



THE
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

ALABAMA SUPREME COURT TO HEAR ARGUMENTS ON EXXONMOBIL VERDICT

The Alabama Supreme Court was to hear arguments on the 6th of this month on the State of Alabama's verdict against ExxonMobil. The case had been awaiting action by the justices for over 18 months. Because we had to send this issue to the printer on January 30th, I won't be able to say how the arguments went. In any event, I believe the Supreme Court justices will follow the law and apply that law to the facts from the trial, which should be good news for the citizens of Alabama.

In 1999, the State Conservation Department sued ExxonMobil, accusing the powerful oil company of underpaying royalties to the state for natural gas wells drilled in state-owned waters along the Alabama coast. The first trial in the case ended with the Alabama Supreme Court overturning the verdict on an evidentiary issue and ordering a retrial. At the retrial, which took place on November 2003, a Montgomery jury awarded the state \$11.9 billion in damages. In March 2004, Montgomery County Circuit Judge Tracy McCooley reduced the amount to \$3.6 billion. ExxonMobil again appealed to the Alabama Supreme Court. ExxonMobil was clearly guilty of a massive fraud intentionally committed against the State of Alabama. The internal documents kept by the powerful oil company relating to its dealings with the state proved without question that the fraudulent scheme, which was put together at the top levels of the company, was designed to cheat the state. Hopefully, a decision in the case will be announced by the Supreme Court very soon. It's most significant that interest on the judgment has been accruing at over one million dollars per day.

POLITICAL CANDIDATES ON PARADE IN MONTGOMERY

The inauguration ceremonies last month took on a look toward both the 2008 presidential primary and the 2010 race for governor. Plenty of potential candidates in both races were present and took advantage of the crowds that attended the functions. That's especially true in the governor's race, where candidates from both parties appear to be lining up to succeed Governor Bob Riley even though that race is a long way off. On second thought, maybe it's their supporters who are jumping the gun instead of the potential candidates. In any event, it appears that lots of folks are looking ahead. It was most interesting to see the candidates on parade.

At least two would-be candidates for president were on hand and making contacts. Republican Senator John McCain of Arizona and retired Army General Wesley Clark, a Democrat, who is considering a second try at his party's nomination for president, were very much in evidence. Senator McCain showed up as a guest of Governor Riley, which promoted all sorts of political rumors and speculation. Frankly, I believe Governor Riley's possible run for the top spot may have prompted McCain's visit rather than the Senator coming to Alabama looking for a running mate. General Clark was invited by Commissioner of Agriculture and Industries Ron Sparks, but apparently his visit failed to attract a great deal of local interest. General Clark had endorsed Ron at campaign stops during the fall campaign and has a great background. Whether he will be a viable candidate remains to be seen.

There were a number of potential candidates for Governor on hand for all of the festivities. Phil Rawls, the veteran and well-respected Associated Press writer, had this to say about all of the gubernatorial speculation:

- As for potential candidates for governor in 2010, they were all over the place.
- Any list of Democrats who might be interested in the job starts with new

Lt. Gov. Jim Folsom, who returned to state government Monday after being gone for 12 years. Also a former lieutenant governor, Folsom became governor in 1993 after then-Governor Guy Hunt was found guilty of using money from his inaugural fund for his personal use.

- Folsom lost his bid for a full term to Fob James in 1994. Although most political types expect Folsom will run for the top job and will be the favorite, he was not the only Democrat on display Monday who is a potential candidate for governor.

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- Sparks is believed to have gubernatorial ambitions, and many expect he will challenge Folsom in four years. Political watchers also pointed to new Alabama Chief Justice Sue Bell Cobb as possibly being interested in the top job, but she would have to step down from the court to run for governor.

On the Republican side, Attorney General Troy King and Treasurer Kay Ivey are thought by some political experts to be the early favorites to win the nomination for governor in 2010. But, new Alabama Secretary of State Beth Chapman is politically ambitious and is said by some to have her sights on the governor's office. Another potential candidate may be state Rep. Mike Hubbard of Auburn, who is minority leader in the Alabama House of Representatives. Mike, who will be the next chairman of the Alabama Republican Party, served as chairman of the Riley inaugural committee and did a tremendous job in that capacity. There is even talk of Rob Riley, the Governor's son, having an interest in following his dad. If that develops, it will change the landscape dramatically.

As I have written in a previous issue, I believe job performance by those who are in office and want to follow Bob Riley will dictate who all will wind up as candidates with a chance to win in 2010. History tells us that things can change overnight when it comes to Alabama politics. In any event, it will be an interesting four years for "political watchers" if the activity thus far is any indication of what's to come.

Sources: *Associated Press* and *Birmingham News*

FIRST ANNUAL TRAUMATIC BRAIN INJURY CONFERENCE TO BE HELD

The Alabama Head Injury Foundation and the Alabama Department of Rehabilitation Services will host the first annual Alabama State of the State in Traumatic Brain Injury Conference. The Conference will be held in Birmingham on the 27th of this month at the Wynfrey Hotel. Alabamians will have the opportunity to learn first-hand about issues of living with traumatic brain injury (TBI)

including aging and TBI, guardianship, social skills, and the relationship between TBI and visual impairment. Conference speakers will include top names in research, TBI issues, and testing. There will also be a professional track with topics such as special education, neuropsychological assessments, guardianship, and behavioral issues. This will be a very good event based on all we have learned about the agenda and the participants.

DEMOCRATS ORGANIZE ALABAMA SENATE

As has been widely reported, the effort by Republican senators to control the new state Senate in the organizational session failed. The senators elected Democratic Senator Hinton Mitchem to the top leadership role of president pro tem. Senator Lowell Barron, who had held the post for the last eight years, did not seek another term. In my opinion, Hinton has the ability and experience required to do what many predict will be a most difficult job. His reputation of being able to bring people together makes the Marshall County senator a very good choice. Hinton, a retired tractor dealer, previously served as chairman of the Senate's Finance and Taxation-General Fund Committee. He did an outstanding job in that capacity. Hinton has been in the Senate for years, having been first elected in 1978. He is extremely popular in his Senate district and is also very well-liked by all of the senators who have served with him in the past. In my opinion, the veteran senator will do an outstanding job in his new role.

I hope the Senate will now proceed in a bipartisan manner to tackle the many problems facing our state. In my opinion, proposals by the Riley Administration will receive fair treatment. But, in addition to the Governor's programs, there is much more that needs to be done in a number of consumer-related areas of great concern. Without a doubt, Alabama is on the verge of greatness, and what happens in the first year of this Administration will determine whether or not we achieve that great-

ness. Wouldn't it be tremendous if all of our public officials would put politics aside for at least this year and work together for the common good!

ARTUR DAVIS PUTS HIS STATEWIDE ELECTION PLANS ON HOLD

U.S. Rep. Artur Davis has decided not to run for the U.S. Senate run next year. The Montgomery native says it's "the wrong time to seek higher office." In my opinion, even without Artur in the race, Jeff Sessions, a Mobile Republican who will seek a third six-year term, is going to have serious opposition. There are several potential candidates on the Democratic side who could give Jeff a run for his money. Some who reportedly are looking at the race include Agriculture Commissioner Ron Sparks, Senator Vivian Figures, Lt. Governor Jim Folsom, and Public Service Commissioner Susan Parker. My brother, Billy, a Barbour County pharmacist who is in his second term in the House of Representatives, has also received some pretty strong encouragement to make the race. If Billy decides to run he would be an attractive candidate and, in my opinion, if elected he would be a very good senator. But, he will likely stay in Barbour County unless there is extremely strong support around the state for him to make the race.

STATE GETS HIGH MARKS FOR TRAFFIC SAFETY LAWS

It's always good to see Alabama mentioned in a good light in the media and especially when it involves safety issues. Recently, a national highway safety group placed Alabama among 16 states receiving high marks for traffic laws. While that's good news, unfortunately, everything in the report wasn't good for my home state. The group, Advocates for Highway and Auto Safety, criticized Alabama for not having six tough safety laws, including three for teen drivers, two for drunk driving, and one for booster seats. The group rated each state and the District of Columbia on traffic safety laws, not enforcement. This is the

fourth time the advocates have ranked states on highway safety. The group is made up of consumer groups, health and safety groups, and insurance companies. The group's report is being sent to the governors and lawmakers in all of the states. As mentioned above, Alabama ranked low in laws dealing with teen drivers, booster seats, and drunken driving. The group said Alabama's graduated driver license needs:

- To require 30 to 50 hours of supervised driving, not including a driver's education course.
- To ban teen driving from 10 p.m. to 5 a.m., instead of midnight to 6 a.m. which state law now allows.
- To restrict the number of teenage passengers to one. Presently, teens can have up to four passengers.

The advocates said Alabama's booster seat law, which was passed last year, doesn't go far enough. They say the age until which a booster seat is reviewed should be set at 8 instead of 6. Another recommendation is that police should be allowed to stop vehicles they see violating the law. Alabama's booster seat law is a secondary law, meaning police can ticket the driver, as I understand it, for not having a child in a booster seat only after the driver is stopped for another offense.

Alabama's drunk driving laws also came under fire in the report. The group said mandatory blood alcohol tests should be given to drivers killed in wrecks, and that the state needs to pass a "super drunk" law, which sets stiffer penalties for drivers with a blood alcohol content of 0.15 or higher. The National Highway Traffic Safety Administration has found the median blood alcohol concentration for all fatal wrecks is 0.16.

The national safety report is based on 2005 traffic statistics. In Alabama, during that year, there were 1,154 people killed in wrecks, which cost the state \$2.79 billion in lost productivity, property damage and medical expenses. I hope the Legislature will take up all of the bills necessary to implement the report's recommendations. Rep. Jim

McClendon of Springville, who chairs the state House Highway Safety Committee, says that laws proposed by the national advocacy group will be considered by his committee. The entire report can be found at www.saferoads.org.

Sources: *Birmingham News* and *Associated Press*

ALABAMA'S CATTLE INDUSTRY NEEDS ASSISTANCE

Agriculture & Industries Commissioner Ron Sparks says that the cattle industry in Alabama continues to be in serious trouble from drought-related complications experienced in 2006. Anybody in the cattle business knows their industry is at a highly critical stage because of shortages of both hay and alternative feed sources. The shortage of hay comes as a result of no rain in May, June, and July of 2006. The severe shortage has caused cattle producers in Alabama to purchase 97,000 more tons of supplemental feed this year for their cows compared to the same quarter in 2005, according to Commissioner Sparks. Although there are other feeds for cattle, a cow must eat approximately 2% of its body weight in roughage (hay) daily to remain healthy. Even with the supplemental feed, most farmers still had to thin their herds, slaughtering 10,000 more brood cows in 2006 than in 2005.

Commissioner Sparks and his staff have been working with Governor Riley trying to determine the best solution for the cattle farmers in Alabama. They have been talking with Alabama's Congressional delegation about an assistance program, which is badly needed. The cattle industry, which is very important for Alabama, must receive assistance and soon. I hope help will soon be on the way. Commissioner Sparks and his staff are committed to finding assistance for Alabama's cattle farmers. It's good to know that this dedicated public official will be working for Alabama for the next four years.

JOE BORG SELECTED AS EXPERT TO PARTICIPATE ON INTERNATIONAL PANEL

Joe Borg, who serves as the director of the Alabama Securities Commission, will participate as a delegate on an intergovernmental expert group convened by the United Nations Office on Drugs and Crime. The group will finalize a substantive report for submission to the Commission on Crime Preventions and Criminal Justice at its sixteenth session. This meeting took place in Vienna, Austria, last month. The group was created to get involved in the prevention of fraud and specifically identity theft and related crimes. It's quite an honor for Joe Borg to be included as an expert in this international effort to fight crime. If you want additional information, you can call Dan Lord at 334-353-4858.

STATES SHOULD DO ALL POSSIBLE TO CONTROL SMOKING

Based on a report card issued last month by the American Lung Association, it appears that some progress was made in 2006 to protect the public from the dangers of smoking. But, the annual report notes that the majority of states are still failing to adequately fund programs to prevent tobacco use—a critical component in keeping children from starting to smoke. On a positive note, there has been dramatic growth in the number of states with smokefree workplace laws.

The American Lung Association State of Tobacco Control 2006 report graded the 50 states, District of Columbia, and Puerto Rico in four categories: smoke-free air, tobacco taxes, prevention funding, and restrictions on youth access to tobacco products. For the second year in a row, Maine was the only state to earn a grade of "A" in all four categories. John L. Kirkwood, president and CEO of the American Lung Association, commented:

Our report sets a high standard. Only the strongest tobacco control laws will protect people from a product responsible for more than

438,000 deaths each year. The tragedy of tobacco use will be resolved only when comprehensive, strong policies are adopted to curb smoking.

The 2006 report gave a record 26 states and the District of Columbia passing grades, which would be a “C” or better, for having laws that make workplaces free of tobacco smoke. Unfortunately, another 23 states received “F” grades in that category. Although overall funding for tobacco prevention and cessation programs increased in 2006, 34 states received “F” grades for the amount they spend to help people avoid smoking or quit. Only nine states received “A” grades for spending a significant amount on smoking prevention and cessation, up from six states in 2005. Unfortunately, Alabama received “F” grades in all of the four categories.

The American Lung Association’s Smokefree Air 2010 Challenge has been successful. This campaign was launched in 2006 to make all 50 states, the District of Columbia, and Puerto Rico 100% smokefree no later than 2010. Sixteen states, the District of Columbia, and Puerto Rico are now considered to be smokefree, up from just two states in 2002 and nearly double the nine states that were smokefree in 2005—a nine-fold increase in just four years. The goal is to meet the group’s Smokefree 2010 Challenge target. Meeting that goal will mean healthier and smokefree air, reduced health care costs and will result in thousands of lives being saved.

In November, seven states voted on ballot initiatives to prohibit smoking in most public places and workplaces, increase cigarette taxes, or increase funding for tobacco programs. The tobacco industry spent millions to defeat good tobacco initiatives—or to support bad ones—but they were unsuccessful. Voters approved pro-health initiatives in five of seven cases—in Arizona, Florida, Nevada, Ohio and South Dakota. Importantly, voters rejected the bad, pro-industry proposals in Ohio, Arizona and Nevada.

The federal government received an “F” for last year’s poor performance.

Neither Congress nor the Administration took any meaningful steps to curb tobacco use. The Framework Convention on Tobacco Control, the world’s first tobacco control treaty, was ignored by President Bush. It became international law, approved by 140 nations—not including the United States, which is par for the course. *The American Lung Association State of Tobacco Control Report* can be found online at www.lungusa.org. I hope 2007 will be an even better year for all states and the federal government. Curbing smoking should be a top priority for all legislative bodies, including Congress, this year.

Sources: *Associated Press* and the American Lung Association

FEDERAL JUDGE BRINGS ALABAMA’S LONG-RUNNING CHILD WELFARE CASE TO A CLOSE

On January 16th, a federal judge released Alabama from nearly two decades of court control over its child welfare system, ruling that the “depraved conditions” that triggered the litigation no longer exist. U.S. District Judge Ira DeMent granted the state’s motion to end the case, which began in 1988. The court found that the care and treatment of the child who brought the suit by the Alabama Department of Human Resources was deplorable.

Over the years, the suit led to sweeping changes in the state’s child welfare system, with a settlement reached in 1991. It set new standards and caseload maximums and required more child welfare workers to be hired and greater agency funding. The agency’s budget went from \$62.6 million in 1998 to \$286 million in 2004. Governor Bob Riley, who believes Alabama’s child welfare system is now a model for the nation, had this to say:

What had been a dysfunctional system years ago is now considered the premier system in America. A lot of work has gone into making this transformation possible and we pledge to continue working hard to improve it even more for the well-being of the children and families of this state.

State Attorney General Troy King had submitted a three-page motion in August asking for the end of the case. I hope this will be the end of this litigation. I know Judge DeMent, an outstanding jurist, well enough to know he would never have signed off on an end to the case if he had any doubts about whether it was the right thing to do.

Source: *Associated Press*

II. LEGISLATIVE HAPPENINGS

ORGANIZATION OF THE HOUSE AND SENATE

Now that the dust has cleared from the organization session, Democrats will be in control of both the House and Senate. Seth Hammett was re-elected Speaker of the House without opposition. As mentioned above, Senator Hinton Mitchem was elected President Pro Tem of the Senate. The next four years will determine whether Alabama will finally achieve its full potential. For that to happen, however, a bipartisan approach to tackling and solving the problems that have held Alabama back for too long must occur. I am hopeful both Democrats and Republicans alike will put the best interest of the people of Alabama first and foremost when the Legislature returns for the regular session in March. Personal and special interest agendas must be put on the shelf and I believe that’s what the people of Alabama expect. I have a strong feeling that the year 2007 will be good for Alabama!

THE REGULAR SESSION

Having displayed my eternal optimism above, based on reports from Capitol Hill, it appears that the powerful special interest groups are lining up support for their own agendas. I hope this doesn’t get in the way of Governor Riley’s legislative programs or those of legislators who have bills of their own that will help keep our state on the

right track and moving forward at a record pace. Recent polling indicates that an overwhelming percentage of people in our state believe state government is headed in the right direction. I happen to be one of those folks. In my opinion, although Governor Riley's programs deserve top priority for the regular session, which starts on March 6th, the independence of the legislative branch must be recognized and preserved. What the people of Alabama really need and expect is a partnership between two independent branches—the executive and legislative—working together for the common good.

III. COURT WATCH

ALABAMA BAR RAISES MONEY TO SEND JUDGES FOR TRAINING

As previously reported, the Alabama State Bar is raising money to send state court judges to national training programs because state funds have been unavailable. The State Bar hopes to get its members to contribute \$250,000 so that 90 to 100 Alabama judges who have never attended National Judicial College training programs will have an opportunity to go. Birmingham attorney Fournier "Boots" Gale III, president of the State Bar, when discussing the program, stated:

By attending the judicial college's 10-day general jurisdiction training program our judges can learn from judges in other states how they address common issues.

Because of a lack of state funds, no new Alabama state court judges have been able to receive substantive judicial training offered by the National Judicial College since 1988, and the Alabama Judicial College has been shut down since 2004, according to the State Bar. Sam Franklin and I co-chair a Bar committee that got this program off the ground. Teresa Minor, who is with the Balch, Bingham law firm in Birmingham,

was the person who headed up a subcommittee that made the effort a reality. This is something that will not only benefit the judges, but it will make our court system stronger.

A TERRIBLE OPINION FROM THE ALABAMA SUPREME COURT

In a real surprise to most legal scholars, the Alabama Supreme Court in a 5-4 decision has denied a rehearing in the case of Cline v. Ashland, Inc. The issue before the court was when the statute of limitations begins to run (and when a cause of action accrues) for injuries resulting from exposure to a hazardous substance. The court had originally affirmed, without opinion, the trial court's summary judgment for the defendant, which had been entered on the basis that the claim was not brought within two years from the date of exposure to the substance involved in the case.

The court held that the statute of limitations starts to run at the time of exposure to the toxic substance, even if the plaintiff didn't become sick until many years later (as happened with Mr. Cline). This is an unbelievably bad decision and can't be justified by any legal standard. Justice Harwood, joined by Justices Lyons, Woodall, and Parker, disagreed with the other five justices who voted for the defendant. They correctly felt that Mr. Cline's case should have been allowed to proceed. In his dissenting opinion, Justice Harwood articulates in detail why the majority opinion is unfair and unworkable. I recommend that you read his opinion. It is a work of art and is correct without question.

I am convinced that Jack Cline sincerely believed that his long battle with the courts would do some good for other people. I am told by Bob Palmer, his lawyer, that Mr. Cline was convinced that God had kept him alive to win his lawsuit. Mr. Cline, who was poisoned decades ago by a company that made benzene, fought the good fight, but lost his legal battle in this most unjust opinion. Mr. Cline was in the hospital, in intensive care and in critical condition, when the court's opinion came down.

Bob had no choice but to tell him what 5 members of the high court had done to his case. His doctors told Mr. Cline 8 years ago he had only months to live when he was diagnosed with acute myelogenous leukemia. This courageous man hung on to life and fought the good fight. Unfortunately, he died on January 16th. Regardless of the outcome of his legal battle, God will bless him for trying to help other victims.

To put things in the proper perspective, by the time most victims know they're sick, under the court's ruling, it's too late to sue. Alabama is the **only state** with a statute like that—one that protects polluters and robs victims of legal recourse. I hope that will soon be changed. The Cline case has received a tremendous amount of national media attention. If you have access to the *New York Times*, I recommend that you read the piece that discussed the Cline case in great detail. I also recommend that you obtain a copy of Bob Palmer's op-ed piece that was carried by *The Anniston Star*. If you can't access these, we will send you copies on request. You may also find copies of the two articles on our Web site, www.jlbreport.com.

DEFENSE LAWYERS WILL NOW RECEIVE OVERHEAD PAY

Lawyers who represent indigent defendants will now be able to collect extra pay for their overhead costs as the result of a recent court ruling. The Alabama Supreme Court ruled that state law provides for these lawyers to collect overhead pay, which in my opinion is good for the state. Lawyers representing clients who are entitled to have a lawyer appointed to represent them in criminal cases should be entitled under state law to get reimbursed for such expenses as office supplies, rent, and staff. At issue, the court, said was a 1999 law in which the Legislature raised the hourly rates for court-appointed lawyers—from \$30 to \$40 for out-of-court work and from \$50 to \$60 for in-court work.

The current law specifically allows a lawyer to be reimbursed for "expenses

reasonably incurred in the defense of his or her own client," according to the court. This wording was said to represent only a slight change from the old law, which provided for reimbursements for "expenses reasonably incurred in such defense." The court found "no meaningful differences in the phrases." Average overhead pay for lawyers representing poor criminal defendants was \$29 an hour—a significant amount compared to the very low rate for legal fees authorized by the state. Lawyers couldn't afford to take appointed cases, and that hurt the system.

The old Christian Coalition of Alabama had argued to the court that the state couldn't afford the overhead pay, which totaled some \$14 million a year. The justices didn't buy that argument obviously. The state clearly has an obligation to provide lawyers in criminal cases for those who can't afford to hire their own defense counsel. Providing a good lawyer and a good defense is one way to reduce the number of wrongful convictions and costly retrials. It's also required by the U.S. Constitution.

Source: *The Birmingham News*

HERE THEY GO AGAIN

ExxonMobil Corp. is asking a federal appeals court to reconsider its December decision demanding the oil giant pay \$2.5 billion to compensate thousands of fishermen and other Alaskans for the 1989 Valdez tanker oil spill. As we all know, the disaster, the worst oil spill in U.S. history, damaged 1,500 miles of Alaskan coastline. An Anchorage jury had ordered the company to pay \$5 billion in punitive damages, which are meant to punish a company for misconduct. The U.S. Court of Appeals for the Ninth Circuit, in the third time it heard one of the nation's longest running cases, cut the award in half, saying \$2.5 billion was enough punishment. Now the powerful oil company wants the San Francisco-based appeals court to rehear the case with the same three judges or to empanel a 15-judge panel

to hear it. Exxon only wants to pay \$25 million, which wouldn't even amount to a drop in the bucket.

Source: *Associated Press*

ANOTHER LAWSUIT OVER FAILURE TO PAY OIL ROYALTIES

A federal jury in Denver returned a verdict on January 23rd against Kerr-McGee Corporation in an important case involving oil royalties. A former top auditor for the Interior Department found that Kerr-McGee had cheated the U.S. government out of millions of dollars in royalties on oil Kerr-McGee produced in publicly owned coastal waters. The auditor, Bobby L. Maxwell, became a whistle-blower and sued Kerr-McGee as a private citizen after top officials at the Interior Department ordered him to **drop** his audit findings. That pretty well tells us which side the Interior Department is on and it surely doesn't appear they are with the public. Mr. Maxwell was dismissed by the Department in a so-called "reorganization," and the government claims it was unrelated to his trying to take on the oil company. Interestingly, the bosses had insisted that the case against Kerr-McGee had no merit.

As previously reported, the Minerals Management Service, an Interior Department agency that collects more than \$10 billion a year in royalties on oil and gas pumped on federal territory, is now the subject of numerous investigations by Congress, as well as its own inspector general, over its enforcement of royalty rules.

In addition to Mr. Maxwell, three other auditors in the royalty program have filed their own lawsuits as whistle-blowers against more than a dozen other oil companies. Like Mr. Maxwell, those auditors have said the Interior Department blocked them from pursuing what they viewed as valid cases of underpayments. The jury in Mr. Maxwell's case decided that Kerr-McGee had underpaid the government \$7.5 million, which was Mr. Maxwell's estimate. That should be justification for this man's courageous actions.

Under the False Claims Act, Kerr-McGee could have to pay more than \$30 million — double or triple the original amount it owed, as well as penalties of up to \$11,000 for each of 1,200 false statements that the company is accused of making in its royalty reports to the government. I hope the Department will start requiring the oil companies to follow the applicable "rules and regulations." Kerr-McGee was acquired last year by Anadarko Petroleum.

Sources: *New York Times* and *Bloomberg News*

\$405 MILLION VERDICT RETURNED IN GAS ROYALTY CASE

A jury in West Virginia, in another most significant decision, has found that one of the state's largest gas production companies cheated gas-rights owners out of more than \$100 million. Does that sound familiar? The jury ordered Columbia Natural Resources LLC and two other gas companies associated with it to pay a class of about 8,000 plaintiffs nearly \$405 million. It was proved that Columbia Natural Resources shortchanged the plaintiffs by \$134.3 million in the payment of royalties. The jury also found that this defendant deserved to pay \$271 million in punitive damages to the plaintiffs.

Columbia Natural Resources merged with NiSource in 2000. In 2003, it was sold to Charleston-based Triana Energy Holdings LLC. In 2005, Triana then sold it to Chesapeake for \$2.2 billion. Chesapeake's purchase of Columbia Natural Resources made it the third-largest holder of natural gas reserves in the United States, behind ExxonMobil and ConocoPhillips. Gas-rich land was leased from the plaintiffs in order for drilling to take place. However, the owners didn't receive market rates for the gas, as their contracts required, and as the defendants represented they would. The plaintiffs were shortchanged by the company deducting post-production and processing costs, by making volume deductions and by not paying for gas that its lines lost. None of this was allowed by the contracts with plaintiffs. It was reported that liability in

the lawsuit rests with NiSource and Chesapeake. Even though Chesapeake and NiSource each set aside reserves to cover the case, the defendants say they will appeal.

The class action was filed on behalf of all the West Virginia gas-royalty owners who leased land to Columbia Natural Resources. It was filed in Roane County, West Virginia, because all of the members of the representative class, or those taking a lead role in filing the complaint, were from that county. The 8,000 plaintiffs live throughout West Virginia and some of them are corporations. This is a prime example of how powerful oil and gas companies believe they can cheat folks who lease their land for drilling in exchange for royalty payments and who also believe they can get away with it.

Source: *The Charleston Gazette*

MYSPACE SUED IN ONLINE PREDATOR SUITS

Four families have sued News Corp. and its MySpace social networking site after their underage daughters were sexually abused by adults they met on the site. Families from New York, Texas, Pennsylvania, and South Carolina filed separate suits last month in Los Angeles Superior Court, alleging negligence, recklessness, fraud, and negligent misrepresentation by the companies. According to the lawsuit, MySpace failed to institute meaningful security measures that would effectively increase the safety of their underage users. When it finally took action it was too late for these children.

I hope these lawsuits can spur MySpace into action and prevent this from happening to other children. Critics, including parents, school officials, and police, have been increasingly warning of online predators at sites like MySpace. Youth-oriented visitors are encouraged to expand their circles of friends using free messaging tools and personal profile pages on these sites.

The plaintiffs in the lawsuits include a 15-year-old girl from Texas who was lured to a meeting, drugged, and assaulted in 2006 by an adult MySpace

user, who is currently serving a 10-year sentence in Texas after pleading guilty to sexual assault. The others are a 15-year-old girl from Pennsylvania, a 14-year-old from upstate New York, and two South Carolina sisters, ages 14 and 15. Last June, the mother of a 14-year-old who says she was sexually assaulted by a 19-year-old user sued MySpace and News Corp., seeking \$30 million in damages. That lawsuit, pending in a Texas state court, claims the 19-year-old lied about being a senior in high school in order to gain her trust and phone number.

Source: *Forbes*

JUDGE REDUCES VERDICT IN FAVOR OF CELEBRITY CRUISE LINES

A federal judge has reduced the \$190 million jury verdict ordering a company that makes water pumps to pay Celebrity Cruise Lines, Inc. The case involved an outbreak of Legionnaires' disease on a cruise ship in 1994. The jury verdict was called "manifestly erroneous," by U.S. Magistrate Judge James C. Francis IV. The judge did allow \$10.4 million of the award to stand. That was for expenses incurred such as refunding passengers, housing, the cost of transporting crew members, and decontaminating the ship, the *Horizon*. The \$135 million awarded for lost value to the business was totally cut out of the verdict amount. A new trial was ordered on the jury's finding that Celebrity, a unit of Royal Caribbean Cruises Ltd, should receive \$47.6 million in lost profits.

The verdict was against industrial manufacturer Pentair Inc., whose subsidiary Essef Corp. was sued by Celebrity, along with two other companies. Pentair acquired Essef in 1999. Celebrity contended that several passengers contracted the disease, a respiratory infection, because a defective water filter in a whirlpool spa failed to stop the spread of bacteria. As you probably know, Legionnaires' disease, which got its name from an outbreak at an American Legion convention in 1976, is a form of pneumonia. Most people

exposed to the bacteria never get sick, but the elderly and people with weak immune systems may be susceptible. Fortunately, the disease is treatable with antibiotics.

The judge said Celebrity provided substantial evidence that it suffered from a stigma after the Legionnaires' outbreak and had to cut prices to attract passengers. But interestingly, he ruled that Celebrity's officers and employees failed to link any specific lost bookings to the Legionnaires' incident and that Celebrity failed to identify one potential passenger or travel agent who declined to book a cruise because of it. The judge also said there was evidence that Celebrity's business had rebounded significantly by the end of 1994 and that the need to discount fares to attract customers later in the 1990s was a practice that ran "rampant in the cruise industry for reasons having nothing to do with the Legionnaires' incident." It was indicated in the ruling that "the stigma from the Legionnaires' incident dissipated quickly."

Source: *Associated Press*

FAMILY FILES WRONGFUL DEATH SUIT AGAINST A CALIFORNIA RADIO STATION

The family of a California woman who died after participating in a radio station's water-drinking contest in an attempt to win a Nintendo Wii, has filed suit against the station. Jennifer Strange, 28, a mother of three, died from suspected water intoxication after taking part in the competition. In efforts to win the contest, about 20 people tried to out-drink each other without going to the bathroom.

Sacramento station KDND-FM has fired 10 staffers, including several DJs, and canceled the *Morning Rave* program. The DJs had actually joked about people dying from water intoxication and teased Ms. Strange about her distended stomach. I understand that all of this is on tape. It would certainly appear that the station had to know they were promoting a dangerous and potentially deadly stunt. Police are also investigating the death for possible

criminal charges. The station should have known that an excess of water in the body can lead to the dilution of vital fluids. That in turn can lead to swelling of the brain, seizures, comas, an irregular heartbeat, and in some cases death. I hope this station and others will learn a lesson from this incident and place controls in put to avoid similar incidents in the future.

Source: Reuters

LAWSUIT AGAINST XM WILL GO FORWARD

Record companies have sued XM Satellite Radio Holdings Inc., alleging that the company is cheating them by letting consumers store songs. A judge ruled last month that the case can proceed toward trial after finding merit to the plaintiffs' claims. U.S. District Judge Deborah A. Batts made the finding in a case brought by Atlantic Recording Corp., BMG Music, Capitol Records Inc., and other music distribution companies against the licensed satellite radio broadcaster. In a lawsuit filed last year, the companies said XM directly infringes on their exclusive distribution rights by letting consumers record songs onto special receivers marketed as "XM + MP3" players. XM has argued it is protected from infringement lawsuits by the Audio Home Recording Act of 1992, which permits individuals to record music off the radio for private use. The judge did not believe the company was protected in this instance by the act and so ruled. The judge said in her order:

The record companies sufficiently allege that serving as a music distributor to XM + MP3 users gives XM added commercial benefit as a satellite radio broadcaster. It is manifestly apparent that the use of a radio-cassette player to record songs played over free radio does not threaten the market for copyrighted works as does the use of a recorder which stores songs from private radio broadcasts on a subscription fee basis.

In refusing to toss out the lawsuit, the

judge noted that the record companies consent to XM's use of their copyrighted material solely for the purposes of providing a digital satellite broadcasting service. She said XM operates like traditional radio broadcast providers who cannot offer an interactive service, publish programming schedules before broadcast, and play songs from an artist more often than specified within a three-hour period. But by broadcasting and storing copyrighted music for later recording by the consumer, the judge said XM is both a broadcaster and a distributor, but only paying to be a broadcaster.

Source: Associated Press

APPEALS COURT UPHOLDS \$8 MILLION VERDICT IN BUS ATTACK

A federal appeals court has upheld an \$8 million verdict against Greyhound Lines for a passenger on one of its buses, who was injured while she was on her way to Atlanta. Another passenger cut the driver's neck while the bus was traveling along an interstate highway and the bus crashed. The incident occurred shortly after the September 11th terrorist attacks. Sharon Surles, a retired auto worker whose spinal cord injury in the October 3, 2001 crash left her a paraplegic, was afraid to fly because of the terrorist attacks. Her fear was the reason she decided to travel by bus.

Ms. Surles, of Saginaw, Michigan, was traveling to visit her daughter in Georgia when the bus crashed on rural Interstate 24 in Tennessee at a point between Chattanooga and Nashville. Six passengers, including the attacker, were killed. A seventh passenger died later at a hospital, and 34 others on board were injured. The U.S. Court of Appeals for the Sixth Circuit upheld the jury's August 2005 verdict, which awarded \$8 million in compensatory damages to Ms. Surles. Reports showing 42 other incidents of passengers grabbing or attempting to assault or grab a bus driver, steering wheel or brakes, had been introduced at trial. As a result of this verdict, Greyhound installed shields that separate drivers from passengers

on all of its more than 1,200 buses nationwide.

Source: Associated Press

OHIO GOVERNOR STRICKLAND ISSUES VETO OF TORT REFORM BILL

On his first day in office, Ohio Democratic Governor Ted Strickland vetoed a bill his predecessor and legislative leaders claim already had become law. After the veto Republican lawmakers promised a court fight. The bill in question limits lawsuits against lead-pigment manufacturers for the costs of cleaning up the hazardous material in older buildings and limits non-economic damages. Outgoing Republican Governor Bob Taft, who was a tried to let the bill become law without his signature. But Governor Strickland and his legal advisors contended that the bill would not become law without the governor's signature until the end of the day on January 8th. That gave Governor Strickland the opportunity to veto the bill after asking the newly-elected Secretary of State to send the bill back to him. In issuing his veto, Governor Strickland stated:

This legislation weakens both consumer protections and corporate accountability, and I will not allow it to go into law, in its current form, during my Administration. Ohio's consumers must be allowed to hold companies fully responsible if a company has a product that harms Obioans, especially children.

The bill, which was passed hastily in a lame duck session of the Ohio Legislature, would prevent anyone, especially cities, from filing public nuisance lawsuits against lead pigment manufacturers. Instead, the lawsuits would have to be filed as product liability lawsuits. After the legislature passed the bill in mid-December, the City of Columbus sued nine paint manufacturers before the law could take effect. A spokesman for Columbus Mayor Michael B. Coleman, who wrote Taft asking him to veto the bill, said he applauded Gover-

nor Strickland's decision to "let cities do what they feel necessary to protect citizens." A vast number of people have been affected by lead paint. The danger to people and the cost put on taxpayers are great. The bill also would cap at \$5,000 non-economic damages in cases filed under the Ohio Consumer Sales Practices Act.

Source: *The Columbus Dispatch*

IV. THE NATIONAL SCENE

A LOOK AT THE NEW CONGRESS

When there is a changing of the guard in Washington, especially in Congress, people hear lots of talk by the new group's leaders about their plans for progress. The current situation in Congress is no different. But, those now in charge must understand clearly that people back home expect more than promises this time—they expect results. So, let's see what the Democratic Congress is saying and what they are doing.

THE DEMOCRATIC PLAN FOR THE FIRST 100 DAYS

With their new Democratic majority, House Democrats pledged to honor the American people's faith in them, and restore America's faith in the future with a New Direction for America. The Democrat's New Direction began last month with a commitment to integrity, civility, and fiscal responsibility. The Democratic leaders say that the voice of every American should be heard, which is the basic premise of our form of government. Democrats in Congress must work to make our nation safer, our economy fairer, and health care more affordable for people. It's very important that the strong link between lobbyists and legislation be broken. Pay-as-you-go budgeting is needed and must be

enacted. Democrats have pledged to govern in a manner that will take our country in a new direction.

The following is what the Democratic majority has promised to do in the first 100 hours, which by the way is counting "legislative hours only." That's the actual time the House is in session and working at an official function.

- They will start by cleaning up Congress, ending the link between lobbyists and legislators, and they are committed to pay-as-you-go, no new deficit spending. These items were the top priority.
- Implementing the recommendations of the independent, bipartisan 9/11 Commission, which makes our nation safer, was another top priority.
- Raising the minimum wage is long overdue. Regardless of politics, an increase in the minimum wage is badly needed.
- Health care must be made more affordable for all Americans. Fixing the Medicare prescription drug program, putting seniors first by negotiating lower drug prices, is another top priority. They will also promote stem cell research to offer real hope to the millions of American families who suffer from devastating diseases.
- A bill to broaden college opportunities by cutting interest rates for student loans in half was introduced.
- The pledge to energize America, by achieving energy independence, was well-received. A start was to roll back the multi-billion dollar subsidies for Big Oil.
- Fighting any attempt to privatize Social Security is a priority with the Democrats and must be dealt with.

Democrats introduced all of this legislation on the first day of the new Congress. Within the first 100

legislative hours all of the bills were passed in the House and sent to the Senate. The priorities of a unified Democratic Party promise a new direction for our country. A pledge was made to the American people. That pledge must be honored and the people will be watching closely to see if they really meant what was said. I had hoped that all of the House bills would pass the Senate and go to President Bush for his signature. The Senate defeated a bill, however, that would have raised the minimum wage in a very close vote.

LET'S TAKE A LOOK AT HOW GOP LAWMAKERS CELEBRATED THEIR FIRST 100 DAYS IN CONGRESS 12 YEARS AGO

Several of my friends were comparing the state of affairs in Washington today to how it was back when the GOP took control of Congress in 1994. We looked at the Democratic plan for the first 100 hours above, so it might be good to look back at Newt Gingrich's "Contract With America," which was the battle cry of Republicans when they took control of Congress some 12 years ago. The former speaker, who in my opinion was a political phony of the first order, boasted at the time:

If we break this contract, throw us out. We mean it.

GOP lawmakers celebrated the end of their first 100 days of the 104th Congress claiming that they had kept the contract they had made with voters. To give the "devil his due," I must admit that Gingrich pushed all of the contract's provisions to a floor vote before the 100-day deadline he had set for the House. All these measures received House approval with one exception, and that was a proposed constitutional amendment to limit congressional terms. What a surprise! There were 10 major issues and all of them came to a House vote. Nine out of 10 were passed by the House and sent to the Senate.

Yet, even as Gingrich and other Republicans toasted their 100-day achievements, history will record what they accomplished was largely a public relations stunt and really a “sham.” I believe that only two contract proposals actually became law and those were:

- A bill curtailing the ability of Congress to impose “unfunded mandates” on the states; and
- Legislation making the House and Senate subject to health, safety, labor and civil rights laws.

The rest of the contract bills were stalled or killed in the Senate. One high-priority objective, a balanced budget amendment, was killed outright in the Senate, whose Republican members refused to affix their signatures to the Contract With America. Other contract bills—from welfare reform to tax relief—were all window dressing and nothing more. Republican leaders finally had to concede that the larger promises were not kept. Let’s look back at what those promises included:

- Shrinking the federal government;
- Eliminating a \$200 billion budget deficit;
- Restoring an ethic of hard work, religious observance and private charity to American society;
- Creating a line-item veto for the President;
- Protecting future defense funding;
- Expanding benefits for senior citizens; restricting the federal regulatory burden; and
- Reforming of the civil law system.

When you compare the two agendas discussed above—some 12 years apart—I believe we will have to say that the present Democratic agenda holds much more promise for the people of this great country. It will be interesting to see what happens in their first 100

days, not just the 100 first **hours**. I am hopeful that this Congress will remember the message they received on November 7th and do the right thing for America. No longer can our elected representatives in Washington ignore the real will of the people and continue to do the bidding of the rich and powerful. We truly need that **new direction** for our country. I hope we will now have it!

THE SHADOW GOVERNMENT

The most powerful forces in Washington over the past several years have been lobbyists for Corporate America and those who represent a number of foreign countries. The lobbyists, who bring in high fees and salaries for their work, have a great deal to say about what happens in our nation’s capital. Many of these lobbyists are former members of the U.S. House of Representatives and Senate. Prior to their becoming lobbyists, many of them had handled legislation while on the public payroll that greatly benefited their future employers or benefactors.

A classic example of a member of Congress who feathered his nest after leaving public service is former House member Billy Tauzin of Louisiana. You may recall that Rep. Tauzin, who was chairman of the House committee that regulates the drug industry, sponsored and pushed through the infamous prescription drug legislation that greatly benefited the powerful pharmaceutical industry. Guess where Tauzin is working now? Would you believe that the gentleman from Louisiana is now the Executive Director of the Pharmaceutical Research and Manufacturers of America, the drug industry’s trade group, pulling down a salary in excess of \$2 million per year plus some good fringe benefits? Surely his doing the bidding of the powerful drug companies while in Congress had nothing to do with his going to work for the industry.

Two other former well known politicians who left public service and now do well as lobbyists are former Senator Bob Dole and former Rep. Bob Livingston, who was almost Speaker of the

House, another Louisiana politician, who makes over \$8 million in fees. Senator Dole does even better, as I understand it. Of course, you can take a look at K-street and you will find hundreds more who are well-connected located there.

It’s said in Washington political circles that the politics of money runs Congress and much of our national government. Hopefully, the power of this shadow government will be curtailed by the new Democrat-controlled Congress. We elect men and women to run the affairs of government and should never turn those affairs over to a powerful group of lobbyists.

EXXONMOBIL PAID TO MISLEAD PUBLIC ON GLOBAL WARMING

It’s most interesting to hear that ExxonMobil Corp. gave \$16 million to 43 ideological groups between 1998 and 2005 in a coordinated effort to mislead the public by trying to discredit the science behind global warming. A report by the Union of Concerned Scientists, a science-based nonprofit advocacy group, mirrors similar claims by Britain’s leading scientific academy. Last September, the Royal Society wrote the oil company asking it to halt support for groups that “misrepresented the science of climate change.”

Accumulating carbon dioxide and other heat-trapping gases from tailpipes and smokestacks are warming the atmosphere like a greenhouse, melting Arctic sea ice and alpine glaciers and disturbing the lives of animals and plants. ExxonMobil lists on its Web site nearly \$133 million in 2005 contributions globally, including \$6.8 million for “public information and policy research” distributed to more than 140 “think tanks,” universities, foundations, associations, and other groups. Some of those have publicly disputed the link between greenhouse gas emissions and global warming. But in September, the company said in response to the Royal Society that it funded groups that research “significant policy issues and promote informed discussion on issues of direct relevance to

the company.” Although the powerful oil company says the groups don’t speak for the company, they clearly are attempting to sway public opinion on a most important issue.

Alden Mayer, the Union of Concerned Scientists’ strategy and policy director, told the *Associated Press* that ExxonMobil based its tactics on those of tobacco companies, spreading uncertainty by misrepresenting peer-reviewed scientific studies or cherry-picking facts. It was reported by *Associated Press* that Dr. James McCarthy, a professor at Harvard University, said Exxon has sought to “create the illusion of a vigorous debate” about global warming. Having dealt with this powerful company, I am not at all surprised to learn that it would mislead folks on important matters.

Source: *Associated Press*

REPORT REVEALS THAT OIL LEASE CHIEF KNEW OF ERROR

A top Interior Department official was told nearly three years ago about a legal blunder that allowed drilling companies to avoid billions of dollars in payments for oil and gas pumped from publicly owned waters, according to a report by the department’s chief independent investigator. The report suggested that Interior officials could have fixed the mistake far more easily if they had taken action when they first recognized it. Oil and gas prices were far lower at that time than they are today. The report was furnished to lawmakers in Washington last month.

It’s significant that the report contradicts statements by the official, Johnnie M. Burton, the director of the department’s Minerals Management Service, who told a House hearing last September that she first learned about the royalties problem in January 2006. Investigators calculated that the government could have collected an additional \$865 million in the last three years alone if officials had told companies drilling in the Gulf of Mexico that they owed all the royalties required on oil and coal extracted from federal waters.

Unless the leases are changed, Administration officials expect the mistake to cost billions of dollars in royalties that drilling companies usually are required to pay the federal government for oil and gas pumped from the gulf. The report is the result of a nine-month investigation by the Interior Department’s Inspector General in response to questions raised by the Senate Energy Committee and the House Natural Resources Committee.

Source: *New York Times*

REPORT RECOMMENDS WITHDRAWAL OF OMB RISK ASSESSMENT BULLETIN

A draft bulletin issued by the White House Office of Management and Budget prescribing technical standards for federal risk assessments is “fundamentally flawed” and should be withdrawn, according to a new National Research Council report. Risk assessments are often used by the federal government to estimate the risk the public may face from such things as exposure to a chemical or the potential failure of an engineered structure, and they underlie many regulatory decisions. Last January OMB issued the draft bulletin, which included a new definition of risk assessment and proposed standards aimed at improving federal risk assessments. OMB also requested that the Research Council review the bulletin.

OMB requested the Research Council report, and it was sponsored by the U.S. Environmental Protection Agency; U.S. Departments of Agriculture, Defense, Energy, Health and Human Services, and Labor; and NASA. The National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and National Research Council make up the National Academies. They are private, nonprofit institutions that provide science, technology, and health policy advice under a congressional charter. The National Research Council is the principal operating agency of the National Academy of Sciences and the National Academy of Engineering.

Source: National Academy of Engineering

NEW EXECUTIVE ORDER IS LATEST WHITE HOUSE POWER GRAB

The White House released a new executive order last month that will threaten the ability of the federal government to protect and inform the public. The order amends a series of previous executive orders that culminated in Executive Order No. 12,866, which the White House has used to give itself the power to review regulations before they can be officially published in the Federal Register. The new order applies the review power not just to regulations but also to what it calls “significant guidance documents.” Joan Claybrook, president of Public Citizen, had this to say:

This order is just the latest in a series of unacceptable power grabs by the Bush Administration. President Bush is asserting the right to change the law by executive fiat.

Public Citizen identified three major problems with the new executive order:

- First, it requires agencies to get White House approval of many important kinds of guidance for the public, which would allow the White House to create a bureaucratic bottleneck that would slow down agencies’ ability to give the public information it needs. Agencies use guidance to let the public know how they intend to enforce the laws and regulations on the books. “By requiring White House approval of important guidance, the White House will insert its political agenda and pro-business bias into every level of agency policy, so that our federal government will handcuff itself instead of the companies that violate the law and put the public in danger,” said Robert Shull, Public Citizen’s deputy director for auto safety and regulatory policy.
- Second, the new order stresses the concept of “market failure” in its revised command for agencies to state justifications for new regulations for public health, privacy, safety, civil rights and the environment. Market

failure is an economics term describing situations in which private markets, left to themselves, fail to bring about results that the public needs. This order, however, will be enforced by Susan Dudley, the radical extremist who the White House is setting up for a recess appointment to become the administrator of the Office of Information and Regulatory Affairs (OIRA) in the White House Office of Management and Budget. Based on an evaluation of Dudley's record in a report released last year, Public Citizen has concluded that in her hands, the market failure provision will become a barrier to the protections that the public needs.

- Third, the order requires agencies to develop annual plans for upcoming rulemakings that identify "the combined aggregate costs and benefits of all...regulations planned for that calendar year to assist with the identification of priorities." This new requirement will make cost/benefit analysis the central factor in setting priorities for needed protections of the public interest.

These cost/benefit analyses are biased against regulation, especially long-term goals such as preventing global warming or cancers that manifest years after exposure to toxic substances, according to Public Citizen. The White House is working quickly to undermine not just agencies but also the new Congress' ability to protect the public. It has the "smell" of the Vice-President and Karl Rove and their total disregard for the welfare of the American people. The White House is amending the Administrative Procedure Act by decree, claiming power that belongs to Congress alone. The new Congress shouldn't allow this power grab to happen and I don't believe they will. Congress must hold the president accountable for this affront to the rule of law.

Source: Public Citizen

THE WHITE HOUSE WON'T GIVE UP ON SUSAN DUDLEY

I had hoped that the Bush Administration had given up on its plan to appoint Susan Dudley to be the Administration's top regulatory czar. Unfortunately, Ms. Dudley's nomination will be sent back to Congress. Why won't the Bush White House give up on this nominee? Ms. Dudley, an anti-regulatory advocate at the industry-funded think tank Mercatus Center, was widely opposed when nominated in July 2006 to become administrator of the Office of Information and Regulatory Affairs in the Office of Management and Budget. This obscure, but powerful position, has the capacity to stall or weaken regulations to protect the public health, safety, privacy, civil rights and the environment. Ms. Dudley's nomination was the subject of a committee hearing, but it was not allowed to proceed to a committee vote in 2006. She clearly has an agenda that makes her a very poor choice for this position.

Unfortunately, the White House renominated Dudley last month, setting up a confrontation with the new Democrat-controlled Congress. As we pointed out in a previous issue, Ms. Dudley has opposed life-saving protections such as rules requiring advanced air bags, improved standards on arsenic in drinking water, and mandatory decreases in ground-level ozone. Concerning this woman's ability to serve, Joan Claybrook, president of Public Citizen, observed:

Dudley is utterly unfit for the job. The White House is again displaying its contempt for carrying out and enforcing the law to protect the public.

Robert Shull, Public Citizen's deputy director for Auto Safety and Regulatory Policy, who was a co-author of the report on Ms. Dudley, added these comments:

The White House is wasting the Senate's time by sending back this radical extremist. The president struck a note of bipartisan cooper-

ation after the November elections. Renominating Dudley shows that it's back to highly partisan business as usual for the White House.

The Bush Administration is so controlled by the giants of Corporate America that it continually puts persons with known and documented anti-consumer agendas in charge of regulatory agencies and in other positions that have tremendous potential for doing harm to the general public. There hasn't been a president in my lifetime any worse for consumers than the current occupant of the White House.

Source: Public Citizen

A DRAMATIC INCREASE OF VIOLENCE IN TELEVISION REVEALED

The Parents Television Council has released a new study on television violence, *Dying to Entertain*, which found that violence on prime time broadcast television has increased 75% since 1998. The television season that began in the fall of 2005 was also one of the most violent ever recorded by the PTC. Violence on television is alarmingly more frequent and much more disturbing. Children and families who watched prime time network television last season were exposed to a disturbing amount and degree of violence. Not only was there more on-screen violence than ever before, but the discussions of violent crimes were more explicit and the violence depicted was far more graphic. I believe that the networks, the cable industry, and the satellite industry have a duty to clean up their programming and newscasts.

It is up to the program creators, the networks, the sponsors and public officials who can do something to solve the problem to institute sweeping changes to the current system that clearly do not go far enough to protect children. Experts like Dr. Deborah A. Fisher with the Pacific Institute for Research and Evaluation, have attempted to explain the effects of violence on children. On that subject, Dr. Fisher observed:

Given that on average American youth witness more than 1,000 murders, rapes, and assaults per year on television, understanding the consequences of such exposure is an important public health issue. After decades of research and more than a thousand studies, the answer is yes, watching violent content on television affects youth. Although not all those exposed will commit violent acts, the evidence is overwhelming that viewing high levels of violent programming increases the likelihood of aggression.

The following are the overall findings from the study:

- Since 1998, violence increased in every time slot during prime time: During the 8:00 pm Family Hour, it increased by 45%. During the 9:00 p.m. hour, violence increased by 92%. During the 10:00 p.m. hour, there was an increase of 167%.
- ABC experienced the biggest increase in violent content overall. In 1998, ABC averaged .93 instances of violence per hour during prime time. By 2006, ABC was averaging 3.80 instances of violence per hour — an increase of 309%.
- Fox, the second-most violent network in 1998 experienced the smallest increase. Fox averaged 3.43 instances of violence per hour in 1998 and 3.84 instances of violence per hour by 2006 — an increase of only 12%.
- Over half (56%) of all violence on prime time network television during the 2005-2006 season was person-on-person violence. Nearly half (49%) of all episodes airing during the study period contained at least one instance of violence.
- For each hour of prime time, CBS had the highest percentage of deaths depicted on screen during the 2005-2006 season. During the 8:00 p.m. hour, 66% of violent scenes depicted a death. During the 9:00 p.m. and 10:00 p.m. hours, 68% of violent scenes depicted a death.

- Across the board, 54% of violent scenes contained either a depiction of death (13%) or an implied death (41%) during the 2005-2006 season.
- Over time, violence has shifted from being incidental to the story-telling, to being an integral part of the program, with more and more programs focusing on graphic autopsy scenes, scenes depicting medical procedures, and extensive torture sequences.
- Violent scenes increasingly include a sexual element. Rapists, sexual predators and fetishists are cropping up with increasing frequency on prime time programs like *Law and Order: S.V.U.*, *C.S.I.*, *C.S.I. Miami*, *C.S.I. New York*, *Medium*, *Crossing Jordan*, *Prison Break*, *E.R.*, and *House*.

Source: Parents Television Council

“GIRLS GONE WILD” FOUNDER SENTENCED AND FINED

The founder of the “Girls Gone Wild” videos has been sentenced to two years probation and 200 hours of community service for violating federal laws designed to prevent the sexual exploitation of minors. Joe Francis, who has become very wealthy exploiting teenage girls, was also ordered to pay a \$500,000 fine as part of a plea deal he made with the U.S. Department of Justice in September. Under the plea deal, Francis acknowledged he included footage of two drunken, underage girls shot in Florida in the videos. In December, a federal judge in Florida ordered Francis’ Santa Monica-based company, Mantra Films, to pay a \$1.6 million fine for featuring in its videos two 17-year-olds who were filmed on Panama City Beach during spring break in 2003. I really wish Mr. Francis had been sentenced to a stiff jail term so he could have had time to consider how truly evil his empire has become, and perhaps he would see fit to repent.

MAYBE IT DOESN’T PAY TO CHEAT IN TEXAS OR DOES IT?

Texas Attorney General Greg Abbott has reached a settlement with BioPerformance, a Dallas, Texas company, that arose out of a fraudulent scheme. The company marketed a mothball-like product as a gas mileage booster. The company sold its product with a claim that putting a couple of the pills into a car’s fuel tank could increase gas mileage by 30%. With the price of gas being what it was, that was good news if true. The investigation by the State of Texas revealed that the product had no such power and that its main ingredient was naphthalene, used in making mothballs. The state also found that the company developed a pyramid scheme that drew in about 50,000 people nationwide and ran up some \$28 million in sales. The judgment provides \$7.3 million in restitution to affected consumers. Attorney General Abbott should be commended for pursuing this matter. Maybe it doesn’t pay to “cheat” in Texas after all. But, there is a big difference between \$28 million and the \$7.3 million being paid by the company that cheated the public.

Source: *New York Times*

V. THE CORPORATE WORLD

SCCI HOUSTON SETTLES LAWSUIT FOR \$7.5 MILLION

It appears that fraud in Medicare system just won’t go away. SCCI Houston, a former long-term acute care service based in Dallas, Texas, has paid the federal government \$7.5 million to settle allegations of fraudulent Medicare claims. The settlement resolves a civil lawsuit filed in 1999 by four former employees and an independent contractor who worked for the 40-bed long-term acute care hospital. At the time, SCCI Houston was part of SCCI Health Services Corp., which operated a number of acute care facilities in several

states. This settlement was the result of another lawsuit that was filed under the federal whistleblower False Claims Act.

In this case, the Justice Department filed its own complaint in March 2003. From 1996 to 1999, SCCI allegedly entered into illegal financial relationships with three doctors and paid them in violation of self-referral statutes, and submitted or caused false claims to be submitted to the Medicare program. As you may recall, SCCI Corp. was acquired by Triumph HealthCare in 2005. The case was handled by the Justice Department's Civil Division and the U.S. Attorney's Office for the Southern District of Texas, with the assistance of the FBI. This is just another example of how some in Corporate America believe cheating the federal government and taxpayers is fine and dandy.

Source: *Houston Chronicle*

FINAL APPROVAL GIVEN TO HEALTHSOUTH SETTLEMENT

HealthSouth Corp. has received final court approval to settle a securities fraud class action lawsuit for \$445 million. The settlement, reached last year, is the result of lawsuits that charged the company with a massive financial fraud that nearly drove it into bankruptcy in 2003. The settlement includes \$215 million in HealthSouth stock and warrants, and cash payments by the company's insurance carriers totaling \$230 million. The members of the class will receive 25% of any recovery from judgments HealthSouth receives against Richard Scrushy, Ernst & Young (its former auditors), and UBS (its former primary investment bank). Each of these three remains a defendant in derivative actions as well as the federal securities class actions. The settlement doesn't include Ernst & Young, UBS, Scrushy or any former executive who entered a guilty plea or was convicted of a crime related to the company's former financial reporting.

Source: *Associated Press*

INVESTOR PAYS \$7.7 MILLION TO END INSIDER TRADING PROBE

Friedman, Billings, Ramsey & Co., an investment firm, has agreed to pay \$7.7 million to settle insider trading charges filed by federal and industry regulators. The U.S. Securities and Exchange Commission and the National Association of Securities Dealers alleged that the company had improperly traded shares of CompuDyne Corp. in a 2001 securities offering that it managed for the security products company. The regulators said the firm had failed to establish procedures to prevent insider trading. One has to wonder whether but for Enron's being caught in a totally different fraud, investors would ever have become aware of how Wall Street was operating.

HOSPITAL CHAIN AGREES TO SETTLEMENT

A settlement providing as much as \$423 million in refunds and discounts to more than 780,000 uninsured patients at Catholic Healthcare West hospitals has been approved by a Superior Court judge in California. The non-profit company, which operates 43 hospitals in California, Nevada, and Arizona, was accused in an October 2005 lawsuit of overcharging its uninsured patients and sending aggressive collection agencies after them when they couldn't pay. According to the suit, the hospitals—including St. Francis and St. Mary's in San Francisco—charged uninsured patients far more than those covered by Medicare, Medicaid, or private insurance.

As we have learned through discovery in litigation being handled by our firm, hospitals commonly set higher rates for the uninsured to make up for lower government reimbursements in Medicare and Medicaid. The suit in California alleged that Catholic Healthcare West's disparities were so extreme that they were unfair to the uninsured, who comprised about 5% of the total patients. The settlement was reached in June and received final court approval. Its terms include a 35% discount for uninsured patients with incomes of less

than \$250,000 a year who were treated at one of the hospitals between July 1, 2001, and Sept. 25, 2006, and 35% refunds for those who have already paid their bills.

Catholic Healthcare West also agreed, for the next four years, to charge uninsured patients the same reduced rates offered to patients in managed care plans, and to provide free or discounted care to uninsured patients with low to moderate incomes, on a sliding scale up to \$100,000 a year for a family of four. Another provision requires "more compassionate collection policies" for patients who fail to pay their bills. The settlement is estimated to be worth \$423 million, which is 35% of the bills sent to more than 780,000 uninsured patients during the period covered by the case. More information about the settlement is available at www.chwsettlement.com.

Source: *San Francisco Chronicle*

BAYER SETTLES STATES' DRUG CLAIMS

Thirty states have reached an \$8 million settlement with Bayer Corp. over allegations that the drug maker failed to adequately warn consumers about risks associated with Bayer, which as you know is a cholesterol-reducing drug. As previously reported, the company learned after introducing Baycol in the U.S. in February 1998 that the drug posed significantly greater health risks than other similar drugs. Bayer informed the federal Food and Drug Administration about Baycol's higher risks, but did not sufficiently warn consumers and doctors about potential problems such as a severe muscle reaction that could cause kidney failure. A multi-state investigation ensued and resulted in this settlement. Bayer voluntarily withdrew Baycol from the market in August 2001.

As part of the settlement, the lead states in the investigation — Pennsylvania, Vermont, Oregon, Michigan, and Connecticut — each will receive \$600,000 for future consumer protection and enforcement programs. The other states will each receive \$200,000. Hopefully, this was a good settlement

for the states. There appear to be some features that will require more disclosure and warnings by the drug company in the future and more patient access to drug information. But, it doesn't appear that Baycol victims benefited at all from this settlement. That's why the courts must remain open to individual victims of corporate wrongdoing, who must have the constitutional right to take their cases to court.

Source: Associated Press

VI. CONGRESSIONAL UPDATE

BUD CRAMER GETS IMPORTANT DEFENSE SPENDING POST

Democratic Representative Bud Cramer of Huntsville has won a most important appointment in the new Congress. Bud was given a seat last month on the House subcommittee that decides on how money for defense programs is spent. Alabama has thousands and thousands of jobs that are tied to defense appropriations. There are major military posts in Bud's district such as the Army's Redstone Arsenal. This is not only great news for north Alabama, it's very good for all of Alabama. The defense subcommittee, which directs military spending and acquisitions, is exactly where Rep. Cramer needs to be. The defense post is timely because of the Pentagon's ongoing Base Realignment and Closure Commission (BRAC), in which bases across the country are being closed and consolidated as the military restructures. As you know, Alabama avoided major closings in the last round, even gaining positions in some bases.

U.S. SENATE FINALLY CRACKS DOWN ON FINANCIAL FRAUD

What a difference the vote of November 7th has made on how some politicians in Washington now view wrongdoing. The U.S. Senate has now

decided that lawmakers and other senior public servants should face stronger penalties, including jail time, for knowingly falsifying financial disclosure forms. That type legislation wouldn't have had a "prayer" to become law had not the voters voted overwhelmingly against corruption last year. The message appears to be understood. The Senators voted 93-2 on an amendment to increase from the current \$10,000 to \$50,000 the maximum civil penalty that can be imposed for willful misrepresentations on the forms, which broadly detail a public official's sources of income, assets and debts. The amendment, offered by Senator David Vitter (R-LA) to a lobbying and ethics reform bill the Senate is now considering, would also allow the U.S. attorney general to file criminal charges, with penalties of up to one year in prison, against those who fail to comply with the financial disclosure law.

Among those required by law to file financial disclosure forms are the president and vice-president, members of Congress, high-level executive branch officials, employees of the executive office of the president appointed by the president, and certain officers of Congress and the judicial branch. Concerning his amendment, Senator Vitter observed:

If average American citizens falsify tax documents, they are in a heap of trouble with the IRS and the federal government. Public officials shouldn't be treated any differently when they falsify their financial information.

Last year former Rep. Bob Ney (R-OH) who pleaded guilty in the Jack Abramoff influence-peddling investigation and faces prison time, acknowledged making false statements on his financial disclosure forms by concealing that Abramoff and a foreign businessman who were the true source of gifts. Much earlier, in 1984, former Rep. George V. Hansen (R-ID), was censured by the House for failing to include transactions on federal disclosure forms. He was later convicted of failing to file full disclosure

forms and spent 15 months in prison. The conviction was overturned in 1995.

It's become more common for lawmakers to amend their disclosure forms after acknowledging that they unwittingly made errors or omitted information. Both Senate Majority Leader Harry Reid (D-NV), and his predecessor, former Senator Bill Frist (R-TN), have amended forms after questions arose over them. The Senate was expected to vote on the ethics and lobbying bill during the week of the 15th of January. The House will likely take up similar legislation this month. Unless both the House and Senate take the necessary action to really clean up the mess in our nation's capital, there will be more incumbents who failed to participate who will be defeated in 2008.

Source: Associated Press

FDA PROPOSES HIKE IN DRUG INDUSTRY FEES

I have never believed that the U.S. Food and Drug Administration (FDA) should have the drug industry as a source of its funding. In my opinion, Congress should fund the FDA adequately and take away the agency's dependence on the annual user fees the pharmaceutical industry pays the government to review its products prior to approval. A recent proposal calls for a 29% increase in the user fees. Although it sounds good to hear the drug companies will pay \$393 million to the FDA under the proposal, in my opinion it is not the way to go. The FDA has done a poor job of regulating the drug companies. Depending on the industry for funding and then trying to regulate the drug companies is sort of like putting the fox in charge of the hen house. The fee increases proposal will require congressional approval. The following is a statement by Dr. Sidney Wolfe concerning the FDA and the drug industry:

The Food and Drug Administration (FDA) is proposing that the Prescription Drug User Fee Act (PDUFA) be reauthorized by Congress this year and that under the

Act, drug companies give the agency nearly \$400 million a year. The FDA's crucial drug regulatory functions are too important to be tainted and compromised by direct funding from the very companies whose drugs the agency reviews for safety. All the better ideas that have been discussed for improving FDA functions of reviewing new drugs, post-market safety studies and advertising should be included in the agency's upcoming budget proposal to the congressional appropriations committees. The agency should request these additional funds through the same process that funded the agency from 1906 through 1992—that is, the money should come from the federal Treasury, not the pharmaceutical industry. Ironically, the entire annual amount of funds now sought from industry under PDUFA is equivalent to fewer than two days of the current expenditures for the disastrous war in Iraq. Where are the congressional priorities?

Separately, the FDA is proposing assessing drug companies a fee to review direct-to-consumer television advertisements before they air. The FDA currently has only a limited ability to curb distribution of drug ads that violate federal rules, according to a recent report by government auditors. The FDA expects to collect about \$6 million in such fees. Incredible as it sounds, the drug companies would not be required to submit their ads for review. Congress should simply pass legislation banning drug companies from doing any direct-to-consumer advertising.

Since it was enacted in 1992, the Prescription Drug User Fee Act, or PDUFA, has authorized the FDA to collect fees from drug companies to underwrite the cost of reviewing their products. The law also requires the agency to stick to certain performance goals that make the approval process faster and more predictable. The current proposal was subject to negotiations with the drug industry, as well as input from patient

and advocacy groups. The law, which has twice been extended for five years, expires September 30th unless renewed by Congress. I hope lawmakers will use the reauthorization as a vehicle for legislation to further reform the FDA.

CONGRESS SHOULD BAN ALL DIRECT-TO-CONSUMER DRUG ADVERTISING

In my opinion, there can be no justification for allowing drug companies to advertise drugs directly to consumers. Drug advertising aimed at consumers referred to as direct-to-consumer (D-T-C) ads reached \$4.5 billion last year. Reportedly, this sort of thing will face hard scrutiny in the new Congress. Industry critics in both the House and Senate are quite numerous and that's good news for consumers. The consumer ads will be scrutinized early in this session.

The pharmaceutical industry, which has pretty much gotten what it asked for from Congress and the Bush White House, won't give up without a fight. This powerful industry has piles of money and doesn't mind spending it. Clearly, the FDA should ban all D-T-C ads. Criticism of this type advertising has intensified since 2004. It started after Merck withdrew Vioxx. The false and misleading ads by Merck promoting Vioxx were about as bad as it gets. Helen Darling, president of the National Business Group on Health, an organization of large employers, stated:

From the beginning, everyone, including the company, agreed that not everybody ought to be getting Vioxx. But the ads implied there was a widespread need for it.

Spending on consumer drug advertising has grown from \$1.1 billion in 1997 to \$4.2 billion in 2005, according to a recent report to Congress by the Government Accountability Office. In the first nine months of 2006, spending rose 8.4% to \$3.29 billion, on track toward \$4.5 billion for the year, according to TNS Media Intelligence, an advertising research firm. Spending on the ads declined in 2005. Two independent gov-

ernment watchdog groups sharply criticized consumer drug advertising recently, and a separate survey commissioned by the PricewaterhouseCoopers accounting and consulting firm indicated that skepticism is widespread among the public. Only 1 in 10 consumers said the direct-to-consumer ads could provide useful information to a large audience, according to the survey. Interestingly, consumer drug advertising is not permitted in most of the world—with the two exceptions being New Zealand and the United States.

People who have a need for a prescription drug should get their information concerning the proper drug from a doctor and a pharmacist—not from some slick television ad. Patients deserve the best and most accurate information about the medicines they take. An essential part of any drug safety proposal must be to give the Federal Food and Drug Administration (FDA) the authority and resources it needs to oversee direct-to-consumer advertising. If there isn't a ban, at least there must be limits on any D-T-C advertising that the FDA allows. Protecting the public health has to be the top priority. I don't buy the First Amendment argument that the pharmaceutical industry has presented. They say banning truthful speech, even for a period of time, must be carefully considered before Congress should start legislating in this area. What about the grossly misleading ads—should those be protected?

Last November the Government Accountability Office (GAO) said that the FDA should be doing a better job of overseeing consumer drug ads. The FDA reviews only a small fraction of the advertising, picking and choosing without proper priorities, according to the GAO. FDA officials have said they had to deal with 54,000 drug promotions each year, aimed at both doctors and consumers. It's time for a total ban!

Source: *New York Times*

FDA REGULATORY CONTROL OVER TOBACCO COULD BE REVIVED

Legislation to give the U.S. Food and Drug Administration authority to regu-

late the tobacco industry is expected to be reintroduced soon. If it passes, the law could give regulators new tools while creating a more predictable business environment that could favor the largest cigarette makers. The bill enjoys the support of both anti-tobacco lobbyists and Altria Group — the owner of Richmond-based Philip Morris USA and Philip Morris International. Philip Morris USA makes cigarettes under the Marlboro, Virginia Slims, and Parliament brands and is the nation's biggest cigarette maker. The bill is sponsored by Massachusetts Senator Ted Kennedy and California Congressman Henry Waxman. It's quite apparent that tough controls over the tobacco industry are badly needed. This is the only industry that puts out a product that if used as intended will eventually kill the users. But, unless the regulation of tobacco is stronger and more effective than regulation of industries like oil, drugs, and motor vehicles, it won't get the job done.

Source: *Associated Press*

VII. PRODUCT LIABILITY UPDATE

IMMI Has No Concern For Safety

Our firm recently settled a products liability case that shows clearly how little regard for safety some manufacturers have. The case, which was filed in the Circuit Court of Montgomery, County, Alabama, involved the tragic death of an innocent man who, while driving a large truck was properly wearing his seat belt in a highway crash. Like all of us, Joe Freeman expected the belt system to work properly. After all, a seat belt is an essential part of a vehicle's safety restraint system. As we all know keeping an occupant in a vehicle in a crash sequence that involves a roll over is good from a safety perspective. Ejection from the vehicle in most every case results in death or a severe disability injury.

On October 12, 2005, Joseph Freeman, Jr. was employed by Evergreen

Forest Products as a truck driver. His job was to transport wood chips from a lumber mill in Chapman, Alabama, to a paper mill located in Prattville, Alabama. Around 6:30 a.m. on that morning, Mr. Freeman was driving a 2004 model large truck owned by his employer, Evergreen Forest Products. He was pulling a trailer loaded with wood chips north on a two lane rural highway in Butler County, Alabama. A small Nissan pickup crossed the center line of the roadway and hit Mr. Freeman's truck head on. Neither vehicle was traveling above the speed limit of 55 miles per hour. That was undisputed. Mr. Freeman attempted to steer his vehicle to the right in an attempt to avoid the collision, but the vehicles collided at the edge of the northbound lane. The Nissan truck was virtually destroyed on impact. The driver—who was **not** wearing his seat belt—was ejected and killed instantly. Mr. Freeman was unhurt in the initial collision with the Nissan and his truck continued beyond the impact. Mr. Freeman attempted to steer his truck to a stop after the impact, but, as he steered his truck back into the northbound lane, the truck and trailer rolled onto its passenger side and slid to rest in the roadway. Mr. Freeman—who **was wearing** his seat belt—was ejected through the windshield of his truck and thrown onto the pavement. He lived approximately 30 minutes at the scene, but died en-route to a local hospital.

Mr. Freeman was killed when he was ejected from the truck because his seat belt didn't work. A wrongful death lawsuit was brought by Mr. Freeman's family against Indiana Mills Manufacturing Inc. (IMMI) and the manufacturer of the truck under the provisions of the Alabama Extended Manufacturer Liability Doctrine. It was alleged that the restraint system manufactured and sold by IMMI for use by the truck manufacturer was unreasonably dangerous and defective. We proved during pretrial discovery that, not only was this buckle defective, but IMMI knew all about the defect, but continued to sell the buckle to truck manufacturers.

When the truck manufacturer first introduced this line of heavy trucks,

the trucks were equipped with a seat-belt system manufactured by Autoliv, a leading restraint manufacturer. During the early years of the line, 2000 and 2001, the truck manufacturer had **no complaints** concerning the operation of the Autoliv seatbelt buckles in its line of trucks. However, in 2002 the truck manufacturer switched from Autoliv to IMMI as the supplier of seatbelts for its trucks. The switch became effective in mid-2002. Almost immediately, the truck **manufacturer** began to **receive** complaints from drivers that the IMMI seatbelt buckles known as the "H2" in the trucks would not latch properly and would fail to stay latched while the truck was being operated. Hundreds of these complaints were passed on to IMMI as part of a warranty agreement. Additionally, the truck manufacturer communicated the buckle defect to IMMI through numerous emails and direct meetings with IMMI representatives.

In the Summer of 2003, about a year after the H2 was introduced into the trucks, two IMMI engineers met and discussed the failure-to-latch problem. They then undertook to redesign the H2 buckle to prevent the buckle failure. As part of their work, these IMMI engineers discovered a Failure Modes and Effects (FMEA) study created during the time when the H2 buckle was being developed. The FMEA identified a potential failure mode of the H2 buckle that would prevent the buckle from latching. A severity value of "10" was assigned by the FEMA to the failure. This was the highest value on IMMI's scale. The buckle defect was attributed to "improper design." Although the failure was identified and documented in the FMEA in 2000, which was 2 years before IMMI began selling the buckle to the truck manufacturers, the problem was not corrected by the company.

Two weeks after IMMI began trying to "fix" the defective H2 buckle, the IMMI engineers came up with a redesign of the plastic buckle button that completely eliminated the defect. Immediately thereafter, IMMI produced samples of the new design and tested them to ensure proper operation and found that

the defect was corrected. By the end of 2003, the redesign and testing was complete. **Although the defect was discovered, documented, researched, evaluated, and corrected by the end of 2003, the truck assigned to Mr. Freeman was built in January 2004, using an older defective buckle.** That sort of conduct is absolutely unbelievable and can't be justified. In fact, Mr. Freeman's truck was purchased by Evergreen Forest Products in February 2004 as part of a fleet of identical trucks. Each truck in Evergreen's fleet was built using the **older** defective buckles. During our case preparation, we inspected and disassembled the buckles with a representative of the defendants being present, to confirm that the buckles were of the older design. Subsequently, IMMI corporate Risk Manager, Bob Crandall, drove from Indiana to Alabama to remove all of the buckles in the Evergreen fleet and replace them with the redesigned H2 buckles. It was admitted by IMMI during pretrial discovery that the older H2 buckle was redesigned to prevent the failure-to-latch problem and that the corrective action was taken by the end of 2003.

It is undisputed that Mr. Freeman was a habitual seatbelt user. In fact, in over 50 depositions—many of which are fact witnesses—we were unable to find a single person who ever saw Mr. Freeman in any vehicle without his seatbelt on. Several of his fellow drivers testified to seeing Mr. Freeman in the subject truck, or in his personal vehicle, with his seatbelt on at least 300 separate occasions. So, it was undisputed by all witnesses that Mr. Freeman always wore his seatbelt. Clearly, Mr. Freeman was wearing his seatbelt in this crash, yet it failed in a manner known to IMMI long before Mr. Freeman's truck was built. Although Alabama law presently doesn't impose a duty to recall defective products, IMMI voluntarily undertook such a duty when it began a silent recall campaign by replacing defective belts under its warranty program. The problem was that nobody driving the trucks with the defective seat belt systems were told.

IMMI failed to properly design the H2 buckle and IMMI sold a defective buckle to the truck manufacturer for installation in Mr. Freeman's truck. Under the silent recall campaign, IMMI replaced defective buckles only when drivers complained that their seat belts failed to properly latch. Even so, IMMI failed to replace the defective buckles in the fleet of trucks at Evergreen Forest Products until after Mr. Freeman was killed. IMMI, as the manufacturer of the defective H2 buckle in Mr. Freeman's truck, was directly responsible for his death.

We settled the case just before a jury was to be selected with the amount of the settlement at the defendant's request being confidential. However, Judge Charles Price lifted a protective order that had previously been in effect concerning the defective buckles as to IMMI. As a result, we are now free to tell the public about IMMI's total disregard for safety and how this manufacturer knowingly sold a defective product and to this day has kept the information concerning the defect from the public. Mike Andrews, Cole Portis, and I handled the case for Mr. Freeman's family. Mike Andrews, who was the lead lawyer on the case, did a tremendous job on discovery. We are now able to let the owners of trucks with the defective seat belt systems know about the hazard. Hopefully, this will save lives in the future. Mr. Freeman's family insisted that the protective order be lifted so that others would find out about this hazard.

UPGRADE OF NCAP TESTS IGNORES IMPORTANT CRASHWORTHINESS ELEMENTS

Last month, U.S. Secretary of Transportation Mary Peters announced upgraded test procedures for determining the New Car Assessment Program (NCAP) ratings for vehicle safety. Although the overhaul and review of these standards by the National Highway Traffic Safety Administration (NHTSA) is a good thing, there are some problems with what the agency did. There are a number of good things that NHTSA did relating to safety problems,

and those are certainly a step in the right direction. Included in the good things are those set out below:

- The overhaul of the NCAP ratings includes improvements to the frontal and side impact crash tests;
- Frontal impact crash tests will now include data about knee, thigh, hip, and lower extremity injuries, which had not previously been collected; and
- Side impact crash tests will adopt the pole test, which rigorously measures the effectiveness of side impact airbags. NHTSA proposed it in its 2004 Notice of Proposed Rulemaking on side impact protection, but the final rule has never been issued.

There are four major crashworthiness standards, however, that were omitted. That is causing major concern to safety advocates such as Public Citizen. Let's take a look at the items that weren't covered:

- A rollover crashworthiness test evaluating roof crush and ejection was still not included in determining the rollover safety rating.
- Compatibility—the disparity in size between passenger cars and light trucks—was not considered.
- Offset frontal crashes will also not be tested, despite the fact that the European Union conducts them.
- Pedestrian impact tests, which are done in the EU, Japan and Australia, were not considered or addressed.

NHTSA has suggested that crash avoidance technologies be factored into the NCAP ratings. The approach NHTSA recommends for this is inconsistent with the approach that it has taken for developing the crashworthiness ratings. NHTSA has outlined 3 major crash avoidance technologies, which are:

- Stability control;
- Lane departure avoidance; and
- Rear-end/frontal collision avoidance.

NHTSA has recommended determining the NCAP rating based on statistical data on the technology's ability to prevent crashes. It should be noted that stability control is the only one of these technologies currently widely available enough to have generated statistical data for making these judgments. By contrast, there are extensive data showing the value of ratings for the crashworthiness issues left out that were referred to above (rollover crashworthiness, compatibility, offset frontal crashes and pedestrian impact). These have been largely ignored by NHTSA, which is most unfortunate.

The crash avoidance technology ratings will be on a letter-based system, and will be based on a statistical representation of accident avoidance potential, as opposed to crash test and accident data. Public Citizen believes having both letters and stars on a vehicle's window sticker, with one set of ratings generated from theoretical data and the other from real-world data, will serve to needlessly confuse consumers. It must be recognized that improved NCAP ratings are not a substitute for standards. The NCAP ratings should be a measure of how much a vehicle exceeds the minimum standard set by NHTSA. Crashworthiness standards are most important for assessing vehicle safety, because these ratings reflect the occupant protection potential of a vehicle. Over the next few months, Public Citizen will be participating in public hearings and comments on the proposal in the next few months. Other safety groups and advocates should join with Public Citizen, a dedicated and hardworking group, and lend their support.

Source: Public Citizen

SETTLEMENT APPROVED IN CLASS ACTION OVER BAD JEEP BRAKES

A New Jersey judge has approved a \$14.5 million settlement in a national class action involving defective brakes on Jeep Grand Cherokees. A class consisting of those who bought or leased 1.2 million 1999 to 2004 Jeep Grand

Cherokees was certified for settlement purposes by Superior Court Judge Jonathan Harris. The vehicles allegedly had defective front brake discs or rotors and defective brake housings or calipers, resulting in uneven disc thickness that caused pulsation when the brakes were applied and sometimes led to brake failure. Complaints about the brakes filed during the warranty period were allegedly stonewalled by carmaker DaimlerChrysler Corp.

Most of the money, up to \$12 million, will go to a subclass of those who bought or leased a 1999 to 2002 vehicle. They are to be reimbursed for the cost of repairing or replacing the brakes within the warranty period. There will also be inspections for members of two other subclasses who have 2003 to 2004 model year Jeeps. Those who contacted DaimlerChrysler about pulsation while still under warranty, even if it has since expired, are entitled to a free brake inspection, and repairs if a disk thickness variation is found. The others get a free inspection, if they are experiencing pulsation, and a free repair, but only if they are still within the warranty.

At the time of the October 30th fairness hearing, more than 1 million class members had been identified, with 1,984 opt-outs. There were fewer than 70 objectors, which was termed "inconsequential" by the court. There had been negotiations between the parties that lasted for several months that resulted in the settlement. The settlement process was aided by a retired federal district judge who served as mediator. The decision resolves litigation in New Jersey as well as similar suits in New York, Florida, Ohio, Kansas, Missouri, and California. The cases were consolidated in New Jersey, where the first suit was filed.

Source: *New Jersey Law Journal*

JURY RETURNS A VERDICT IN A LAWSUIT INVOLVING A TRUCK WITHOUT UNDERRIDE PROTECTION

A Texas jury recently ordered Lufkin Industries to pay \$38.5 million for designing a truck without underride

protection that would have most likely saved the life of one woman and prevented crippling injuries to another. The jury awarded \$36 million to 25-year-old Kelleigh Falcon, who suffered severe brain injuries in the crash, and \$2.5 million to the family of Virginia Walker, who was killed in the crash. Ms. Falcon, the mother of two young daughters, suffered severe brain damage in the crash. As a result of her impairment, she can't care for herself. In fact, she can't even remember her father, who is her full-time caretaker.

At trial, Lufkin Industries argued it wasn't responsible for the injuries because the government didn't require manufacturers to install side underride guards. It also claimed that providing this needed protection wouldn't have been cost-effective for the company or the industry as a whole. The plaintiffs' lawyers contended that Lufkin Industries sold a defective and unreasonably dangerous product, and, that the lack of government regulations didn't relieve the company of the responsibility to make a safe truck.

In October 2003, an 18-wheel tractor trailer pulled out from a stop sign to cross a highway, cutting off a Ford Taurus driven by Ms. Walker. The Taurus skidded under the side of the trailer, slamming its windshield into the side of the truck, which dragged the car for a short distance. A large truck is almost far enough off the ground for a passenger car to pass right under it—but not quite. A typical passenger car will make contact with the underside of the trailer near the top of the windshield, leaving the occupants without any protection when the collision occurs. Seatbelts are useless and the airbags don't deploy. A collision between a tractor trailer and a passenger car is always very bad for the cars front seat occupants. The first thing to make impact is the car's windshield. The next objects that absorb energy are the occupants' heads. The vehicle's front end doesn't connect with anything under the trailer, so it absorbs no energy. Thus, the occupants in the passenger car take the full brunt of the collision.

Perhaps, the most important testimony in the case was that of the defendant's former chief engineer, who offered general information about trailers and underrides. He testified about how **dangerous** these vehicles are without the underride protection, acknowledging that Lufkin and the industry as a whole had known about the **danger** of these types of accidents since the 1960s. This witness called the space between the bottom of the trailer and the ground "**the space of no hope.**" Perhaps the engineer's most damning statement, however, came when he acknowledged that the only way to get the company to make their trucks safer was to pass stricter government regulations. It's common for defendants in product liability cases to hide behind the lack of government regulation when they put a defective vehicle on the market. That was the defense in this case and it failed. If we waited for the federal government's regulatory agency to require underride protection, it would never happen. The jury system has had to actually take over that responsibility.

A former employee of the National Highway Traffic Safety Administration (NHTSA) testified about how strong the industry's lobby is in Washington, and how much influence the Truck Trailer Manufacturers Association wields. It's well known that this group has successfully kept NHTSA from enacting a regulation to require the underride protection on large trucks. The lawyers who represented the plaintiffs in this case were Chip Ferguson and Chris Coco from the firm of Provost & Umphrey in Beaumont, Texas. They did a very good job for their clients.

Source: *Lawyers USA*

VEHICLE BACKOVER SAFETY ISSUE

The National Highway Traffic Safety Administration (NHTSA) recently released a report examining the safety issue of motor vehicle backover accidents involving pedestrians. This report was prepared in response to renewed Congressional interest in the issue. The

key item giving rise to this interest by members of Congress is the disproportionate involvement of small children in this accident scenario.

Many backover injuries and deaths are not reported. This has made it difficult to estimate the magnitude of this safety problem because many of the backover incidents occurred on private property and as a result are not recorded in state or federal crash databases. Nevertheless, NHTSA's research estimates that at least 183 fatalities occur annually as a result of backover crashes. Additionally, between 6700 and 7419 injuries result from backover crashes per year.

NHTSA also reviewed several of the currently available safety systems offered on vehicles that address the backover problem. Devices such as onboard cameras are being marketed as "parking aids," which are designed to help drivers in parking maneuvers. NHTSA found that camera systems offered the greatest potential for driver assistance in detecting people in the path of the vehicle while backing. The poorest performer was the "sensor-based parking aids" (ultrasonic and radar). NHTSA found them to be typically "poor, sporadic and limited in range." These types of devices are being offered as original equipment on vehicles and as aftermarket add-ons.

NHTSA intends to continue its research into the causes for and prevention of backover accidents. It intends to consult with and encourage the automotive industry to further develop the various systems intended to prevent backover crashes. NHTSA also plans to step up its educational efforts to make drivers more aware of the problem and provide common sense safety tips. The potential for tragedy in backover accidents is extremely high. These accidents often occur in family driveways, and many times they involve parents who are unaware of the presence of small children. The NHTSA website shows testing of the ultrasonic based system equipment on vehicles such as the Lincoln Navigator and BMW 330. Although the testing does not place the children in any harm, the video is quite frightening as it

shows them walking and playing behind vehicles as part of the test to determine the ability of the detection system to activate. The video really puts this hazard into the proper perspective. With the advanced technology we have today, all vehicles should be equipped with adequate detection systems so that this hazard can be avoided.

VIII. MASS TORTS UPDATE

THE ROLE OF LITIGATION IN DEFINING DRUG RISKS

I have known for years that product liability litigation has played a major role in making things better for consumers in their dealings with Corporate America. This role certainly includes litigation involving the powerful drug companies. An interesting article on the role of lawsuits in the drug industry appears in the January 17th issue of the *Journal of the American Medical Association* (JAMA). The article can be found at www.jama.com. In the drug cases discussed in JAMA, the litigation process revealed new data on the incidence of adverse events, enabled reassessment of drug risks through better evaluation of data, and influenced corporate and regulatory behavior. In performing these tasks, trial lawyers and their clients often find themselves serving as drug safety researchers of last resort. The article, by two Harvard researchers, says:

Litigation can exert its effect through the discovery process, in which each side shares previously unavailable information relating to the issue in dispute, as well as by motivating proper disclosure initially by presenting the possibility of substantial damages in cases of misconduct.

With regard to manufacturer disclosure of adverse events, the authors say "One common theme in the cases reviewed was delay in revealing adverse

event data, often accompanied by attempts to minimize their prevalence or severity.” In addition to the effect of litigation on manufacturing practices, verdicts and settlements influence drug companies to reexamine the practices exposed in the suits. The article’s authors reflected on regulation:

Litigation has also helped identify regulatory policies that can keep unsafe prescription medications on the market and has exposed important limitations in the FDA information collection and dissemination procedures.

The article concludes with discussion of the role of the FDA in recent years, siding “with manufacturers in arguing that the courts should not expect the industry to provide any risk information beyond what is contained in the drug’s official label,” and the FDA’s attempt to preempt court action. The authors made this assessment:

Limiting legal involvement in the prescription drug arena is likely to increase the nation’s problem of poorly defined or inadequately presented drug risk information.

It is my belief—based on our firm’s experience dealing with the drug industry—that the courts actually serve as the real regulators of the drug companies. The FDA is so controlled and understaffed that it has been largely ineffective in carrying out its regulatory function. The tort reformers want the court system shut down so that drug companies such as Merck can get away with wrongdoing with no fear of the consequences.

Source: *Journal of the American Medical Association*

FDA DOES NOT USE ADVISORY COMMITTEES EFFECTIVELY IN APPROVING NEW DRUGS

Public Citizen believes that the U.S. Food and Drug Administration (FDA) has failed to use its own advisory committees effectively when considering the approval of new drugs. Their belief comes from a study, the results of which are published in a letter in the current

edition of the *Lancet* medical journal. The study of drug advisory committee meetings found that the FDA overrules the findings of its own advisory panels 28% of the time, a figure much higher than is generally assumed. The FDA has 18 drug advisory committees that provide the agency with independent advice, but there have been virtually no quantitative examinations of how the committees function. In the present study, Public Citizen expanded upon its earlier study of financial conflict of interest in FDA drug advisory committee meetings published in April in *The Journal of the American Medical Association*. The nonprofit consumer organization examined meetings between January 1, 1997, and June 30, 2006, to determine how well the system is performing. Dr. Peter Lurie, deputy director of Public Citizen’s Health Research Group, and one of the authors of the letter, observed:

Advisory committees are a vital element of the nation’s drug safety net, but by failing to use these committees adequately, this resource is being squandered.

Public Citizen found that the FDA often allows drug companies to make an oral presentation without a countervailing FDA view. The agency fails to present its own interpretation of the company’s data 18% of the time, or at 49 of 275 drug advisory committee meetings for the period covered—which is inexcusable, according to Public Citizen. The data also revealed that the FDA is holding drug advisory committee meetings less often than it did in the late 1990s. The study showed that only 24%, or 35 of 147, new molecular entities (NMEs) approved between 2000 and June 30, 2006, were preceded by advisory committee meetings. This represents a decrease from 1998 and 1999, when the FDA held meetings for 40% and 52% of approved NMEs, respectively.

Source: Public Citizen

SIGNIFICANT APPELLATE DECISION INVOLVING VIOXX CLAIMS IN NEW JERSEY

A New Jersey appellate court panel has opened the door to a potential class action lawsuit against Merck & Co. The case was filed on behalf of people who took Vioxx and who want the company to pay for tests to detect possible heart ailments. The ruling by a three-judge panel of the Appellate Division of the Superior Court of New Jersey overturned a lower court decision in a case that sought to include patients who have not suffered medical problems but took Vioxx for at least six consecutive weeks before Merck pulled the drug from the market. The appellate decision said the lower court dismissing the case “prematurely terminated plaintiffs’ opportunity to prove they have a legal claim.” It’s believed that Merck will ask the New Jersey Supreme Court to review the ruling. As a matter of interest, Merck faces more than 27,000 personal injury lawsuits over Vioxx, plus 265 potential class-action suits. At least 14,000 additional plaintiffs have entered agreements with Merck suspending the time limit for lawsuits. Those claims can be filed beyond the normal time constraints imposed by statutes of limitation.

Sources: *Forbes* and *Associated Press*

CURRENT STATE OF THE ZYPREXA LITIGATION

For the second time in less than two years, Eli Lilly & Co. has reached an agreement to settle product liability litigation involving Zyprexa, its antipsychotic medication. As you may know from previous reports, Zyprexa is in a class of anti-psychotic medications that includes the medications Risperdal, Seroquel, Clozaril, Geodon, and Ablify. The drug’s side effects have come under renewed and intense scrutiny over the past year. Even with this most recent development, the Indianapolis-based pharmaceutical company will still have at least 1,200 Zyprexa product liability claims not covered by this latest settlement. There are also pending claims from government and private drug

benefit plans related to their coverage of Zyprexa prescriptions. Lilly says that it plans to take the remaining cases, not included in the settlement, to trial.

The lawsuits generally claim that Zyprexa, which is used to treat schizophrenia and bipolar disorder, caused high blood sugar and diabetes. It's alleged in most of the cases that before September 2003 the packaging insert for Zyprexa failed to adequately display information about these risks. In September 2003, U.S. regulators required label changes related to these risks for Zyprexa and other antipsychotics.

Lilly didn't disclose the full amount it will pay under the new settlements, but says it would be "substantially less" than the \$700 million paid under a June 2005 settlement. The earlier settlement involved about 8,000 claims, while the latest settlement is expected to cover more than 18,000 claims. We believe the total amount in this settlement will be about \$500 million. Lilly says the new settlements resolve the "vast majority" of remaining Zyprexa cases.

Our firm currently represents a good number of individuals who either suffer from schizophrenia or who are bipolar and who have been prescribed Zyprexa. All of our lawsuits were sent to the MDL court in New York where all of the Zyprexa litigation is being handled. We carefully screened our clients' claims and currently represent 500 clients. We are confident that we represent clients whose claims have merit because we have carefully evaluated all of the injuries and claims of our clients. All of this information was provided to Eli Lilly. Over the next several months we will be working to finalize the settlement of the claims for our clients.

Eli Lilly believes that this last round of settlements will essentially end the Zyprexa litigation. Not only has the Zyprexa litigation compensated people for Zyprexa-related injuries, but it has educated doctors on the risks of Zyprexa and the other anti-psychotic medications. Zyprexa is Lilly's best-selling drug, generating \$4.2 billion in sales in 2005—the last full year reported—or nearly 29% of total

company revenue. Fortunately, our clients will be given the opportunity to have their claims settled. We don't plan on filing any more Zyprexa claims at this juncture.

Source: *Wall Street Journal*

FDA PROPOSES STRONGER WARNING LABELS FOR OVER-THE-COUNTER MEDICINES

According to the Food and Drug Administration (FDA), more than 200,000 people are hospitalized each year because of reactions to nonsteroidal anti-inflammatory drugs (NSAIDs). Approximately 56,000 people go to the emergency room each year because of acetaminophen poisoning. The FDA has recently proposed adding stronger warning labels to over-the-counter NSAIDs (such as Advil, Motrin and Aleve) and pain medications containing acetaminophen (such as Tylenol). The FDA stated the warnings would "include important safety information regarding the potential for stomach bleeding and liver damage and when to consult a doctor." Some of the proposed changes include:

- Adding warnings to acetaminophen advising consumers of the possibility of liver toxicity (especially when taken with other acetaminophen-containing products or in high doses);
- Adding warnings to both acetaminophen and NSAIDs advising consumers not to take the products with even moderate amounts of alcohol; and
- Adding warnings to NSAIDs advising of the risk for stomach bleeding in people older than 60, patients who have had stomach bleeding or ulcers, patients taking blood thinners or more than one medication containing an NSAID.

Although the FDA defended the pace of its action, the consumer advocacy group Public Citizen believes that the FDA's proposal comes "decades late." Public Citizen wants the FDA to require warnings in ads and make public service announcements about the changes. I believe both are needed to

educate the public because the warnings deal with over-the-counter medications that generally don't involve a prescribing doctor.

Sources: *The Washington Post* and Public Citizen

MORE SUITS BEING FILED OVER BIRTH CONTROL PATCH

As we have previously reported, there have been a great number of lawsuits filed against Johnson & Johnson over the Ortho Evra patch, its patented contraceptive device. As many as 500 suits have been filed over the patch in the last two years, alleging that it has caused clots, strokes, and in several cases death. A multidistrict litigation (MDL) proceeding is pending in Ohio on behalf of more than 100 women nationwide. Ortho Evra, which was approved by the U.S. Food and Drug Administration (FDA) in 2001, is a once-a-week birth control patch worn on the skin. It releases estrogen and progestin directly into the bloodstream. In September, the FDA approved new label information for Ortho Evra following a study that showed women using the patch were twice as likely to experience blood clots as were those who took the pill. The FDA also required Ortho Evra last year to carry a new warning that the drug exposed women to 60% higher levels of estrogen than oral contraceptives.

Johnson & Johnson, which owns Ortho-McNeil Pharmaceutical Co., the patch's developer and manufacturer, is selling 20 million prescriptions for the Ortho Evra patch. With regard to safety information, the company states on its Web site: "Serious as well as minor side effects have been reported with the use of the Patch. Serious risks, which can be life threatening, include blood clots, stroke and heart attacks and are increased if you smoke cigarettes." Nearly 28,000 adverse events were reported to the FDA regarding Ortho Evra. In comparison, for that same time period, about 5,500 adverse events were reported by women taking the Ortho-Tricyclin birth control pill, another Johnson & Johnson product.

Source: *The National Law Journal*

EQUINE SUPPLEMENTS CONTAIN LESS INGREDIENTS THAN CLAIMED

One of the fastest growing markets in this country involves the sale of organic supplements and vitamins. People are buying organic supplements at an alarmingly increasing rate, not only for themselves but also for their pets. Herbal and natural supplements are available for virtually every condition imaginable, including cures or treatment for arthritis, obesity, indigestion, and even cancer. Despite the booming nature of this industry, it is largely an unregulated and unwatched area of consumption, especially as it relates to the products made available for our animals. Because there is limited or no regulation in this field, the question must be asked, what are we buying? Stated differently, are we getting what we are told we are getting in these products?

Recently, a team of Canadian scientists examined 23 equine oral joint supplements made available on the market. The reason for the inquisition was to determine whether the supplements contained the level of glucosamine that the manufacturer claimed was included in the product on the product label. Glucosamine is a popular joint supplement. It is a byproduct of chondroitin sulfate and is an amino derivative of glucose that is critical to cartilage building and repair. It has played a tremendous role in the horse industry in the recent past to treat joint stiffness, discomfort, and arthritis. Its success with horses has led to it being used by more and more people. Glucosamine is readily available and can be purchased online, through supplement catalogues, at drugstores, and at horse and animal supply stores.

BAYER CROPSCIENCE ILLEGALLY ALLOWS GENETICALLY-MODIFIED RICE TO INFILTRATE U.S. LONG-GRAIN RICE MARKET

The discovery of genetically modified rice in the U.S. rice supply has caused significant loss in revenue for US farmers and threatens the success of the U.S. rice on the world market. On

August 18, 2006, Mike Johanns, the U.S. Secretary of Agriculture, publicly announced that unapproved (and therefore illegal) genetically modified rice, Liberty Link 601 rice (LL601), had been found in US rice supplies destined for human consumption and export. Liberty Link 601 (LL601) is a type of genetically-modified rice seed developed, manufactured, and tested by Bayer CropScience. LL601 is a variety of long-grain genetically modified with a bacterial trait that causes the rice grown from that seed to produce a protein that makes the crop resistant to glufosinate. The "glufosinate-tolerant" trait of LL601 allows growers to spray Liberty herbicide over the entire crop, killing the weeds without damaging the rice plant.

Bayer field-tested LL601 in the U.S. Bayer was aware that during field-testing that conventional rice (non-genetically altered) could be contaminated by LL601 through cross-pollination and commingling. Bayer failed to take steps to prevent LL601 from commingling or cross-pollinating with other non-genetically altered strains of rice. Furthermore, on August 22, 2006, it was reported that Riceland Foods, an Arkansas based farmer-owned cooperative, disclosed rice samples from a 5-state region—Arkansas, Mississippi, Missouri, Louisiana, and Texas—had tested positive for LL601. Bayer's wrongful conduct in allowing LL601 cross-pollination and contamination resulted in hundreds of thousands of bushels of rice being contaminated as well as thousands of acres of U.S. farmland.

After the public announcement in August 2006 that LL601 has infiltrated US rice, rice futures fell by the daily trading limit of 50 cents per hundred-weight—or more than 5%. As a result of the fall in price, over \$144 million dollars in revenue was lost by U.S. farmers in 2006. Over 41% of the U.S. market was impacted to some degree.

Lawyers in our Mass Torts Section were shocked to learn that Bayer has not tested LL601 for human consumption. Before the genetically altered rice infiltrated the US rice crop, Bayer had not sought approval to commercialize

the rice. After it was announced that U.S. rice tested positive for LL601, Bayer hastily filed an application for approval by the United States Department of Agriculture (USDA). The USDA approved LL601 for human consumption in November 2006. The genetically altered rice has not been approved for human consumption in foreign markets including the European Union, Japan, and South Korea, among others. The quick approval by the USDA has caused grave concern among farmers and agriculture scientists. Joseph Mendelson, legal director of the nonprofit Center for Food Safety, had this to say:

The quick approval shows that the USDA is more concerned about the fortunes of the biotechnology industry than about consumers' health.

Rice farmers who have had rice test positive for LL601 will incur significant expense as they are forced to take the necessary steps to eradicate the rice from their farms. Secondly, all long-grain rice farmers who grew and sold crops after August 18th, 2006, have been damaged in the form of lost revenue caused by the downturn in the rice futures' market. This is true even if yields from a particular farm have not tested positive for LL601. Moreover, in coming months, farmers will incur costs associated with testing the seed planted in their fields to ensure that it does not contain LL601.

Lawsuits are pending in courts in Arkansas, Mississippi, Missouri, Louisiana, and Texas. In December, the Judicial Panel on multidistrict litigation (MDL) consolidated all federal cases in the Eastern District of Missouri and appointed Judge Catherine D. Perry to preside over the MDL. Federal officials are still investigating Bayer CropScience's conduct in allowing LL601 to infiltrate U.S. rice to determine whether USDA regulations were violated.

Sources: *Washington Post* and *Associated Press*

PREMPRO VERDICT IN PHILADELPHIA FOR PLAINTIFF

As we prepared to take this issue to press, a Philadelphia jury had just awarded \$1.5 Million in compensatory damages to Mary Daniel and her husband in a Prempro lawsuit. Mrs. Daniel's lawsuit is one of several thousand similar pending cases and the third thus far to get to a jury. The women filing the suit allege that Wyeth's blockbuster menopausal drug, Prempro, caused their breast cancers and that the company failed to conduct the proper studies and warn doctors and patients of the risks. In this trial, Wyeth claimed that Mrs. Daniel's breast cancer was caused by something other than Prempro. The jury obviously disagreed. This is the second compensatory award for Plaintiffs in Philadelphia. You may recall that the first award was thrown out as a result of a mistrial and is being retried at this very moment. On January 30, 2007, the Daniel jury was to start considering how much to award in punitive damages if any. At press time, that result wasn't in.

ANOTHER PREMPRO LAWSUIT STILL IN TRIAL

The trial of another suit, filed by an Arkansas woman against Wyeth pharmaceutical company, started last month. The case involves allegations that Prempro caused her breast cancer. Helene Rush, of Little Rock, who developed breast cancer after taking Prempro, is the plaintiff in this case. There are currently about 5,000 cases over the hormone-replacement therapy pending against Wyeth.

Ms. Rush sued the company in 2005 after taking Prempro for nine years and developing breast cancer in 1999. Prempro is a combination of estrogen and progestin, and Premarin, which is estrogen only. Ms. Rush took Prempro to ease her menopausal symptoms. Many women stopped taking the drugs after a federal Women's Health Initiative study in July 2002 in which researchers said more breast cancer and heart problems occurred among women taking estrogen-progestin pills. A gag order is in

effect in the Rush case, imposed by the trial judge. The case will be watched closely.

Sources: *Houston Chronicle* and *Associated Press*

IX. BUSINESS LITIGATION

WAL-MART SETTLES EMPLOYEES' OVERTIME PAY

Wal-Mart Stores Inc. has reached an agreement to settle an overtime pay dispute with employees. The retail giant will pay more than \$33 million in back wages to thousands of employees for paying too little in overtime over the past five years. The agreement was announced on January 25th by the U.S. Labor Department. Apparently, the case—involving nearly 87,000 employees nationwide—resulted from Wal-Mart coming to the Labor Department in early 2005 and asking for a review of its overtime calculations. This settlement, involving overtime pay, was one of the largest ever reached by the Labor Department's wage and hour division.

As we have reported, there have been multiple lawsuits against Wal-Mart in recent years by employees alleging payroll violations. For example, last October, Wal-Mart workers in Pennsylvania were awarded \$78.5 million by a jury in a case which alleged that employees worked off the clock and through rest breaks. That case is now on appeal.

It is apparent that not-everybody believes the settlement is a good one for employees. One of Wal-Mart's strongest critics, WakeUpWalMart.com, said the overtime settlement was a "sweetheart deal" that favored the giant retailer rather than its workers. A spokesman for WakeUpWalMart.com, which is union-backed, said workers were not represented in the settlement talks and added that the idea that Wal-Mart "would negotiate in the best interests of its workers is ludicrous on its face." In any event, the settlement was approved by a federal judge in the U.S. District Court for

western Arkansas. Hopefully, this settlement is good for all of the affected employees.

Source: *Associated Press*

FORD MOTOR CO. SUES NAVISTAR OVER PRICES

Ford Motor Co. has filed suit against Navistar International Corp., a diesel engine supplier, over pricing and a contract dispute. The supply of high-profit Super Duty pickup trucks down the road could be affected. Ford filed the lawsuit in a Michigan court against Navistar, which is based in Warrenville, Illinois, accusing it of not complying with a warranty cost-sharing agreement and "unjustifiably" raising prices on a diesel engine used in the F-series pickup truck line.

The lawsuit states that Navistar has threatened to cut off shipments if Ford does not pay a price Navistar is demanding, Ford claims such a move would breach a contract. In addition, Ford accuses Navistar of not complying with warranty-contract obligations related to the cost of fixing quality glitches that consumers encounter. Ford had debited Navistar's invoices to recover what it felt the supplier owed related to warranties.

Ford is in the midst of launching its critical F-Series Super Duty vehicles in the United States. The truck has traditionally represented more than 300,000 vehicles worth of annual volume. It's highly significant that 70% of Super Duty trucks carry diesel engines. The vehicle was redesigned for 2007, but its sales launch was delayed by nearly six months because of problems in diesel engine development. The launch is currently planned for early this year. The once good relationship between Ford and Navistar has been deteriorating over the past year or so. Various quality issues and a delay on the development of a recent product have not done much to repair the damage done to the relationship.

Source: *Associated Press*

PENNSYLVANIA COURT GRANTS CLASS ACTION STATUS IN DOCTORS' LAWSUIT

Now that a federal judge has granted class action status, thousands of Pennsylvania doctors may be eligible to join a lawsuit over a Blue Cross health plan's reimbursement rates. The suit charges that Keystone Health Plan Central systematically lowered its reimbursement rates to doctors by bundling or changing procedure codes; failing to pay legitimate claims on time; undercounting the number of patients assigned to doctors in the managed care plan; and other questionable practices.

The doctors accused the health maintenance organization of fraud and racketeering, paralleling a strategy used in suits nationwide over managed-care rates. Many of those suits have been consolidated in a Florida case. The Pennsylvania case involves medical claims dating from January 1996 through November 2001, when the lawsuit was filed on behalf of a Kutztown doctor and her practice group. It was noted in U.S. District Judge James Gardner's order that since the suit was filed the two parties have "been locked in an acrimonious battle over discovery and other pre-trial issues."

The court ruled that the evidence does not indicate that these alleged practices have been applied only to plaintiffs. Rather, "it appears that defendants' practices involve all Keystone providers," the judge wrote in his order. Keystone Health Plan Central, which serves central Pennsylvania and the Lehigh Valley, was co-owned at the time by Highmark Inc., a Blue Shield affiliate, and Capital Blue Cross. It had more than 6,400 participating physicians in 2001.

The judge granted class-action status on two racketeering claims and a third involving the prompt payment for health care services. But he rejected class certification on a breach-of-contract claim, saying they should be tried individually. Similar claims involving more than 700,000 physicians and at least 10 health care companies have been consolidated in a nationwide class-action suit in Florida. Several of the insurers, including Aetna Inc. and Cigna Corp., have reached

settlements in that case. According to Judge Gardner's order, Keystone lawyers have "vacillated" in their arguments on whether their case should be joined with the Florida suit.

Source: *Insurance Journal*

DAIMLERCHRYSLER REACHES A SETTLEMENT IN MERGER-RELATED LAWSUIT

DaimlerChrysler AG has reached an agreement with insurers over their contribution to a \$300 million settlement of an investor lawsuit over the 1998 merger that created the company. DaimlerChrysler and the insurance companies, led by ACE Ltd., reached an agreement late last year. The insurers will contribute 168 million euros (\$222 million), out of an outstanding 175 million euros (\$231 million) arising from the 2003 settlement of a lawsuit over the merger of Daimler-Benz and Chrysler Corp.

According to a report in the Financial Times Deutschland newspaper, U.S. insurer AIG has already paid \$25 million (18.9 million euros) and DaimlerChrysler paid the rest. Chrysler shareholders in the U.S., who argued that they were duped into approving the deal that combined Chrysler and Daimler-Benz when executives from both companies portrayed it as a merger of equals, had filed a class-action suit seeking \$22 billion in damages. The lawsuit cited a 2000 interview with former DaimlerChrysler Chairman Juergen Schrempp in which he said billing the combination as a merger rather than a takeover was "for psychological reasons" only.

Daimler had counted on liability insurance on Schrempp to cover part of the settlement, but several companies refused to pay. The class action suit was independent of another similar lawsuit filed by Kirk Kerkorian, the billionaire investor, who claimed that Daimler-Benz engineered a takeover of Chrysler, then cheated him out of an acquisition premium by claiming it was a merger of equals. A Delaware court rejected his suit and dismissed it.

Source: *Associated Press*

CHINESE FIRM WINS ITS FIRST CASE AGAINST A U.S. COMPANY IN THIS COUNTRY

A Hong Kong conglomerate has won a \$2.8 billion judgment against a Fremont company that provides interactive video technology. This appears to be the largest legal victory for a Chinese company in a U.S. court. It's also believed to be the first against a U.S. company. The judgment was in favor of New World TMT, a unit of New World Development. The trial judge had ruled that the founder of Fremont video technology provider PrediWave, Jianping "Tony" Qu, gave false testimony in depositions and did not appear for a court-ordered deposition and settlement conference. The court's order included \$2 billion in punitive damages. Dennis Ellis, the lawyer who represented New World, observed:

As China becomes a more commercialized country and takes its place in the world economy, it's refreshing to know that Chinese companies that have disputes with American companies can come to our courts and be treated fairly and seek redress for claims they have. That's all we wanted.

In a statement on the company's Web site, PrediWave says New World's lawsuit was an effort to make the Fremont company a "scapegoat for their own blunders" and is tied to the Hong Kong company's "financial troubles, its own missteps in marketing PrediWave's new technology in China, and its desire to avoid its contractual obligations to PrediWave."

New World accused Qu, PrediWave, and its affiliated companies of defrauding it of about \$700 million and providing technology that did not work. The Hong Kong company took a nearly \$300 million equity position in PrediWave and its related companies, and spent about \$400 million on PrediWave technology. The four-year partnership began to fall apart in 2004 after PrediWave delivered set-top boxes that did not work. The company "determined that Tony Qu had taken over \$100 million in bonuses during the four years, he leased

30 cars and purchased 19 homes,” according to the complaint. There was other “extravagant” spending, including wine purchases for about \$10,000. According to their lawyer, the company doesn’t know how much of the judgment it will be able to recover. But, at least \$250 million appears to be obtainable through the bank accounts of PrediWave and its affiliated companies.

Source: *Mercury News*

CMS REACHES TENTATIVE SETTLEMENT IN SHAREHOLDER SUITS

CMS Energy Corp. has reached a preliminary \$200 million settlement of class-action lawsuits by shareholders related to a round-trip energy trading practice. The shareholder lawsuits contend that the company, based in Jackson, Michigan, made false and misleading statements about its business and financial conditions by including the results of round-trip energy trades carried out by a Texas-based subsidiary in its revenues and expenses for 2000 and 2001. Round-trip energy trading occurs when energy marketers make swaps to artificially inflate revenue and expenses. The company disclosed in 2002 that the practice had inflated revenue and expenses by more than \$5.3 billion over 18 months. The company settled with the Securities and Exchange Commission in March 2004 with no financial penalties. It closed the Houston subsidiary, CMS MS&T, by the end of 2003.

Under the terms of the settlement, CMS will pay \$123.5 million plus interest on the outstanding, unpaid settlement balance beginning on the date of preliminary approval by the court and running until the balance of the settlement funds is paid into a settlement account. The company’s insurers will pay \$76.5 million. The final agreement must be approved by a federal judge, which is expected to take place in the first quarter of this year.

Source: *Associated Press*

LAWUIT FORCES MARKETER TO PAY \$1.2 BILLION TO ACQUIRE DIRECT MAIL FIRM

Valassis Communications Inc. has agreed to acquire direct-mail marketer Advo Inc. for \$1.2 billion in a settlement ending a lawsuit over the planned acquisition. Under the settlement, Valassis will acquire all of Advo’s outstanding common shares for \$33 each, a discount of more than 10% from the price of \$37 a share that Valassis had agreed to pay in July 2006. Livonia, Michigan-based Valassis had filed the suit in an effort to back out of a \$1.3 billion acquisition of Windsor, Conn.-based Advo, accusing it of withholding and fabricating financial information during acquisition talks early last year. Advo filed a counterclaim, alleging that Valassis was simply trying to drive down the purchase price.

Sources: *Associated Press* and *National Law Journal*

INSURER MUST PAY MICHIGAN CITY \$10 MILLION IN A LAWSUIT

The City of Sterling Heights, Michigan, will recoup more than \$10 million from United National Insurance Co. in money lost in a 2004 lawsuit involving Hillside Productions Inc., a company which operates Freedom Hill Amphitheater. A U.S. District Court judge ruled in the city’s favor and ordered the insurance company to pay \$10.33 million. Sterling Heights filed suit against the insurance company after the city lost a \$31 million lawsuit filed against the city two years ago by Hillside and resulted in the adverse verdict.

Hillside Productions filed a series of civil suits that accused city officials of harassment and conspiring to close the facility because of residents’ complaints over noise and traffic. The city sold bonds to pay Hillside while it negotiated with three insurers over who would adequately pay the bill. The city received a total of \$18.75 million from two insurers, Specialty National Insurance and the Indemnity Co., earlier this year. It was looking to recoup the rest from United National. The city will still be responsible to pay the remainder of the money to Hillside. The judge set a March 23rd trial date for other claims

against the insurance company that include a breach of covenant involving the city’s original claim. That trial will involve fees the city had to pay to sell the bonds to take care of the Hillside settlement. United National apparently left the city in a bind during the settlement process negotiations and the jury ruled in the city’s favor.

Source: *Detroit Free Press*

X. INSURANCE AND FINANCE UPDATE

THE KATRINA INSURANCE CLAIMS SAGA CONTINUES

Things are finally moving at a rapid pace on the Katrina-related insurance claims front in both Mississippi and Louisiana. First, a federal jury returned a verdict against State Farm Fire & Casualty Co. for \$2.5 million in punitive damages in a Mississippi federal court. The case involved the insurer’s refusal to cover damages to a Mississippi couple’s house that was destroyed in Hurricane Katrina. The jurors in U.S. District Court in Gulfport, Mississippi, reached a unanimous decision on the punitive aspect of the case less than three hours after Judge L. T. Senter Jr. ruled that State Farm failed to prove that the damage to the house in Biloxi had come from surging floodwaters and, thus, was not covered by the homeowner’s policy. In a statement from the bench, Judge Senter announced that State Farm had presented no “legal or arguable reason for refusing to pay the plaintiffs’ claim.” The judge then ordered State Farm to pay \$233,292, the full value of the policy as compensatory damages, and instructed the jury to determine whether the insurer should pay punitive damages and, if so, how much. The punitive damages award followed.

In the aftermath, State Farm then attempted to reach a global settlement with Mississippi Attorney General Jim Hood to resolve a civil lawsuit filed against State Farm for its refusal to cover

property damages from Katrina. State Farm also attempted to settle lawsuits filed by individual lawyers on behalf of some 600 policyholders and offered to reopen thousands of other claims for homeowners devastated by Katrina whose claims were denied, but who haven't yet sued the company. According to the proposed settlement, State Farm agreed to participate in a court-supervised mediation to reconsider claims from Hurricane Katrina in the following Mississippi counties: Hancock, Harrison and Jackson. More than 35,000 Mississippi families could be affected by the settlement.

However, Judge Senter Jr. refused to approve the proposed settlement. The judge said in the absence of more information, he is "unable to say, even preliminarily, that the proposed settlement establishes a procedure that is fair, just, balanced, or reasonable." Judge Senter also expressed concerns regarding specific portions of the settlement agreement. In particular, he had concerns about sending the policyholders into arbitration, prohibiting a declaratory judgment with respect to the interpretation of State Farm's policy provisions and the complexity of the claims procedure. In this regard, Judge Senter stated:

I am very concerned with the proposed settlement's provisions limiting the right of other litigants (and their representatives) who are not members of the proposed class to express their views on the fairness of the proposed settlement.

In addition, Judge Senter expressed reservations regarding the resolution of Attorney General Jim Hood's lawsuit. The judge stated that he was "very concerned that the resolution of the state court actions brought by the Mississippi Attorney General purports to incorporate or rely upon an arbitration program administered by this Court." He added that "there is currently no such procedure in place, and there may never be such a procedure" unless he becomes "satisfied that the basic standards of fairness are met." The bottom line is that at

press time, I don't know exactly where the settlements are headed. The fact that State Farm has shown a willingness to address a global settlement is at least a good sign.

ALLSTATE SETTLES KATRINA LAWSUIT

Another insurer, Allstate Corp., settled with a Mississippi couple who sued the Northbrook-based company for denying their Hurricane Katrina claim. The plaintiffs claimed that Allstate hired a "biased" engineering firm to conclude their house was destroyed by flooding, a hazard that wasn't covered by their policy, rather than wind, which was covered. The terms of the settlement are confidential.

Source: *Bloomberg News*

INSURER SETTLES CHARGES OF BID-RIGGING FOR \$17 MILLION

Chubb Corp. has said that it will pay \$17 million to settle allegations that the property and casualty insurer paid insurance brokers to bring the company clients. Attorneys general in three states investigated whether Chubb had paid "contingent commissions," or payments on top of commissions, to encourage brokers to bring the company business. Chubb has agreed to contribute \$15 million to an account reimbursing customers who bought insurance through brokerage Marsh & McLennan Cos. Chubb will also pay \$2 million to New York, Connecticut, and Illinois to pay for the investigations.

Source: *National Law Journal*

METLIFE PAYS \$19 MILLION TO SETTLE BUSINESS PRACTICE LAWSUIT

MetLife Inc., the largest group life insurer in the nation, has agreed to a lawsuit settlement that requires the payment of \$19 million and a change in some of its business practices. This puts to an end the investigation by New York Attorney General Eliot Spitzer of payments the insurer made to brokers to steer clients its way. The settlement

came as part of a multiyear investigation of bid-rigging and price-fixing in the insurance industry. "Contingent commissions" paid to brokers and agents to steer business to insurance companies—the equivalent of kickbacks that unfairly increase the prices paid by insurance clients—was the subject of the investigation. New York-based MetLife will ban contingent commissions and disclose broker payments as part of the settlement. The company will pay \$16.5 million in restitution to policyholders and penalties of \$2.5 million.

MetLife instructed its sales personnel to "leverage" commission agreements by telling brokers how close they were to meeting certain targets for business provided to MetLife. If met, the targets would guarantee the brokers additional money. MetLife also arranged lucrative compensation agreements with certain brokers who directed major insurance contracts to MetLife, according to the settlement. The company has more than 70 million customers worldwide. Spitzer's probe of the industry began in 2004 and thus far more than 20 insurance companies have agreed to pay more than \$3 billion. In similar cases, as reported last month, Prudential Insurance Co. and UnumProvident Corp. have agreed to the settlements.

Source: *Insurance Journal*

ST. PAUL TRAVELERS AGREES TO HALT ALL CONTINGENT COMMISSIONS

The St. Paul Travelers insurance company has agreed to stop paying "contingent commissions" to brokers and agents, according to a report from Connecticut Attorney General Richard Blumenthal. In August, St. Paul Travelers, which is based in St. Paul, Minnesota, settled a bid-rigging investigation for \$77 million in an agreement with Connecticut, Illinois, and New York. The company agreed at that time to pay restitution and penalties and adopt reforms. In November, the attorneys general for the three states told St. Paul Travelers and three other major insurance companies that they must end

special commissions to agents and brokers by January 1st, as agreed to in the earlier settlement. ACE Group Holdings Inc. of Bermuda, American International Group Inc. of New York, Zurich American Insurance Co. Inc., and St. Paul Travelers had agreed to end contingent commissions when companies that don't pay the commissions sell 65% of an insurance line.

In November, the companies were told that the 65% "tipping point" was reached in homeowners, personal automobile, boiler and machinery, and financial guaranty insurance. As a result, the four companies had to stop paying contingent commissions for these insurance products effective January 1, 2007. The companies have already given them up for excess casualty insurance. A lawyer for St. Paul Travelers said in a letter, dated December 29, 2006, to Blumenthal and the attorneys general of Illinois and New York that it would stop paying contingent commissions on the lines as set forth in the order beginning on the first day of January 1, 2007. The company said in its letter that it will "go even further by providing a fixed commission option (no contingent commissions) for all agents on all lines and encouraging all of its appointed agents in all lines to accept a fixed commission in lieu of any contingent commissions in 2007."

The company said it "expects all of its agents will be on a purely fixed commission program" by year end. In my opinion, St. Paul Travelers has done "the right thing" by voluntarily agreeing to stop paying contingent commissions. Insurance carriers don't have to pay contingent compensation to compete profitably in the insurance industry. State attorneys general have argued that "contingent commissions" paid to brokers and agents to steer business to insurance companies are tantamount to kickbacks that unfairly increase the prices paid by insurance clients.

Source: *Insurance Journal*

CONSUMER GROUP SAYS INSURERS ARE OVERCHARGING

The Consumer Federation of America (CFA) has released new data that indicate that "auto and home insurers dramatically increased profits and surplus in recent years, in part by systematically overcharging for insurance and by shifting costs to consumers and taxpayers." CFA provided detailed information on the strategies that insurers have used to, as it claims, "inappropriately shift costs and on how state and federal policymakers can prevent these practices." The report was released as many insurers are increasing premiums for homeowners insurance and in some cases reducing or eliminating coverage in coastal areas.

CFA says its data reveals that insurers are offering the "lowest payouts to consumers in over 50 years, in part because policy coverage cutbacks have made insurance less valuable." CFA is critical of insurers for asking Congress to continue taxpayer subsidies for terrorism losses and to create a federal catastrophe insurance program that could also involve taxpayer subsidies. Speakers at the news conference where the information was released were J. Robert Hunter, director of insurance for CFA, and Travis B. Plunkett, legislative director for CFA.

Source: *Insurance Journal*

SUBPRIME FORECLOSURE CRISIS

More than two million subprime mortgage loans that lenders made during the boom years are in foreclosure, putting at risk \$164 billion in wealth accumulation, according to a study by the Center for Responsible Lending. The organization's president has observed: "We are in the worst foreclosure crisis in modern American history." The Center's study found that one in five owners homes with a subprime loan face losing their home. This was attributed to aggressive tactics used by subprime lenders who largely prey on minority households, many of whom are unfamiliar with the financing system.

One of the biggest problem loans has been what the mortgage industry calls the "exploding ARM," a loan that after a short low-rate fixed period adjusts upward without regard to the direction that interest rate indexes are actually moving. Even if interest rates are heading down, these borrowers can face monthly mortgage payment increases. These loans are typically made in a refinance setting, putting at risk years of equity. This problem highlights the need for increased regulation of mortgage brokers. I hope there will be reforms at both the federal and state levels.

Source: *Realtor Magazine*

TENNESSEE GOVERNOR NAMES NEW INSURANCE COMMISSIONER

Tennessee Governor Phil Bredesen has appointed Leslie Shechter Newman as the Commissioner for the Tennessee Department of Commerce and Insurance. This position was previously held by Commissioner Paula Flowers, who did an outstanding job for the people of her state. As you may be aware, our firm represents the Tennessee Department of Commerce and Insurance as Receiver of several failed malpractice insurance companies domiciled in Nashville.

Ms. Newman previously worked under Governor Bredesen when he was the Mayor of Nashville. Later she served several governmental entities as legal counsel, including the Metropolitan Nashville Department of Law, the Metropolitan Counsel, the Metro Department of Finance, the Department of Water and Sewer, and the Metro Planning Commission. More recently, the new Commissioner has been in private practice with the firm of Farmer & Luna in Nashville, one of the premier law firms in Tennessee.

The new Commissioner brings over 25 years of experience working for and representing governmental agencies in Tennessee. Furthermore, her experience as a private practitioner has emphasized issues regarding commerce and the insurance industry in the state of Tennessee. Ms. Newman should prove to be a great asset to the state of Tennessee.

Observers who are knowledgeable about government affairs are convinced Ms. Newman will protect the rights of Tennessee citizens concerning their insurance transactions.

XI. PREMISES LIABILITY UPDATE

DISNEYLAND SETTLES LAWSUIT OVER RIDE

Disneyland, which as you know is Walt Disney Co.'s theme park in California, has settled a 5-year-old lawsuit in which a woman's family contended she died as a result of a brain hemorrhage after riding the Indiana Jones Adventure ride. Since the terms of the settlement are confidential, the amount to be paid can't be disclosed. The lawsuit, filed in Los Angeles Superior Court, alleged that Cristina Moreno of Barcelona, Spain, suffered the hemorrhage while on the ride, then lost consciousness later that evening. Ms. Moreno died two months later in 2000. In 2001, her estate filed a wrongful death suit, alleging that the design of the ride has a history of causing brain injuries and that Disney decided to "push the envelope to the extreme" in creating the attraction. The settlement came shortly before jury selection was to start.

Source: Reuters

PARALYZED PATRON CAN SUE BAR IN MASSACHUSETTS

The Supreme Judicial Court of Massachusetts has ruled that a teenager paralyzed in a car crash after a night of underage drinking can sue the bars that served him alcohol. Although the highest state court rejected claims by Robert Nunez that two North Shore establishments knowingly served him when he was already intoxicated, the court allowed his claim against the business for negligently serving a minor. The Court's ruling said:

The Legislature has consistently recognized the dangers of furnish-

ing alcohol to young adults who have not reached the legal drinking age of 21 years. Because (Nunez) was under the legal drinking age, he need only establish that the actions of the defendants were negligent.

Nunez, was 18 on May 11, 2002 when he was pinned beneath his car following an accident that left him a paraplegic. His blood alcohol level was .13%, above the legal limit of .08. The teenager said he drank six glasses of vodka and soda with his dinner at one restaurant just hours before the crash. The teenager had worked at the restaurant and many of the workers there knew him. He was served two more drinks at a nightclub, where employees also knew him. Nunez admits in court documents that he was driving drunk and carrying a fake ID card when his sport utility vehicle collided with another car. Nunez, now 23, sued both the restaurant and the bar to hold them legally responsible for his injuries.

Source: Insurance Journal

CAR WASH VICTIM'S FAMILY AWARDED \$7.5 MILLION

A Florida jury has returned a verdict in favor of the family of a woman who died after being hit by an SUV at a car wash. The award was for \$7.5 million in compensatory damages in the lawsuit against the business. The 43-year-old woman died of head injuries after the crash in 2005 at a Tampa car wash. Her 18-month-old son, who she was pushing in a stroller at the time, survived. The jury's verdict was allocated as follows: the surviving husband was awarded \$2.5 million and the infant was awarded \$5 million. Even though no punitive damages were awarded, the jury, in its verdict, said punitive damages were warranted in the case. The jurors said the business owners should be punished for intentionally neglecting customer's safety. Actually the request for punitive damages was withdrawn by the plaintiff after the compensatory award.

The incident occurred as the woman and her baby were walking to her

washed vehicle when a car wash worker drove an Isuzu Rodeo out of another bay, knocking her onto the vehicle's hood and then the ground. The stroller fell on its side and fortunately the baby boy strapped inside wasn't injured. The employee was not a licensed driver and from all accounts had no ability to drive a vehicle at all. He didn't even know the difference in the gas pedal and the vehicle's brakes. Clearly, this man had no business driving a vehicle at any time and certainly not at a crowded place of business

Source: Tampa Tribune

XII. WORKPLACE HAZARDS

DRUG COMPANY SALES REPRESENTATIVES FILE SUITS FOR OVERTIME WAGES

Several class action lawsuits have been filed against nine major drug companies, seeking tens of millions of dollars in back pay for thousands of drug company sales representatives across the country. The lawsuits, filed in New York, California, New Jersey, and Connecticut, are the latest in a series of class claims seeking overtime pay from U.S. businesses. The pharmaceutical company lawsuits seek overtime wages dating back two to six years, allowed under federal and state statutes of limitations. Companies being sued are Eli Lilly, Boehringer Ingelheim Pharmaceuticals Inc., AstraZeneca PLC, Pfizer Inc., Johnson & Johnson, Amgen Inc., Hoffmann-La Roche Inc., GlaxoSmithKline PLC, and Bayer AG.

ASSAULTED WOMEN SUE RITE AID

Several women who claim to have been sexually assaulted by a former Rite Aid manager have sued their attacker and the pharmacy chain. The lawsuit, filed by six of the seven women, accuses Rite Aid Corp. of negligence and recklessness for inadequately supervising the manager and giving him access

to prescription drugs, including the “date-rape” drug triazolam and other tranquilizers. The 49-year-old manager pleaded guilty and was sentenced to 64 years in prison for drugging and sexually assaulting the women. The attacks were photographed and in one case videotaped. The manager, who was given a key to the store’s pharmacy, stole sleeping pills and other drugs from the Rite Aid store he managed. The assaults began in 1999, but the women did not know they had been assaulted until March 2004, when one of them found a photo album containing pictures of an assault.

E-LOAN SETTLES CLASS ACTION SUIT

E-Loan Inc. has agreed to pay \$13.6 million to 506 mortgage loan consultants in California to settle a class action lawsuit filed against the provider of online financial services. A federal judge granted preliminary approval of the settlement on January 11th. The suit claimed that the company failed to pay the workers overtime or provide them with meal and rest breaks. The affected employees sold loans, prequalified borrowers, and processed applications. The loan consultants worked for E-Loan during a period from December 2001 through June 2006.

Source: *Associated Press*

OSHA FINES TYSON FOR DEATH AT KANSAS PLANT

Tyson Foods has been fined for safety violations in a Kansas worker’s death at Tyson’s South Hutchinson, Kansas plant. The U.S. Occupational Safety and Health Administration (OSHA) levied a \$5,000 fine for each of three “serious” violations and \$25,000 for a “repeat” violation. An ammonia leak on October 31st killed one employee and injured another. Federal investigators found that a pipe fitting that split while the two employees were trying to drain anhydrous ammonia from refrigeration equipment was responsible for the death. The men weren’t using protective gear required

by federal regulations. The amount of the fine—\$40,000—is no more than like a slap on the hand for Tyson Foods.

XIII. TRANSPORTATION

WRONGFUL DEATH SUIT FILED IN SCHOOL BUS CASE

Our firm has filed a wrongful death lawsuit arising out of the November school bus accident that occurred in Huntsville, Alabama. The complaint names as defendants Laidlaw Transit, the school bus driver, and the driver of a passenger car that was involved in the incident. The school bus involved, which was owned by Laidlaw Transit, was transporting a group of Lee High School students to the Huntsville Technology Center. The school bus was equipped with a seat belt for the driver, but not for the students.

The school bus, carrying 40 Lee students to the technical school, ran off a downtown Huntsville interstate bridge on November 20th and plunged 30 feet to the ground, nose first. A 1990 Toyota Celica driven by a 17-year-old Lee student had collided with the bus before the bus went over the retaining wall. The bus driver, who was not wearing a seat belt, was ejected and thrown onto the elevated roadway before the bus went airborne. The fact that the driver was not wearing his seat belt when contact was made with the other vehicle contributed to his loss of control of the bus. The bus had struck a 32” high ramp wall before it crashed some 30 feet below. Four students were killed in the crash and several others injured.

The suit was filed in the Circuit Court for Madison County by the family of Nicole Ford, who was seated in the front of the bus and was killed in the crash. Neither she nor any other student on the bus was wearing a seat belt because the bus was not equipped with seat belts for student passengers. Seat belts are required by statute for the drivers of school buses in Alabama.

However, the statute is silent on any mandate for seat belts for passengers. The Alabama Supreme Court has ruled that this silence indicated that the Legislature only intended for bus drivers to be belted. That’s sort of hard to understand since there is no recorded legislative history relating to the act.

The safety of children riding as passengers on school buses must be a top priority for those who are in charge of our schools and for those who own and operate school buses. This tragic incident resulted in the loss of innocent lives. Hopefully, the Alabama Legislature will take the necessary action to require all bus manufacturers to equip school buses with seat belts for passengers. Of course, the Alabama Supreme Court could remedy the current situation when another school bus death case comes before the justices for review. Cole Portis and Kendall Dunson from our firm, along with Wayne Wolfe of Wolfe, Jones, Boswell, Wolfe, Hancock & Daniel, LLC, a Huntsville firm, will be handling the case for the Ford family. I will assist in trial preparation and will be involved in the actual trial of the case. This case was the first to be filed arising out of this tragic incident. There will be others filed in the near future.

GOVERNOR RILEY ACTS ON SCHOOL BUS SAFETY ISSUE

Two days after the Huntsville incident, Governor Bob Riley announced the creation of a committee to study whether school buses should have seat belts. The panel includes state Superintendent of Education Joe Morton, Alabama Department of Transportation Director Joe McInnes, and Alabama Department of Public Safety Director Chris Murphy. The group will talk with pediatricians, bus manufacturers, and others before making its recommendations in time for the next legislative session in March. The Governor called for a review of school bus safety in the wake of the November 20th school bus crash in Huntsville that killed four students and injured several others. Federal transportation department officials had

promised to assist in an analysis of school bus safety and the need for seat belts on buses. The committee members were instructed to focus first on the safety issue. A two-day public hearing was to be held in Huntsville on February 5th and 6th.

As a matter of interest, the Alabama Supreme Court ruled in a previous case that the failure of a manufacturer to install seat belts for passengers in school buses didn't provide a cause of action under the Alabama Extended Manufacturers Liability Doctrine. Unless the court changes that decision, a ruling which really can't be justified under product liability law, the manufacturers could have virtual immunity in Alabama. The Legislature could change that by amending the Alabama code section that now requires drivers of school buses to use seat belts and make it so that it would also include passengers. But, the Supreme Court really shouldn't need any legislative help on this issue. It can simply correct the old opinion.

JURY RETURNS A VERDICT IN AIR SHOW DEATH CASE

A jury awarded \$10.5 million to the family of a Bellevue, Washington, pilot who died in a 1999 crash at a Northwest Experimental Aircraft Association (EAA) air show, which was taking place in nearby Arlington, Washington. The jury reached the verdict in a lawsuit filed by the pilot's family. On July 7, 1999, the pilot crashed in his self-built RV-6 shortly after takeoff during the Northwest EAA Fly-in at the Arlington Municipal Airport. He survived the impact, but became trapped in the burning wreckage. Bystanders tried to save him, but to no avail. Firefighters didn't arrive at the scene for about five minutes. The jury found that the air show's sponsors, the Northwest EAA and the national Experimental Aircraft Association, were liable for not providing adequate fire and emergency response services.

Source: *Associated Press*

FEDERAL GOVERNMENT FAILS TO REQUIRE ELECTRONIC RECORDERS IN ALL TRUCKS

The Federal Motor Carrier Safety Administration (FMCSA) has failed the public again. After being rebuked by a federal court for failing to consider requiring electronic devices to monitor whether trucking companies are forcing their drivers to work beyond the maximum permissible number of hours, the FMCSA released a very weak standard for electronic on-board recorders (EOBRs). Requiring EOBRs in all trucks holds great promise for detecting—and deterring—violations of the hours-of-service rules. Hours-of-service rules are intended to protect all highway users, including truckers. Everyone who travels on our highways is entitled to be protected from the grave risks of having overworked, exhausted drivers on the nation's roads. But for some reason, which is difficult to understand, FMCSA elected to pass up a real opportunity to protect the public.

Instead of mandating on-board recorders in all commercial trucks with a fair, across-the-board standard, FMCSA released a proposed rule that would require recorders only for trucking companies that have been **caught** significantly violating hours-of-service rules. Based on our firm's litigation experience, we know that many more companies violate these rules because their drivers keep fake log books. These fake log books are known in the trade as "comic books." Under the FMCSA rule, drivers can continue to violate the law without consequences and thereby put the driving public at risk. These recorders should be mandated in an across-the-board standard that treats all companies equally. The public deserves much more than this from a federal agency that is supposed to be protecting the public.

Source: Public Citizen

WHEELCHAIR-DEATH SUIT SETTLED

A lawsuit in California involving the death of a stroke victim in a wheelchair that caught fire has been settled. The

family of John Robles Sr. agreed to a settlement of the case just before a trial was set to start. The fire that killed Mr. Robles severely injured his daughter, Virginia Robles, who had unsuccessfully tried to pull her father out of the flames in their apartment back in 2004. The Robles family contended that the fire was caused by a faulty battery design in the Pride Mobility Jet 10 motorized wheelchair. During recharging, one of two mismatched batteries overcharged, releasing hydrogen gas, which then ignited.

Pride Mobility Products Corp. and its distributor, Golden State Medical Supply, claimed that the fire was caused by Mr. Robles carelessly lighting a cigarette with a paper towel ignited at the kitchen stove. Had the case gone to trial, jurors would have heard evidence that Pride Mobility was aware of at least 18 other fires in its wheelchairs and scooters with identical battery packs. Ten of those fires destroyed dwellings, and five involved deaths. A motion by the plaintiffs contended that Pride Mobility obtained the damaged products from many of the fires and "destroyed them with little or no investigation" and without issuing a product recall. During arguments on a related motion last November, a lawyer for the plaintiffs told the trial judge that Pride had destroyed fire-damaged equipment before and after the Robles family filed its lawsuit.

It was contended by Pride that none of the other fires was in a Jet 10 wheelchair. It was claimed that each fire had been investigated and all were "unrelated to the allegations of design problems in this case." In 2006, the company released a new product manual warning of the potential for hydrogen fire during recharging of the wheelchair's battery. At the time of the settlement, the trial court judge had not yet ruled on whether the evidence of other fires could be presented to jurors in the case.

Source: *Monterey County Herald*

XIV. HEALTHCARE ISSUES

TWO PARKINSON'S DRUGS SHOWN TO INCREASE HEART-VALVE RISK

A recent story in the *Wall Street Journal* reports that two drugs once widely used to treat Parkinson's disease sharply increase the risk of heart-valve damage. The studies by researchers resulted in calls for the treatments to be discontinued or patients to be more closely monitored. Patients who take the drugs, pergolide or cabergoline, which are marketed by Valeant Pharmaceuticals International and Pfizer Inc., are four to seven times as likely to suffer damage to their heart valves as patients who don't take either one, according to two studies published in the *New England Journal of Medicine* on January 4th. Because of previous reports of associated heart-valve disease, these drugs are less commonly prescribed than they used to be.

Dr. Bryan L. Roth, a University of North Carolina psychiatrist, said the new research marked the largest and most definitive findings of the heart risks of these drugs. Dr. Roth, who is also director of the National Institute of Mental Health's drug-screening program, believes that the findings should lead doctors to discontinue using the drugs and to tell patients to get echocardiograms to make sure they don't have damage. Dr. Roth, who wrote an article in the journal accompanying the studies, commented:

The incidence is kind of mind-blowing. It's so prevalent in people taking these medications, you kind of wonder why it was missed.

About 1.5 million Americans and six million people world-wide have Parkinson's, according to the National Parkinson Foundation. Parkinson's, a brain disorder, stems from a loss of a chemical called dopamine, which facilitates smooth functioning of the body's muscles. Patients experience tremors,

difficulty with balance, and other symptoms. The main treatment is a medicine called levodopa, which the body converts to dopamine. When that treatment becomes less effective, doctors prescribe other medicine, including pergolide and cabergoline. They stimulate receptors in the brain, mimicking dopamine's effects.

Pergolide was brought to market under the name Permax by Eli Lilly & Co. in 1989. In 2003, the company issued a safety alert, posted on the FDA's Web site, that warned of "a small number" of patients developing heart-valve problems. Valeant, of Costa Mesa, California, now markets Permax in the U.S. According to the *Wall Street Journal* article, Lilly "provides, but does not promote, pergolide in countries outside of the United States." Pfizer markets cabergoline in the U.S. under the brand name Dostinex, not for Parkinson's, but for a hormone condition, the excessive production of prolactin. Valeant no longer promotes Permax, but it does make it available to doctors who prescribe the drug.

Source: *Wall Street Journal*

DIET PILL MAKERS FINED MILLIONS FOR FALSE CLAIMS

On January 4th, the Federal Trade Commission (FTC) fined the marketers of four weight loss pills \$25 million for making false advertising claims ranging from rapid weight loss to reducing the risk of cancer. The products can remain on store shelves, but the companies will have to stop making the false claims, according to the FTC. It appears that the FTC is only challenging the marketing of the claims. The marketers will be required to back up the claims with the science, and if they can't do that, they can't make the claim, according to the FTC. The FTC investigated a variety of claims made, including rapid weight loss and reduction in the risk of osteoporosis, Alzheimer's, and even cancer. Fines were levied against marketers of Xenadrine EFX, One A Day Weight Smart, CortiSlim, and TrimSpa. Some of the money paid as civil fines, which will

be in the millions, will apparently be returned to consumers.

The largest fine was levied against two marketers of Xenadrine EFX, made by New Jersey-based Nutraquest, Inc., formerly known as Cytodyne Technologies. The marketers will pay at least \$8 million and as much as \$12.8 million. A federal lawsuit has been filed in Newark, New Jersey. The marketer was identified as RTC Research & Development, LLC, based in Manasquan, New Jersey. A \$12 million fine was assessed against seven marketers of CortiSlim and CortiStress. One marketer was identified as Window Rock Health Laboratories, based in Brea, California. The Bayer Corp., based in Morristown, New Jersey, will pay a \$3.2 million civil penalty to settle the claims and agreed to stop ads that say the multivitamins can increase metabolism. TrimSpa, based in Whippany, New Jersey, will pay \$1.5 million.

The estimated 70 million Americans who are trying to lose weight were told by the FTC not to turn to pills. The FTC investigation found that the marketers of Xenadrine had a study that said those who took a placebo actually lost more weight than those taking the pill. I'm not shocked—based on our firm's experiences—that the company actually had a study that said its product was not effective. But, that was not the message the marketers put out to the public. Some of the companies marketed their products through infomercials or celebrity endorsements. Anna Nicole Smith, for example, has endorsed TrimSpa. Congress needs to get involved and pass legislation needed to regulate these companies from a health and safety perspective.

Sources: *MSNBC* and *Associated Press*

FDA TO REMOVE UNAPPROVED DRUGS FROM THE MARKET

I have to wonder why it's such big news when the Food and Drug Administration (FDA) says it plans to step up efforts to remove unapproved drugs from the market. An accelerated removal of unapproved drugs will apparently take place this year. One

would think that unapproved drugs would never be a problem insofar as their marketing is involved. The FDA's action came as a result of a USA TODAY cover story, which pointed out that many doctors, patients, and pharmacists are unaware that some medications on the market—nearly 2% of prescription drugs, according to the FDA—have never been scrutinized by the agency. Senator Chuck Grassley (R-IA) took on the project to protect the public. Unapproved drugs end up on the market being sold as prescription and over-the-counter products for a range of ailments, including colds and coughs, hot flashes, and pain. Consumers can't be sure whether such medications are effective, let alone safe, says Deborah Autor, Director of the FDA's Office of Compliance. I have to wonder why the FDA doesn't just ban all unapproved drugs. Instead, the agency is taking what a spokesperson says is a "concerted and concentrated approach."

Source: USA Today

COLD REMEDIES MAY BE LETHAL TO INFANTS

It has been reported by the federal Centers for Disease Control (CDC) and Prevention that cough and cold remedies can be very dangerous for infants. After investigating the deaths of three infants between 1 and 6 months old linked to cough and cold medication use, officials with the CDC are emphasizing that these drugs should be given to an infant only after talking with a physician. Between 2004 and 2005, about 1,500 children younger than 2 years old were treated in emergency rooms for adverse events associated with cough and cold medications, according to an article in the January 12th issue of the Morbidity and Mortality Weekly Report.

For each of the three dead infants, a medical examiner or coroner determined that the cough and cold medications were the underlying causes of death. Blood levels of the decongestant pseudoephedrine at autopsy were far above what's normally expected after therapeutic dosing in children between 2 to 12 years of age. Because of the risk

of toxicity, the lack of dosing instructions, and the scarcity of published evidence on effectiveness of these medications in children younger than 2 years old, Dr. A. Srinivasan and colleagues at the CDC had this advice:

Parents and other caregivers should not administer cough and cold medications to children in this age group without first consulting a health-care provider and should follow the provider's instructions precisely.

In an editorial note, the CDC adds that the results of controlled trials indicate cough and cold medications are no more effective than placebo in children younger than 2. Furthermore, the American College of Chest Physicians in 2006 released clinical practice guidelines for management of cough, advising clinicians to refrain from recommending cough suppressants for this age group. Safer and probably more effective treatments for young patients' symptoms include softening nasal secretions with saline nose drops or a cool-mist humidifier, then clearing nasal congestion with a rubber suction bulb.

Source: Reuters News

NICOTINE IS INCREASING IN CIGARETTES

Researchers at the Harvard School of Public Health report they have confirmed a study by the State of Massachusetts that found nicotine levels in cigarettes increased from 1997 until 2005. The analysis, based on data submitted to the Massachusetts Department of Public Health by cigarette manufacturers, found that increases in smoke nicotine yield per cigarette averaged 1.6% each year, for a total of about 11% over a seven-year period. Howard Koh, an associate dean for public health practice who worked on the analysis, had this to say:

Cigarettes are finely tuned drug delivery devices, designed to perpetuate a tobacco pandemic. Yet precise information about these products remains shrouded in secrecy, hidden from the public.

The health department study released last October examined nicotine levels in more than 100 brands over a six-year period. The study showed a steady climb in the amount of nicotine delivered to the lungs of smokers. Dr. Gregory Conolly, head of the Tobacco Control Research Program at the Harvard School of Public Health, said the increase found in Harvard's study is caused mainly by an increase in nicotine in the raw tobacco used in the cigarettes. He believes that results from either the type of tobacco being used or the addition of more nicotine to the reconstituted tobacco. The findings call into question whether the tobacco industry is living up to its 1998 agreement with states that it would launch a campaign to reduce smoking by young people. The higher nicotine levels made it easier to get hooked on cigarettes and harder to quit.

Massachusetts is one of three states to require tobacco companies to submit information about nicotine testing according to its specifications, and the only state with data going back to 1997. Harvard did a more in-depth analysis of the state's data and looked at one additional year. Work on the report was supported by funds from the anti-smoking advocacy group The American Legacy Foundation and the National Cancer Institute.

Source: ABC News

XV. ENVIRONMENTAL CONCERNS

CLASS ACTION LAWSUIT FILED AGAINST OCCIDENTAL CHEMICAL

A class action lawsuit has been filed by our firm against Occidental Chemical's Muscle Shoals plant on behalf of residents who claim their property was damaged by the release of harmful substances. The suit, filed last month in Colbert County Circuit Court by plaintiffs who live near the plant, is being handled by our firm and a Birmingham

firm. The plant produces a variety of chemicals including chlorine, potassium hydroxide, potassium carbonate, potassium bicarbonate and hydrogen gas. Before 1992 caustic soda was produced there. According to the suits, the manufacturing process involves mercury and discharges it as a result.

As of May 2003, OxyChem had two known groundwater contaminant plumes that exceeded the maximum contaminant level. The plant discharges mercury through its wastewater and disposes of mercury into storage facilities and waste piles, according to the suit. Housekeeping and maintenance practices at the plant contributed to the release of contaminants. Sources of the releases include corroded storage drums, pumps leaking onto unprotected ground surfaces, and pouring spent solvents onto unprotected ground surfaces. The plaintiffs, who live in the vicinity of the plant, have suffered damages to their property, which has also been rendered less valuable because of the contamination.

The suit involves primarily mercury contamination, but also contamination by other harmful substances. The damages involve contamination of property and groundwater, as well as health-related issues. We believe that further investigation will reveal more specific information about the effects of the contamination on individual plaintiffs. All the medical and scientific research done on mercury shows it's highly toxic and causes severe health problems. We are especially concerned about children in the area being exposed to toxic substances.

We expect to prove that a plant manager and an environmental team leader breached their duties by operating the plant in a manner that allowed the release of harmful substances onto the plaintiffs' property. Although the plant has been in operation since 1955, OxyChem has only been operating the facility since 1986. As of 2004, the plant has been the largest single source for mercury air emissions in the state. We are asking that the release of contaminants be stopped and that contaminated areas be cleaned up. We also sell com-

ensation for any class members who have suffered damages because of the contamination. Occidental announced in April that the Muscle Shoals plant would be phasing out the chlor-alkali operation, which utilizes mercury to produce chlorine and other chemicals. That portion of the plant is expected to close in 2008.

Our firm is working with Lee Lesley, a Birmingham lawyer, in the handling of this lawsuit. Lee and Alyce Robertson from our firm will be the lead lawyers for the plaintiffs. Rhon Jones, who heads up our firm's Toxic Torts Section, will also be involved in this case.

CEMEX PAYS \$1.5 MILLION FOR AIR POLLUTION IN COLORADO

In Lyons, Colorado, CEMEX cement plants received one of the largest air pollution penalties ever issued by state environmental regulators. The regulators levied \$1.5 million penalty to implement environmental regulations to knock out air pollution. For the past several years, Mexican-based CEMEX has received complaints from activist groups about the dust pollution caused by its tires-to-fuel burning operation. The Rocky Mountain National Park has even cited the plant for their emissions. The Colorado Citizens Campaign headed the efforts to stop the plant's pollution and was successful when the settlement agreement was reached with the state health department's Air Pollution Control Division. CEMEX is required to pay a \$350,000 fine to the state's general fund, spend \$200,000 in air monitoring at the plant site, spend \$500,000 for environmental projects, and pay \$450,000 to the STEPP Foundation, a nonprofit environmental organization. CEMEX has also agreed to a moratorium on burning tires for fuel for one year.

CEMEX and the surrounding neighborhood are in disagreement about the "aggressive community outreach" CEMEX claims to perform. Although activists for the Citizens Campaign claim that CEMEX has not talked to surrounding residents about the issues, CEMEX claims the only issues that exist

are data monitoring issues. Once again, big businesses tend to think that compliance with plant permits means the facility is environmental friendly. That isn't always so. For example, in this case, it's about the respiratory health and air quality of the surrounding neighbors.

The head of Colorado's air pollution division said that the permits aren't necessarily the only factors involved in a situation like this. Colorado prides itself on punishing facility operators that doesn't consistently adhere to specific terms and conditions that are prescribed for the safe operation of their facility. Although the \$1.5 million settlement agreement with CEMEX is one of Colorado's largest administrative settlements, in 2002 Rocky Mountain Steel Mills agreed to a \$1.8 million air pollution settlement. In Colorado, a few other companies have also been assessed criminal fines for air pollution. It's good to see that Colorado is concerned about environmental issues.

Source: Rocky Mountain News

SETTLEMENT REACHED IN TOXIC GAS RELEASE

A federal judge has approved a settlement in a lawsuit involving a train derailment that released a toxic cloud over the town of Graniteville, South Carolina. U.S. District Judge Margaret Seymour gave approval to a preliminary settlement reached by Norfolk Southern and the families of persons who were injured or killed in the incident. In the early morning hours on January 6, 2005, a Norfolk Southern train veered off the main track onto a spur, rear-ending a parked train whose crew failed to switch the tracks back to the main rail. The wreck ruptured a car carrying chlorine and released a poisonous cloud over the tiny mill town, killing nine people and injuring 250. Some 5,400 people were evacuated.

Under the settlement, those who sought medical attention within three months of the derailment will receive between \$10,000 and several hundred thousand dollars. About 760 residents, mill workers, and first responders who qualify will receive funds from the set-

tlement of the class action suit. It's uncertain exactly how much money will be paid in total. Thus far, the Norfolk, Virginia-based company has already paid roughly \$41 million in claims and expenses to about 3,700 people, according to a company spokesman.

Source: *Associated Press*

TOYOTA SETTLES CLASS ACTION SUIT OVER OIL SLUDGE

Toyota Motor Sales U.S.A. Inc. has settled a class-action lawsuit that covers about 3.5 million Toyota and Lexus vehicles that may have been damaged by engine oil sludge. Details of the settlement, which allows for third-party mediation of sludge claims rejected by Toyota, have been mailed to 7.5 million current and previous owners. Many critics believe that Toyota told customers and dealers far too little about sludge issues. They say some customers took vehicles with dead engines to dealers who had little or no knowledge of the problem and often assumed the problems were caused by the owners. Unhappy customers had no remedy other than to take their complaints to the courts.

Under the settlement agreement, owners of vehicles whose claims have been denied by Toyota may submit them to a neutral third-party at no cost for binding arbitration. The lawsuit, filed in a Louisiana district court, is expected to be approved by the court this month. It appears that the affected Toyota vehicles are susceptible to oil sludge, which can cause thousands of dollars in damage and require replacement of the engine. The following are the vehicles included in the settlement: Camry 4 cylinder for the years 1997-2001, Camry 6 cylinder for the years 1997-2002, Camry Solara 4 cylinder for 1999-2001, Camry Solara 6 cylinder for 1999-2002, Sienna 6 cylinder for 1998-2002, Avalon 6 cylinder for 1997-2002, Celica 4 cylinder for 1997-1999, Highlander 6 cylinder for 2001-2002, Lexus ES 300 for 1997-2002, and Lexus RX 300 for 1999-2002.

Sludge is gelled oil that fails to lubri-

cate engine parts. It can lead to damage, often requiring a new engine at a cost that can exceed \$10,000. Complaints about sludged engines have plagued several carmakers, but Toyota's troubles have been especially controversial in light of its reputation for vehicle quality. Many believe that Toyota is growing too fast for its engineering resources. If that's accurate, it could lead to quality problems and a tarnished reputation for the company.

When a customer takes a sludged engine to a dealership, there is usually a "clean-out" procedure. The head is pulled and a service technician tries to steam out the sludge. If that doesn't work, the engine must be replaced. Sludge can result from poor engine design; overly tight tolerances between moving parts; improper cooling; and poor maintenance by consumers. After Toyota had received 3,400 sludge complaints by 2002 it extended its vehicle warranty to eight years and unlimited miles. The program was offered to owners of 1997-2002 Toyota and Lexus vehicles equipped with 3.0-liter V-6 or 2.2-liter four-cylinder engines. If you have oil sludge, Toyota pays the consumer. Consumers can get more information by calling 888-279-4405 or at <http://www.oilgettlement.com>.

Source: *Associated Press*

HOPEFULLY ADEM WILL ACT ON REPORT ON ALABAMA STATE WATERS

A report that was released last month is very critical of Alabama on an important environmental issue. Our state is at the top of the nation for threats to its waters from sources both natural and governmental, according to the report published by two environmental groups. With 77,000 miles of rivers and streams, Alabama has 14 major river basins and a tremendous diversity of aquatic life. But it is fourth in the nation for endangered freshwater species. In the report "Alabama Water Agenda," published by the Southern Environmental Law Center, based in North Carolina, and Birmingham's Alabama Rivers Alliance, the groups outlined the

reasons for the threats to the quality of Alabama's waters. They laid out the problems:

- Rainwater carries sediment, pesticides, fertilizers, and other chemicals into streams and rivers. It is the leading cause of poor water quality in Alabama.
- Six state agencies have some responsibilities for water resources, creating confusion and conflict.
- Enforcement of water protection laws and rules is lax. Polluters go unpunished and fines are so low they are ineffective.
- State programs to monitor and protect the water are under-funded. State government spending on environmental protection is among the lowest in the nation.
- The state has no comprehensive policy about withdrawing water or using water from one river and depositing it in another river. There are insufficient policies to stop anyone from dramatically changing the levels of water in rivers or lakes.
- Damaging floods are increasing as natural spaces are paved over. Water can sink into unpaved land but quickly runs off developed areas and into streams.

Alabama's Department of Environmental Management should take this report and study it carefully. April Hall, of the Alabama Rivers Alliance, observed:

We are blessed with abundant water sources and unique aquatic biodiversity. But we have to raise the alarm about the high percentage of polluted streams and unfortunate number of extinct and threatened species.

The Rivers Alliance is a coalition of dozens of water quality groups. Alabama has about 70 groups dedicated to rivers, creeks or other water issues. The group recommended enactment of a strong water protection policy that would maintain water supply and sensitive

habitats such as wetlands. The agencies that oversee the environment must be adequately funded.

ADEM is the lead agency on water pollution in Alabama. But, the Office of Water Resources, the Surface Mining Commission, the Industrial Relations Department, the Department of Conservation and Natural Resources, and the Department of Public Health all play a part in the oversight of Alabama's water quality, quantity or aquatic species. Certain federal agencies, such as the Army Corps of Engineers and the Environmental Protection Agency, also have some responsibility in this area. The report suggests that Alabama needs a better method for applying state fines and fees toward water protection and restoration. Polluters have to be kept in check and violators punished.

The report states that enforcement for illegal pollution should be strong enough to stop polluters. We are blessed in Alabama to have an abundance of rivers, creeks, and waterways, and they must be protected. I hope the recommendations in this report will be taken to heart and implemented by those at ADEM who have the power and authority to do so. The report correctly states that "polluters often go unnoticed or unpunished unless vigilant citizens and groups fight their way through complex administrative processes and court battles." That has been our state's enforcement history—sad to say!

Sources: Birmingham News and Associated Press

XVI. THE CONSUMER CORNER

STATE SECURITIES REGULATOR WARNS AGAINST OIL DEALS

Fraudulent oil and gas deals remain a favorite ploy of con artists nationwide, according to Joe Borg, Director of the Alabama Securities Commission. Most of these investments are highly risky and not appropriate for smaller investors. And even where the underlying project

is legitimate, any revenues realized can be absorbed by high sales commissions paid to the promoter and dubious 'expenses' skimmed off by the managing partner. Businesses raising money by soliciting investors must comply with the Alabama Securities Act. Scam artists tend to target individual victims and make an unsolicited contact, usually with a phone call, offering a "great" business opportunity. Director Borg had this to say concerning the oil and gas deals being offered:

Securities investments offering profit participation in oil and gas ventures can be legitimate for those who understand and can afford the risk. But too often we are seeing doubtful and even outright fraudulent energy deals aggressively promoted to the public.

The Alabama Securities Commission, along with its membership organization, the North American Securities Administrators Association (NASAA), has issued an alert to investors who may be considering oil and gas opportunities. Because these investments scams tend to be interstate in nature, NASAA has coordinated a group of representatives from state securities agencies to share information on oil and gas investment schemes. Over the past two years, state securities regulators have opened more than 260 cases involving oil and gas-related schemes and have issued 122 cease and desist orders against promoters. Most oil and gas fraud victims don't realize they have been swindled until after the money is gone. An investor should do three things before buying into any limited partnership in energy or any other industry:

- Independently research the background of the promoters;
- Get a clear explanation of the deal in writing; and
- Carefully read all the fine print.

To learn more about gas and oil investment scams, you can view a new brochure in the Investor Education

& Fraud Prevention area at www.asc.state.al.us. You can also contact the Commission for inquiries regarding securities broker-dealers, agents, investment advisors, investment advisor representatives, financial planners, and the registration status of securities. The Commission's phone numbers are 334-242-2984 or 1-800-222-1253.

NEW DANGER LABEL REQUIRED ON ALL PORTABLE GENERATORS

With winter weather still hanging around, I believe that folks who use portable generators should learn more about them and especially become aware of any risks associated with their use. The U.S. Consumer Product Safety Commission (CPSC) has voted unanimously to require manufacturers of portable generators to warn consumers of carbon monoxide (CO) hazards through a new "Danger" label. The label states that, "Using a generator indoors CAN KILL YOU IN MINUTES." Manufacturers will now be required to place the "Danger" label on all new generators and the generators' packaging. The label warns consumers that a generator's exhaust contains carbon monoxide, which is a poison that cannot be seen and has no odor. This poison is referred to as the "silent killer." The label also warns that generators should never be used inside homes or garages, even if doors and windows are open.

It has been reported that the death toll from CO associated with generators has been steadily rising in recent years. At least 64 people died in 2005 from generator-related CO poisoning. Many of the deaths occurred after hurricanes and major storms. CPSC staff are aware that from October 1st through December 31, 2006, portable generators caused at least 32 CO deaths. Deaths from carbon monoxide poisoning are preventable. This information came from police, medical examiner, and news reports. The warning labels are meant to stop consumers before they make what could be a fatal mistake.

Safety experts say that generators should be used outdoors only, far from

windows, doors and vents. The CO produced by one generator is equal to the CO produced by hundreds of running cars. It can incapacitate and kill consumers within minutes. The new "Danger" label requirements for generators manufactured or imported will take effect 120 days after the regulation is published in the Federal Register.

In December of last year, in a separate action the Commission began rulemaking to address safety hazards with generators by approving an advance notice of proposed rulemaking, or ANPR. The CPSC directed its staff to investigate various strategies to reduce consumers' exposure to CO and to enable and encourage them to use generators outdoors only. Those strategies include generator engines with substantially reduced CO emissions, interlocking or automatic shutoff devices, weatherization requirements, theft deterrence, and noise reduction.

Source: CPSC

XVII. RECALLS UPDATE

NHTSA RECALLS 81,000 HONDA ACCORDS

The National Highway Traffic Safety Administration (NHTSA) has ordered the recall of 81,000 Honda Accords (model years 2004 and 2005) because of a potentially unsafe driver's side airbag seat positioning sensor. The seat positioning sensor detects the driver seating position and adjusts airbag pressures. On some Honda Accord wiring harnesses the sensor was attached to the seat frame in the wrong location and may malfunction. The airbag system will default to full inflation pressure regardless of seating position, increasing the risk of airbag-caused injury for "smaller drivers in a frontal crash," according to NHTSA. A broken seat positioning sensor will also cause the airbag warning light to illuminate. Dealers will replace the seat position sensor wiring sub-harness when the recall begins this month. Honda Accord owners may contact NHTSA at 1-888-327-4236 or

call Honda at 1-800-999-1009. The recall is being conducted in cooperation with the U.S. Consumer Product Safety Commission.

TOYOTA TO RECALL SEQUOIAS AND TUNDRAS

Toyota is going to recall about 533,000 Sequoia SUVs and Tundra pickup trucks in the U.S. to repair faulty components that could make the vehicles hard to steer. According to the automaker, six people have been injured because of the defect. The recall applies to certain 2004 to 2007 model year Sequoias and 2004 to 2006 model year Tundras. Toyota will notify owners this month and will repair the defective front suspension lower ball joints free of charge.

SAMARA BROTHERS RECALLS CHILDREN'S TWO-PIECE OVERALL SETS

Samara Brothers LLC, which is located in New York, has recalled about 200 Starting Out Shirt and Overalls. The coatings on the snaps in the overalls and shirt contain excessive amounts of lead, posing a serious risk of lead poisoning and adverse health effects to young children. No incidents or injuries have been reported so far. This recall involves two styles of children's overall sets. One set is a red plaid denim overall with a white shirt trimmed in red, sold in sizes 12 through 24 months. The other set is a navy blue corduroy overall with a white shirt trimmed in green, sold in sizes 3 through 9 months. Both styles have decorative train appliqués on the front of the overalls. The collar tag of the overalls reads, "Starting Out."

The sets were sold exclusively at Dillard's nationwide during October 2006 for about \$20 for the red overalls set and about \$25 for the blue corduroy set. Consumers should stop using the products immediately and contact Samara to obtain a full refund. For additional information, please contact Samara Brothers at (800) 985-9975 between 8:30 a.m. and 5 p.m. Eastern Time Monday through Friday, visit the firm's Web site at [\[recall.com\]\(http://recall.com\), or e-mail the firm at \[info@samararecall.com\]\(mailto:info@samararecall.com\).](http://www.samara</p></div><div data-bbox=)

FAMILY DOLLAR STORES RECALLS OSCILLATING CERAMIC HEATER FOR FIRE HAZARD

Family Dollar Stores, of Charlotte, North Carolina, has recalled about 35,000 Oscillating Ceramic Heaters. The heaters can overheat and smoke, which could pose a fire hazard to consumers. Family Dollar has received three reports of the heaters overheating or smoking. Thus far there have been no reports of fires, but there have been two reports of minor property damage. The recalled heater is a 1500 watt oscillating ceramic heater. The heater has a white plastic housing with the name "Heat-Wave" in black on its top. A label on the product contains the control number "ETL 3090262." The heaters were sold at Family Dollar stores nationwide from September 2006 through November 2006 for about \$20. Consumers should contact Family Dollar at (800) 547-0359 between 8:30 a.m. and 5 p.m. Eastern Time Monday through Friday, or visit the firm's Web site at www.familydollar.com for more information.

DEWALT RECALLS PORTABLE GENERATORS BECAUSE OF ELECTRIC SHOCK HAZARD

DEWALT Industrial Tool Co., of Towson, Maryland, has recalled 13,000 DEWALT DG2900 Portable Generators. A ground fault circuit interrupter (GFCI) installed on the generator could fail to operate properly, posing a risk of electric shock to consumers. Thus far no incidents or injuries have been reported. The recall involves DEWALT DG2900 2900 watt gasoline-powered generators with date codes 200150 through 200635. The generators are black and yellow. "DEWALT" and "DG2900" are printed on the generator. The date code is stamped on the right side of the unit on the black plastic covering the rear of the control panel. Units with an "R" stamped on the name plate are not affected by this recall. The generators were sold at home center and

hardware stores nationwide from December 2001 through November 2006 for between \$900 and \$1,000. For more information, contact DEWALT toll-free at (888) 742-9108 between 8 a.m. and 5 p.m. Eastern Time Monday through Friday, or visit the firm's Web site at www.DEWALT.com.

GRACO RECALLS 100,000 HIGHCHAIRS FOR REPAIR

About 100,000 Graco highchairs are being recalled for repair because they can collapse if they are not fully opened and locked into place from the storage position. Graco Children's Products Inc. is recalling the Graco Contempo Highchairs. The company has received 18 reports of the chair collapsing, according to reports. There was one report of an 18-month-old boy suffering a bruise on his foot, the U.S. Consumer Product Safety Commission (CPSC) reports. The highchairs were sold from December 2005 through December 2006 for between \$100 and \$130 at various retailers nationwide. The recalled chairs have model numbers that begin with 3800, 3803, 3804, 3805, 3810 and 3811, followed by a three-letter fashion code. Consumers should contact Graco for a free repair kit. Although the CPSC says folks can continue to use the highchair until they receive the kit as long as they make sure it is fully opened first, I would believe the best thing to do is to wait for the repair kit. Graco can be contacted at (877) 445-1312 or at Gracobaby.com.

XVIII. SPECIAL RECOGNITIONS

ALABAMA TOURISM DIRECTOR IS DOING AN OUTSTANDING JOB

Governor Bob Riley put together an excellent cabinet during his first Administration and it paid great dividends for the state. One of those chosen to serve the people of Alabama was Lee Sentell, a

well-respected and experienced person in the field of development and tourism promotion. Lee, a native of Ashland, Alabama, was appointed by Governor Bob Riley on January 15, 2003, to serve as the Director of the Alabama Tourism Department. Lee had been director of tourism for the Huntsville Convention & Visitors Bureau for 12 years. He also had been director of marketing for the U.S. Space & Rocket Center for 10 years, developing advertising and marketing plans for the tourist attraction and establishing marketing programs for U.S. Space Camp. Lee attended Auburn University, where he received a Bachelor of Arts Degree in Communications.

Under Lee's skilled leadership, the Alabama Tourism Department has won several awards for its marketing campaigns from the Travel Industry Association of America, the National Council of State Tourism Directors, and the Public Relations Council. The department has also been named Tourism Organization of the Year for two years in a row by the Southeast Tourism Society.

Without a doubt, tourism is big business in Alabama. Our state's tourism industry grew by 14%, or more than \$1 billion, during the fiscal year that ended October 1, 2006. The growth caps a four-year increase of 33% in spending by travelers in the state. We are approaching an industry that will exceed \$10 billion annually. Governor Riley had this to say:

More and more tourists are discovering what we Alabamians have known all along: we have the most beautiful state in America. They've discovered our great hospitality, rehabilitated beaches, first-class golf resorts and new hotels. There are outstanding festivals, performances and attractions all over our state, and we're glad travelers are coming here to visit and boost our economy.

The increase in tourism has added 49,000 workers to the payrolls in the state's hospitality industry during the past four years. Travelers spent an estimated \$8.9 billion in fiscal year 2006, up from \$6.7 billion four years ago.

Almost 200,000 direct and indirect jobs in Alabama were a result of traveler spending.

Since Lee Sentell took over his Department, the State of Alabama has done a tremendous job of promoting our state's tourist attractions. Lee has been able to bring all of the various segments of this industry together, and I understand that much progress has been made. In my opinion, Lee has been the best Director of the Alabama Tourism Department in my recollection. Under his leadership, all areas of Alabama have benefited from the influx of tourists who visit our state. I predict even greater things during the next few years.

THE COURTS MUST REMAIN OPEN TO VICTIMS

My good friend Max Cassady recently told me about a woman in his county who had been badly mistreated. Max, an outstanding lawyer who works out of Evergreen, Alabama, has a **heart** for people and goes about his business in the right way. He and I were discussing the woman who had contacted his office concerning a legal issue. After hearing the story, I asked Max if he would write a piece on the woman's plight for the report. He did and the following is the story, which—based on my experience—is a fairly common experience for lots of consumers and that's a sad commentary.

A 21 year old woman who works for minimum wage at a fast food restaurant called my office today, moments after her vehicle had been repossessed, even though she had made a payment on the vehicle only days before. She had in her hands all of her receipts to prove that she had made 13 consecutive, timely weekly payments. Most of her personal property had been in the car because she was in the process of moving from one apartment to another. She ran out and pleaded with the "repo man" to allow her to remove her belongings. He would not allow it; he stated that he had already contacted the Sheriff, and that what

he was doing was legal. She needed to step away from the car.

Reading the contract, it turned out the used car dealer had simply lied to the young lady. The dealer had promised her that her payments would be weekly, on a "rent to own" basis, when, in fact, the contract called for a \$5,000 balloon payment on December 28th, three days after Christmas. It did not surprise me in the least that the dealer had waited around for her to make her first January 2007 weekly payment, after the contractual December default date on the \$5,000 balloon, before sending out the repossession truck.

I explained to the woman the extreme difficulty that she would face in prosecuting the case. The dealer would likely have an arbitration contract signed by her, although, of course, she did not have a copy of any such document. Also, the reasonable reliance rule would pose a real problem. I explained to her that under current Alabama law, a seller can look a buyer straight in the eye and lie repeatedly about what the sales terms will be, and then, when the lie is discovered, pervert justice in the court system on the defense that the buyer was not "reasonable" because she failed to read the fine print of the contract and discover that she was being lied to. "Blame The Victim" is truly the law of Alabama now.

This young woman needs her car to get to work. My car enables me to practice law, to take my children to the doctor, and to vote. Anyone who takes the time in their mind to consider the simple yet severe economic impact of this event to this woman should be angry that our court system has closed the courthouse doors to the working poor. The working poor have never had power in the legislative and executive branches of government, but at least they have

had a court system when individually injured. Now they are blamed if they are defrauded.

*In high school, a very good English teacher assigned *The Grapes of Wrath*, John Steinbeck's classic novel depicting the poor farmers who lost their farms when the land turned to dust because of drought. Fraudulent handbills advertising high wages for farm work in California were distributed en masse to these desperate people in the Midwest, and with their families and every belonging they could tie to a beaten-up truck or vehicle, they drove to California, only to discover that the purpose of the handbills advertising low wages was to induce an overpopulated wave of laborers who would ultimately work for nothing simply to keep daily bread in their mouths. This woman today is in no better shape, if not worse shape, for she has no car at all now.*

The state legislature does not have the power to ban arbitration; however, it does have the power to regulate the making of contracts without impairing those contracts in violation of the United States Constitution. The legislature has the power to disclose that a warranty disclaimer be in a particular conspicuous large typeset, and it does so in the UCC. A good start would be a disclosure in large typeset, at the very top of contract, that states:

By signing this contract you give up your right to trial before a judge or jury under the United States constitution and the Alabama constitution. Do not sign if you do not intend to give up those rights.

The working poor are serving us. They are cleaning our clothes. They are cutting our grass, serving us food, keeping our children, cleaning our cars, sitting with our

elderly parents, cleaning our streets and offices, and working on the holidays we treasure with our families. It is shameful when they are victimized by scheming merchants who prey upon the poor. It is perhaps more shameful when they are locked out of the court system, or, if they are lucky enough to get past an arbitration clause in order to walk up the courthouse steps, they are then blamed by the court system, and their cases are dismissed because they were not "reasonable" when they were cheated.

I really appreciate Max taking the time to write this piece—based on a real life story—since it tells us why it's so morally wrong for big companies to mistreat folks who have no economic or political power. I hope the courts and legislators will do something to change the plight of consumers like the woman Max wrote about. The working poor have been left behind in this country, and unfortunately, that includes Alabama. These folks have literally been thrown to the **wolves** (predatory lenders) by our political system. You can also include in the **wolf category** lots of corporate entities which have made big bucks preying on low income consumers. It's quite evident that the only salvation for the victims has been from the court system. That's why the tort reformers **love** arbitration and **hate** the court system. When the victims lose their constitutional right to go to court with their dispute, they are then totally at the mercy of the **wolves**.

If you agree that victims' constitutional rights should be protected, I hope you will contact Governor Bob Riley, Lt. Governor Jim Folsom, Attorney General Troy King, House Speaker Seth Hammett, and your local House member and Senator. It would also be a good idea to let the members of Congress from your district know how you feel. Ask these public officials to help victims and stand up for their rights.

MELISSA PRICKETT IS MADE A SHAREHOLDER

Melissa Prickett, a lawyer in our Mass Torts Section, has recently become a Shareholder with the firm. Melissa is currently responsible for investigating Celebrex and Bextra claims for the Mass Torts Section. She has also handled Hormone Therapy, Baycol, Crestor and other statin claims. Melissa has served on several committees in the Prempro Multi District Litigation. She is an active member of several associations. Melissa has also been involved in the settlement of some of the firm's Baycol cases.

Melissa graduated from Jones School of Law in 2001. While at Jones, Melissa served as a member of the Law Review Board and was recognized as Outstanding First Year Student. She was active in the Student Bar Association and held the positions of First-Year Senator and Vice-President. The Montgomery native was also selected Who's Who Among Students in American Universities and Colleges.

Melissa is married to Michael Prickett. They have six-year old twin sons, Jake and Sam. The Pricketts are members of Frazer United Methodist Church and are active in the Children's Ministry. Melissa is a very good lawyer, who works very hard, and is a valuable member of the firm.

LAWYER SERVES ON JUNIOR LEAGUE BOARD

Alyce Robertson, one of our lawyers, currently serves on the Board of Directors of the Montgomery Junior League (JLM). She serves in two positions, including the Advisory and Strategic Planning Chairman and the Chairman of Membership Education. Last year, Alyce was the Merchant Chair for the 2005 Holiday Market. Before that, she worked two years on the Community Research Committee, which she describes as a League-changing experience in that she learned first-hand of the great need for the Junior League's financial and volunteer resources in the Montgomery area.

For more than 80 years, the JLM has responded to the needs of our community. They have awarded millions of dollars and donated countless volunteer hours to worthy organizations in Mont-

gomery. The focus of the JLM is "strengthening families." JLM members are committed to improving the lives of others with programs that address areas such as parenting, health and well-being, early childhood intervention, life skills development, domestic violence, education, and children and youth in general. More than 800 women contribute over 20,000 hours in volunteer services each year in the JLM. The firm will serve as a Grand Investor for the JLM this year. We are excited to be involved in such a worthy organization.

SHANNA MALONE IS A VALUABLE EMPLOYEE

Shanna Malone serves as the Public Relations Coordinator for the firm. She is responsible for developing and overseeing media relations, and coordinating and implementing the firm's charity functions, community outreach and service programs. Shanna deals with media outlets all over the country as a result of our national litigation presence. She also serves as the editor for the Jere Beasley Report and helps in putting this Report together each month. Shanna gets a gold star for having to deal with that job! The Report currently goes to over 38,000 persons each month, and we receive a great number of responses from our readers each month.

Shanna graduated from Troy State University with a Bachelor of Science in Print Journalism and Public Relations in August of 1999. She is a member of the Troy State Alumni Association, and the Troy State Journalism Alumni Association. Shanna is married to Shannon Malone. They have two daughters, 5 year-old Sydney and 3 year-old Shelby. They attend Union Baptist Church in Honorville where Shanna is actively involved in the Children's Ministry. Shanna does an outstanding job and is a valued employee of the firm.

XIX. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

Scarlette Moore Tuley

Scarlette Moore Tuley graduated from the University of Alabama School of Law in 1998. While at Alabama, she was an editor of the Law and Psychology Review, as well as serving as the Honor Court Defense Counsel. Upon graduation, she began her practice with our firm as an associate, focusing on personal injury cases. Today, her practice areas are business litigation, environmental/toxic tort litigation, and securities litigation. In her business practice Scarlette has represented hospitals, manufacturers, food packagers, lumber companies, and contractors. Her securities practice currently consists of representing individuals who were involved in the recent WorldCom scandal, as well as numerous other securities litigation matters. Scarlette is very involved with the Women's Bar in Alabama. She is the founder and former President of the Montgomery County Women's Bar Section.

Scarlette, a native of Jackson County, Alabama, is married to Jay S. Tuley, who is a shareholder with the Montgomery law firm of Nix, Holtsford, Gilliland, Higgins & Hitson, P.C. and a good guy. He is also a very good lawyer but most folks believe Scarlette is the better of the Tuley team. The Tuleys, who have two children, Beck and Riley, are active members of Memorial Presbyterian Church. Scarlette is a very good lawyer who does outstanding work for her clients. She is also a great wife and mother, according to four of my good sources. Those sources happen to be her mother and father, her father-in-law, and her husband. We are blessed to have Scarlette as a Shareholder in the firm.

Donna Puckett

Donna Puckett, who works in our Toxic Torts Section as a Legal Assistant to David Byrne, has been with the firm since February 2001. During that time, she has worked on some very important

cases, including the Monsanto case, which settled in late 2003. She now works primarily on other environmental cases involving carbon black and PFCs. Donna is married to John Puckett. They have three children: a son, Dylan, who is in 9th grade at Elmore County High School; and twin daughters, Leslie and Preslie, who are in 8th grade at Eclectic Middle School. Donna is a valuable member of the litigation team in our Toxic Torts Section and does very good work.

XX. SOME CLOSING OBSERVATIONS

Walter Albritton, who is one of our pastors at Saint James United Methodist Church, where Sara and I are members, publishes a weekly Sunday school lesson, which I look forward to receiving each week. Walter has the ability to convey a message that is both insightful and easy to understand. There is an old saying where I come from that says when a speaker or writer “puts the hay down where the goats can get it,” that person could be clearly understood by those who hear or read the message. Walter has that ability. I always send his message each week to everybody in our firm. When it’s late, I am always asked by several folks—“when is Walter’s lesson coming?” But, I really wish this preacher would quit using me as examples in his lesson. In any event, I am including one of Walter’s recent messages—one that I believe is well worth reading—for your reading pleasure. Walter hits the nail squarely on the head!

ONLY JESUS CAN SATISFY OUR HUNGER AND THIRST FOR GOD

John 6:34-40

Key Verse: I am the bread of life. Whoever comes to me will never be hungry, and whoever believes in me will never be thirsty.—John 6:35

Novelist Marghanita Laski was a professed atheist yet she wrote mostly about religion. Not long before her death Laski said to a Christian friend, “I envy you Christians; you have someone to forgive you, and I don’t.”

Her sad words surely validate Blaise Pascal’s classic assumption: “There is a God shaped vacuum in the heart of every man which cannot be filled by any created thing, but only by God, the Creator, made known through Jesus.”

Laski evidently spent her entire life without ever discovering the difference that Jesus could have made in her heart. She could not bring herself to believe that there is a God like Jesus and that only Jesus could satisfy the emptiness of her life. She was hungry and thirsty for God yet unwilling to believe that her need could be satisfied by receiving Jesus into that God-shaped vacuum in her heart.

She knew a lot about religion but did not know God. Jesus said the Pharisees were in this same predicament. They were up to their eyebrows in religion but they did not know God. They were looking for a Messiah who would recognize their authority and their righteousness, not one who would boldly declare that he had come down from heaven to be the living bread and the living water for all people.

The Pharisees wanted a Messiah who would do their will, not one who would upset their apple carts by doing the will of his Father. After all, the claims of Jesus were downright impossible; what right did he have to say that he was the bread God had sent? Or that he was the living water? Such absurdity they could not accept!

Yet Jesus declares that he is indeed the true bread that satisfies and the water than quenches the thirst

of all who come to him and drink. Some in every age find this hard to believe, just as the Jews balked at believing it. Admittedly no one can accept Jesus’ claims except by faith. But that is exactly what God asks of us—faith! Genuine faith enables each of us to believe that Jesus is everything he says he is and that he has the power to do all that he says he can do.

Seven times Jesus says emphatically “I am.” Each of us has to decide how to respond to his claims. We can decide that he was confused or crazy to make such statements about himself. We can decide that this was the Gospel writer John talking, not Jesus. Or we can decide that what he said is absolutely true. This is the choice of faith. This choice enables each of us to receive Jesus Christ into our hearts, thus to be reconciled to God and saved from our sins.

The word “whoever” in our text is an important and beautiful word. By using this word Jesus tells us that it is God’s will for all people to be saved, that salvation is available to anyone who repents and receives Jesus as Lord and Savior. “Whoever” includes everyone! This means that God sent Jesus to be the bread of life for all people everywhere, including all those who have embraced other “religions” or no religion like Laski the atheist.

As long as there is still one person in the world who has not received Jesus as Savior, the church must remain in mission. God’s will is for every person to have the opportunity to receive the salvation that comes from acknowledging Jesus as the bread of life.

Most of us know what it is like to be satisfied with physical bread. Our hunger is gone. We want no more. To receive Jesus gives us that same satisfaction spiritually. It is what the hymn writer asks for when he says, “Bread of heaven,

*feed me till I want no more”!
 (“Guide Me, O Thou Great
 Jehovah”)*

*Once it was my privilege to host a
 gracious Methodist bishop from
 India on a visit to America. His
 words still ring in my ears: “In my
 land many are starving; they are
 hungry for bread for their bodies.
 But while many need bread to eat,
 even more they need to know
 Jesus so their souls can be nour-
 ished by the Bread of heaven.”*

*The good bishop stressed the need
 for our missionaries to make Jesus
 known as well as to help them feed
 the hungry. He was right and it
 remains true that the missionary
 enterprise must be holistic, focused
 on the spiritual as well as the phys-
 ical needs of people everywhere. We
 cannot remain faithful to the
 gospel if we neglect either one.*

*The satisfaction of a good meal
 will soon give way to hunger. But
 when Jesus fills us with himself, we
 experience eternal satisfaction. We
 have found what was missing and
 we realize nothing else can satisfy
 the soul like Jesus. The word for
 this soul satisfaction is peace, the
 sweet peace that only Jesus gives
 when he fills that vacuum in the
 heart. This peace is God’s assur-
 ance that our “eternal life” has
 begun and that it will last forever!*

*When my friend John Felton was
 dying, he did not tell me about his
 suffering, his politics or his accom-
 plishments. He told me about his
 Savior: He said it all when he said,
 “Jesus is everything.”*

*I think that is what Jesus meant
 by saying that he is living bread
 and living water. When we have
 him, and he has us, we have every-
 thing we need—now and forever*

*—so we are never hungry or
 thirsty again!*

*Isn’t this too good not to share it
 with everyone? Let’s do it!*

If you don’t read any other part of this
 issue, I really hope that you read what
 Walter had to say about “religion” and
 Jesus Christ. He is absolutely right—
 Jesus is the **real deal** and is **everything!**

XXI. SOME PARTING WORDS

I had planned to write more in this
 section, but after reading again what
 Brother Walter had to say, I resisted that
 temptation and will simply say in
 closing: may God bless each of you, and
 I sincerely hope and pray that Jesus is
 your Savior too!

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