinancial company in our country’s history. Exxon’s total cash hit $31.9 billion at the end of March, compared with $28.6 billion at the end of 2005, according to figures filed late with the
Securities and Exchange Commission. Interestingly, Exxon's cash doesn't include $4.6 billion it has set aside related to the appeal of a civil court case. As you may already know, Berkshire is the largest cash holder for a nonfinancial company, according to research provider Capital IQ. Banks, insurers and other financial firms, by definition, are generally the larger cash compilers. As gas prices have soared at the pump, Exxon and other big oil companies have come under severe attack from consumers and politicians who question - with good reason - why the oil companies haven't invested more funds so they can to increase production. Even some investors complain the cash buildup means Exxon hasn't sought out new energy projects.

So far, it is interesting that Exxon's record profits, rather than the company's huge cash pile, have garnered the most outcry from the public. I suspect most folks will be shocked to learn that even an oil company has this much cash lying around - especially at a time when most folks can't afford gas for their vehicles. Exxon's cash growth has actually outpaced its earnings growth. In the first quarter, Exxon posted net income of $8.4 billion, up 6.9% from a year earlier. The company generated cash from operations of $14.6 billion in the first quarter, which was up 13%. While most of its customers are really hurting every time they fill up a vehicle with the company's gasoline, ExxonMobil is doing just fine.

Source: Wall Street Journal

V. THE CORPORATE WORLD

Ten Worst Corporations of 2005 Named

The 10 worst corporations of 2005 were announced last month by the Multinational Monitor magazine. BP, Delphi, DuPont, ExxonMobil, Ford, Halliburton, KPMG, Roche, Suez, and W.R. Grace are the ten worst, according to a survey by the magazine. The ranking is made annually, based on corporate behavior, and usually causes some corporate bosses to see red. Robert Weissman, editor of the Monitor, remarked concerning this year's listings:

2005 was a good year for bad corporations. There were no U.S. elections to worry about, with their troubling possibility of politicians running on the popular platform of curbing corporate power. There were corporate scandals and corporate crime and violence galore, but none that rated the ongoing banner headlines of Enron and WorldCom. Indeed, the ongoing prosecutions of individuals associated with corporate financial scandals enabled Big Business and its apologists to claim there had actually been a crackdown on corporate crime.

A recent Harris poll found that 90% of people in the United States believe corporations have too much power in Washington, D.C. I believe that is an accurate view of how folks currently feel. All of the corruption and influence-peddling in Washington is finally catching up with the powerful corporate lobbyists and their political friends. Nonetheless, this listing was not based on those feelings, but, as I understand it, was based solely on a corporation's performance. Here is the Monitor's 2005 list:

BP

In March, 15 workers were incinerated, and more than 170 injured, following an explosion at BP's sprawling refinery in Texas City, Texas. It was the third fatal accident at the Texas City BP facility in the last four years. Nationwide, BP's facilities have had more than 3,565 accidents since 1990, ranking first in the nation, according to a 2004 report by the Texas Public Interest Research Group (TexPIRG).

Delphi

In October, Delphi CEO Steve Miller took his company into bankruptcy, with the explicit purpose of trashing the social contract between unionized auto workers in the United States and the auto industry. He proposed slashing worker wages from $27 an hour to a mere 10 bucks. And, in a fit of staggering arrogance, Miller and Delphi simultaneously proposed huge bonuses for company executives.

DuPont

Deadly chemicals from DuPont's perfluorinated, chemical-based coatings and related sources are now in the blood of 95% of people in the United States. DuPont has claimed that it does not know how the chemicals got there. But Glenn Evers, formerly one of the company's top technical experts, says that DuPont hid for decades that it was polluting people's blood with a hyper-persistent chemical associated with the grease-resistant coatings on paper food packaging. (For a complete history, see www.ewg.org.) In December, the U.S. Environmental Protection Agency agreed to settle claims against DuPont for a paltry $16.5 million. On a happier note, the agency and DuPont announced that the chemicals will be phased out by 2015.

ExxonMobil

In the face of a virtually complete scientific consensus that global warming is real and happening — and considerable agreement that it is happening faster than expected just a few years ago - ExxonMobil continues to insist that "scientific evidence remains inconclusive." So far, the cynical, profit-motivated, short-term, and self-interested views of ExxonMobil have mattered more than the evidence-based perspective of the world's climatologists. That's because the most profitable corporation on earth has lots of political power and is skilled at amplifying its views (see ExposeExxon.org for details), and the climatologists do not and are not. While the world burns, ExxonMobil is raking in record profits - more than $36 billion in 2005, the highest

BeasleyAllen.com
Ford

Ford Motor Company's factory in Mahwah, New Jersey, once the largest auto assembly plant in the nation, dumped millions of gallons of paint sludge - enough to fill two of the three tubes of the Lincoln Tunnel - into a now-residential area, revealed a series published in the Bergen Record (see www.toxiclegacy.com). Tests commissioned by the Record found lead, arsenic and xylenes in the sludge — some at 100 times the levels the government considers safe. Reporters with the Record dug up documents showing that Ford executives knew as early as 34 years ago that its waste had contaminated a stream that feeds the Wanaque Reservoir.

Halliburton

The company has effectively made a business model of crooked dealing with the U.S. government. Getting caught, over and over, doesn't seem to affect things much. In February, the U.S. Army agreed to pay Halliburton's KBR subsidiary nearly $2 billion for work that nobody can prove ever done. In March, the company revealed that the U.S. Justice Department opened a criminal inquiry into possible bid-rigging on foreign contracts by Halliburton. In June, at a Congressional hearing, Bunmatine H. Greenhouse, then the senior contracting specialist with the Army Corps of Engineers, testified, "I can unequivocally state that the abuse related to contracts awarded to KBR [Halliburton's subsidiary] represents the most blatant and improper contract abuse I have witnessed during the course of my professional career."

KPMG

KPMG "admitted to criminal wrongdoing in the largest-ever tax shelter fraud," said U.S. Attorney General Alberto Gonzales in August. KPMG managed to escape with no conviction or plea agreement, thanks to a "deferred prosecution" agreement by which the firm promised to pay $456 million in fines, restitution and penalties and do better in the future. That won't quite make up for the harm the company inflicted. According to the government, "KPMG has admitted that it engaged in a fraud that generated at least $11 billion in phony tax losses which, according to court papers, cost the United States at least $2.5 billion in evaded taxes."

Roche

On license from the San Francisco-based company, Gilead, Roche makes the anti-flu drug, Tamiflu. Tamiflu appears to be the best available pharmaceutical defense for those exposed to the avian influenza. For now, avian flu is not communicable among humans, but if the disease mutates so that it is, the global consequences could be dire. For Roche, this is good news - suddenly its poorly selling product is in such great demand that the company literally can't make enough. Rather than licensing production broadly, the company has engaged in a series of obfuscations about how difficult it is to manufacture Tamiflu, and maneuvered to keep as much control over the global supply as possible. That's helped the company's bottom line - Tamiflu is suddenly a billion-dollar-a-year earner - but it leaves global public health in a needlessly precarious position.

Suez

Suez has been a leading purveyor and beneficiary of the global trend of water privatization - the selling off of public water systems to private entities, or the turning over of control and management of public systems to corporations. The result has been lousy service, jack-up rates and targeted efforts for well-off households at the expense of the poor. In a notable case in El Alto, Bolivia, mass demonstrations in January 2005 led the Bolivian government to cancel a water privatization contract with Aguas del Illimani, of which Suez is a major shareholder.

W. R. Grace

Federal prosecutors in February charged Grace with knowingly endangering residents of Libby, Montana, and concealing information about the health affects of its vermiculite mining operations. Vermiculite was used in many common commercial products, including insulation, fireproofing materials, masonry fill, and as an additive to potting soils and fertilizers. The vermiculite deposits in Libby were contaminated with a form of asbestos called tremolite. Federal officials charge that Grace knew the residents would get sick — they allege Grace learned in the 1970s of the toxic nature of the tremolite asbestos in its vermiculite, but failed to turn the information over to the government, despite a legal duty to do so. The company allowed workers to leave the mine site covered in asbestos dust, allowed residents to take waste vermiculite for use in their gardens, and distributed vermiculite tailings to the Libby schools for use as foundations for running tracks and an outdoor ice skating rink.

As you may have already figured out, the above list is in alphabetical order and not based in the order of how bad each corporation actually was. You may believe that several other large corporations could be added to this list or you may feel that some were improperly or unjustly singled out. In any event, we are simply setting out this information for your review without taking any position on the correctness of this listing of corporations. Frankly, I can think of a few corporations that would be on my top 10 list that didn't make theirs. I would be interested in hearing your views.

Source: Corporate Crime Reporter
Guilty Verdicts In New Jersey Worker-Safety Trial

A McWane-owned company and four of its managers were convicted in April in a New Jersey federal court on criminal counts involving a conspiracy to evade workplace safety and environmental laws by lying to regulators, tampering with evidence, and bullying employees into silence about dangerous working conditions. The charges against Atlantic States Cast Iron Pipe Co., which is located in Phillipsburg, New Jersey, included polluting the Delaware River, intimidating workers and covering up details of a workplace fatality. The federal jury found the company guilty on 32 of 34 counts, including conspiracy. Four of five current or former managers on trial also were convicted of at least one count. The four managers, all found guilty of multiple felony charges, face possible prison terms. McWane says that the verdict will be appealed.

Birmingham-based McWane has faced a recurring series of accusations since 2003. In fact, the company has found itself in court for much of the past three years, facing persistent questions about environmental and safety practices such as those that led to the 2000 death of the Atlantic States worker who was crushed by a forklift that had faulty brakes. Prosecutors said the company knew of the brake problem and attempted to cover it up after the employee's death. Atlantic States was found guilty by the jury of covering up the circumstances that led to the fatality.

The verdict in this criminal trial marks the fifth time in four jurisdictions across the country that a McWane plant has been found guilty of federal crimes since The New York Times published a series of articles in 2003 about McWane's safety and environmental record. In the four previous cases, McWane was ordered to pay a total of $19 million in fines and restitution, and several current or former managers were fined or sentenced to probation. The Atlantic States verdict is likely to bring about many millions of dollars in criminal fines.

McWane is one of the largest manufacturers of ductile iron pipe, which is used in underground water and sewer systems. It is also one of the most dangerous employers, with at least 4,600 injuries and nine deaths at its 13 foundries since 1995, according to New York Times stories that relied on federal workplace records. Prosecutors in the New Jersey case said the company and employees would remove safety equipment on machines, often to improve production, and then reinstall the safety features before an inspection by federal safety regulators. Prosecution witnesses, including several former foundry supervisors, painted a sordid picture revealing a brutal and dangerous workplace at Atlantic States. They told of rigged smokestack tests, of polluted wastewater dumped under cover of night, of regulators stalled at the front gate while flagrant safety violations were hidden. It appears that workers were blamed for accidents even when shoddy equipment or inadequate training was the real cause. The public will not tolerate any company and its bosses who have such a total disdain for the law and safety regulations.

The trial marks the first test of a new federal effort to prosecute employers who repeatedly put workers at risk by violating safety and environmental laws. Such prosecutions are a rarity, in part because workplace safety laws carry relatively weak criminal sanctions. But the new approach, which combines the resources of the Occupational Safety and Health Administration, the Environmental Protection Agency and the Justice Department, seeks to marshal a spectrum of existing laws with stiffer penalties.

Fannie Mae Will Have To Pay A $400 Million Fine

Senior executives at Fannie Mae manipulated accounting to collect millions in "maximum, undeserved bonuses" and "deceive investors," according to a federal report. The government-sponsored mortgage company was fined $400 million. The report by the Office of Federal Housing Enterprise Oversight, which took the company to task, the result of an extensive three-year investigation, was issued as Fannie Mae struggles to emerge from an $11 billion accounting scandal. The housing oversight agency and the Securities and Exchange Commission announced the civil penalty against Fannie Mae in a settlement over the alleged accounting manipulation. The company also agreed to cut its multibillion-dollar mortgage holdings and to make "top-to-bottom" changes in its corporate culture, accounting procedures and ways of managing risk. Several executives and employees at the company as well as others who have left will be reviewed for possible disciplinary action or termination.

It is quite apparent that Fannie Mae's management has been a total disaster. Senior management manipulated accounting, reaped maximum, undeserved bonuses, and prevented the rest of the public from knowing what was going on, according to the report. Fannie Mae's board of directors was blamed for failing to exercise its oversight responsibilities and failing to discover "a wide variety of unsafe and unsound practices" at the largest buyer and guarantor of home mortgages in the country.

Freddie Mac Pays $410 Million To Settle Securities Suits

Freddie Mac, the federal mortgage lender, has reached an agreement in principle to pay $410 million to settle lawsuits related to a $5 billion restatement of earnings for the years 2000 to 2002. The Federal Home Loan Mortgage Corp., or Freddie Mac, said the settlement would close securities class action and shareholder derivative suits without the company having to admit any wrongdoing. The proposal comes after the company had agreed to pay a $3.8 million fine to the Federal Election Commission to settle claims it made illegal campaign contributions.

Source: National Law Journal

Source: New York Times and Birmingham News

Source: CBS News
J.P. Morgan Pays $425 Million To Settle IPO Lawsuits

J.P. Morgan Chase & Co., the nation’s third-largest bank, will pay $425 million to settle lawsuits accusing the institution – and dozens of other Wall Street underwriters – of manipulating the market for initial public offerings of stock. The suits allege that J.P. Morgan Chase and 54 other underwriters induced customers who received allocations of IPOs to place orders for additional shares in the aftermarket, artificially inflating the share prices. Investors should be able to trust companies that invest their funds for them. We have seen far too many instances where trust was certainly misplaced, and that’s a sad commentary on our times.

Source: National Law Journal

Tyco To Pay SEC $50 Million To Settle Securities Claims

Tyco International Ltd. will pay the Securities and Exchange Commission a $50 million civil penalty to settle allegations the manufacturing conglomerate’s previous management violated securities laws, cooked the books, and overstated financial results by at least $1 billion. Under the proposed settlement, the SEC's Enforcement Division will decide how to distribute the $50 million to investors who were harmed. It is extremely sad to see large corporations being run by persons who get greedy, violate their shareholders’ trust, and wind up breaking the law. We have seen far too much of that sort of thing and it must be stopped.

Source: National Law Journal

Boeing Pays To Avoid A Criminal Prosecution

Boeing Co., one of the largest government contractors, has reached a tentative $615 million settlement to end federal investigations into its illegal hiring of a high-ranking Air Force official and the use of a rival's proprietary documents to win government work. The settlement represents the largest penalty to ever be paid by a defense contractor. This ends three years of investigations involving activities of the aerospace and defense giant. Interestingly, under the settlement, Boeing avoids criminal and civil charges. Neither will the company have to acknowledge any corporate wrongdoing.

The settlement is expected to be completed and signed in the next few weeks according to the Justice Department. Boeing’s ethics troubles began when it admitted in 2003 that several employees had thousands of pages of rival Lockheed Martin Corp.’s proprietary documents during a 1990s competition to launch government satellites. Bethesda, Maryland-based Lockheed accused Boeing of using the stolen documents to cheat. The Air Force barred the company from competing for such work for a year, the longest suspension of a large defense contractor. Later in 2003, Boeing fired its then-chief financial officer, Michael Sears, for illegally negotiating a job for Air Force official Darleen A. Druyun while she was overseeing billions of dollars of the company’s work. Druyun later said that for years she had favored the company in her decisions. Sears and Druyun pleaded guilty and served several months in prison. That case led to a wide-ranging review of Boeing contracts overseen by Druyun and the loss of a $20 billion contract to sell refueling planes to the Air Force.

It is noteworthy that Boeing had $2.57 billion in profit last year and more than $5 billion in cash, so the fine agreed to in this settlement won’t hurt the company very much. But, Danielle Brian, executive director of the Project on Government Oversight, a Washington watchdog group, says that the settlement is significant, adding:

You can’t minimize the size of the settlement. It’s a big deal. We’re really glad the government is upping the ante for misconduct, but our jury’s out on whether this is going to make it painful enough for Boeing or any other government contractor to avoid misconduct.

In my opinion, banning repeat violators from being able to bid on government contracts is a necessity. Otherwise, these large corporations pay fines and keep on trucking. The series of Boeing’s actions – which surely seem like major criminal activities to me – will justify extremely strong punishment. I believe a ban on bidding for government contracts is the proper way to get their attention.

Source: Washington Post

VI. Campaign Finance Reform

Lobbyists Contributed $103 Million To Lawmakers

Lobbyists and their political action committees have contributed at least $103.1 million to members of Congress since 1998, according to a new report released on May 22nd by Public Citizen. This is the first comprehensive effort to match actual names of lobbyists with Federal Election Commission campaign contribution data. The result provides shocking details about the biggest lobbyist contributors and congressional recipients of campaign largesse and furnishes a contribution total nearly double the previous estimate. The report details the amounts given to members of Congress since 1998 by the 50 biggest lobbyist money-givers. A select 6.1% of these lobbyist contributors have contributed 83.4% of all lobbyist contributions. Interestingly, many of the top recipients of congressional campaign money are on appropriations committees that dole out federal money.

The report, which should be read in full, records the rise of contributions by lobbyists from $17.8 million in the 2000 election cycle to $33.9 million in the 2004 cycle – a 90.3% increase. In the 2006 election, lobbyists and their PACs are already on track to give about 10% more than in the previous cycle. This does not account for the expected increase in contributions as Election Day draws nearer. The campaign contributions lobbyists make aren’t the only problem. The Public Citizen report reveals that top lobbyist contributors coordinate lucrative fund-raisers for the lawmakers they hope to influence and bring in a steady stream of contribu-
tions from their corporate clients far greater than they alone give. This is a good way – totally legal under existing law – to avoid contribution limitations. The full report can be found by going to www.citizen.org.

Source: Public Citizen

KEEPING A RECORD OF POLITICAL TALK

After reading the Public Citizen report, some of our readers may be asking why Congress doesn’t fix a broken system. The reason is quite obvious - the special interests that control our nation’s capitol, including Congress, won’t allow it. So we must wait for a new Congress. Even though campaign finance reform is on hold until after the fall elections, I have decided to keep a file on all of the public pronouncements on the subject made during this political season by editorial writers, the media, political parties, politicians, groups such as Public Citizen, The National Chamber of Commerce, ATLA and others. Based upon what I have already heard and read, and we are only in June, everybody says they are for campaign finance reform. I haven’t heard anybody say it’s a bad thing. So, it should be very easy to get strong laws passed in Washington and in every state in the U.S. next year even though nothing of substance has been done in prior years. No, I haven’t been drinking. I just decided to believe what I am hearing and reading – for a change – and hope that a few of those doing the political talking will remember what was said after November 6th.

Put The Politicians On The Spot

As we move into the months leading up to the general election, I suggest that we all take every opportunity to ask political candidates – both state and national – where they stand on campaign finance reform. Get them on the record so they can be reminded of their commitments when the time comes next year. In my opinion, passage of strong campaign finance reform laws is one of the most important issues – if not the most important issue – that will face the next Congress. It is also an issue that every state legislative body should take up at the earliest opportunity. Controlling political spending and taking away the influence over the affairs of government that big money gives the special interest groups, will allow other important issues to get fair consideration when they are brought up in Congress and in legislative bodies.

VII. CONGRESSIONAL UPDATE

PUBLIC CITIZEN REPORT ATTACKS BROAD LIABILITY SHIELD

Heaven help all American citizens if Senator Bill Frist (R-TN) is successful in his bid to be elected to the presidency in 2008. This Senator, who rose quickly to the top leadership role in the U.S. Senate, has been nothing more than an elected pawn of the powerful special interests. As we all know, without their support Frist would never have been heard of politically. The liability shield for drug companies is a prime example of how Senator Frist – in return – takes care of those special interests. The Senator inserted the shield provision into an already-completed conference report for the defense appropriations bill in the dead of night, with the aid of Speaker of the House Dennis Hastert (R-IL). Many of the members of the conference committee had even never seen the language in this amendment when the report was approved. Committee leaders had explicitly assured Democrats, who had heard rumors that Frist was up to something, that no attempt would be made to insert the liability measure into the spending bill. Obviously, those assurances were ignored by Frist.

The shield is totally unnecessary because the government now can – and does – indemnify drug companies in contracts. This is done using provisions in the contracts stating that the government will cover costs in excess of the companies’ available liability insurance. The American people are fed up with all of the corruption and unethical behavior that has become commonplace in Washington. Unfortunately, what Senator Frist did for the drug companies is part of the course these days in Washington. Taking care of the powerful special interests – such as the drug industry – has long been the agenda of politicians like Senator Frist. Being in power allows a leader like Frist to abuse the system, and that’s exactly what he did in doing the bidding of the drug companies on the liability shield. The voters in November, in my opinion, will say enough is enough and vote out those in Congress who have sold out to the special interests and their cadre of highly paid lobbyists.

Source: Public Citizen

VIII. PRODUCT LIABILITY UPDATE

SETTLEMENTS WITH FORD MOTOR COMPANY

Recently, our firm settled 4 separate cases with Ford Motor Company. Two of the cases involved Explorers and the other 2 were Bronco II cases. We have handled a number of cases over the past few years involving rollover accidents when those vehicles were the culprit. The settlements in all 4 cases were confidential. But, we believe each of them is worth mentioning.

Dezerpa v. Ford Motor Company

This case involved a one vehicle accident in Venezuela. Carmen Dezerpa was traveling with her husband Ramon Antonio, Zerpa Machado and her young son Daniel during the holy week holidays in Venezuela in 2000. Her husband was driving the Ford Explorer and her son was asleep in the back seat. The vehicle suffered a rear tire tread separation and became uncontrollable because of handling defects in the Explorer. The vehicle left the road and overturned, killing both Mrs. Dezerpa’s husband and young son. In Venezuela, the Firestone tires on the vehicle were ulti-
mately recalled by Ford because of unacceptable tread separation rates in the tires. Ford Venezuela also altered the suspension design of the Explorer in Venezuela to prevent loss of control of the Explorer during tread separation events.

Ford also embarked on a "silent recall" campaign where it replaced shock absorbers for the rear suspension in existing Explorers only for those drivers who brought vehicles in and complained of loss of control of the rear end during rough road usage. It was revealed in documents released during congressional hearings on the Ford/Firestone matter that Venezuelan engineers for Ford bad sought approval to recall all Ford Explorers in Venezuela to replace the rear shocks. Instead, Ford management in Dearborn, Michigan, opted for the silent recall approach. Ford has tried three cases regarding this handling defect that occurs during a tire separation event and substantial verdicts have been rendered against the company in each case for this defect. The case, which was bitterly contested by Ford, was handled by Ben Baker and Cole Poris for the firm.

**Oriente v. Ford**

This case involved a vehicle accident in Macon, Georgia, resulting in the death of Nazira Oriente. At the time of the accident, Ms. Oriente’s daughter, son, and grandchildren were occupants of the Ford Explorer when the driver attempted to avoid a vehicle that had swerved into her path of travel. While making this emergency avoidance maneuver, the Explorer rolled over because of its inherent instability and ejected Ms. Oriente even though she was wearing her seatbelt.

This accident involved issues of vehicle stability related to the Explorer and its handling during an emergency avoidance maneuver. Ford documents provided to the government as early as 1973 show that Ford’s design philosophy is that a vehicle should slide out on flat dry pavement rather than roll over during an accident avoidance maneuver. The Oriente accident occurred on an interstate highway on flat dry pavement. The rollover occurred as a result of steering inputs only. Evidence showed that the design of the Explorer violates Ford’s own internal standard for vehicle performance and design. It was established by evidence that if the Explorer had been lowered and widened, as suggested by Ford engineers, this accident would not have occurred. This case was handled by Ben Baker for the firm.

**Lee v. Ford**

This case involved the death of Jonathan Lee, who was 19 years old, when he was killed in a rollover accident. Jonathan was a rear seat passenger in a Ford Bronco II. He had just gotten into the back of the Bronco II with some friends to go shopping. The vehicle was in Moundville traveling toward Tuscaloosa when the accident occurred. Another vehicle ran a stop sign and came into the lane of the Lee vehicle. The driver of the Bronco II had to swerve to avoid hitting the approaching vehicle. The Bronco II rolled over in the road, partially ejecting Jonathan.

The Lee case is a typical on-road rollover involving a Bronco II. The results are usually tragic. The Bronco II has a very long history of being susceptible to rollover in an emergency avoidance maneuver. The Bronco II is unstable and does not give the driver sufficient warning that it is about to overturn. The documents involving the Ford Bronco II make it clear that Ford was aware of the rollover propensity of the Bronco II before it was first put on the market in 1982. Although production of this vehicle was discontinued in 1990, we continue to see injuries and deaths from these vehicles in rollover accidents. We have bad cases that we investigated where a single Bronco II had been involved in more than one rollover event.

Unfortunately for young folks, the Bronco II is now a pass-me-down vehicle to beginning drivers, a deadly combination.

Ford’s knowledge of the danger of the Bronco II before it was sold is evidenced by the fact that Ford’s Office of General Counsel ordered a document “sweep” of all Bronco II design documents. Every document was reviewed by the Office of General Counsel. Ford’s Bronco II testing demonstrated its rollover propensity. In May of 1982, Ford was testing a Bronco II on a test track when it rolled over causing a crash. Ford then signed off on the safety of the Bronco II by using an ADAMS computer simulation model. LaBarron Boone handled the case with along Greg Allen for our law firm. Other lawyers working with us included Robert Turner of Marion, Alabama and S. E. Seale, III, of Greensboro.

**Baldwin v. Ford**

Ford has also agreed to settle another Bronco II case, which was pending in Hinesville, Georgia, involving the death of Thomas Baldwin. Mr. Baldwin was on his way home from work when a vehicle approaching from his right ran a stop sign. This was very similar to the circumstances in the Lee case. In an effort to avoid the vehicle that pulled out in front of him, Mr. Baldwin swerved, and the Bronco II he was driving rolled over on the pavement. Even though Mr. Baldwin was wearing his seatbelt, and was not ejected, he still died from head injuries.

Greg Allen and Mike Andrews handled the case for our firm along with Russ Bozeman from Camden, Alabama, Stewart Vance from Montgomery, and Brinson Williams, who is from Hinesville, Georgia.
CRASH TESTS SHOW BENEFIT OF SIDE AIRBAGS

For motorists seeking greater protection in crashes, test results released last month by the Insurance Institute for Highway Safety show the benefits of side airbags. Versions of the 2006 Toyota Prius and six minivans made by DaimlerChrysler AG and General Motors Corp. that were evaluated without side airbags got poor marks in side-impact tests. The same vehicles, when tested with the optional airbags, all showed improvements, and the Prius earned the Institute's top score in side protection. Some 96% of Prius models are sold with the side airbags, which as an option costs $650.

DaimlerChrysler's minivans – the 2006 Dodge Grand Caravan and Chrysler Town & Country – improved from the worst score to the second-highest on a four-tier scale (poor, marginal, acceptable and good) when the airbags were included. The airbag option costs an additional $595. GM's four minivan models built on the same platform – the 2006 Chevrolet Uplander, Buick Terraza, Pontiac Montana SV6, and Saturn Relay – showed minor improvements when the side airbags were included, moving up one notch to marginal. According to the Institute, in testing the Uplander with and without side airbags, the middle-row seats either dislodged or separated partially from the floor. The side airbags are available for $350 on the minivan models, according to GM's website.

In addition to the GM and Daimler-Chrysler models, the Mazda MPV and Ford Freestar without optional side airbags received the lowest scores in side protection. Several small cars tested received the lowest score in side evaluations: Volkswagen New Beetle, Suzuki Aerio, Hyundai Elantra, Kia Spectra, Saturn Ion, Suzuki Forenza, Suzuki Reno, and these models without side airbags – Chevrolet Cobalt, Ford Focus, Mazda 3, Mitsubishi Lancer, Toyota Corolla, and Nissan Sentra.

VEHICLE MISMATCH LINKED TO SPINAL CORD INJURIES

We know from our experience in handling personal injury cases involving motor vehicle crashes that certain injuries are more likely to occur when one of the vehicles involved is a light truck. Researchers from the University of Alabama have concluded that vehicle compatibility is a significant factor contributing to spinal cord injuries, when the motor vehicle crash includes a light truck as one of the vehicles. Using National Automobile Sampling System and Crashworthiness Data Systems, researchers examined 101,682 cases of cervical, lumbar, or thoracic spinal cord injuries that occurred in two-vehicle crashes between 1995 and 2003. Their results, published in the Journal of Spinal Cord Medicine, showed that the occupants of light trucks were at an increased risk of spinal cord injuries, regardless of the crash partner's vehicle type. In crashes with passenger cars, light truck occupants were at greater risk for spinal cord injuries in the cervical and lumbar regions. In crashes between light trucks, all occupants carried a greater risk of any type of spinal cord injury. Passenger car occupants were more likely to sustain a thoracic spinal cord injury in a crash with a light truck.

The researchers did not find that vehicle curb weight influenced the risk for spinal cord injury, but speculated that such a difference might be a significant factor when one of the crash partners is a light passenger car. This was the first study to examine vehicle mismatch as a potential risk factor for spinal cord injuries. Its authors say that the results have implications for the future design of light truck vehicles, given their popularity and the enormous economic burden of spinal cord injuries. In 1998, light trucks accounted for 42% of all new vehicle sales. Those numbers have increased significantly since that time. Motor vehicle accidents account for 38% of all spinal cord injuries in the U.S. The first-year health and living expenses for that injury can top $683,000, with a lifetime price tag of well over $1 million.

VOLVO PRODUCES SAFEST SUV

The Volvo XC90 sport utility vehicle still holds the top position for safety among the sport utility class of vehicles. In our crashworthiness litigation, the Volvo XC90 has become the benchmark by which all SUVs are measured in terms of safety. The Volvo XC90 has been on the market since 2002 and is one of the safest and most popular vehicles available.

The key to the safety success with the Volvo XC90 appears to be the approach taken by Volvo as a company. Volvo has developed the most advanced testing facility for automotive safety. The advances made in this facility are being carried over to other Volvo car lines in addition to the XC90. Volvo’s approach can best be summarized by a statement by Ingrid Skogsmo, head of Volvo Car Safety Centre, when she says:

We would go so far as to say that we re-drew the safety map for SUVs when we designed the Volvo XC90.

While some of the safety features on the XC90 are new innovations, much of the engineering is derived from basic common sense. For instance, the Volvo XC90 has a roof structure and safety cage which contains high-strength, boron steel. Many of the roof structure members are “closed section, box members” that provide added strength at little cost. In comparison, many SUV roof structures are made of cold-rolled, low carbon steel, which is of a lesser grade and strength. Use of the higher grade steel only marginally increases the cost of production for the vehicles, but many companies choose to continue to use the cheaper, lower grade material.

One of the key problems with SUVs is their propensity to roll over. The XC90 has a system designed to counteract rollovers. This system, “roll stability control,” uses a gyroscope to determine the risk of rollover and adjusts the vehicle components accordingly. Many other automobile manufacturers are developing similar electronic stability control systems, but many still only offer these as an option for an additional charge. The Volvo XC90 also has inflatable side curtains and laminated side windows that protect occupants from ejection from the vehicle. Occupant ejection is one of the most serious con-
cerns in the event of an automobile accident and is a major cause of fatalities. We have reviewed testing conducted by Volvo on the XC90; even with the vehicle rolling over two to three times, the glass in the vehicle does not break out during the rollover. Volvo has been able to produce a remarkably safe vehicle that is comparable in price to other SUVs in its class. Other automobile manufacturers would be well served by taking a proactive, commonsense approach to safety like the one chosen by Volvo. This would result in a major reduction in automobile fatalities. Volvo is living proof that automakers can design and produce safe vehicles and still do well financially.

A REPORT ON CHILD SAFETY SEATS

Our children and grandchildren are precious in our eyes and as they should be. Thus, for their protection, we place our children in child safety seats. I wish I could tell you that these seats are rigorously tested to confirm that our children are safe during a car wreck. Unfortunately, car seat manufacturers do the minimum amount of testing that is required to meet the Federal Motor Vehicle Safety Standard 213. This standard is grossly inadequate because it does not duplicate any conceivable real world crashes. There are no side impact tests, no rear impact crash tests, no oblique or off-set crash tests. Therefore, if you notice a manufacturer boasting that its child seat meets FMVSS 213, then you should be aware that that seat is not necessarily a safe one.

In 1999, the head of the National Highway Traffic Safety Administration (NHTSA), Dr. Ricardo Martinez, encouraged the industry to go beyond the inadequate standards noted in FMVSS 213. Dr. Martinez wrote that: “I am urging each manufacturer of child restraints to ensure that these restraints perform well beyond the minimum requirements of our standard. American families expect, and deserve, no less.” Remember it is NHTSA that has the duty to promulgate these safety standards. The agency should do more than just ask the industry to improve its standards.

Unfortunately, the standard was never updated by the government, and manufacturers continue to construct seats that are not effective during car wrecks. In my opinion, it is incumbent on child safety seat and booster seat manufacturers, as well as the federal government, to do more. Other countries, including Canada, Australia, and some European nations, have performance standards for child safety seats and booster seats that are more rigorous than our country’s minimal performance requirements of FMVSS 213. If the industry fails to respond to the pressures of consumers, and the government fails to enact a more meaningful child safety seat standard, then we will continue to use civil litigation to pressure manufacturers to make changes to ensure our children are safe during a wreck. In the past, the child seat industry has responded favorably after juries have told the industry that certain booster car seats were unsafe and awarded substantial damages for catastrophic injuries.

My prayer is that these car seat companies will remember that they are designing seats for children, our future. If you run across a bad child car seat, please let NHTSA know about it immediately. You can file a report online at www.nhtsa.dot.gov. For additional information on children’s car seats, I encourage you to look at www.carsafety.org. This website answers basic questions on children’s car seats.

A TRAGIC CASE UNFOLDS

In today’s world, should it be acceptable to drive through town with a harpoon strapped to your car? Is it ok for log truck drivers to travel without the logs tied down? Should we turn a blind eye to vehicles that are so poorly manufactured that parts actually fall off on the roadway? Of course not - those examples may seem absurd, but, unfortunately there aren’t. Logs fall from log trucks, parts fall off vehicles, and we currently represent the family of a man who was literally harpooned and killed while driving near Montgomery. The man was killed when a retractable awning mounted to the side of an oncoming horse trailer broke free and crashed through his windshield, striking him in the head. Although the case is in its very early stages, one thing is abundantly clear and it is that this product failed.

In the course of our research, we have learned that this is far from an isolated incident. Research reveals that the
IX. MASS TORTS UPDATE

SHORT TERM USE CAUSES VIOXX-LINKED HEART ATTACKS

The lawyers in our Mass Torts Section and officials at Merck & Co. have at least one thing in common: all of them have known for a long time that short-term use of Vioxx can cause heart attacks.

The only difference is that the Merck bosses knew about it much sooner than we did. Merck knew it for a long time before Vioxx was finally pulled from the market. Now there is further evidence that short term use of Vioxx does in fact cause heart attacks. Vioxx raises the risk of a heart attack within two weeks after patients start taking the drug, according to Canadian researchers.

More than one-fourth of 239 elderly patients who had heart attacks while on Vioxx were stricken within six to 13 days after they first started taking the drug, according to a study published on May 24th by the Canadian Medical Association Journal.

Over the past two years, Merck has done a very good job, especially with the media, of promoting the line that short-term use of Vioxx doesn’t cause heart attacks. Of course, that is totally false and Merck knows it. As you know, a jury in a recent trial on April 21st awarded $52 million to a Texas family after finding that Vioxx caused the death of a man who took the painkiller for less than a month.

The new study, along with other recently released data, will help tremendously in lawsuits against Merck. Short-term cases should now be much easier to win. Up to now, we have had to overcome the bias caused by Merck’s spin on the science that only long-term use of Vioxx causes heart attacks. The Canadian findings are consistent with the science and medicine that we have known about for some time. Juries are now getting the truth and that’s good.

All of the science supports the Canadian study on short-term use that is, all except that which is funded by Merck. Dr. Linda Levesque, assistant professor of epidemiology at Queen’s University in Kingston, Ontario, and the study’s lead researcher, observed:

For first-time users you can have an event in as little as two weeks. Now we have evidence that early risk is possible.

Canadian researchers analyzed health records of 114,000 patients aged 66 and older who were prescribed painkillers, including Vioxx, Pfizer Inc.’s Celebrex, and ibuprofen, a non-prescription pain medication. Although about 30% of the patients had risk factors for heart disease, such as hypertension or coronary artery disease, none had ever had a heart attack. The study, which followed patients for about two-and-a-half years, included 30,200 Vioxx users and 45,000 Celebrex users. Out of the 239 patients on Vioxx who had heart attacks, 65 occurred within a median of 9 days after patients started taking the drug, researchers said. The study found no such statistically significant increase in risk among patients taking Celebrex.

Merck’s unpublished data from clinical trials and other data show an increased risk of heart attacks after short-term Vioxx use. Our analysis of Merck’s clinical trials has shown that people who have suffered heart attacks even with short-term use of Vioxx. Merck has done a tremendous job of convincing the news media that there is no risk until after 18 months of Vioxx use. That is just not true! From this point forward the playing field will be much more level for victims in short-term use cases. There’s one thing for certain and that is Merck has known all along that short-term use of Vioxx caused a significant increase in heart attacks and strokes.

Source: Bloomberg News

DOCTORS CHALLENGE CLAIMS OF VIOXX STUDY

Merck & Co. has been caught in another untruth. The company has been telling folks that once a person stops taking Vioxx any heart attack or stroke risk is over. It now appears that people who took Vioxx were actually at increased risk of heart attack and stroke for at least a year after they stopped taking the drug. In fact, Vioxx use can cause permanent cardiac damage.
including trigger or accelerate the process of plaque-build up in arteries. Several doctors have now challenged claims that Merck was making on this issue as recently as last month. The doctors refute Merck’s self-serving and faulty interpretation of the APPROVe study. The Merck group had contended that users of Vioxx weren’t at increased risk of heart attack or stroke in the year after quitting the drug. Dr. Steven Nissen, a cardiologist at Cleveland Clinic who is leading a huge international study of the risks of several other painkillers, believes that ‘Merck misrepresented the results of this study.’ Based on what we have learned about how Merck operates, we aren’t at all surprised that the company would misrepresent a study’s results.

Several other prominent doctors agreed with Dr. Nissen, adding that former Vioxx users should be closely watched. The new data showed that in the year after a patient stops taking Vioxx the risk of a heart attack or stroke could be up to three times higher for the Vioxx group, according to the doctors. The doctors, who looked at the data, said that depending on which way the data are calculated, patients who had taken Vioxx had a 64% to 85% higher risk of heart attack, stroke, and death during the year after stopping the drug, compared to patients who were taking a placebo. The Vioxx group on average had a 74% higher risk of cardiac complications throughout the three years they were on the drug and the one-year follow-up. This is clearly more bad news for Merck. Source: Associated Press

**TAKING FOSAMAX CAN CAUSE HEALTH PROBLEMS**

Last month we mentioned a lawsuit that was filed against Merck & Co. concerning Fosamax, which is the company’s second best-selling prescription drug. Fosamax, a prescription drug used to treat a variety of bone related conditions, is a type of drug known as bisphosphonates. Fosamax was approved by the FDA in 1995. Fosamax and bisphosphonates are most commonly prescribed to prevent and treat osteoporosis in post-menopausal women. However, it is also approved to prevent and treat osteoporosis in both men and women, to treat Paget’s disease of the bone, and to treat patients with cancer that has metastasized to the bone. It is estimated that doctors wrote 39 million prescriptions for Fosamax in American alone.

Recently, it has been discovered that there is a connection between Fosamax and a serious bone disease called osteonecrosis of the jaw (ONJ), which is also known as ‘dead jaw.” As you may know, ONJ is a condition in which the bone tissue in the jaw fails to heal after any minor trauma, such as a tooth extraction, causing the bone to be exposed. This exposure can lead to infection or fracture and can require surgery to remove the dying bone tissue. Lawyers in our Mass Torts Section are currently investigating claims involving serious injuries caused by the use of Fosamax. If you, a member of your family, or someone you know has experienced any of the problems outlined above after using Fosamax, feel free to contact our firm for further information. Jerry Taylor and Chad Cook are the lawyers primarily responsible for Fosamax claims.

**AN EARLY SETTLEMENT IN SOME ORTHO-EVRA CASES**

Ortho Evra, a patch worn on the skin to prevent pregnancy, is being used by millions of women in the United States. In fact, approximately 4 million women have used the patch since it was put on the market in 2002. Ortho Evra is manufactured by Ortho McNeil (a subsidiary of Johnson & Johnson) and contains both estrogen and progestin. The patch is worn on the skin for one week at a time for three consecutive weeks, with the fourth week being “patch-free.” Recently, the FDA disclosed that excessive levels of estrogen delivered by the birth control patch can cause serious injuries and even death.

According to the FDA, women who use the patch are exposed to 60% more estrogen than those who are taking a more conventional birth control pill. This significantly increases their risk of a serious adverse event. Specifically, there have been reports of life-threatening blood clots, fatal heart attacks, strokes, pulmonary embolisms, and other serious problems among Ortho Evra users. A February study showed the patch doubled clot risk compared with the pill. In November 2005, the FDA required that Ortho McNeil change the label for Ortho Evra to include information about the higher levels of estrogen.

Last month, Johnson & Johnson settled the lawsuits that had been filed by about 30 women who had used Ortho Evra and had developed blood clots. The company had actually started settling some cases in January without a great deal of fanfare. Thus far, there have been about 140 lawsuits filed by Ortho Evra users, claiming they suffered strokes or clots in the legs or lungs. As a matter of interest, Johnson & Johnson’s willingness to settle Ortho Evra lawsuits contrasts with Merck & Co.’s stance on the 11,500 suits it faces over Vioxx. Johnson & Johnson have settled Ortho Evra cases in state courts so far in New Jersey, Texas, and California. The federal court cases settled were in North Carolina and Pennsylvania.

About 125 lawsuits have been consolidated in an Ohio federal court. So far the company has turned over about 4.5 million company documents and 100 hours of videotaped depositions to victims’ lawyers. Johnson & Johnson has indicated that it wants to review medical fact sheets and records on these victims so their claims can be properly evaluated. The company indicated it would look at patch users who were hospitalized after strokes and clots in the legs or lungs. Our Mass Torts Section is currently investigating claims involving serious injuries related to the use of Ortho Evra. If you, a family member, or someone you know has experienced severe injuries that may have been caused by using Ortho Evra, feel free to contact our firm for further information. Chad Cook is the lawyer who is the primary contact for Ortho Evra claims in our firm.
Bextra/Celebrex MDL Moving Forward

Judge Charles R. Breyer, the federal judge overseeing the consolidated Bextra and Celebrex litigation in San Francisco, has indicated that he wants the first case to be tried in the winter of 2007. Judge Breyer is pressing both Pfizer lawyers and the lawyers representing thousands of injured Bextra and Celebrex users (including the families of victims who died) to prepare as quickly as possible so that the first case can be tried no later than eight months down the road. Unfortunately, our efforts have been hampered by Pfizer’s failure to timely produce internal documents related to its development of both drugs. The judge has rectified this problem, however, and as a result, Pfizer has recently produced 5.5 million documents for steering committee members to review. Obviously, reviewing this volume will be a massive undertaking. The Plaintiff’s Steering Committee or PSC (the court-appointed lawyers representing the plaintiffs) has established a document repository in Denver to house the document production. As you may recall, Paul Sizemore of our firm has been appointed by Judge Breyer to the PSC and is playing an important role in the MDL litigation.

The PSC has also formed a discovery committee and has designated Jerry Taylor of our firm to co-chair this very important group. The discovery committee is charged with requesting, obtaining, storing, and reviewing the millions of documents that will be produced in this litigation. Currently, the depository is being staffed by dozens of lawyers from across the country on a weekly basis. These lawyers are reviewing documents in preparation for upcoming depositions of key Pfizer employees. Paul and Jerry expect to take the first of these depositions in July of this year.

The PSC has also authorized the creation of a Bextra/Celebrex MDL website. The website will contain up to date information about the MDL, a court hearing schedule, rulings from Judge Breyer, selected form discovery, and a calendar of upcoming events. The PSC has selected Navan Ward of our firm to direct the creation and establishment of this website. Once the website is up and running, we will post the web address in the report.

Finally, the MDL continues to grow with more and more law firms filing cases daily. Currently our firm has 298 Bextra cases and 58 Celebrex cases on file in the MDL. We are filing cases on a regular basis and expect to file literally thousands before the conclusion of the MDL. The more we learn about Celebrex and Bextra, the more concerned we have become for the folks who have taken these drugs. We will keep our readers updated on the progress of the MDL and all related matters in future issues.

Pfizer is Back at It Again With Celebrex Ads

There was another development relating to Celebrex that needs to be discussed. After a long absence, magazine ads for the Pfizer painkiller are back. The first one featured a man holding a boy’s hand as they walk up a stadium staircase. The ad’s message is that “52 steps won’t keep you from taking him out to the ballgame.” This ad includes a boldface warning that begins, “Important Information: Celebrex may increase the chance of a heart attack or stroke that can lead to death.” As you may recall, the company stopped advertising Celebrex because of its concerns about the drug’s heart risks. Now, after the 18 months absence, Pfizer has returned to the consumer ad market. The question is - why? Could it be as a result of Celebrex sales that fell like a big rock last year during the ad moratorium? In any event, the new campaign in magazines is not sitting well with consumer groups. They say that Celebrex is so dangerous that Pfizer should stop selling it instead of encouraging patients to use it. The ad campaign is more evidence of the drug industry’s dependence on consumer advertising to prop up sales, according to Dr. Sidney Wolfe of Public Citizen’s Health Research Group, who told the New York Times:

There’s no objective evidence of any unique benefit with this drug, and there is objective evidence of a unique risk.

Pfizer stopped advertising Celebrex in December 2004, after Merck stopped selling Vioxx because of its heart dangers. Four months later, federal regulators ordered Pfizer to put a black box warning on Celebrex, detailing its risks. As you know, this is the strongest warning available at this time. In 2004, before the advertising moratorium, Pfizer spent $117 million promoting Celebrex. That year, Celebrex sales were $3.3 billion worldwide. In 2005, during the ad moratorium, sales dropped down to $1.7 billion.

When it was introduced in 1998, Celebrex was thought to be safer for the stomach than older painkillers like naproxen (Aleve). Significantly, Celebrex’s stomach benefits have never been proved. Clinical trials, on the other hand, have repeatedly linked Celebrex to heart problems. In addition, Celebrex is far more expensive than the older painkillers, costing about $3 a pill, compared with a few cents for naproxen or ibuprofen. I - like many others who put safety high on our list of priorities - believe that Celebrex should be pulled from the market immediately.

Source: The New York Times

Class Action Lawsuit Filed Against Bausch & Lomb Over Eye Fungus

We wrote last month on problems relating to contact lens made by Bausch & Lomb. Now, a lawsuit seeking class action status has been filed in Miami. The suit blames the contact lens for a painful eye fungus that permanently scarred the cornea of a woman who used its contact lens solution. The lawsuit came on the heels of a similar suit filed in New York. This latest suit alleges the company either failed to remove the fungus from the Renu with MoistureLoc eye solution or fostered its growth in the manufacturing process. Bausch & Lomb stopped shipping the product last month after health officials linked it to 109 cases of the eye fungus. More than 50 of those cases were diagnosed in Florida, according to the federal Centers for Disease Control and Prevention.

BeasleyAllen.com
Jacqueline Wartmann, a 57-year-old woman, was among those diagnosed with Fusarium keratitis, a fungus that causes blurred vision and can lead to blindness, according to the Miami lawsuit. It's alleged that Ms. Wartmann's corneal scarring has resulted in permanent blurry vision. Ms. Wartmann and the six other plaintiffs all used the Renu solution to clean their contacts. Each of them developed the fungus. The lawsuit, which seeks class action status, is requesting compensatory damages for each plaintiff.

The company's manufacturing plant in Greenville, South Carolina, which is at the center of the fungus investigation, was cited by the Federal Food and Drug Administration (FDA) four years ago. The FDA said the company failed to adequately investigate the cause of paint chips discovered during inspections in 2002 in rooms where containers of eye care products were filled. I suspect there will be many more lawsuits filed. On May 15th, the company announced that it was pulling the contact lens solution from the market worldwide. I suspect that the number of lawsuits will increase since the number of reported cases was already up to 122 at press time.

Source: Associated Press

PUBLIC CITIZEN SAYS CRESTOR SHOULD NOT BE PRESCRIBED

Because of all the media attention to drugs like Vioxx and Celebrex, Crestor has been flying under the radar. But, Public Citizen has not changed its mind on its assessment that Crestor should not be prescribed by medical doctors. The group's Health Research Group believes Crestor has unique risks without evidence of any benefits and that it should not even have even been approved by the Food and Drug Administration (FDA). A recent study on Crestor presented at a meeting of the American College of Cardiology, reported that Crestor, when taken in high doses, reduced the build-up of low-density lipoprotein, also known as LDL, or "bad cholesterol." But, Public Citizen cautioned about reading too much into the study's conclusion, because the study was of relatively short duration and of small size. Dr. Sidney Wolfe, head of Public Citizen's health Research Group, noted:

It is believed that these factors coupled with the lack of randomization, preclude any refutation of evidence from larger pre-approval randomized trials and from post-approval reports that the rates of muscle and kidney damage in patients who use Crestor are higher than in patients who use other currently marketed statins.

The dose used in the study (40 milligrams) is a dose that the FDA-approved labeling for the drug states should not be used unless patients fail to reduce their LDL cholesterol adequately with lower doses. It is unlikely that very many of the generally lower-risk patients in this study would qualify for this high dose. It should be noted that the authors of the study failed to state that this study should prompt doctors to switch patients to Crestor. As you know, Crestor is associated with an increased rate of rhabdomyolysis, muscle damage, and kidney damage. Public Citizen has repeatedly called for the FDA to stop "pandering to the pharmaceutical industry and start protecting patients by taking Crestor off the market."

Source: Public Citizen

INSOMNIA DRUGS ON TRIAL

I suspect most of our readers have seen news accounts of persons doing weird things while taking Ambien, the insomnia drug, and were shocked at what they learned. Some of the activities were extremely dangerous both to the users and to third parties. Currently, questions are being raised about the safety of Ambien. There is also a growing criticism of the nation's increasing use of prescription sleep aids. The news reports of persons who took Ambien reveal episodes where persons eat, cook, and even drive in their sleep after taking the drug. At this point, experts don't know exactly how often these things occur or which patients may be most susceptible. We do know from reports that doctors write over 25 million prescriptions for Ambien a year. As reported in the USA Today, recent research paints a picture of some disturbing behavior.

As reported in USA Today, chronic sleep disorders are a problem for lots of folks in this country. More than 50 million Americans have these disorders, according to an April report by the Institutes of Medicine. This is the group that advises Congress on health policy. Americans spent nearly $2.8 billion on sleep-
ing medications last year, according to IMS Health, which tracks drug sales. Ambien’s label lists sleepwalking as a “possible rare adverse event,” defined as one that affects fewer than 1 in 1,000 patients. I am not sure where all of this is headed, but clearly there appears to be a potentially serious problem from a health and safety perspective.

The National Institutes of Health has called for more research into insomnia and its treatments. It is significant that many drugs taken for insomnia have never been tested for long-term use, even though patients often take them for years. The report referred to above indicates that some commonly used treatments for sleeplessness – antidepressants and antihistamines – aren’t approved for insomnia. Many doctors don’t believe the potential side effects are worth the risks.

**FDA WARNS OF SUICIDE RISK FOR PAXIL**

The Food and Drug Administration (FDA) is warning that the antidepressant Paxil may raise the risk of suicidal behavior in young adults. GlaxoSmithKline and the FDA sent a warning letter to doctors on May 12th. The warning letter was accompanied by changes to the labeling of both Paxil and Paxil CR, a controlled-release version of the drug, also called paroxetine. A recent analysis of clinical trial data on nearly 15,000 patients treated with both Paxil and placebos revealed a higher frequency of suicidal behavior in young adults treated with the drug, according to the letter. The FDA reported that there were 11 suicide attempts – none resulting in death — among the patients given Paxil in the trials. Just one of the placebo patients attempted suicide.

Eight of the 11 attempts were made by patients between the ages of 18 and 30. All trial patients suffered from psychiatric disorders, including major depression. GlaxoSmithKline released its findings following an FDA request that antidepressant manufacturers examine their clinical trial data for any links between the drugs and suicide in adults. The FDA stressed that all patients, especially young adults and those who are improving, should be carefully monitored when treated with Paxil. In 2004, the FDA ordered strong warnings about the pediatric risk of suicidal tendencies put on antidepressant labels, and began analyzing whether adults face a similar risk. All antidepressants now carry warnings on their labels cautioning patients and doctors of the risk of suicidal behavior.

Source: Associated Press

**DRUG MAKERS USE DECEPTION IN MARKETING**

Last month, we wrote about the Department of Justice finally beginning to crack down on off-label promotion of prescription drugs. Now, we see that off-label promotion is just a part of the problem. According to a report released in early May by a consumer advocacy group, drug manufacturers commonly downplay risks, exaggerate claims, and promote unproven uses of drugs when they market their products to both doctors and consumers.

The scathing report, “Turning Medicine Into Snake Oil: How Pharmaceutical Marketers Put Patients At Risk,” was written by the New Jersey chapter of the Public Interest Research Group (PIRG), which as you know is a consumer “watchdog” group. The report says that drug marketers are inundating doctors and consumers with false and misleading advertising through “conventional advertising, sales representatives, doctors speaking on behalf of drug marketers, and through clinical trial suppression, manipulation and misrepresentation.” The report also states that the Food and Drug Administration (FDA) is ineffective at addressing the problems and stopping the abuses. To learn more about the report, or to download the entire report, visit [http://nipurg.org](http://nipurg.org). After looking at enforcement letters that the FDA sent to drug companies from 2001-2005, PIRG found, among other things, that “deceptive drug marketing is pervasive, dangerous, and primarily aimed at doctors.” Specifically, their findings revealed the following statistics, which are very troubling to say the least:

- From 2001-2005, 85 companies received 170 notices from the FDA explaining that the marketing for 150 different drugs was false and/or misleading.
- 62% of the false or misleading messages targeted doctors, and those mes-
sages were expressed by 38 different types of advertising. By contrast, the public was exposed to 17 different types of false or misleading ads.

- The false messages were serious: 35% misrepresented risk; 22% promoted unproven uses; and 38% made unsupported or misleading claims. For deceptive messages targeting doctors, 37% misrepresented risk; 24% promoted unproven uses; and 36% made unsupported or misleading claims.

Their findings also showed that the problems with false or misleading marketing are recurring. Twenty-eight of the 85 companies received more than one letter declaring that their ads were false or misleading. The report also stated that sales representatives are a significant part of the deceptive marketing problem because “sales representatives, as a group, form long and deep relationships with doctors, beginning in medical school.” It is very likely, as suggested by PIRG, that those early relationships increase doctors’ receptiveness to sales representatives once they are in practice. Finally, the report stated that the deceptive marketing practices of the drug companies even include clinical trials. In the letters that were sent to the drug companies identifying advertising as false or misleading because it contained unsupported claims, the FDA highlighted at least 82 times that the advertising cited clinical trials for propositions they did not support. In some instances, the cited trials even contradicted the claims.

As the report acknowledges, the limited number of letters reviewed by PIRG does not even begin to address the entire spectrum of problems associated with prescription drug marketing. It’s obvious that changes need to be made in the way drug companies market their products to both doctors and consumers, but it must start with the drug companies themselves. But, as long as the drug companies continue to put profits over people, the correct measures are very unlikely to be implemented, and, as the report stated, the FDA is ineffective at stopping these deceptive practices. There is another very good article that I recommend that you read relating to how marketing has taken over the drug companies. "The Drug Pushers” by Dr. Carol Elliott was published in April of this year in The Atlantic Monthly. Dr. Elliott, who is widely published, teaches at the Center for Bioethics at the University of Minnesota.

Source: Associated Press

**The FDA Should Do Effective Postmarket Oversight**

We have written in previous issues on how the federal Food and Drug Administration doesn’t have the authority needed to monitor drugs once they are approved for the market. The United States Government Accountability Office has now recommended executive action to improve post-marketing surveillance of prescription drugs by the FDA. A March 2006 report, titled “Improvement Needed in FDA's Postmarket Decision-making and Oversight Process,” outlines actions the Commissioner of the FDA should take to improve post-marketing surveillance. Because of the numerous, high profile drugs that have been withdrawn from the market because of safety issues, the GAO, at the request of Congress, studied the organizational structure of the FDA and its ability to handle post-marketing safety surveillance of drugs.

According to the report, once a drug is approved for marketing, the FDA lacks the necessary authority to require drug companies to conduct postmarket safety studies. Although the FDA can require pharmaceutical companies to report postmarket adverse events of a drug or even require that a company withdraw a drug from the market for safety-related reasons, the FDA has limited authority to deal with other problems it might identify when reviewing post-marketing safety data of a drug. Currently, once the FDA identifies a potential safety problem with a drug, the agency must actually negotiate with the pharmaceutical company to take appropriate action. This is just as shocking as the FDA’s inability to order changes to drug labeling and product inserts. That pretty well tells us who has the power when it comes to regulation of the drug industry.

To correct this imbalance, the investigators recommended that Congress expand the authority of the FDA to require pharmaceutical companies to conduct postmarket studies when needed. Currently, the FDA has limited authority to require drug sponsors to conduct postmarket safety studies and, once a drug is marketed, can require the company to conduct postmarket studies only if the company intends to expand the drug indication to include children. This lack of authority prevents the FDA from acquiring the necessary data to make accurate postmarket safety decisions concerning withdrawal.

Further, the GAO found that the FDA “lacks a clear and effective process for making decisions about, and providing management oversight of, postmarket drug safety issues.” According to the report, insufficient communication between divisions within the FDA has been an ongoing problem. This problem is the result of a lack of clarity about how decisions are made, a lack of clarity about organizational roles, insufficient oversight by management, and data constraints.

The two offices at the FDA that are responsible for safety issues for drugs that have been approved for marketing, are the Office of Drug Safety (ODS) and the Office of New Drugs (OND). The authority of ODS, the subdivision focused primarily on postmarketing safety, is limited to making recommendations to the OND. The OND, which is responsible for drug approvals, safety monitoring, and decision-making responsibility for post-marking drug safety, often does not agree with ODS on safety issues or whether regulatory action may be necessary to protect public health. In fact, the report found that the OND has refused to allow ODS physicians from speaking at FDA Advisory Meetings, the meetings of outside experts intended to provide unbiased opinions about the safety of drugs and to elicit recommendations on how the FDA should address potential safety issues.

Many of the problems reported by the GAO have been known to exist for over 30 years. Although the FDA has made attempts to strengthen its authority with regard to post-marketing surveillance, the GAO identifies many areas...
where the FDA is not handling, or cannot handle, post-marketing safety issues adequately. In the wake of the withdrawal from the market of Vioxx and the numerous other “blockbuster” drug recalls, the public has to be shocked to learn that the FDA negotiates with drug companies to revise the drug labels, including the information included in the label warning sections. Everyone should urge their U.S. Senators and members of the House of Representatives to give the FDA the teeth it needs to ensure public safety with regard to prescription drugs.

Source: Government Accountability Office

**FDA Advisory Panel Members Shouldn’t Have Conflicts Of Interest**

Conflicts of interest involving officials and employees of government regulatory agencies and the industries being regulated are clearly improper. Clearly, conflicts of interest involving such persons at the Food and Drug Administration certainly can’t be tolerated because of the nature of the agency’s mission. Issues dealing with public health and safety are critically important, and those who regulate the drug industry and medical device manufacturers must be as independent as possible and free from any appearance of a conflict of interest as possible. The rules also should apply to FDA advisory panels. Interestingly, almost 30% of the experts on FDA advisory panels reported financial conflicts of interest. However, the panel members say excluding them wouldn’t have changed their panel’s recommendation for or against any particular drug. To the contrary, a study by Public Citizen’s Health Research Group found that conflicts of interest can increase the likelihood that some panelists will vote to recommend that the FDA approve a drug. The group’s analysis of voting data was culled from 221 drug advisory committee meetings from 2001 to 2004. Co-author Peter Lurie, deputy director of health research, observed:

> For every additional conflict you have a 10% increased probability that the meeting will favor the company more.

As you may know, the FDA often turns to panels of outside experts for advice whether to approve a new drug and other matters. The agency is not required to follow the panels’ recommendations, but historically that’s exactly what happens. Recently, financial links between the panel members and drug makers have come under closer scrutiny, with calls for the FDA to locate and use advisors without industry connections. Of nearly 3,000 panel members in the study, 28% disclosed a financial relationship within the previous year with the company that made a drug under discussion or a competitor, according to the study.

The most common ties were consulting arrangements, research contracts or grants, and stock holdings or other investments. Having seen how companies such as Merck use reports by the FDA advisory panels to their advantage in litigation, I don’t believe an advisory board panel member should have any ties – financial or otherwise – to the drug industry, and certainly not to a drug company whose drug is being considered by the panel. Conflicts of interest for the members of an FDA advisory committee should never be allowed.

**X. BUSINESS LITIGATION**

**SOFTWARE GIANTS TO PAY $133 MILLION OVER ROYALTY FEES**

A Texas federal jury has returned a $133 million verdict against Microsoft Corp. and Autodesk Inc. for infringing on two software patents owned by a Michigan technology company. The lawsuit, filed in 2004 by z4 Technologies Inc., claimed that Microsoft and Autodesk used two z4 patents in their Office and AutoCad software programs without paying royalty fees. Jurors ordered Microsoft to pay $115 million and San Rafael, California-based Autodesk to pay $18 million. One patent covered a method and apparatus for securing software to reduce unauthorized use. The other one involves a method for securing software to decrease software piracy.

Source: National Law Journal

**JUDGE GIVES PRELIMINARY APPROVAL TO BLOCK SETTLEMENT**

We wrote last month on the proposed $39 million settlement of a federal class action lawsuit against H&R Block Inc. A U.S. District Court judge has now granted preliminary approval of the settlement and scheduled an August 2nd fairness hearing for the deal.

In December, Block agreed to pay $62.5 million to settle four state class action lawsuits involving more than 8 million consumers related to the loans in Alabama, West Virginia, Ohio, 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 it $25.7 million.

Source: Kansas City Business Journal

**H&R BLOCK SAID TO HAVE KNOWN IT WAS DOING WRONG**

New York Attorney General Eliot Spitzer says he has evidence that H&R Block executives not only knew they were pushing customers to buy money-losing retirement account plans, but penalized its own employees who refused to recommend them. The Attorney General has amended his suit, filed in March against Block, adding copies of e-mails that allegedly revealed that managers disregarded complaints from tax preparers about the misleading marketing of Express IRA. The internal documents also allegedly revealed that tax preparers were told to “sell more IRAs” or “there’s the door.” General Spitzer had this to say about the latest development:

In addition to designing a flawed product with hidden fees and marketing it fraudulently to unsuspecting customers, senior management did more than simply ignore the concerns of its tax preparers; management penal-
ized H&R Block tax professionals who refused to push the product.

The Attorney General's lawsuit seeks to stop the company from engaging in any fraudulent practices, force it to return profits and pay damages and restitution caused by its alleged scheme, and pay civil penalties in an amount no less than $250 million. Spitzer said that H&R Block opened more than one-half million Express IRA accounts in the last four years. He said 85% of customers who opened the accounts paid H&R Block more in fees than they earned in interest. More than 150,000 customers closed their accounts, incurring additional undisclosed fees and almost $6 million in tax penalties, Spitzer said.

Source: Bloomberg News

XI. NSURANCE AND FINANCE UPDATE

DUPONT TOLD TO PAY UP TO $60 MILLION IN BENLATE CASE

A jury in a Florida State Court has ordered DuPont Co., to pay as much as $60 million to a group of Costa Rican farmers who blamed the fungicide Benlate for destroying their fern crops. Jurors, who heard the case, which was tried in Miami, found that Benlate harmed 27 farms in Costa Rica. This is the seventh loss for DuPont in lawsuits over the chemical since June 2000. Benlate killed ornamental ferns sold by the farmers to florists, driving some of them out of business. DuPont says it will appeal.

The suit was one of thousands focusing on DuPont's marketing and handling of Benlate, which the Wilmington, Delaware-based company pulled from the market in 2001. DuPont has paid more than $1.9 billion thus far in damage awards, settlements and other costs over the fungicide. DuPont, the third-largest U.S. chemical maker which had sales of $26.6 billion last year, ranked third among U.S. chemical makers, behind Dow Chemical Co. and ExxonMobil Corp.

Some of the 13 farmers who own the 27 farms are Costa Ricans, while others are U.S. citizens with operations in the Central American country. The jury calculated $113.4 million in total damages. Jurors found 14 of the farms 45% negligent, 12 of them 50% negligent, and one 70% negligent. That left DuPont liable for about 53% of the damages or about $60 million. The growers claimed that DuPont scientists knew about problems with Benlate since the 1980s. The lawsuit accused DuPont officials of covering up the problems in order to pump up sales and failing to do enough safety testing. The company argued that a virus might have caused the damage to the ferns.

Source: Associated Press

In spite of what some in the industry have said, it appears that the insurance industry had a very good year in 2005. In fact, it was the most profitable year ever for the property-casualty insurance industry. Despite Hurricane Katrina and other natural disasters, profits hit record highs in 2005. Here's what the records reflect:

- The property-casualty insurance industry's after-tax net income for 2005 was a record breaking $44.8 billion - their highest ever;
- 2005 profits are up 18.7% over last year's profit of $38.7 billion. The year 2004 had been the record before 2005.
- The property-casualty insurance industry's surplus also is at the highest level - rising more than 7% to nearly $427 billion.

Settlement Reaches in States' Bid-Rigging Case

An $80 million settlement agreement was reached last month by the States of New York, Connecticut, and Illinois with Bermuda-based holding company ACE, Limited, and its U.S.-based insurance subsidiaries. The charges against the insurance giant were that it engaged in bid-rigging, steering of insurance business, and accounting misconduct. The agreement requires ACE to pay back $40 million to policyholders, who were the victims of ACE's scheme to rig bids on excess casualty insurance policies. The company failed to disclose to its policyholders that it was colluding with other insurers and brokers to rig bids for excess casualty insurance. Under the agreement, ACE also will pay $40 million in penalties and payments to the three states.

Additionally, the agreement requires ACE to reform critical business practices. Under the agreement, ACE is required to sharply curtail its use of "contingent commissions," paying no contingent commissions on excess casualty insurance placements through 2008. Contingent commissions are payments that insurers pay to brokers and agents in addition to the base commissions. Contingent commission amounts generally are based on the volume and profitability of the business a broker or agent produces for an insurance company. The investigation found that because contingent commissions are based on volume and profitability, they encourage brokers and agents to improperly steer their clients to particular insurers, even if that is not in the clients' best interest. In addition, ACE has agreed to stop paying such commissions in any line of insurance in which companies with 65% of gross written premiums do not do so.

ACE also has agreed to support legislation barring contingent commissions and requiring greater disclosure of compensation to brokers and agents. Under the agreement, ACE has agreed to provide new disclosures about ranges of compensation paid to brokers and agents by insurance products on a special website later this year. ACE's compliance with these new business reforms will be monitored by the three states. Regarding the settlement, Illinois Attorney General Madigan stated:

Our investigation revealed that ACE secretly agreed with insurance brokers and other insurers to rig bids for insurance policies. Because of this illegal conduct, policyholders did not get the impartial recommendations they
deserved to get and they ended up paying more for their insurance. ACE also paid contingent commissions to brokers in exchange for the brokers steering business to ACE, again without the policyholders' knowledge or consent. This settlement, along with other recent similar settlements, will help restore integrity to the insurance markets.

The settlement is a product of a wider ongoing probe of misconduct in the insurance industry. That investigation previously resulted in Attorney General Madigan’s $153 million settlement with Chicago-based insurer Zurich in March 2006 and the $190 million settlement with Chicago-based insurance brokerage firm Aon in March 2005. Those settlements, which also included the New York and Connecticut attorneys general, similarly dealt with bid-rigging, contingent commissions, and improper steering. The Illinois investigation was conducted in cooperation with the IDFPR’s investigation of ACE’s conduct. IDFPR has primary responsibility under Illinois law for regulating the insurance industry.

Source: Illinois Attorney General’s Office

HARTFORD SETTLES ANNUITY FRAUD SCAM

The states of New York and Connecticut have fined Hartford Financial Services Group $20 million in connection with the sale of group related annuities. The investigations were conducted simultaneously by New York State Attorney General Eliot Spitzer and Connecticut Attorney General Richard Blumenthal. The basic claim is that Hartford was making secret payments to insurance brokers in order to convince the brokers to recommend Hartford annuities to pension plan customers over competitor annuities. The scheme involved using fake expense reimbursement agreements between Hartford and brokerages, which were nothing more than secret bonus payments for sales of Hartford annuities.

Hartford sold over $800 million dollars worth of the group annuity pension plans before the scheme was uncovered by the attorneys general. The customers were unaware of the secret payments and had been convinced that the brokers were acting in their best interests by supposedly analyzing several companies before selling them Hartford annuities. What the customers did not know is that instead of actual expense reimbursements, the brokers were receiving bonuses for recommending and pushing the Hartford annuities over competitors. The result was that the purchasers of the annuities ended up paying increased costs when they could have gotten similar adequate products more cheaply if the brokers and Hartford had acted properly. In addition to a fine of $20 million, Hartford has agreed to improve disclosures and stop making any payments to the brokers for a period of three years.

AN INTERESTING BOOK THAT FURTHER EXPOSES ALLSTATE

We wrote in the December issue about Allstate Corp. and David Berardinelli, a lawyer who has taken on the powerful insurance company. David, who is from Santa Fe, New Mexico, will become a published author within the next two to three weeks. David has written a book titled, From Good Hands to Boxing Gloves, which will be available to lawyers soon, that tells the story of the key role played by management consultant McKinsey & Co. in re-engineering the insurance claims operations at Allstate. I can say two things with certainty:

- it’s a story Allstate doesn’t want told, and
- Allstate will fight to stop the book.

In February, a New Mexico state court rejected Allstate’s initial efforts to keep David from publishing his book. Since 2004, Allstate has been defying an order by the same court to make available public copies of some 12,500 PowerPoint slides McKinsey prepared for the insurer, which form the basis of the book. I have found over the years that even large companies normally obey judicial orders. Of course, there have been exceptions. In a court filing in this case, Allstate has characterized its actions as "respectful civil disobedience." The title of David’s book is taken from a McKinsey slide that suggests that Allstate should treat some of its claimants with “boxing gloves,” rather than with its trademark “good hands.” Collectively, the documents present a portrait of business strategies that – to put it mildly – are at odds with the insurer’s carefully cultivated public image.

Allstate utilizes a variety of systems set in place by McKinsey to make sure it pays only the bare minimum necessary — and it plays hardball with those who seek more. The book is expected to illuminate the largely hidden role McKinsey has played as a key architect of claims practices in use across the insurance industry today. In addition to advising Allstate, McKinsey has also done work for Farmers Insurance Group, USAA, State Farm, and Fireman’s Fund. While many of the strategies McKinsey recommended at Allstate remain in place, I understand that some have been reined in following legal and regulatory challenges in several states.

The McKinsey re-engineering project institutionalized aggressive practices aimed at enriching Allstate at the expense of customers. In the decade after Allstate instituted the McKinsey program in 1995, the amount of money it paid out per premium dollar in car accident cases declined from about 65 cents to 47 cents, according to A.M. Best. In his book, David compares Allstate to a vendor of canned peas and argues that the documents “show how McKinsey...deliberately designed Allstate’s claim factory to arbitrarily ‘underfill’ every can of Allstate insurance.” The book, which I recommend to lawyers who handle claims against insurance companies, can be pre-ordered by going to www.trailguides.com. Presently, David is only selling his book to practicing lawyers who represent victims. He will personally monitor folks who buy copies from the publisher. If you have cases against Allstate and want to help your clients, David’s book is a must read.
**STATE FARM SUED OVER KATRINA CLAIMS**

A lawsuit, filed by nearly 700 Gulf Coast homeowners, accuses State Farm Insurance Co. of using a "one-size-fits-all" engineering report as the basis for refusing to cover damage to homes destroyed by Hurricane Katrina. The suit alleges that the large insurance company denied many of the homeowners' claims without investigating whether Katrina's wind rather than water was responsible for damage to their homes. Instead, the suit claims, an engineering firm hired by State Farm drafted a generic, "one-size-fits-all" report that concludes all damage to homes on Mississippi's Gulf Coast was caused by "storm surge" and not hurricane-force winds. State Farm's policies cover wind damage, but storm surge is considered flood water and is excluded from coverage.

It is claimed in the suit that many of the State Farm adjusters who inspected homes in Katrina's early aftermath told homeowners that wind damaged their houses hours before any water from the Mississippi Sound surged onto land. State Farm is said to have rejected their findings and fired, transferred, or reassigned many of those adjusters. The suit also claims that State Farm "extorted" engineering firms by refusing to pay them if their conclusions conflicted with the HAAG report. In addition, the action accuses the insurer of hiding or shredding engineering reports that blamed damage on wind. This most serious charge is made in the complaint:

*State Farm intentionally suborned and encouraged the corruption of scientific investigation and accepted physical realities ... to achieve the desired result of blanket denials of coverage.*

It will be most interesting to watch this case and see how the charges against State Farm unfold. If the company has done that which is being alleged, it is a most serious matter. We will keep you posted on all developments in the case.

Source: Associated Press

**LIBERTY MUTUAL WILL FIGHT CHARGES OVER CONTINGENT COMMISSIONS AND ACCOUNT STEERING**

Unlike American International Group, Zurich, ACE and other insurers that have settled similar charges, Liberty Mutual Insurance Group has decided to fight allegations of anti-competitive practices that have been brought against the company by the attorneys general of New York and Connecticut. The Boston-based insurer claims that charges regarding improper commissions and bid-rigging are untrue. Interestingly, after two years of negotiations, Liberty Mutual now says it was unable to reach a settlement and that the states' settlement demands were too high.

Liberty Mutual took its stand following the filing of the complaints by the New York Attorney General involving big rigging and commission payments. The complaints describe alleged cooperation of Liberty Mutual employees in a bid-rigging scheme in which the employees provided Marsh, the large insurance broker, with so-called "B" quotes for excess casualty accounts. The quotes were intentionally less favorable than other insurers' quotes. It is significant that in August 2005, a former Liberty Mutual executive, Kevin Botta, pled guilty to criminal charges in connection with big rigging conduct while employed at Liberty Mutual. The complaints also allege that Liberty Mutual paid contingent commissions — or what the attorneys general call "kickbacks" and "payoffs" — to insurance brokers and independent agents in order to encourage them to place more business with Liberty Mutual. Attorney General Spitzer said:

*Brokers and agents responded to these incentives, steering their clients to Liberty Mutual and in many cases violating their fiduciary duty to assist their clients in finding the best insurance for the lowest price. It is simply appalling that a major financial institution would rig bids and induce brokers and agents to abuse their position of trust with the insurance-buying public.*

It is said that since at least the mid-1990s Liberty Mutual has paid tens of millions of dollars in so-called contingent commissions to insurance brokers like Marsh, Aon Corporation, Willis Group Holding Ltd., and Arthur J. Gallagher & Co. In exchange, brokers allegedly agreed to steer contracts to Liberty Mutual. Interestingly, as for the bid-rigging charges, Liberty Mutual has not denied that former employees engaged in bid-rigging but insists it is not a common company practice as alleged. I predict this case will settle and never get to a trial.

Source: Insurance Journal

**THE INSURANCE INDUSTRY HAS ADDED RESPONSIBILITIES RELATING TO INVESTMENT COMPONENTS**

Recently, the U.S. Treasury Department's Financial Crimes Enforcement Network issued two separate regulations making the insurance industry responsible for selling insurance products that could be used for money laundering or terrorist financing. Under the new regulations, the U.S. Treasury Department will require life insurers to create a formal compliance program to avoid money laundering and terrorist financing. The new regulations also require insurers to make sure their agents and brokers take appropriate steps to prevent both money laundering and terrorist financing. Insurers are required to report suspicious transactions totaling at least $5,000 that involve a covered product. The covered products included in the regulations are those with a cash surrender value or those that permit loans.

By May 2, 2006, all businesses or individuals associated with the insurance industry must determine whether their products have investment features that could be used for money laundering. A violation of the new requirements could subject a business or individual to both civil and criminal liability. In addition to establishing programs to prevent money laundering and terrorist financing, insurance companies are now required to report potential violations of law or suspicious activities. Failure to establish and implement appropriate systems could lead to significant risks on the
part of an insurance company. The new regulations took effect in May.

**Lawsuits Filed Over Canceled Policies**

Over the years, we have been contacted by numbers of persons who had their insurance policies cancelled by an insurance company after claims were made on the policies. Some of those cancelled were health policies. Those cancellations generally came after a bout of illness by the policyholders or their families that required extensive treatment. Alabama law is not very good concerning the right of a policyholder to resist an insurance company's canceling a policy of insurance. That doesn't appear to be the case in some other states.

Former policyholders, complaining that two health plan operators systematically dropped members after receiving bills for their medical care, have filed civil lawsuits in California against the insurance companies involved. The complaints, filed in three California counties, join 10 lawsuits filed in March alleging that Blue Cross of California improperly canceled policies of sick members. Three of the recently filed suits, however, accuse Blue Shield — a not-for-profit health plan operator — of similar conduct. All of the allegations concern individual policies, not group or employer-sponsored coverage. The lawsuits allege that once individual policyholders incurred medical expenses, the companies looked for ways to drop them to boost their bottom lines. The former policyholders allege that they were dropped for trivial or inadvertent omissions on their applications. Jerry Flanagan, who is with Santa Monica-based Foundation for Taxpayer and Consumer Rights, said he had received complaints about cancellations involving several companies. He made this comment:

> We suspect this is a much wider problem. We've gotten calls from Nevada and West Virginia.

A California Blue Cross employee testified in a deposition that the company, which is the state's largest health-plan company, routinely canceled policies of sick members after looking for inconsistencies — not fraud — in their applications. The law in that state allows only deliberate omissions or misstatements as grounds for canceling health coverage. The deposition testimony, given in a lawsuit against Blue Cross, also indicated that those reviews were triggered by claims for treatment of certain illnesses. The suits, being filed by policyholders, say the company seized on inadvertent errors and omissions in applications to justify dumping the policyholders after receiving claims, leaving them with large medical bills and no health coverage.

A second employee testified that the reviews were triggered by claims made for treatment for certain illnesses, such as hypertension, diabetes, and cardiovascular disease. That employee stated, "When a claim comes in and there is a certain diagnosis, that would pretty much [be enough] to be reviewed for a possible preexisting condition." The list of diagnoses includes diseases of the jaw, disorders of the breast, endometriosis, and disorders of the female genital tract.

Interestingly, a Los Angeles County judge sealed several documents from these cases, including the employees' depositions referred to above, finding that they included proprietary information about the way Blue Cross conducts business. Portions of the employees' testimony, however, are included in the public court file. Along with other documents, they give an example of the work of a four-person unit that, according to the employees' testimony, reviews as many as 1,500 policies a week and cancels those whose holders stated or omitted facts found in medical records — inadvertently or otherwise. One employee testified under oath that if a condition wasn't disclosed on an application — regardless of whether it was intentional or by mistake — it would be enough to cancel.

The plaintiffs in the cases filed against Blue Cross say they were issued individual policies and paid the required monthly premiums. In most cases, Blue Cross authorized payment after it received claims for treatment. But, the plaintiffs say, some months later, the company canceled their policies and declined to pay the medical bills, saying the individuals had omitted pertinent information from applications. The California State Departments of Insurance and Managed Healthcare have opened investigations of the allegations in the lawsuits.

*Source: Los Angeles Times*

**Five California Hospitals Sue Blue Cross**

Five California hospitals have also filed suit against Blue Cross, accusing the health insurer of authorizing expensive patient treatments and then failing to pay. The case, filed in state court in California, has allegations like those made in the previously mentioned lawsuits filed by more than two dozen former Blue Cross members. In the latest lawsuit, Long Beach Memorial, Anaheim Memorial Medical Center, Miller Children's Hospital in Long Beach, Orange Coast Memorial Hospital in Fountain Valley and Saddleback Memorial Medical Center, which operates in Laguna Hills and San Clemente, said they treated Blue Cross patients after obtaining authorization from the insurer, but the company declined to pay for the procedures. Instead, it retroactively canceled the patients' policies on grounds that they lied on health plan applications.

It was alleged in the lawsuit that the unpaid bills — some exceeding six figures — often force the hospitals to write off the losses because patients can't afford to pay them. The claims by the hospitals involve policies covering individuals, not plans issued through employers or other groups. The lawsuit seeks an unspecified amount in payments and other damages.

Blue Cross, a subsidiary of Indianapolis-based WellPoint Inc., has contracts with hospitals across the State of California. Blue Cross has denied any wrongdoing in response to the complaints by former policyholders. The company says it legally cancels policies if it finds members have misrepresented information on their applications.

*Source: Associated Press*
XII. PREDATORY LENDING

OVERDRAFT LOAN PROGRAMS CAN BE ABUSED BY BANKS

According to a nationwide survey, low-income people, single people, and certain minorities are increasingly turning to borrowing money from financial institutions by over-drawing their checking accounts. This results in interest rates that can exceed 1,000%. The survey, performed for the Center for Responsible Lending, revealed that only 16% of bank customers account for nearly three-quarters of all overdraft loans. In other words, overdraft loans or "courtesy overdraft protection," as it's often called, is being used as a line-of-credit. Eventually, a good number of them will be in over their head. This is an outrageously expensive way for a person to obtain credit. Certainly, customer over drafts shouldn't be used as loans by banks.

Here's how overdraft loans work: A financial institution covers a check, ATM withdrawal, or debit card transaction even when the customer's account doesn't have funds adequate to cover the transaction. Typically, when the customer's next deposit hits the account, the bank takes the overdraft amount and adds a fee. Eric Halperin, a senior policy counsel at the Center, says:

A service created as a favor for customers has morphed into a harmful practice that traps vulnerable customers in debt. Some banks now realize that trapping borrowers and charging them a $25 fee for a $20 overdraft loan is a pretty good scam.

It appears that financial institutions are increasingly turning to fees rather than traditional interest to increase their income. Overdraft programs have grown almost 80% to 3,500 programs between 2003 and 2005. Of the estimated $10.3 billion in overdraft fees Americans pay each year, the survey indicates that $7.3 billion comes from repeat borrowers. The Center for Responsible Lending calls on the Federal Reserve and other regulators to do the following:

- Require disclosure of the interest rates on overdraft loans;
- Require borrowers' explicit consent before signing them up for these programs;
- Require warnings when ATM and debit-card transactions will trigger fees and allow customers to opt out of the transactions;
- Require institutions to report the numbers on their overdraft loans, which would show the impact of these programs on borrowers; and
- Prohibit repeated overdraft loan charges within a quarter.

Regulators in the federal and state governments need to protect borrowers from getting caught in the cycle of debt described above. It's unfortunate that this type of borrowing has not been well unnoticed, and something needs to be done to correct that. Otherwise, there can be serious consequences for people's finances such as loss of their checking accounts or worse.

Source: PFI Newswire

B resilient MORTGAGES ARE NOT FOR EVERYBODY

Many mortgage companies lend money to folks who really can't even afford to buy a home and who certainly can't afford a big mortgage payment. Some of these borrowers are even approved for large loans despite having a bad credit history. Many of these loans carry with them very large monthly mortgage payments that take a huge part of a borrowing couple's monthly income. This will generally make it a loan with payments that will be impossible-to-pay. The Houston Chronicle reported on a situation in Texas where borrowers were literally taken to the cleaners by lenders on mobile home purchases. Hundreds of home buyers lost their mobile homes to foreclosure in a handful of Montgomery County neighborhoods. In one of them, 67% of the mobile homes have been foreclosed on since 2001, according to a report by the newspaper.

Home buyers, who are fighting back, filed a lawsuit targeting developers, among many others, for selling the homes at inflated prices and underestimating the monthly escrow payments needed to cover the mortgage, insurance and taxes. The U.S. Department of Housing and Urban Development backed many of the mortgages on the homes. Quite often, mobile homes are sold at very high prices to folks who simply can't afford them. The loans are pushed on them knowing that the chances of foreclosure will be very high. The Texas lawsuits, filed by homeowners and lenders, seek a system designed to boost prices by:

- Qualifying otherwise uncreditworthy borrowers for loans they couldn't afford.
- Having the lender make a loan using documents that made it appear as if the homeowners were refinancing a property they'd owned for years, even though they'd only recently agreed to buy it.
- Giving insurance agents and mortgage brokers a reason to cooperate to close the deals — a higher selling price meant bigger loans and more insurance coverage, increasing their fees.

The lawsuits accuse home sellers of high pressure sales tactics that convince folks to buy and incur large mortgages with high payments. It is interesting that developers who financed the sales were able to profitably pass risky loans on to a national lender. After all of the cost and expenses were incurred — in addition to the actual mobile home cost — many buyers were left with mobile homes that cost far more than they ever expected. The high price, coupled with rising monthly payments caused by underestimated escrow payments, ended in unaffordable mortgage payments. Pretty soon, the new homeowners found themselves having to either see their homes foreclosed or trying to get concessions from their lenders that would lower their payments but add to their total debt. The developers sold inflated land and home packages to more than 1,500 low-income, first-time

BeasleyAllen.com
home buyers, according to allegations in the Texas lawsuit.
Source: Houston Chronicle

XIII. PREMISES LIABILITY UPDATE

A POWERFUL REPUBLICAN SUPPORTS LEGISLATION THAT WILL HELP PREVENT ACCIDENTAL DROWNING

James A. Baker, III, a prominent Texas lawyer who served as Secretary of State under former President George Bush, and his daughter-in-law Nancy Baker are supporting a key bill in Congress. This legislation, introduced last month, would offer incentive grants to states that pass laws requiring safeguards to prevent drowning, drain entrapment, and entanglement in swimming pools and spas. Secretary Baker's 7-year-old granddaughter, Virginia Graeme Baker, died four years ago when she became entrapped in the drain of a spa. The child's mother was unable to free her from the drain. It then took several adults to help pry the little girl free from the force of the drain, located in the bottom of the spa. By that time, it was too late - Graeme had drowned. This tragedy occurred at a graduation party that was well supervised by scores of adults. There were lots of children there playing and having a good time.

Like most adults, neither Secretary Baker nor the child's mother had any idea that a child could be entrapped in the drain of a spa. In fact, the public doesn't even equate that sort of thing with a real swimming pool. The tragic truth is that deaths from entrapments are absolutely preventable with the installation of safeguards as well as awareness by parents and pool owners of the danger. Secretary Baker said in support of the legislation:

"We hope Graeme's story and the passage of this new legislation will help save lives."

The legislation, which was introduced last month by Representative Debbie Wasserman Schultz (D-FL), is modeled after a law, enacted in 2000, which she sponsored as a state legislator in her home state of Florida. The bill would provide incentive grants for states that make mandatory the use of pool and spa safety devices, such as drain covers that comply with Consumer Product Safety Commission guidelines, safety vacuum release systems, multiple drains, and four-sided fences. At least four states have laws addressing barrier requirements for residential swimming pools. But currently, no state has enacted a comprehensive safety law, incorporating all layers of protection, for both residential and public pools and spas.

Entrapment occurs when part of a child's body becomes attached to a drain because of the powerful suction of a pool or spa's filtration system. It also can occur when a child's hair or swimsuit gets tangled in the drain or on an underwater object, such as a ladder. From 1985 to 2004, records show that at least 33 children aged 14 and under died as a result of pool and spa entrapment, and nearly 100 children were seriously injured. But according to the U.S. Consumer Product Safety Commission and Safe Kids Worldwide, the number of entrapment deaths could actually be much higher than reported. Because entrapment is generally a little-known risk for drowning, it is quite possible that many drowning deaths have not been properly classified as entrapment. Nancy Baker, Graeme's mother, who has worked tirelessly to bring public awareness to this problem, commented:

"If the safeguards proposed in the legislation had been in place, Graeme's death may have been prevented. Entrapment is a very real danger for children in swimming pools and spas. State laws must mandate the layers of protection that have been proven to save lives."

New research conducted for National Safe Kids Week, which was May 6th to 13th, shows only 34% of parents with children aged 14 or under in the household recognize that drowning is one of the top two causes of accidental death among children. The survey revealed that 66% are not at all, or only somewhat, familiar with the threat of drain entrapment and entanglement. Frankly, I am surprised the level of knowledge is even that high.

These findings are alarming because research reveals that pool and spa ownership is becoming much more popular. One out of two parents report that they have a pool or spa at home. This research from Safe Kids Worldwide, sponsored by Johnson & Johnson, tells a grim story of parents' lack of understanding of the dangers of pool and spa drains.

The research also suggests parents' confidence in their children's safety while swimming may be higher than their children's abilities in the swimming pool, leaving children exposed to unnecessary risks. Martin Eichelberger, M.D., president and CEO of Safe Kids Worldwide, who is also director of Emergency and Burn Services at Children's National Medical Center in Washington, D.C., observed:

"A child is no match for the powerful suction of a drain. The dangers of the drain can easily be mitigated with the right equipment. Parents should warn their children to stay away from drains and install safety devices if they own a pool or spa."

The facts surrounding the Baker child's drowning, while hard to take for parents, graphically tell us of how dangerous this sort of thing is. The force holding the little Baker girl underwater was so great - "hundreds of pounds of pressure" according to her mother - that the drain cover cracked in two as Graeme's body was pulled free. Secretary Baker says: "It's hard to understand how anyone cannot support this bill." He pledged to work for passage of the bill, saying, "It's the least I can do to honor the memory of my granddaughter." The Baker family filed a wrongful death suit arising out of Graeme's tragic death and it was settled before going to trial. Hopefully, coming out of the Baker's tragedy, will be legislation that will save the lives of other children.
Jury Verdict Returned Against Smoke Alarm Maker

A New York jury has returned a verdict against the makers of the First Alert brand smoke detector in a case arising out of a May 2001 fire that occurred in Rotterdam, New York, killing two members of a family and injuring two. First Alert will have to pay more than $7 million in damages, including $500,000 in punitive damages. The case was heard in the U.S. District Court for the Northern District of New York. William Hackert, John's father and Sheila's husband, and Christine Hackert, the fourth member of the family, died in the fire, which started when an extension cord overheated. The two survivors sued First Alert and BRK Brands Inc., contending that the smoke detectors installed in their home failed to go off and alert the family. John Hackert, and his mother Sheila Hackert were awarded $7,051,702 by the jury following a three-week trial.

The family had two of the companies' smoke detectors installed in their home and both failed to alert the residents. The detectors at issue were ionization type smoke detectors that sense high temperature, fast moving fires, as opposed to detectors employing photoelectric cells that are better at detecting smoldering fires, like the one that apparently killed William and Christine Hackert. A photoelectric smoke detector would detect the smoke from a fire 15 minutes earlier than the ionization type. Witnesses testified during the trial that the company was aware of the shortcomings of the ionization-only detector, but continued to market the product instead of selling only dual detectors. It should be noted that the dual detectors cost from $20 to $25 while the ionization-only types sell for $10 to $15. During discovery in the case, it was learned that 750 complaints had been made by consumers whose ionization type detectors failed to sound during smoke or fire events. The technology to make dual-sensor smoke detectors has been around since 1979 and it is unconscionable for a company to continue to market an inferior product. Most homeowners don't know the difference in the two types of detectors and depend on the makers and sellers to advise them of their options.

Source: The Albany Business Review

New York Reacts To Amusement Park Deaths

A bill has been introduced in the New York Legislature that would prohibit children younger than 11 from riding alone on amusement park attractions that take them out of the line of sight of the operators. The legislation is among six bills resulting from an investigation into four amusement park deaths in New York last summer. One victim was 7-year-old child who died when he got out of his boat and fell in a dark tunnel on a ride at Playland Park in Rye, New York. The bill would impose the age requirement when "all participants are not visible to the person in charge" during the ride. A child under 11 could ride if accompanied by an adult or another child.

Besides the Playland death, an adult patron and a worker were killed at Adventureland in Farmingdale, New York, and a worker died at the state fair in Syracuse. Playland uses height requirements rather than age requirements. At a hearing of the bill, the child's mother testified that she would not have allowed him on the ride by himself "had I been properly informed of the true nature of this ride, that it was designed to frighten the patrons, leading them through a long, dark, unsupervised, scary tunnel." The mother is suing Westchester County, owner of the amusement park.

Other bills introduced in New York would establish an amusement park safety advisory board, increase penalties for violations, create a database to track inspections and safety records, begin a public awareness campaign on safety, and bring state standards for amusement devices into line with national standards. The number of accidents involving deaths or serious injuries at amusement parks around the country appears to be increasing. It's obvious that better regulation is needed to make sure the rides are made reasonably safe.

Source: Insurance Journal

Settlement Of Hilton Mold Lawsuit Approved

A Honolulu judge has approved a settlement for guests of the Hilton Hawaiian Village who stayed in the mold-contaminated Kalia Tower in 2002. The judge approved the settlement valued at $1.83 million between Hilton Hotels Corp. and 3,058 people who were hotel guests between June 14 and July 23, 2002. Under the terms of the settlement, Hilton will pay either $150 in travel coupons or $50 in cash for each night of an eligible guest's stay. If the claims don't exceed $900,000, Hilton will give the remaining travel coupons to the American Red Cross. Kalia Tower had been open for less than a year when mold was found in some of the rooms, the apparent result of faults in the air-conditioning system.

The 315-room tower was closed for nearly 14 months and reopened in September 2003. Hilton, which said the cost of repairs and lost room revenue amounted to $55 million, has sued the architects and contractors who worked on the project. The settlement of the class action suit by the guest does not include attorneys' fees, which are to be decided by a judge after a hearing in July.

Student Sues Fraternity Over Injuries From Hazing

A University of Pennsylvania student has sued the Alpha Phi Alpha fraternity and two of its members over a hazing incident six months ago. The student says he was beaten and branded. Martyn Griffen, who is the 21 year old son of an Arkansas appeals court judge, claims in a federal lawsuit that a fraternity member repeatedly punched his thighs, damaging them to the point where he can no longer participate in long-distance running, the sport he competed in during high school. Another fraternity member carried out a "de-facto branding" by continuously snapping a rubber band on Griffen's upper arm, leaving a scar, according to the lawsuit.

The October 12th hazing was part of a group punishment meted out after
Alpha Phi Alpha members said one of the pledges had divulged fraternity secrets to someone outside the organization, according to the lawsuit. The University suspended the fraternity until July 2008, after a university investigation found the chapter had violated the school's anti-hazing regulations. Griffen's civil suit, filed in U.S. District Court in Philadelphia, names as defendants the Baltimore-based national Alpha Phi Alpha organization and two members. The complaint, which alleges assault, battery, negligence, and intentional infliction of emotional distress, seeks damages.

The National Pan-Hellenic Council, an umbrella organization for the country's nine historically black fraternities and sororities - including Alpha Phi Alpha - banned pledging in 1990 because of hazing concerns and reiterated that position in recent years. Would-be members are supposed to be inducted through a revised membership development and intake process in each organization, according to the policy. Griffen's lawsuit contends that Alpha Phi Alpha's national organization knows about so-called "underground" pledging but has done nothing to stop it. It should be noted that Alpha Phi Alpha chapters have been accused of hazing at other schools. Eight men were indicted on felony assault charges in Dallas in January 2004 after one pledge was left in a coma after he was forced to consume large amounts of water. Seven members of the fraternity at Lincoln University in Oxford, Pennsylvania, were suspended in March 1999 after hazing resulted in a sophomore being hospitalized with internal injuries. Frankly, I can see no need for hazing by fraternities or sororities and believe all colleges should ban such activities.

Source: Associated Press

XIV. WORKPLACE HAZARDS

LAWSUITS FILED IN CRANE DEATH AT ALABAMA STATE DOCKS

A family member of an electrician who was killed when a ship hit a crane at the Alabama state docks is suing the company that chartered the ship and two of its officers. The lawsuit contends that the ship's captain ignored "repeated warnings" that the ship should not leave port without assistance from tugboats. The 46-year-old was killed when the 534-foot-long ship, ZIM Mexico III, began turning in the river, its bow struck the state docks' largest container crane, and the crane collapsed. The suit was filed in Mobile County Circuit Court on behalf of the widow and a teenage daughter and names as defendants ZIM-American Israeli Shipping Co., which chartered the ship; the ship's captain; and the bar pilot, who was on board the ship and was said to be involved in its operation.

A federal grand jury indicted the captain, a native of Germany who now lives in Ireland, in late April on charges of misconduct or neglect by a ship officer. The civil suit contends that the captain "disregarded, ignored and/or failed to heed the repeated warnings from the ship's engine room regarding the safety and maneuverability of the ship."

A previous suit had been filed by the Alabama State Port Authority asking for $12 million in damages.

Source: Associated Press

UTILITY PAYS $8 MILLION IN FATAL GAS EXPLOSION

Puget Sound Energy, a utility company located in Bellevue, Washington, has paid more than $8 million to the family of a lady who died after a natural gas explosion turned her home into a virtual fireball. The victim, who was 68 years old at the time, was badly burned in the 2004 explosion and died from her injuries a few days after the incident. A lawsuit was filed in a Washington state court by the victim's three children and a settlement was subsequently reached. State investigators had concluded that prolonged corrosion in a gas line caused the leak and that an electrical device designed to repel corrosion had been wired backward.

Source: Seattle Post-Intelligencer

FAMILY MEMBERS PROTECTED IN ASBESTOS LITIGATION

According to a recent ruling by New Jersey's Supreme Court, a retired steamfitter whose asbestos-contaminated work clothing allegedly led to the death of his wife can sue ExxonMobil the owner of the refinery where he was exposed to asbestos-covered pipes. ExxonMobil should have known that Eleanor Olivo, who washed the work clothes, was in danger, the court said. Anthony Olivo worked as a steamfitter and welder from 1947 until he retired in 1984. The Woodbury resident worked for several contractors at various sites in New Jersey, among them Exxon Mobil's refinery in Paulsboro. At the refinery, Olivo worked around asbestos-laden pipe coverings and gaskets. The Irving, Texas-based company argued that it should not be held responsible for Eleanor Olivo's death because she had never been on company property and her husband was not an ExxonMobil employee. In its opinion, which upheld an appellate panel's decision, the court wrote:

"ExxonMobil owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos borne home on contaminated clothing."

Mrs. Olivo died in 2001 of a rare form of cancer associated with prolonged exposure to asbestos. Her husband, Anthony, worked as a steamfitter and welder from 1947 until he retired in 1984. Independent contractors hired him at various sites in New Jersey, among them Mobil's refinery in Paulsboro. Valero Energy Corp. took over the refinery in 1998, and Exxon and Mobil merged in 1999. According to the court, Exxon had been aware since 1937 that exposure to asbestos dust or raw asbestos was associated with disease. Exxon claimed that it didn't owe anything to Eleanor Olivo because she had not been on its premises and because Anthony Olivo had not directly worked for it. The decision means a lower court can now take up Anthony Olivo's wrongful-death lawsuit again.

This was the first time a high state
appellate court has ruled that plant owners have a duty to protect a worker's household from foreseeable harm. Industrial-plant owners have known for years that toxic substances can cause harm if brought home with workers. This case is most significant and now sets a precedent for other state courts to follow. In the case, Anthony Olivo sued 32 defendants, including five owners of properties where he worked. All but ExxonMobil have settled with him, for undisclosed amounts.

Source: Associated Press

$25 MILLION SETTLEMENT FOR DISABLED WORKER

A New York man who lost an arm and both legs when 200 missile nitrogen tank ruptured in 1998 has settled his claim. The 50-year-old truck driver will receive $25 million in settlement. Michael Ottaviano, who drove for Praxair, a supplier of industrial gases, agreed to the settlement with the liability insurance carriers for five worldwide businesses. The settlement, which was court-approved, will provide the disabled man and his heirs a total of about $30 million. A small portion of the settlement was structured to provide an additional $5 million at a later date.

Mr. Ottaviano was delivering liquid nitrogen to a Genex Cooperative facility near Ithaca, New York, when a tank ruptured, inflicting severe burns. The man, unattended to for hours after the accident, lost his right hand and wrist and had both legs amputated below the knee. He was hospitalized for months, has undergone numerous operations and will require care and therapy for life. The defendants in the case were Praxair, Genex Cooperative Inc. of Shawano, Wisconsin, and 21st Century Genetics (a subsidiary of Genex), and Minnesota Valley Engineering, a producer of cryogenic tanks.

Source: Associated Press

EMPLOYERS CITED BY OSHA FOR HIGH WORKER INJURY RATES

Approximately 14,000 employers have been notified that injury and illness rates at their worksites are higher than average and that assistance is available to help them fix safety and health hazards. In a letter last month to those employers, the federal Occupational Safety and Health Administration (OSHA) explained that the notification was a proactive step to encourage employers to take steps now to reduce those rates and improve the safety and health environment in their workplaces. Discussing the magnitude of the problem, OSHA Administrator Edwin G. Foulke, Jr. observed:

This identification process is meant to raise awareness that injuries and illnesses are high at these facilities. Injuries and illnesses are costly to employers in both personal and financial terms. Our goal is to identify work-places where injury and illness rates are high, and to offer assistance to employers so they can address the hazards and reduce occupational injuries and illnesses.

Establishments with the nation's high workplace injury and illness rates were identified by OSHA through employer-reported data from a 2005 survey, consisting of data from calendar year 2004, of 80,000 worksites. The workplaces identified had 6.0 or more injuries or illnesses resulting in days away from work, restricted work activity, or job transfer for every 100 full-time workers. The national average during 2004 was 2.5 such instances for every 100 workers. Employers receiving the letters were also provided copies of their injury and illness data, along with a list of the most frequently violated OSHA standards for their specific industry. The letter to each employer also offered the agency's assistance in helping turn the numbers around. Some of the things available include, among other things, the use of free safety and health consultation services provided by OSHA through the states, state workers' compensation agencies, insurance carriers, or outside safety and health consultants.

The 14,000 sites are listed alphabetically, by state, on OSHA's website at: http://www.osha.gov/as/opa/foia/hot_12.html. The list does not designate those earmarked for any future inspections. I understand that an announcement of targeted inspections will be made later this year. Also, the sites listed are establishments in states covered by federal OSHA. The list does not include employers in the 21 states, and Puerto Rico, that operate OSHA-approved state plans covering the private sector. OSHA's data collection initiative is conducted each year to provide the agency with a clearer picture of those establishments with higher-than-average injury and illness rates.

Source: Insurance Journal

JURY VERDICT FOR WORKERS IN ASBESTOS LAWSUIT

Three machinists suffering with asbestosis, which we all know is a
potentially lethal disease caused by asbestos exposure, were awarded $16.4 million in a lawsuit against the Long Island Rail Road for flagrant workplace safety violations. The former workers charged that the railroad exposed them to dangerous substances in awful conditions without any warning or protection. Actually, this was the second trial of the case. The railroad appealed a 1999 jury award, which had resulted in an award of $800,000 to the three men. The railroad was awarded a new trial by the appellate court. The second trial found once again in favor of the railroad workers, but this time awarded a much larger amount.

The three men had breathed air full of asbestos fibers and other dust since the 1970s in the railroad's former repair shop in New York and its current Maintenance Complex in Jamaica. It was proved at trial that the brake repair shop was filthy, with only a window for ventilation. Diesel trucks idled outside, sending fumes into the shop. Steam from vats of lye and other solvents used to clean train parts also filled the room. The machine used a steam gun to blow dirt off large parts and wire wheels to grind and buff gaskets, which they didn't know contained asbestos. It was significant that workers were given no safety gear other than protective eyeglasses. This is typical of how the asbestos problem was handled by companies that showed no concern for their workers.

Source: New York Post

**Owens Corning Settles Asbestos Claims**

A settlement has been reached by Owens Corning, the world's largest maker of insulation products, in asbestos cases. Under the agreement, the company will pay $5.2 billion to asbestos victims and $2.5 billion to creditors. If approved by a U.S. bankruptcy judge, the settlement will allow the company to get out of bankruptcy this year. The payments to the victims - if the settlement is approved - would resolve more than $10 billion in asbestos-related claims.

The agreement requires that Owens Corning pay $4.29 billion in cash into an asbestos victims' trust plus 28.6 million shares in the company once it emerges from bankruptcy. Toledo, Ohio-based Owens Corning is one of more than 70 U.S. public companies that have sought bankruptcy protection since the early 1980s to deal with asbestos suits. As we all know now, asbestos, a heat-resistant material used in insulation, auto parts, and construction products, causes respiratory illness. Prolonged exposure to the fibrous mineral has been linked to mesothelioma, a rare form of cancer. It should be noted that the settlement is structured so that, if Congress passes legislation to bail out former asbestos makers from liability, Owens Corning may not have to make all of the payments.

**A Further Asbestos Update**

The head of the Congressional Budget Office told lawmakers last fall that the total costs of compensating asbestos victims could reach $150 billion. Several key U.S. Senators are pushing for the creation of a fund to pay asbestos claimants and free companies from future liability on such claims. Along with Owens Corning, companies such as W.R. Grace & Co., Federal Mogul Corp., USG Corp., and Armstrong World Industries Inc. filed for Chapter 11 protection in bankruptcy court in Delaware since 2000 to set up plans to wipe out their asbestos liabilities. USG, the No. 1 maker of gypsum wallboard, agreed on January 30th to pay as much as $3.95 billion to settle asbestos liability claims and emerge from over 4 years of bankruptcy.

Before USG and Owens Corning settled, the biggest payment to asbestos victims was the $3.15 billion paid by Johns-Manville in 1987. The Rand Corp. published a report on the asbestos issue in 2005. It is an appropriate time to remember that countless lives were lost or destroyed as a result of the needless use of asbestos-containing products. The welfare of victims must be protected by both Congress and the courts.

**The BP Refinery Explosion Is Now The Subject Of A Criminal Probe**

We have written about the BP Texas City refinery explosion in previous issues. Now a federal grand jury has been empaneled to investigate possible criminal wrongdoing in connection with the incident that caused the deaths of 15 workers last year, according to sealed motions filed by federal prosecutors in county, state, and federal courts this week. It is not clear whether the grand jury has begun taking testimony or hearing evidence in the case. Department of Justice officials can't discuss investigations. And the motions do not address the status of the grand jury's investigation. But federal investigators and prosecutors appear to be ramping up their probe. Federal investigators and perhaps some government lawyers have talked to some high level representatives of British Petroleum.

The Justice Department began its investigation after the Occupational Safety and Health Administration in September levied a record $21.3 million fine against BP and charged the company with more than 300 willful violations, the most serious kind. Local FBI agents and investigators with the Environmental Protection Agency's environmental crimes division are leading the federal probe. Many of the violations found by OSHA centered on the lack of maintenance and routine safety guidelines, as well as numerous instances of broken equipment. In announcing the violations, OSHA's regional director said it appeared the company's management turned a blind eye to safety issues.

In its internal report released in November of last year, BP acknowledged serious management lapses that it believed led to the accident. And although the company originally fought to block their release, BP also made public in recent months two scathing internal reports regarding safety at the refinery. The lawyers for the federal government have requested "reasonable limitations" on discovery in civil cases until the criminal investigation is complete. I hope that won't happen, because the work-up of the civil cases is equally important. Of course, persons
who have criminal exposure can’t be made to testify against their will so long as the criminal cases are active.

Source: Houston Chronicle

**FATAL DISEASE FROM FOOD FLAVORING RAISES RED FLAG**

We have written in several issues on litigation involving food flavoring. A potentially fatal lung disease linked to chemicals used in food flavorings poses a growing health risk, according to government scientists who are questioning the food industry’s willingness to protect its workers. Bronchiolitis obliterans first emerged as a threat within the food industry in 2000, when the National Institute of Occupational Safety and Health (OSHA) was called to a southeast Missouri popcorn plant to investigate lung illnesses among workers. Investigators subsequently found the disease among popcorn workers throughout the Midwest. They linked it to diacetyl, a substance that is found naturally in many foods, but which also is artificially produced and widely used as a less expensive way to enhance flavor or impart the taste of butter. NIOSH has linked exposure to diacetyl and butter flavoring to lung disease that sickened nearly 200 workers at popcorn plants and killed at least three. Dr. Kathleen Kreiss, chief of the field studies branch of NIOSH’s division of respiratory disease studies, observed:

*Now we've got cases of bronchiolitis obliterans among workers in other plants that use flavorings and in plants that make the flavorings.*

Bronchiolitis obliterans causes inflammation and obstruction of the small airways in the lung by rapid thickening or scarring. The irreversible condition is progressive and often fatal without a lung transplant. Recent cases that NIOSH scientists have learned about include:

- a man who worked at a small Baltimore-area flavoring company;
- a man who worked at a North Carolina potato chip plant;
- an employee at a Chicago candy maker; and
- workers at a Cincinnati flavoring plant.

We have learned by experience that on all too many occasions that many in industry won’t voluntarily take the steps necessary to protect its workers. It takes strong regulation by the government, which includes inspections of plants, to protect workers. Dr. Kreiss says:

*We need to get into some of these plants because we don’t have confidence that the flavoring industry has taken steps to actually prevent this disease, and we need to determine how widespread the exposure may be.*

But while scientists at NIOSH and the Occupational Safety and Health Administration want to intensify investigations, the agency bosses don’t plan to act because they claim enough is being done now. It’s obvious that even knowing that workers may be at risk of exposure to vapors of artificial flavorings, the government agencies won’t act. Dr. David Michaels, an epidemiologist at George Washington University’s School of Public Health, who examined OSHA’s handling of the popcorn workers’ sickness, called its inaction “criminal.”

Interestingly, the FDA has allowed flavoring producers and sellers to decide for themselves which chemicals are safe. The difficulty of assessing workplace illness is further complicated by employees who fear reprisal for complaining about hazards and by medical doctors who lack the training to recognize bronchiolitis obliterans and other occupational threats. About 70 U.S. companies are involved in the making and sales of flavorings, according to the Flavor and Extract Manufacturing Association, the largest trade group for the $3 billion-a-year industry. About 3,000 employees are currently engaged in the actual production of flavorings. But in the much larger food processing industry, however, tens of thousands of workers are estimated to work with flavorings. More than 150 former popcorn plant workers have sued companies supplying or making the butter flavoring. So far, more than $100 million has been awarded in jury verdicts or paid in settlements. At least 30 suits are still pending. I have to wonder why the government agencies refuse to wake up and get involved in protecting the workers.

The latest suit, filed in February, charges that the Flavor and Extract Manufacturing Association conspired with the other defendants to fraudulently conceal information about the health risks of butter flavoring. In 1985, consultants for the industry’s trade association produced a data sheet indicating that breathing diacetyl is harmful to the respiratory tract and is “capable of producing systemic toxicity.”

Source: Associated Press

**XV. TRANSPORTATION**

**NHTSA DATA INDICATE RISE IN HIGHWAY DEATH RATE**

The highway death rate increased in 2005 for the first time in about 20 years, according to recently released federal statistics. Despite increased usage of safety belts and numerous campaigns against drunken driving, 43,200 people died in motor vehicle crashes last year. This is up from 42,636 in 2004, according to the National Highway Traffic Safety Administration estimates. The death rate per 100 million vehicle miles traveled was up from 1.44 to 1.46. The report was not complete and the final results will be made public later this year.

Source: USA Today

**ALABAMA MARINE POLICE ENFORCE BOATING SAFETY LAWS**

Alabama has been named one of the worst states in the country for boating fatalities and that’s not very good news. Florida tops the list, followed by Louisiana, California, Tennessee, Texas, and Michigan. Given that Alabama ranks eighth for boating deaths, it’s quite...
obvious that we have a most serious problem. It’s important for persons who operate boats on lakes and rivers to know what is required relating to safety. In Alabama the law requires every boat to have:

• enough life vests for every passenger;
• navigation lights that can be seen from every direction;
• a fire extinguisher; and
• a “kill switch” attached to the driver.

As we move into the summer months, with increased boating, it’s critically important to know what the safety rules and requirements are. It’s also equally important that we all obey these rules and regulations. The Alabama Marine Police do a good job of enforcing the law. The public should welcome the random safety checks conducted by these officers who patrol state waters. We should all do our part and make boating as safe as possible.

LAW SUIT FILED IN ETHAN ALLEN BOATING ACCIDENT

A wrongful death lawsuit has been filed in federal court by the family of a 67-year-old lady who was killed when the Ethan Allen capsized on Lake George in New York. The lady was among the 20 senior citizens from Michigan and Ohio who were killed when the boat capsized during a “leaf-peeping tour” in October of last year. Named as defendants in the lawsuit are Shoreline Cruise Inc., the owner of the tour boat; the vessel’s captain; Shoreline Tours Inc., which arranged the tour; Scarano Boat Building Inc., which modified the Ethan Allen; and the Lake George Steamboat Company Inc. Other lawsuits have been filed in Michigan and New York on behalf of victims and survivors of the accident. As you may recall from a previous issue, the Ethan Allen was carrying 47 elderly passengers when it capsized.

XVI. NURSING HOME UPDATE

NURSING HOMES ARE NOT PENALIZED FOR ERRORS

On many occasions nursing homes that jeopardize patients’ safety or have long-standing problems are not penalized by Medicare, according to a government watchdog. Medicare contracts should have been subject to termination at 55 nursing homes between 2000 and 2002, according to the Inspector General for the Health and Human Services Department. But, the Centers for Medicare and Medicaid Services failed to end the contracts, as required by law, in 30 cases. When investigators looked at follow-up surveys of the 30 nursing homes, they found that all of the homes had later problems that led states to refer the facilities for federal action.

In addition to ending a home’s Medicare contract, the government is required to deny payment for new admissions when nursing homes take more than three months to come into “substantial compliance” with federal rules. Of 706 cases requiring denial of payment, that step was not taken 28% of the time, the report said. The findings evidenced by this report reveal a lack of enforcement against bad nursing homes and that simply can’t be justified. Residents in immediate jeopardy at a nursing home must be in a safer facility. These people are the most vulnerable to abuse and neglect. There can be no excuse for the federal government failing to terminate a bad nursing home. Otherwise, if a deficient nursing home is allowed to remain in the program, there is no other incentive for it to clean up its act.

NURSING HOMES’ OWNER SETTLES 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. USA Healthcare Inc. (USAH), which is located in Cullman, Alabama, 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. The health care provider’s action allegedly caused Medicare to pay higher reimbursement amounts. Medicare regulations require that a provider must alert the Medicare program if a provider and a vendor have such a relationship. The owners in this case contended the omitted disclosures were not intentional, were prepared by a third party, and the reimbursement requests fell under an exception to the Medicare related party principles. But, 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.

JURY VERDICT AGAINST BEVERLY

A Kentucky state court jury has awarded $20 million to the estate of a man who died at a nursing home after nurses had ignored his pleas for help. It was alleged that the resident suffered abdominal pains and that nurses at Beverly Health and Rehabilitation of Frankfort, Kentucky, ignored his repeated calls for help. The lawsuit also alleged that the Beverly facility was understaffed because of companywide cost-cutting. The resident had an impacted bowel and later died of a heart attack.

JURY AWARDS $18 MILLION IN CASE OF NURSING HOME ABUSE

A jury in Idaho has awarded $18 million in punitive damages to the family of an 86-year-old man who sued the nursing home where he died in 1995, claiming he had been abused and overly medicated. The death of the resident in February 1995, came nearly a year after he was placed at Valley Vista Care Center in St. Maries. The staff committed more than 700 violations of federal nursing home regulations. The jury found that they eventually caused the resident’s death with repeated dosages of Haldol, a powerful anti-psychotic medication they used to control him after he tried to leave Valley Vista.

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Interestingly, Valley Vista Care Corporation is a non-profit organization. The facility involved in this lawsuit is located in the scenic St. Mary's River Valley.

Source: Associated Press

**GEORGIA JURY AWARDS $1.1 MILLION IN WRONGFUL DEATH CASE**

A state court jury in Bibb County, Georgia, awarded more than $1.1 million last month in a wrongful death lawsuit against a Macon, Georgia, nursing home. It was alleged that the facility provided poor care to a stroke victim and caused his death. The 62-year-old resident died in 2002 from an infection in his leg. It was proved that a series of lapses in care at North Macon Health Care, including several preventable falls, led to the resident's death in September 2002. Testimony during the trial showed that employees of the health-care facility actually complained that the facility was understaffed. UHS-Pruitt Corp. is the parent company of North Macon Health Care.

The resident broke his leg in one fall in 2002 and the injury wasn't diagnosed for a week. Another fall in June 2002 opened the wound from the surgery, and a lack of follow-up care led to an infection from contact with feces and urine. The resident was removed from the facility after the infection. Complications from that infection led to his death. The resident was taken to North Macon Health Care in August 2001 based on the recommendation of doctors. The man, who couldn't speak because of a stroke in 1998, previously had been cared for at home by professionals and family members.

Source: Macon Telegraph

**VERDICT AGAINST NURSING HOME IN DEATH CASE**

A St. Louis, Missouri jury awarded $275,000 to the daughter of a University City nursing home resident who died during a heat wave in April 2001. The 70-year-old resident was one of four women who died within two days after the temperature climbed above 95 degrees inside the Leland Health Care Center. After a four-week trial, the jury ruled against the nursing home and its operator, EMI Enterprises, in the wrongful-death lawsuit. The jury ordered Leland to pay 60% of the damages, or $165,000. The jury said EMI should pay the remaining 40%, which amounts to $110,000.

The lawsuit accused Leland of failing to install, maintain, repair, and turn on an air conditioning system. The nursing home was also accused of failing to provide Burns with adequate medical treatment. The air conditioning inside the nursing home wasn't working at the time of the woman's deaths. Firefighters recorded temperatures inside the building of at least 95 degrees. The St. Louis County Medical Examiner had determined that all four women died of overheating. But since the doctor never conducted an autopsy of the resident in the case that was tried, the judge barred her from testifying. It was contended that Leland Health Care improperly fed and cared for Burns and falsified records about her care. Relatives of the other three women who died reached confidential settlements with the nursing home.

Source: St. Louis Post-Dispatch

**XVII. HEALTHCARE ISSUES**

**MARKETING FORCES TAKE OVER IN THE DRUG INDUSTRY**

It appears that over the years the drug industry has gradually abandoned science for salesmanship. We have now seen what's become a total take-over by the master salesmen at many of the drug companies. In recent years, companies such as Merck & Co. have actually been run by high-powered salesmen, rather than by the scientists who formed the company and ran it for years. The main thrust of the new bosses has been to develop drugs to ease pain and to make folks look better and to make money. The drug companies have used massive direct-to-consumer advertising campaigns to promote sales of these drugs.

It's pretty obvious that the triumph of salesmanship over science in the drug industry is not good for the consuming public. The industry spends a fortune to create and sell remedies aimed at illnesses and other maladies that aren't considered serious and certainly not life-threatening. In the process, the companies often ignore the urgent need for the life-saving drugs. It's quicker and more profitable for the companies to go for the pain-killers. This is true even as research pipelines run dry, patents on old drugs expire, and critical areas of medicine go underserved. The truth is that the drug makers are selling drugs like other companies sell toothpaste, shampoo, or deodorant. On many occasions side effects from an over-hyped and over-prescribed medicine are fatal. That is quite serious and shouldn't be ignored any longer by the Food and Drug Administration (FDA). The methods used by the drug companies to market their drugs is described in the article by Dr. Elliott that I referenced earlier.

A total of 87 major drugs with $31 billion in combined annual sales have lost patent protection since 2002, but new drugs aren't being developed to replace them. As you probably know, a total of 17 drugs have been recalled in the past decade. Wyeth's withdrawal of diet drug Redux in 1997 and Merck's withdrawal of Vioxx in 2004 are prime examples. The focus on marketing by the drug industry is undeniable. The companies spend tremendous sums on advertising and other forms of marketing. The top ten drug firms invest $42 billion a year on research, which is 14% of sales, yet they put more than twice that much into marketing and administration. That's not a good distribution of their money, in my opinion. The consuming public would be much better off from a health perspective if at least the following things happened:

- a return to scientists running the drug companies and allowing those experts to make key decisions on drugs;
- a ban by the FDA on direct-to-consumer advertising by the drug companies;
- A reining in of drug company sales representatives who have lots to do.

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with what drugs are being prescribed by doctors; and

• Better control of how drug companies influence the medical community on drugs.

If you agree that something needs to be done, contact the U.S. Senators in your state, as well as your member of the House of Representatives, and ask them to help with legislation designed to force the FDA to act. Before you make that decision, I encourage you to read Dr. Elliott's article referred to in the Mass Torts section of this issue.

Source: Forbes

DRUG SETTLEMENTS KEEP SOME GENERICS OFF THE MARKET

The consuming public should be able to buy generic drugs, and the drug companies should be making them available. Instead, brand-name drug makers are restricting the introduction of cheaper generic drugs. Pharmaceutical companies are striking more deals with generic rivals, using controversial settlements that entail payments to generic rivals who promise to restrict selling competing generic drugs. FTC Commissioner Jon Leibowitz told a business group in Philadelphia that they are seeing far more settlements today that potentially raise competition concerns. The Commissioner's comments came on the same day the Federal Trade Commission (FTC) released a report on patent settlements between drug companies.

The FTC has filed lawsuits in recent years challenging patent settlement agreements between major drug makers and their generic rivals. In some cases, the FTC contends the settlements stifle competition because drug makers are paying generics to stay out of the market. As you know, generic drugs are typically cheaper for consumers to buy than brand-name drugs. Under federal law, drug makers are allowed to seek U.S. Food and Drug Administration (FDA) approval for generic versions of brand-name drugs before a drug's patent expires. They must certify that the patent is invalid or will not be infringed by the new generic version.

But, in one key decision last year, an appeals court in Atlanta overturned an FTC ruling that said Schering-Plough Corp. had illegally kept cheaper versions of its blood pressure drug K-Dur off the market through patent settlements with generic competitors.

Months later, another federal appeals court upheld a lower court decision throwing out a similar case involving AstraZeneca Plc's cancer drug Tamoxifen. The FTC has petitioned the U.S. Supreme Court to review the Schering-Plough decision. At press time, the High Court had not yet decided whether it will review the case. Congress passed a law in 2004 requiring drug companies to notify the FTC about such settlements in advance. This has resulted in the FTC monitoring drug patent settlements closely. In the report issued last month, the FTC found that in fiscal 2005, three of 16 drug patent settlements included payments to the manufacturer of a generic drug and restrictions on when the generic would become available. It was the first time since 1999 that drug companies entered in such agreements, according to the FTC. During the past six months, according to Commissioner Leibowitz, at least seven of the 10 settlements reported to the agency included those kinds of provisions. Recent settlements of the sort mentioned above involved:

• Plavix, a drug-thinner blood manufactured by Bristol-Myers Squibb and Sanofi-Aventis, and

• Provigil, a sleep disorder drug made by Cephalon Inc.

But, unlike most other drug patent settlements, the Plavix agreement will require the approval of the FTC because of a consent agreement Bristol-Myers signed to resolve a previous antitrust case with the agency. The FTC and the FDA should join forces and work to make sure settlements in patent cases are not keeping lower cost generics off the market.

Source: Reuters News Service

SELLING GENERIC DRUGS BY MAIL IS BIG BUSINESS

The pharmaceutical industry brings in $250 billion business each year in this country. It's big business in every sense of the word. Many are pushing for the sale of generic drugs in hopes of getting cheaper prices. There is more to the story relating to the sale of generic drugs, however, that needs to be told. It appears that some companies are making a financial killing at the expense of the public. Everybody knows by now that the drug manufacturers are making record profits. Most Americans have never heard of a Pharmacy Benefit Manager (PBM) and that's really not too surprising. PBMs, which are a relatively new creation, are also doing very well financially. So, let's take a look at how PBMs operate and how much income they rake in for their work. In many industries, middlemen just barely get back since they operate generally on small margins. That's not the case for generic drugs. The following examples should shock most folks:

Medco Health Solutions Inc. paid $90 in 2001 for the pills to fill 114 prescriptions for a generic copy of Valium. Medco sent its client, the StateTeachers Retirement System of Ohio, a bill of $1,028 for the drugs, which also reflected its dispensing costs. In addition, Medco paid $766 for the pills to fill hundreds of prescriptions for the blood-pressure medicine atenolol. It billed the Ohio teachers $25,628. The retirement system filed suit in Ohio against this PBM. In another case it was revealed that Caremark Rx Inc., another middleman, charges the federal government and employees $96.88 for 90 pills of generic Prozac, according to a Caremark website. The same pills can be bought wholesale for less than $5.

For your information, Medco, Caremark, and Express Scripts Inc. are the big three PBMs. Employers that offer prescription-drug coverage to their employees are hiring PBMs to do the paperwork and keep costs down when an employee needs a prescription filled. More than 100 million Americans cur-
ently carry a card from one of the big
three, and use the cards at the phar-
my to show they're covered. PBMs
have become big-time players in the
sale of prescription drugs, and few
people even know they exist.

The mail-order sale of prescription
drugs - especially generics - has
become a big business. Generic drugs
are popular because they save money
by offering alternatives to expensive
brand-name drugs. But the PBMs have
figured out how to use mail order to
turn generics into a cash bonanza.
Buying in bulk, the PBMs typically pay
a few cents per pill, then turn around
and bill employers a quarter, 50 cents,
or even a dollar a pill. The profit margins
are huge.

Employers believe they are getting a
real bargain at the generic prices
because they're generally still much
lower than those of brand-name drugs.
Most of the time the employers don't
even know the spreads enjoyed by
the PBMs. It should be noted that collec-
tively, the big three PBMs recorded net
income of nearly $2 billion last year.
This made PBM executives extremely
rich. Sadly, all of this is happening at the
same time many employers are strug-
gling to provide health insurance for
their employees.

When you consider that the pharma-
ceutical business is a $250 billion indus-
try annually, you can see why the PBMs
were formed and how they saw a
tremendous opportunity to control the
market. A big part of the PBMs' strategy
is to sell employers on the mail-order
pharmacy concept. General Motors
Corp., International Business Machines
Corp., and Southwest Airlines currently
have "mandatory mail" programs. About
eight million beneficiaries served by
Medco, one of the big 3 PBMs, come
from employers with such rules. This is
up from two million in 2003, an increase
of over 6 million persons.

The PBMs should be put under strong
regulation by the federal government.
The states also can pass laws to require
PBMs to reveal where their profits come
from. Carefully worded laws could make
PBMs fiduciaries of their clients, just like
accountants or lawyers. That would limit
the PBMs' ability to grab lucrative
margins through pricing methods that
employers find hard to follow. The PBMs
have become very powerful and are
gaining tremendous political strength.
They will fight any attempts to regulate
this industry.

The first such law was passed in
Maine two years ago, requiring PBMs to
reveal where their profits come from.
The Maine law was recently upheld by a
federal appeals court. The Pharmaceutical
Care Management Association,
which represents PBMs, asked the U.S.
Supreme Court last month to review the
case. For your information, legislators in
about a dozen other states are working on
similar legislation. PBMs say their
services are part of health benefits that
are governed by federal law and that
states can't impose their own laws. They
also say that requiring them to disclose
proprietary information violates the
Fifth Amendment of the Constitution,
which bars the government from taking
private property except for public use
and with just compensation. I hope
that argument won't fly and the laws
that are passed will be enforced.

Source: Wall Street Journal

**XVIII. ENVIRONMENTAL CONCERNS**

**JUDGE OVERTURNS ENVIRONMENTAL PERMIT
FOR MINE DISCHARGE**

Montgomery County Circuit Judge
Truman Hobbs Jr. should be commended
for a recent ruling of his that has
drawn praise from environmental
groups. The ruling overturned a deci-
sion by the state environmental agency
to allow a mine waste discharge permit
to a Tuscaloosa company. Judge Hobbs
reversed a decision by the Alabama
Environmental Management Commis-
sion to uphold a National Pollutant
Discharge Elimination System permit
granted to Tuscaloosa Resources Inc. by
ADEM. An administrative law judge had
recommended that the Commission,
which oversees ADEM, overrule ADEM's
decision to issue the permit. Instead,
the Commission in February 2004
rejected the recommendation by a 4 to
1 vote.

Hurricane Creekkeeper, along with
Alabama Rivers Alliance, sued the Commission in 2004. The Commission had found that the north fork of Hurricane Creek in eastern Tuscaloosa County had already failed state water quality standards, which should have made it off-limits to further degradation by new sources of pollution. The Commission concluded there was no evidence that the quality of the water had been degraded, a finding Judge Hobbs said was “clearly erroneous.” The judge wrote in his ruling:

Not only is there ample evidence in the record that the impairment is due to iron, aluminum or turbidity but also this court could discern little to the contrary.

Waterkeeper Alliance is a New York-based umbrella group for 160 water protection organizations, including Friends of Hurricane Creek, one of the environmental groups that brought the suit. Robert Kennedy Jr., president of Waterkeeper Alliance, observed: “This is, for us, an encouraging thing because the courts are standing up and saying, 'Enforce the law against an agency.'” Kennedy, the son of the late U.S. Attorney General Robert Kennedy, said ADEM is known as a “poster child around the country basically because it’s become a spokesman for regulated industries.”

ADEM Director Trey Glenn, who disagrees with Kennedy’s assessment, says the agency is reviewing the ruling and considering its next step. I hope the next step will be in keeping with Judge Hobbs’ order. John Wathen, director of Hurricane Creekkeeper, Friends of Hurricane Creek’s investigative arm, said the ruling is a victory for advocates who accuse ADEM of being a rubber stamp. In any event, all who believe our environment should be protected should commend Judge Hobbs for his ruling.

**States Sue EPA On Carbon Dioxide Emissions**

Ten states, including New York and California, have sued the Environmental Protection Agency (EPA) for refusing to regulate carbon dioxide emissions from power plants. Attorney General Eliot Spitzer of New York, the lead plaintiff, said the agency’s refusal “continues a sad course of conduct on the part of the Bush Administration and reflects a disregard for science, statute and wise policy.” It is quite evident that the Bush Administration’s policy on global warming is pretty well dictated by the powerful oil industry. I hope this lawsuit will have a positive effect in this area of grave concern.

James R. Milkey, chief of the environmental protection division of the Massachusetts attorney general’s office, said this case is narrowly focused on what has become a central policy question about global warming: whether the EPA has the authority to regulate carbon dioxide, the principal contributor to global warming, as a pollutant? New York City, the District of Columbia, and three environmental groups also joined in the suit, along with Connecticut, Massachusetts, Maine, New Mexico, Oregon, Rhode Island, Vermont and Wisconsin.

The suit seeks to force the environmental agency to start regulating emissions of heat-trapping gases, like carbon dioxide, from power plants and to tighten regulations of conventional smog-forming pollutants. The basis for the argument is that the agency has not lived up to requirements in the Clean Air Act to ensure public health. With 135 new coal-powered plants on the drawing board nationwide, environmental groups see tougher emission controls as an urgent need before the building of plants that can last for half a century or more. The proposed plants would “blow a hole in the world’s effort to curb global warming,” said Daniel Becker, director of the global warming program at the Sierra Club, a party to the suit. He says:

A little over a third of U.S. global warming pollutants come from power plants, and the bulk of it from coal-fired power plants.

The Bush Administration claims that voluntary measures are the best way to curtail global warming, rather than requirements on industry to reduce emissions. The Administration’s decision not to classify carbon dioxide as a pollutant has complicated the desire of several states to regulate emissions from cars. Currently, California is in a legal battle with automakers over the state’s new law putting strict curbs on emissions from the tailpipes of cars and trucks. New York and other states are planning to enact similar standards and have also been sued by the auto industry. That industry has been supported in its efforts by the Bush Administration. Environmentalists and lawyers for the states argue that the Clean Air Act compels the federal government to regulate carbon dioxide.

Source: New York Times

**Alabama Power Company Settles Pollution Case**

Alabama Power Co. will significantly reduce emissions of two pollutants at its coal-fired Miller Steam plant in West Jefferson County under a settlement with federal agencies. The agreement follows a federal judge’s ruling last year that went against key arguments of the federal government in its clean-air case against four other coal-fired plants of Alabama Power. The U.S. Justice Department and Environmental Protection Agency believe that the Miller plant agreement will improve air quality in Alabama and downwind states as the utility cuts back emissions of sulfur dioxide and nitrogen oxides by 28,000 tons a year. The accord, according to the EPA, will provide a “dramatic and permanent reduction” in air pollution from the plant.

The federal government in 2001 claimed that Alabama Power had failed to finish construction of two units at the Miller plant within the time required for them to qualify as “existing” rather than “new” air pollution sources under the federal Clean Air Act. Alabama Power, in agreeing to the Miller settlement, will pay $100,000 and permanently “retire” or “waive” $4.9 million in sulfur dioxide credits that it might have used in a national program that allows buying and trading of pollution credits. The federal government described the agreement as a partial settlement, saying it will explore with Alabama Power a separate resolution of remaining claims involving the four other coal-fired plants - Barry in Mobile County, Gaston in Shelby County, Gorgas in Walker County and Greene in Greene County. But
Alabama Power officials contend that the federal judge’s ruling last year basically wiped out EPA claims concerning those four plants.

Source: Associated Press

**LAWSUIT FILED OVER OIL SPILL IN NEW YORK**

A suit that seeks to force ExxonMobil, BP and Chevron to face up to their legal responsibilities has been filed in a New York state court against the three companies. These companies are responsible for a massive oil spill in the Brooklyn-Queens area. Approximately twenty plaintiffs, including landlords and business owners, filed the suit in an effort to get it certified as a class action. If the suit is certified, as a class, the plaintiffs will ask for a medical monitoring fund to evaluate health concerns in the area.

This isn’t a small spill, as the plume is estimated to be as large as 30 million gallons. This is four times the size of the Exxon Valdez spill in Alaska in 1989. A lawsuit relating to this matter was filed in federal court by the environmental group RiverKeeper, in 2004. A second suit was filed in Brooklyn last fall. Interestingly, a consultant in that case is none other than Erin Brockovitch. The three oil companies involved, ExxonMobil, BP, and Chevron, are now under consent decrees from the state’s Department of Environmental Conservation to clean up the spill. The lawsuits came as a result of the companies’ stalling in complying with the ongoing government-directed cleanup that began in 1990. This will be an interesting matter to monitor.

Source: New York Daily News

**3M AGREES TO PAY EPA PENALTY**

The 3M Company has agreed to pay a $1.5 million dollar penalty to the Environmental Protection Agency for 244 alleged violations of the Toxic Substances Control Act (TSCA). This is believed to be the second-largest civil penalty assessed by EPA for violations of TSCA, surpassed only by the $16 million penalty assessed against DuPont for withholding human health risk information related to the same family of perfluorinated chemicals. Interestingly, the alleged violations are related to 3M’s use of various chemicals, including those used to make Scotchgard. The EPA didn’t say when or where the violations occurred, but the agency did accuse 3M of failing to tell the EPA about new chemicals and of late reporting of “substantial risk information.” The EPA says it takes violations of toxic substances laws seriously and is committed to enforcing those laws. This action was said to be a “reminder of the importance of timely industry reporting of substantial risk information to EPA.” I hope this means the EPA is really serious and takes its responsibilities on health and safety matters to heart.

XIX. THE CONSUMER CORNER

**NATIONAL SAFE KIDS CAMPAIGN BECOMES SAFE KIDS WORLDWIDE**

In my opinion, protecting children from harm is an obligation that is shared by parents, industry, government, and many others. Fortunately, there are groups whose sole mission is to work toward making safety for children a top priority. Some of you may already be familiar with one of these organizations, Safe Kids, which has been a real leader in the effort. The National SAFE KIDS Campaign is now Safe Kids Worldwide. This evolution reflects the union of the nearly two-decade-old Safe Kids grassroots network in the United States with the burgeoning international Safe Kids movement, each with the mission of preventing accidental injuries to children ages 14 and under. In addition to the new name, a new logo and brand identity were introduced. Following a two-year transition period, this will be shared by all Safe Kids member countries and local coalitions. Currently, there are 16 member countries and more than 450 local coalitions.

Accidental injuries are a leading killer of children across the globe. Each year more than one million children die, and many more are injured, by accidents that could have been prevented. Safe Kids Worldwide will continue to follow the proven injury prevention model, conducting public outreach and awareness campaigns, stimulating hands-on grassroots activity, creating safe environments, and working to make injury prevention a public policy priority. Safe Kids has already made significant progress in reducing the risk of accidental injury to children. In the United States, the national accidental injury death rate among children ages 14 and under has declined more than 40% since the inception of Safe Kids - and the visibility of unified global operations will enhance the organization’s efforts.

Martin R. Eichelberger, M.D., president and CEO of Safe Kids Worldwide, observed:

While preventable injuries are now the leading killer in most industrialized countries, they are also poised to overtake diseases among children in developing nations in the next two decades. There is an urgent need for a global organization that can compile research, develop community programs and share best practices. Each Safe Kids Worldwide member country will apply that knowledge in a culturally appropriate way at the grassroots level.

Launched in 1987 by Children’s National Medical Center and the founding sponsor, Johnson & Johnson, the National SAFE KIDS Campaign was the first and only national nonprofit organization dedicated solely to the prevention of accidental childhood injury. Safe Kids expanded outside this country in 1992 when Canada became its first international affiliate. Since then, 14 other members have joined, including Brazil, Austria, Korea, and China. The goal of Safe Kids Worldwide is to reduce the accidental childhood injury death rate by 25% in member countries by the year 2014. The union of the two organizations is the culmination of a strategic planning process initiated in 2002. For more information, you can visit the all-new Safe Kids website at www.safekids.org.
Swimming Pool Safety Alert

As we approach the summer months, children of all ages will be heading to the swimming pools in droves. Many of these pools will be in their back yards. Unfortunately, few of them have any concept of how dangerous swimming pools can actually be. I had intended to write this part of the report before learning of the bill in Congress being pushed by Secretary James Baker. That effort reinforced my belief that many adults and most children don't always recognize dangers relating to swimming pools and that's the government regulation has to be increased and made effective. Each year, about 250 children under 5 years of age drown in swimming pools. As mentioned in the Capitol Comments Section of this issue, where we discussed the death of Secretary Baker's beautiful granddaughter, the suction from drains in swimming pools and spas, under certain conditions, can entrap swimmers underwater. To help protect your family and other children who may be under your care, the following are some recommended steps you can take.

Use Layers of Protection

To prevent swimming pool drownings, layers of protection are essential. Place barriers completely around the pool, closely supervise young children, and be prepared in case of an emergency. In addition:

- If a child is missing, always look first in the pool. Remember seconds count!
- Knowing how to swim doesn't make a child drown-proof. Never use flotation devices as a substitute for supervision.
- Keep rescue equipment and a phone next to the pool.
- Learn cardiopulmonary resuscitation (CPR) and make sure all adults in your family do the same.
- Install physical barriers around the pool to limit access. In connection with the barrier make sure:
  - That fences and walls are at least 4-feet high and are installed completely around the pool; and
  - Make gates self-closing and self-latching and make sure that the latch is out of reach of small children.
- If your house forms one side of the barrier for the pool, doors leading from the house to the pool should be protected with alarms that sound when the doors are unexpectedly opened. Or, use a power safety cover; a motor-powered barrier placed over the water area, to prevent access by young children.
- For above-ground pools, steps and ladders to the pool should be secured or removed when the pool is not in use.

Pool and Spa Entrapment Dangers

- Never use a pool or spa with a missing or broken drain cover. Be sure a newer, safer drain cover is in place. The new drain covers are usually dome-shaped - instead of the old flat drain covers.
- Consider installing a Safety Vacuum Release System (SVRS), a device that will automatically shut off a pump if a blockage is detected.
- Have a professional regularly inspect your pool or spa for entrapment or entanglement hazards.
- Plainly mark the location of the electrical cut-off switch for the pool or spa pump.
- If someone is entrapped against a drain, cut off the pump immediately. Instead of trying to pull the person away from the powerful suction, pry a hand between the drain and the person's body to break the seal. If you follow each of these rules, it will assure that the risk of drowning by children in your family, and others who use your pool, is lessened dramatically. You really can't afford to ignore safety when it comes to swimming pools and children.

Source: CPSC

Inflatable Pools Pose Danger

As a follow-up to the above, we have now learned that the number of children drowning in inflatable pools has increased significantly. As you may know these pools have gotten larger and accordingly more dangerous. Safety officials warn that inflatable pools pose the same dangers as other types. Because inflatable pools have become larger, owners do not empty them every night, increasing the risk, according to the Consumer Product Safety Commission. The pools — ranging in size from small wading pools to 4-foot-deep, 18-foot-wide above-ground pools — have grown much more popular over the past several years, the CPSC says.

Seventeen children drowned in inflatable pools in 2005, according to CPSC. This is up from nine in 2004 and 10 in 2003. In all types of pools, about 280 children under age 5 die each year, CPSC said. Interestingly, the Association of Pool and Spa Professionals, a trade group for the industry, does not track inflatable pool sales. The association recommends layers of protection and responsible adult supervision for all pools. It is significant that safety standards for the larger inflatable pools are the same as for other above-ground pools. One of the organization's committees is reportedly looking at establishing standards specifically designed for larger inflatable pools. The CPSC recommends barriers such as fences to surround inflatable pools. The agency also recommends door alarms if a house forms one of this barrier's walls. Constant supervision when children are in these pools is extremely important. However, the industry also has the duty to do its part. Pool owners who want more information can call the association for safety information at 800-323-3996. You can also contact the CPSC at 800-638-2772.

Sunscreen Lawsuit Filed in California

A recently filed lawsuit claims the nation's major sunscreen makers are misrepresenting the truth about the effectiveness of their products in blocking harmful sun rays and preventing such dangerous skin conditions as

BeasleyAllen.com
melanoma. The suit, filed in California, seeks class action status. The makers of Coppertone, Banana Boat, Hawaiian Tropic, Bull Frog and Neutrogena products are named as defendants in the suit. The lawsuit seeks to return to consumers the money they spent on the lotions and sprays and asks the court to force the manufacturers to change their labeling and advertising. It is claimed that the manufacturers misled people into thinking they can spend countless hours out in the sun without doing damage to their skin.

The lawsuit alleges that while the products may prevent sunburn, they are much less effective in protecting people against premature aging of the skin and severe types of skin cancer, namely melanoma. It is contended that's because the products work against some ultraviolet rays - particularly those that cause a sunburn - but not those that can hurt the DNA in skin cells and possibly lead to cancer. The Food and Drug Administration drafted new rules in the 1990s for sunscreen makers to follow when advertising and labeling their products, but stopped short of making them effective. This is a most interesting case and one that will be watched closely by consumer groups. This most important aspect - if the case does in fact have merit - will be the warnings feature.

**Two Examples Of Why Theft Of Lap Top Computers Are Very Bad**

Identity theft has become a most serious problem for most all American citizens. I really don't believe that most folks realize how bad it really is. There have been two recent incidents which indicate how criminals can obtain your personal information and how vulnerable folks really are to identity theft. These two thefts involved lap top computers and happened while they were in the possession of two employees, one with a large company and the other with a government agency.

**Aetna**

Health insurer Aetna Inc. reported that a laptop computer containing personal information on about 38,000 of its members was stolen from an employee's car last month. The stolen data include names, addresses and Social Security numbers of the members. Aetna, according to a statement, says there was no indication that data on the laptop had been compromised. However, this theft puts 38,000 persons at risk and that's a most serious matter. There have been reports of other incidents recently where lap top computers containing consumer information were stolen. The latest involved information stolen which affects veterans.

**Veterans' Data**

The theft of electronic data on 26.5 million veterans from the Veterans Affairs Department is even more serious than the Aetna incident because of the number of people affected. Data stored on computer disks were stolen on May 3rd at the home of an agency employee in Maryland. The disks carried names and accompanying Social Security numbers and birth dates of American armed forces veterans. This means somebody has access to critical personal information on men and women who have served in some branch of service. That's all that is needed to do great damage to a person whose identity is stolen. The information stolen gives criminals - or some other entity who might purchase the stolen information - access to things like bank accounts. I was shocked to learn that the theft wasn't reported by the agency for over three weeks.

Source: Reuters and New York Times

**XX. RECALLS UPDATE**

Due to the length of this report, we are only going to feature a few significant recalls this month. These recalls are:

**General Motors Recalls 400,000 Pickups**

General Motors is recalling about 400,000 pickup trucks after federal safety regulators got several complaints regarding defective brake lights. The affected vehicles are the 2004-2006 Chevrolet Colorado and GMC Canyon, and the 2006 Isuzu i280 and i350. According to GM, the brake lamps on some vehicles may stop working or may remain on. On vehicles with cruise control, that function also becomes inoperative. To date the National Highway Traffic Safety Administration says it has had three complaints. GM says they aren't aware of any crashes as a result of the problem. Dealers will replace the brake lamp switch assembly at no charge.

**Toyota Recalls Lexus Cars**

Toyota Motor Corp. is recalling its best-selling Lexus luxury sedans following the discovery of a seat belt problem. The recall affects three models - IS250, GS300 and GS430 - that may have problems with the seat belt control mechanism in the two front seats. The problem makes it hard to buckle the seat belts and may cause the belts to malfunction in an accident. As I understand it, 43,000 vehicles will be recalled worldwide encompassing IS250, GS300 and GS430 models produced between July 2005 and January 2006.

**Gas-Powered Backpack Blowers Recalled**

About 170,000 RedMax gas-powered backpack blowers are being recalled because the muffler support bracket can break, creating an opening in the muffler body. Hot exhaust gases could escape from the muffler and melt the fuel tank or ignite grease, oil or debris around the fuel tank, posing a fire hazard. RedMax has received five...
reports of units that have caught fire when hot exhaust gases from damaged mufflers ignited grease, oil or debris around the area of the fuel tank. No injuries have been reported. The RedMax gasoline-powered backpack blowers are red-and-black with a white fuel tank. Model numbers EB6200, EB7000, EB7001, and EB7001RH can be found on the body of the blowers along with “RedMax,” “Zenoah,” and “Komatsu.

The recalled blowers were sold by RedMax dealers nationwide from December 1996 through December 2005 for about $530. Consumers should stop using the backpack blowers and contact RedMax for a dealer location nearest to them to schedule a free inspection and a free repair if necessary. Consumers who have registered their equipment will receive direct notification about the recall from RedMax. Consumers can contact RedMax at (866) 217-4152 or visit the firm’s, www.redmax.com for more recall information.

PLAYSETS RECALLED

The Consumer Product Safety Commission is recalling thousands of backyard playsets. The Adventure Playsets have defective bolts that could cause the swing set frame to detach. Backyard Ventures has received 64 reports of the bolt heads twisting off during installation. No injuries have been reported. They were sold this year at Toys-R-Us, Wal-Mart, and Menards nationwide for about $1000. Owners are asked to call the manufacturer, Backyard Ventures, at 1-800-856-4445 for free replacement bolts. The recalled swing set models include: The Durango, Tacoma, Odyssey, Bellvue, Monarch, Grand Teton and Outlook II. The swing sets are made of wood, and feature various types of slides, swings, and a fabric canopy over part of the structure. For more information, you can call Backyard Ventures at (800) 856-4445 or visit the firm’s website at www.adventureplaysets.com.

SIMPLE SET POOL LADDERS RECALLED

There has been a recall of about 520,000 Simple-Set pool ladders for inflatable pools. The ladders’ support clips can be assembled upside down, causing them to break under weight. The ladders are imported by Aqua-Leisure Industries. There are six reported injuries associated with these ladders, including a concussion and fractured ribs. The ladders were included with Aqua Leisure Simple-Set inflatable pools ranging in size from 12 to 18 feet in diameter. Each step of the ladders has “Aqua Leisure” molded into its surface. The pool sets, including the ladders, were sold at discount department and toy stores around the country between January 2002 and August 2005. Consumers should contact the company for a free repair kit by calling 866-807-3998. For more information visit, http://www.aqua leisure.com or http://www.cpsc.gov.

XXI. FIRM ACTIVITIES

SPOTLIGHTED EMPLOYEES

Ben Baker

Ben Baker, who graduated from the Cumberland School of Law in 1993, works in our Personal Injury/Product Liability Section. Ben’s focus has always been on products liability and crashworthiness cases. He practiced in Birmingham for several years before coming with us. Ben’s secondary focus is in the area of nursing home litigation, aviation crashes, and construction site injuries. Ben recently obtained a record $12 million verdict for his client in Limestone County, Alabama in a crashworthiness case involving a defective product. He has also settled many crashworthiness cases that have resulted in multimillion-dollar recoveries for his clients.

Ben is currently a member of the Executive Committee for the Alabama Trial Lawyers Association. He previously served on the Executive Committee for the Young Lawyers Section of the Birmingham Bar Association, an elected position. Ben was also previously selected as “Boss of the Year” by the Birmingham Magazine. Ben was raised in Ozark, Alabama. He is married to the former Kimberly Strag of Alexander City, and they have one daughter, Isabella, and one son, Benjamin. Ben and his wife are members of the Episcopal Church of the Ascension in Montgomery. Ben is an excellent lawyer who cares deeply about the welfare of his clients. His is a definite asset to our firm and a credit to the legal profession.

WILLA CARPENTER

Willa Carpenter, who has been with the firm for thirteen years, serves as our Human Resources Liaison for our firm. Without dispute, Willa is the firm’s spiritual leader. Willa, who really is more like a Chaplin, provides guidance and support to the firm’s employees by listening, counseling and praying with them whenever they are in need. She oversees the firm’s weekly devotions and says these are a wonderful testament to the spirit of Christian fellowship that exists. Her duties also include coordinating other social activities for the firm, such as the annual night out with the Montgomery Biscuits. Willa also has regularly scheduled prayer meetings with several of the male shareholders’ spouses. Willa recently started a bi-weekly bible study available for the ladies at the firm. This has been a great success. I am told that all of the ladies who attend look forward to Willa’s teaching and her wisdom.

My observations over the years have been that this saintly lady is totally committed to Jesus Christ, totally unselfish, and cares deeply for other folks. Willa and Sam, who have been married for 52 years, have three children and six grandchildren. They serve as elders at Christian Life Church in Montgomery. The Carpenters enjoy entertaining and regularly hold pray meetings in their home.
At the risk of offending some of our folks, if I had to say that there is one person who we simply couldn’t do without at the firm, it would be Willa.

**The Fight Against Cystic Fibrosis Is Very Important**

The Cystic Fibrosis Foundation held its annual Great Strides Walk on Sunday, April 30th at the Montgomery Zoo. We had several employees participate in the walk and our Beasley Allen race car was on display. The Beasley Allen 82Racing team is providing a constant reminder of the firm’s commitment to providing exposure to the CF Foundation. Great Strides is the CF Foundation’s largest and fastest growing signature event. More than 90 cents of every dollar raised by the CF Foundation is used to fund CF research and care programs.

More than 30,000 people nationwide have this life-threatening disease. In addition, more than 10 million Americans are genetic carriers. Each carrier has one copy of the defective CF gene, but does not have the disease and its symptoms. It takes two copies of the gene for a child to be born with cystic fibrosis. For people with CF, the defective gene causes the body to produce a faulty protein that leads to abnormally thick, sticky mucus that clogs the lungs and can result in fatal lung infections. The mucus also obstructs the pancreas, causing difficulty for a person to absorb nutrients in food.

With the support of the CF Foundation, there has been tremendous progress in cystic fibrosis research and care. The median age of survival has improved from early childhood in the 1950s to the mid-30s today. However, CF continues to be a critical health matter, as most individuals with cystic fibrosis must battle lung disease for their entire lives. At least one person dies each day from this disease.

**School Children Attend Biscuits’ Games**

From time-to-time, before school was out, Montgomery’s professional baseball team, the Biscuits, played 10:30 a.m. games so that children could attend with their school’s permission and with proper supervision. I went by on April 18th to see a few innings and eat a hotdog. Thousands of area schoolchildren participated in the Grand Slam School Day field trip to the stadium for that game. When we learned that a school in Lowndes County was unable to attend because of the costs involved, our firm decided to pitch in and send the students from the school to their first Biscuits’ game.

During another Grand Slam School Day on May 3rd, many of our employees who hold season tickets stepped up to the plate and donated their season tickets for that game to a group of students with disabilities. A total of 10 of these children attended the game and I understand that each had a great time. These children had never been to a baseball game before and I am glad we were able to help out.

I am a big baseball fan and that includes following the Biscuits. I saw Sherrie Myers, one of the owners of the team, at one of the morning games recently and had a chance to talk with her. We discussed the special efforts she has gone to in making Riverwalk Stadium children-friendly. It was quite obvious that Sherrie, who incidentally does a great job in every respect as an owner, works hard to make sure children enjoy their time at the ballpark. In my opinion, the Biscuits have been good for Montgomery and for our children.

**Legal Services of Alabama Does Great Work**

Legal Services of Alabama (LSA) works hard representing folks who have a need for legal help, but don’t have access to lawyers who will take their cases. Unfortunately, much of the good work LSA provides goes largely unnoticed by the public and isn’t always fully appreciated. LSA is an independent, non-profit organization that provides qualifying low-income families with legal aid and assistance in civil matters. LSA, a statewide program serving all 67 counties in Alabama, provides a full range of services, including: counseling and advice, mediation, administrative representation, representation in court, appeals in appropriate cases, and legal self-help materials and forms. LSA currently has eleven offices with 58 lawyers who strive to serve 700,000 Alabamians who live in poverty. It should be noted that one-quarter of that number are children. LSA’s lawyers
closed almost 9000 cases last year, more than half providing assistance to the victims of domestic violence. Perhaps LSA's most shining hour came in response to Hurricane Katrina. LSA staffed every disaster resource center that was opened in the State of Alabama and has already provided legal assistance to more than 900 Katrina victims. LSA's disaster hotline network remains open 12 hours a day - Monday through Friday and Saturdays - and it has also launched a toll-free legal hotline for Spanish speakers.

Because our firm believes so strongly in what LSA does, we funded a three year fellowship for LSA in 2004. And, we will also make a major gift to the Montgomery-area Guardians of Justice Campaign. We believe it is our duty to help LSA help others. I am personally committing my time and energy to support this most worthwhile campaign. Charlie Stakely, a great lawyer and a good friend, and I will serve as co-chairmen of the leadership committee. At my request, Melissa Pershing, who does an outstanding job as Director of LSA, contributed the following for this issue:

_How many amongst us, both long-retired and newly-minted, choose the law for a profession in some small part because our hearts beat faster and throats tightened the first time we heard Reverend Sykes utter these words, "Jean Louise, Jean Louise, stand up. Your father's passing."

Now gentlemen, in this country our courts are the great levelers, and in our courts all men are created equal. I'm no idealist to believe firmly in the integrity of our courts and of our jury system. That's no ideal to me. That is a living, working reality.


Harper Lee turned 80 on April 28; the Pulitzer-prize winning novel to Kill A Mockingbird was published and the movie debuted almost half a century ago. It was a far different time. Much has changed for the better in Alabama. But the practice of law has changed in a way that has too often dissolved civility and collegiality and broken the bonds of our professional brother and sisterhood. Our hectic work lives have left us with little or no time to care about our fellow Alabamians for whom justice is a meaningless word carved on the cold white façades of pillared buildings—whose doors are closed to those without the price of admission.

We have a rare opportunity to rekindle the fire of a shared commitment to equal justice, to reaffirm our professional ideals and to celebrate some of the men and women who selflessly live those ideals each working day. From 6:7:15 p.m. Thursday, June 22, the Guardians of Justice Gala reception will be held at the Alabama Shakespeare Festival, to be followed by a special performance at 7:30 p.m. of To Kill A Mockingbird. Proceeds from the reception and the play will benefit Legal Services Alabama - the statewide non-profit organization providing free civil legal assistance to elder and low-income Alabamians and to the victims of Hurricane Katrina.

If you have not seen To Kill a Mockingbird performed on stage, you have indeed missed something extraordinary. If you are lucky enough to have seen a production at the Monroeville courthouse, you have witnessed the play performed at its very birthplace. But all attorneys, in fact all those who care about justice and the rights of the most vulnerable of our neighbors who are least able to access our courts, should see it performed live—for the first time or one more time—at the Shakespeare Festival June 22. As the actor playing Atticus Finch in the ASF production is brother-in-law to a much esteemed career legal aid lawyer who founded a rural legal services program in the remote and poverty-stricken hills and coal fields of Tennessee— it is not hard to see where he might have found additional, living inspiration for his part.

I hope that as many of our readers and their families as can will join LSA on June 22nd at the Alabama Shakespeare Festival. For more information about LSA, the Guardians of Justice Gala reception, or this special performance of To Kill A Mockingbird see www.alsp.org.

**The Unity Games In Montgomery**

The 2nd Annual Unity Games were held in Montgomery on April 8, 2006 at Alabama State University. The Unity Games, featuring two very good basketball games (one male and one female), both hotly contested, will be an annual affair. The teams were made up of senior high school student-athletes, who exhibited their talents as high school players for the final time. The event is designed to convey a positive image of our youth while creating a wholesome atmosphere to express racial harmony in our community.

Each school in Montgomery was asked to select four students (two girls and two boys) of different ethnic backgrounds to participate in the games. There were cash giveaways, free t-shirts, free caps, and other prizes given to the crowd of spectators. The City of Montgomery was a major sponsor of this event. Chris Conway was the Master of Ceremonies at the games. Belinda Forte was the real force behind the scenes and organized the event. I had the distinct pleasure to serve as a coach for one of the boys' teams along with Circuit Judge Johnny Hardwick. Unfortunately, my friend Greg Calhoun's team beat us in an overtime thriller by 2 points. Nevertheless, I enjoyed my participation. I sincerely believe that the Unity Games will continue to play a vital role in promoting racial harmony in our community.

**The Jimmy Hitchcock Awards**

This year two of our lawyers, Cole Portis and John Tomlinson, had the distinct pleasure of serving on the Jimmy Hitchcock Award selection committee.
The purpose of the Jimmy Hitchcock Award is to recognize outstanding high school senior athletes in Montgomery County who, by their actions, have consistently represented the highest ideals of Christian leadership in athletics. To be considered for the award, these student-athletes are nominated by their coaches and the administrators of their respective schools.

This year, Cole and John were charged with the responsibility to learn about Dominik Riley, a football star at Carver High School. They discovered a young man who not only excels on the football field and in the classroom, but who is also a faithful and humble servant of Christ. This year the Jimmy Hitchcock committee recognized Dominik as its male recipient. Dominik was an All-State offensive lineman and team captain as well as an Honor Roll student at Carver. He participates in the Fellowship of Christian Athletes and is a devoted servant to his church and community. Dominik will attend college at the University of Memphis, where he received a football scholarship. We know Dominik will have continued success and be a shining Christian example for others wherever he goes. Coach Larry Ware, Dominik’s football coach at Carver, certainly deserves a lot of credit for the leadership he has provided for that football program and for the great Christian example he has set for these young men.

Obviously, there are always a good number of outstanding young people who are nominated for this award. While all of them can’t be selected to win this cherished award, in my opinion, they are all winners. I am very glad that this committee finds time to recognize outstanding Christian students in Montgomery County.

XXIII. STRICTLY PERSONAL OBSERVATIONS

It appears that trial lawyers will be made a central issue - both on the state and the national levels - in the general election this fall. With all of the false and misleading information being put out by groups such as the National Tort Reform Association, the U.S. Chamber of Commerce, The Christian Coalition, and a group called The American Taxpayers Alliance, this shouldn’t come as a big surprise. While some in my line of work may believe it’s best to avoid another fight, I have never subscribed to that approach and can’t do it this time around. I don’t mind telling the world that I have been an underdog for most of my life. So it’s nothing new about being cast as David in this epic battle with a very powerful and well-funded Goliath. Regardless of the odds, I just can’t back down from this fight.

You see, I come from a family of hardworking farmers, none of whom ever attended any college. All of them believed they had good Alabama values! So our readers will know where I am coming from I will give a glimpse of my early life in sort of a capsule form:

First, I grew up in Barbour County, Alabama, where the Beasley Clan settled in 1819. Four Beasley brothers came to Alabama and split up somewhere around what is now Montgomery - two went down to what is now Barbour County and two went to what is now Crenshaw County. My mother, Florence Camp Beasley of Scotch Irish Stock (her mother was a Perry), who was truly a great woman, died when I was 15 years old. I must confess, I still miss her after all these years. I tried to excel in sports for a number of years, first in high school and then in a year of college. My plans were to be a coach. After realizing that because of a knee injury I couldn’t play football in college any longer, I dropped out of school after my freshman year, tried farming for two years, and then gladly went back to Auburn. That’s when I met Sara Baker from Adamsville, Alabama, which turned out to be a very good thing. I graduated from Auburn, attended law school at the University of Alabama, and after graduation practiced first in Tuscaloosa and then in my hometown of Clayton for several years. As a young lawyer, I managed the campaign of former Lt. Governor Jim Allen and as you know he was elected to the U.S. Senate. Two years later, I ran for a statewide office myself despite never having never held public office at any level. To the shock of most everybody, I was elected over a number of well-known and well-financed state Senators. Several years later, I went back to the law after being emphatically retired by the voters from politics. I must confess that I wasn’t very good at politics. Finally, for the last 27 years, I have taken on Corporate America as a lawyer in the courts when they did bad things to folks.

Having come through all of this and, with God’s undeserved help, survived, I am convinced that I can’t run away from this fight simply because it will be rough, tough and mean-spirited. I know from experience that our opponents play hard ball, employ a scorched earth philosophy, and take no prisoners. Those are the rules they play by!

I must admit that their attack the trial lawyers plan - designed by Karl Rowe at a time when few Americans believed lawyers like me were “bad folks” - has been extremely effective. Over the past 15 years, this attack has been carried out in a manner very similar to the old Chinese water torture. After a long time, eventually folks start to believe as least part of it. Clearly, this attack over time has hurt lots of folks. Even “Buddy” my faithful black lab, started to wonder if I really was a liberal, greedy trial lawyer who has done all of these bad things that were being circulated by the tort-reformers. I am happy to report, however, that Buddy - my loyal friend - hasn’t bought the Rove line. He’s too smart to believe things that simply aren’t true, just because some groups say they are. Besides - Buddy really likes me!

Nevertheless, regardless of the personal attacks and untruths, I will continue to fight for victims of corporate abuse and wrongdoing so long as I have breath in me. Over the years, I have seen too many tragic incidents occur when - without a trial lawyer like me being available and willing to take on cases for persons who had been
wronged in some manner by Corporate America - obtaining justice for these victims wouldn't have been possible. While on a morning television show I was asked by a person who called in recently, "Who do you think you are to have all of these opinions?" I got to thinking about who I really am and here's what I came up with. Maybe this personal information may help our readers know who I really am:

I am Christian who loves the Lord - a husband who loves his wife - a father - a grandfather - an Auburn man - a Boston Red Sox fan - a member of the board of directors of the Montgomery Area Chamber of Commerce - a past-president of the Montgomery Lions Club - an outdoorsman - a hunter who owns about 15 band guns, rifles and shot guns - a long-time country music fan from the days when my brother Billy and I sat with our Mama and listened to the Grand Ole Opry every Saturday night on the radio - a fellow who has a knack for finding good barbeque places - a consumer advocate - and by the way, a trial lawyer, who is proud of what he does.

Simply put, that's who I am and I don't plan on changing any of it. There are a few other things that also affect my decision to continue with this fight. I realize that candidates for public office at the national and state levels - including judicial candidates - will continue to take tremendous sums of money and spend it wildly so long as we have weak and ineffective campaign laws on the books. I also realize that lobbyists for the powerful special interests will continue to influence and virtually control Congress, federal regulatory agencies and many state legislative bodies until such time as strong laws are passed to put a stop to this sort of thing. I also realize that by destroying the jury system corporate wrongdoers, who have no real concern for their victims, will be protected. That's really what this battle is all about.

So, I am in the fight to save the jury system - the destruction of which, as stated above, is the real goal of our adversaries - and I will remain in the fight - win or lose - until the final battle is done. I can sleep well at night because I know that I am on the right side in this struggle. God has given me the ability to try lawsuits and help the clients I have been blessed to represent over the years. I know firsthand they need my help and the help of others. I am proud to be called a trial lawyer, who represents only victims, and when that changes I will retire from my law firm and go back to the farm with my wife Sara and my friend Buddy.

Yet the debate goes on. The book angered some clergy to the point that they wanted to have a book-burning. One pastor remarked, "When I read the book's fallacious attack upon the deity of Christ, I wanted to burn the book!"

First reviews of the movie suggest that it may not be the blockbuster some thought it would be. A New York Times reviewer called the movie "one of the few screen versions of a book that may take longer to watch than to read."

What moviegoers think has yet to be known. They, and not the critics, will decide what the box office response will be.

Some Christians say they have not read the book and do not plan to see the movie. They will ignore both and hope the furor will soon subside. However, some pastors are convinced the threat to the Christian faith is so serious that it must be challenged. My friend Ken Himes sums up what many pastors feel:

"Tens of millions of people will read this book and see this movie and come away with serious questions about Christianity. They will question their faith, the Deity of Jesus Christ, the validity of the Bible and much, much more. These questions have eternal significance."

This possibility has persuaded many clergy to address Dan Brown's novel in current sermons. Lester Spencer, senior pastor at Saint James United Methodist Church in Montgomery, is doing just that. He sees the controversy about the book and movie as "an opportunity to open a dialogue and get people really talking and thinking about the core issues of our faith."

The Bible warns us that "evil people" will flourish and will deceive people. This comes from Paul's warning to Timothy (2
I agree, without any reservation, with everything Walter says about this movie. While I don’t like anything about either the book or the movie, I fully realize that millions of people will be affected by the movie in one way or the other. The movie comes at a time when many people are already having doubts about their religious beliefs. Satan knows this better than any mortal and he will take full advantage of this doubt. That’s why the church has to get fully engaged, but in the right way. In my opinion, it’s more important to educate people – including church-goers – with the real truth and prepare them for the battle that is to come. The movie – as well as the novel – is based on fiction and outright lies. History tells us that this combination can be deadly.

As Walter points out, Lester Spencer, who is the senior pastor at my church, is now doing a series of sermons on the movie and he has done an excellent job. It’s important for Christians to become knowledgeable so that they can debate this issue. I believe that Christians must deal with this sort of thing and be willing to stand up for Jesus Christ, the Son of God, who died on the cross for all of us – including Dean Brown, Ron Howard, Tom Hanks, and all others who had anything to do with the book or the movie. We must pray that the movie will have an effect – but not the one planned and expected by Satan – and that good will actually come from it. We will win the battle that will be waged as a result of this movie because truth is on our side. It’s my belief that God will use this truth to further His kingdom. It’s up to all of us who profess to be Christians to do our part.