



THE
JERE BEASLEY REPORT

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Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., Attorneys at Law

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I. CAPITOL OBSERVATIONS

THEIR NEW HOME IS IN ALABAMA

The best news to come along for Alabama in years occurred when ThyssenKrupp announced that it selected Alabama as the home for its new state-of-the-art steel and stainless steel processing facility. The facility, a cooperative effort between ThyssenKrupp Steel and ThyssenKrupp Stainless, will be located in Northern Mobile and Southern Washington counties in south west Alabama. Initially planned as a \$2.9 billion investment, ThyssenKrupp will actually invest at least \$3.7 billion in this facility and possibly much more. The increased investment primarily results from a rise in both steel and stainless steel capacity, as well as the installation of additional equipment to allow further diversification of the product portfolio. The facility represents the largest investment in the history of ThyssenKrupp Stainless. It is also the largest industrial development announcement in Alabama history. Governor Bob Riley, who worked tirelessly to bring the steel mill to Alabama, stated:

With this project, Alabama and ThyssenKrupp are making history. A project this size, with this amount of economic impact, comes along perhaps once in a generation. It is transformational, and we thank our partners at ThyssenKrupp, our state and local economic development team, and Alabama's outstanding workforce for making our success possible.

It should be noted that ThyssenKrupp conducted extensive due diligence and negotiations to select a location for the construction of a new facility in the United States. The process began in February 2006 with 67 potential sites in 20 states. From the initial sites, ThyssenKrupp confined its search to locations in three states: Alabama, Arkansas and

Louisiana. In February of this year, the company announced that it narrowed its search to two states, Alabama and Louisiana.

The new plant complex, which is scheduled to begin operations in 2010, is expected to be one of the largest private industrial development projects in the United States over the next decade. Approximately 29,000 jobs will be generated during the construction phase. When it is fully operational, the plant will employ 2,700 people. Over a 20-year period, the facility is also expected to yield tens of thousands indirect jobs. Construction is expected to begin by the end of the year.

Governor Riley, Lieutenant Governor Jim Folsom, Commissioner Ron Sparks, Speaker Seth Hammett and ADO Director Neal Wade, as well as all of the local officials who worked on this project, are to be congratulated for a tremendous accomplishment. Without reservation, it's clear that the facility wouldn't have come to Alabama, but for the leadership and dedication of Governor Riley. He was the reason Alabama is now home to a new steel mill that will change our state in a most meaningful way.

ANOTHER ECONOMIC BOON FOR OUR STATE

Hyundai Motor Company (HMC), Korea's largest automotive manufacturer, is already finding that being at home in Alabama is a very good thing. Hyundai Motor Manufacturing Alabama, LLC (HMMA), which was incorporated in 2002, constructed a \$1.1 billion plant in Montgomery. The company's first manufacturing facility in the U.S. now employs more than 3,200 people with high-paying jobs and full benefits. In February 2007, HMMA achieved Certification to the International Automotive Task Force's most rigid quality management standard, ISO/TS 16949, which is a set of Quality Management System requirements specific to the automotive industry. ISO/TS 16949 is the highest automotive operating standard in the world.

There was more good news recently concerning HMMA. In March, Governor Riley announced that the company will construct a second engine plant at its Montgomery production facility, creating approximately 522 new jobs. HMMA will invest approximately \$270 million to construct the 349,440-square-foot building, which will manufacture 2.4-liter 4-cylinder Theta engines. This will enable Hyundai to serve its growing manufacturing operations in the United States, including supplying engines to the new Kia plant being built just across the Alabama line in Georgia. The expan-

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sion also includes a 533,000 square-foot consolidation center and a container yard. All of this is just another classic example of how good Alabama is for business.

ALABAMA STILL RANKS NUMBER ONE FOR BUSINESS

As evidenced by the huge steel mill announcement last month, and all the other economic development news, Alabama continues to be recognized as a state that is great for business. It's also significant that for the second year in a row, Site Selection magazine picked the Alabama Development Office, our state's industrial recruitment agency, as the very best in the nation. ADO was selected to receive the 2006 Competitiveness Award and was thereby recognized as the best in the business. To select the winner, the magazine weighs 10 factors, including new plant activity in each state, and determines which state is the best. Alabama's selection was based on 586 companies locating or expanding in Alabama in 2006, which is a tremendous accomplishment. The industries, when completed, will create about 25,000 jobs. In acknowledging the honor for our state, Governor Bob Riley remarked:

This award is recognition of the professional staff we have employed at the Alabama Development Office and the depth of economic development experience at the local, regional and corporate levels in America.

Following Alabama in the magazine's top 10 states were: North Carolina, Indiana, Georgia, Ohio, Kentucky, Tennessee, Virginia, Iowa and Oklahoma. It's good to see Alabama being recognized as a state where business owners and industrial prospects want to locate. It's also significant that Alabama treats existing business owners very well. When you consider how well Alabama is doing—compared to all other states—it's difficult to understand how the so-called

tort reform groups, including the U.S. Chamber of Commerce and AVALA, can continue to slam our state repeatedly. Shame on them!

GOVERNOR RILEY IS MAKING A DIFFERENCE

In a matter related to Alabama's economic development and the tremendous progress our state is making, Southern Business & Development magazine, which covers the economic development activities of the world's third-largest economy (which happens to be the South), has put Governor Bob Riley in its top ten list of people who are making a positive difference in the region. Not only is the Governor a good salesman for Alabama, he has put in place some extremely talented people in the state's economic development department. My longtime friend, Neal Wade, who heads up the Alabama Development Office, is recognized as one of the very best industrial recruiters in the business and his record speaks for itself. During the last four years, Alabama has had one of the nation's most dynamic state economies. Governor Riley, who has truly made a difference for Alabama, will go down in history as one of the best—if not the very best—governor in our state's history. In fact, I can't think of anyone who would be ranked any higher today than the Clay County native. Governor Riley is not only doing a tremendous job for Alabama—he also really enjoys being Governor.

MORE PROOF THAT ALABAMA IS GOOD FOR BUSINESS

As mentioned above, Southern Business and Development magazine tracks economic development in the South each year. Alabama was ranked very high in several categories that predict future growth. The Top 10 list ranking various locations and individuals in the South puts Alabama high in the top 10. The list includes economic indicators for growth, such as leadership, transportation resources and emerging

industries. This year, Alabama scored very high on several of the lists. Neal Wade, Director of the Alabama Development Office, observed:

Alabama has developed a reputation for excellence when it comes to economic development. It took a lot of people doing a lot of work to win us that reputation, so I'm pleased to see our state get recognition for what we've accomplished.

There are a number of reasons why Alabama is doing so well and is ranked so high by all the experts. For example, our state was ranked in the Top 10 in several categories by the magazine. In addition to having a super salesman as Governor, the following are some of the categories where Alabama did well:

- **Tremendous Industrial Job Training Program**—Alabama has the best training program in the country and it has successfully trained employees for all of the major projects in Alabama and over the past many years.
- **Top 10 Great Locations to Raise a Family: Birmingham**—Southern Business and Development praises Birmingham as “an excellent place to raise a family. The cost of living and housing market are among the most affordable in the Southeast.” The magazine also says Birmingham is a national leader in life sciences, finance, retail and publishing.
- **Top 10 Great Places for Aviation and Aerospace: Mobile and Huntsville**—The state earns two places on this top 10 list. Huntsville gets honored for its vital role in the U.S. Army's missile and aviation programs. “Almost every major U.S. aerospace corporation has a presence in the community,” the magazine says. Mobile earns its spot on the Top 10 list for the Brookley Industrial Complex, which was selected by Northrop Grumman and EADS North America as the site of its advanced tanker production facility.

- **Top 10 Universities that Drive Economic Development: University of Alabama at Birmingham**—“Research is the foundation of today’s knowledge economy, and as a result, research universities are playing an increasingly important role in economic development,” the magazine states. It goes on to note that UAB is ranked high nationally in funding received from the National Institutes of Health, and that UAB provides a basis for the growth and recruitment of biotech companies.
- **Top 10 Places in the South for Emerging Growth Industries: Huntsville**—Huntsville received recognition for its business environment that encourages innovation, its “world-class” technology infrastructure, including Cummings Research Park, and its intellectual capital. The city has the second-highest number of scientists and engineers per capita in the U.S., the magazine reports. Huntsville also made this Top 10 list for being the home of the Hudson-Alpha Institute for Biotechnology and Digium.
- **Top 10 Inland Waterways in the South: the Tennessee-Tombigbee, the Warrior-Tombigbee, the Alabama River, and the Tennessee River**—Several of the state’s inland waterways were recognized for being “vital components of the South’s transportation system.” Alabama’s outstanding waterways help reduce transportation costs for manufacturers and producers.

Source: www.sb-d.com

CHICKEN LITTLE SHOULD HANG HIS HEAD IN SHAME FOR BEING USED

The selection of Alabama as the home of the new \$3.7 billion steel processing facility in Mobile sends a clear message: “business has never been better in Alabama.” Had the facility gone to another state, AVALA and the U.S. Chamber of Commerce would have played a major role in bringing about Alabama’s loss. Thankfully, that didn’t

happen. However, it’s time to call the hand of the giants in Corporate America who fuel the tort reform movement and tell them it’s not good to use others to do their dirty work. It’s evident that AVALA’s spokespersons are being used by these giants of Corporate America for their own ulterior motives. Otherwise, they wouldn’t be putting out such bad and misleading information about Alabama at a time when the largest industrial prospect in our state’s history was being recruited. The barrage of bad news about Alabama’s business climate—even though totally false—has to have been viewed by any industrial prospects considering Alabama to become their new home. I suspect the decision-makers who selected Alabama as the location for its steel mill had to have had access to the information.

Many business groups, including Southern Business and Development, which has awarded Alabama its “State of the Year Award” for four years running, continue to laud Alabama for its business-friendly atmosphere. Those who are attempting to destroy the civil justice system in Alabama, claiming that the system hurts the business climate and our ability to attract new jobs and industry, are now being exposed. ThyssenKrupp’s decision to locate its facility in Alabama puts things in perspective and brings the truth to light.

The spokespersons for groups like AVALA and the Chamber’s surrogates are definitely like the character in the fable, Chicken Little, who kept shouting to all who would listen that the “sky was falling.” We all know how untrue those claims proved to be and how baseless in fact they were. The same is true about Chicken Little’s claims about Alabama’s business climate and our state’s court system. Alabama’s progress economically, and specifically in industrial development, is undeniable proof, once and for all, that the civil justice system in Alabama does not negatively affect the business climate in our state. In fact, I am told that Alabama’s court system never comes up in discussions when prospects are considering Alabama as a

place in which to locate. Shame on “Chicken Little” and more especially those in the tort reform movement who are funding his and other efforts to discredit Alabama and its citizens.

THE NATIONAL CHAMBER OF COMMERCE IS A TOOL OF THE GIANTS OF CORPORATE AMERICA

The more I learn about the U.S. Chamber of Commerce the more I am convinced that the national organization does not represent the interest of our local Chamber. The national organization, which is funded by big corporate interests—oil, insurance, tobacco and drug industries—cares nothing for small business owners in any state and certainly not Alabama. Their lobbyists spend their time fighting for the Exxons and Wal-Marts of the world, not locally owned businesses, and that’s difficult to justify. I am an elected member of the Board of Directors of the Montgomery Area Chamber of Commerce and can attest to the fact that the U.S. Chamber operates independently of our organization. Frankly, the national group has become nothing more than a front for the giants of Corporate America. Its primary mission has become one designed to destroy the jury system in our country resulting in protection for corporate wrongdoers. Tremendous sums of money are collected from the giants in the industries mentioned above and others, which is then poured into court races in selected states. The U.S. Chamber also gets involved in legislative issues at the national and state levels and they are always on the side of the corporate giants and not small business owners.

A number of local and state chambers of commerce have been working to distance themselves from the national group. For example, you might want to take a look at what is going on in West Virginia. Steve Roberts, who is president of that state’s chamber, is dismayed over the U.S. chamber’s approach to politics. It appears that the national organization got involved in a fight in the West Virginia

legislature and took a stance that was bad for local businesses. Their action was described as a real slap in the face for local chambers of commerce that are working hard for the betterment of their communities in West Virginia. I recommend that you ask officials with your local chamber if they support the anti-consumer and anti-small business strategies and tactics of the national group. I suspect you will find that most all of the local folks don't even understand what the U.S. Chamber is doing politically. If they did, most would likely be shocked.

ALABAMA RESIDENTS DON'T BELIEVE IRAQ WAR IS WORTH THE TOLL

A majority of Alabama residents questioned in a recent poll by the Capital Survey Research Center say the war in Iraq is not worth the loss of life and the amount of money it has cost. The poll is in contrast to surveys three years ago. At that time, most respondents supported the war. The statewide telephone poll was conducted May 2-3 and May 7-9 and polled registered voters only. The survey shows President Bush no longer has a majority of Alabama voters backing him on Iraq. In the latest survey, 53% said they disapproved of the president's war management, and 58% said the United States was not winning in Iraq. Nationwide, the feelings about the war are even stronger.

On an unrelated issue, the State of Alabama did very well in the poll. Overall, 61% of those in the survey said they thought Alabama was on the right track. However, only 33% said the same about the direction of our nation. When asked to list the most important issue facing the country, the largest portion—38%—said the war. That really doesn't come as a surprise. Folks are learning about why this war was started and how the Bush White House has continued to mislead American citizens about its progress. I don't see things getting any better and that's making it difficult for the troops who are being called on to occupy a very hostile country.

Source: Capital Survey Research Center

DEATH CASE SETTLED IN MONTGOMERY COUNTY

Our firm settled a death case in Montgomery County Circuit Court that was scheduled to go to trial on May 21st in Judge Truman Hobbs' court room. The case, filed against McInnis LLC and Tractor and Equipment Company (TEC), involved the death of Otis Mann, a truck driver, who was an independent contractor. Mr. Mann was killed on September 7, 2004 when a ramp on a lowboy trailer owned by McInnis fell and crushed him underneath. The lowboy was owned by McInnis, a construction company, in 2002, and when purchased in 2002, was in a state of disrepair. The lowboy was put back in service by McInnis after that company and TEC did some work on it. The original design of the lowboy was modified and it was made much less safe as a result. After the lowboy started to be used by McInnis it had continuous mechanical failures. The hydraulic system that controlled the ramps was a source of many of the problems. In fact, TEC kept a mechanic almost full time at the McInnis facility and that person performed repairs on equipment owned by McInnis including the lowboy.

This lowboy should never have been used to haul heavy equipment before putting it in service without a major over haul. The ramps were a constant problem right up to the date Mr. Mann was killed. Our experts said the lowboy was defective and unsafe and should not have been used by McInnis. TEC had numerous opportunities to inspect the entire hydraulic system on the lowboy and made the changes required to put it in good condition. On September 3, 2004, the ramps on the lowboy would not go up and down as they should have, had the system been in good working order. TEC was notified of the problem and sent a mechanic out to check it. Even though the mechanic found that the power plug coming from the truck to the lowboy had shorted out and replaced it, he failed to check the rest of the system. That failure was a vio-

lation of the TEC's own policy to be followed when a repair was made by TEC. Had the system been inspected, other parts of the hydraulic system would have been found to be in bad shape and need of repair or replacement. This same mechanic had done repair work on the electrical system on other occasions and was familiar with its condition.

It was significant that the ramps on the lowboy failed again on the very same day that TEC had done the repair referred to above. The ramps would not rise after an excavator was loaded using the ramps. The ramps were then manually raised and the retaining rods inserted, which kept the ramps in an upright position. Neither Mr. Mann nor the employee, who helped him raise the ramps, knew that it was improper to manually raise the ramps. The truck, with the lowboy attached, was then taken by Mr. Mann to the McInnis facility in Montgomery where it remained through the weekend and the following Monday, which was Labor Day. The excavator was to be returned to Cowin on Tuesday, September 7, 2004.

Mr. Mann came to pick up the excavator on that Tuesday. He told an employee of McInnis that the ramps wouldn't rise on the previous Friday after it was loaded in Tuskegee. A check was made at the time by Mr. Mann and the McInnis employee and the problem couldn't be found. Mr. Mann was told by the employee to deliver the excavator to Cowin and the problem would be handled later. Mr. Mann proceeded to take the equipment to Cowin.

When Mr. Mann got to the Cowin location he attempted to unload the excavator and at that time one of the ramps fell and struck him. He was most likely killed instantly since the heavy ramp struck his head and pinned him underneath. The other ramp was still in the upright position when he was found. We would have proved that at trial. The hydraulic system failed, causing the ramp to fall. The system was checked after the incident and it was found that there was no power getting

to the rear of the lowboy where the hydraulic motor was located.

Lee Hurley, an experienced mechanic, testified as an expert that the lowboy was in very bad shape and posed a hazard. He said that the maintenance on the trailer had been very bad during the years while it was being used by McInnis. His opinion was that the repairs performed by TEC were substandard. Gary Friend, who is a mechanical engineer, also testified as an expert that both McInnis and TEC were at fault and were responsible for the ramp failure. He agreed with the opinions by Mr. Hurley relating to the maintenance by McInnis and repairs done by TEC. McInnis had a duty to keep the lowboy in good working condition of the lowboy and it failed to do so. The overall condition was very poor and it should never have been used without a major overhaul. Clearly, the electrical system was one of the real culprits. Personally, I don't believe you will ever find a more poorly maintained piece of equipment. This lowboy was in terrible condition on the date Mr. Mann was killed. McInnis was guilty of maintaining the lowboy in a very bad condition and the repairs done by TEC were inadequate and substandard. Both were guilty of negligence and we would have proved it without any doubt.

The case was settled with both defendants just before jury selection was to start with the amount of the settlement being confidential. The family requested that the title to lowboy be transferred to them as a part of the settlement so that it could be destroyed. They didn't want anybody else to use it and possibly be killed. Cole Portis, Mike Andrews and I handled the case for Mr. Mann's family. They are a very close family and were greatly concerned that both McInnis and TEC appeared to put safety at such a low priority. Hopefully, this case will encourage them to change their safety practices for the better.

II. A LOOK AT THE NATIONAL POLITICAL PICTURE

SOME RECENT POLL RESULTS IN ALABAMA

A recent poll done by Capital Survey Research Center in Alabama has Giuliani and Clinton leading in their respective presidential primaries in our state. Interestingly, Senator Clinton led Senator Obama among African American voters in the state by a margin of 41% to 33%. The poll revealed that overall, 45% of likely Alabama voters indicate they plan on voting in the Republican primary with 43% in the Democratic primary. There were 11% who were undecided as to which primary they would vote in.

Perhaps the most significant finding from the poll was that neither Clinton nor Obama would do well in our state against either Giuliani or McCain if the general election were held today. I suspect that finding will be pretty much the same in other southern states. Even though Clinton did a little better in the match-ups in Alabama, it wasn't by very much. When you consider that none of the Republican candidates are very strong in any region of the country, it tells me that John Edwards needs to be the nominee for the South to be in play for the Democrats. However, John appears to have slipped in Alabama for some reason. That decline may be because of all of the free media attention being enjoyed by Clinton and Obama. But I believe John will rebound in Alabama in the months ahead. In any event, it's my belief that no candidate who does poorly in the Southern states will be our next president.

Source: Capital Survey Research Center

III. LEGISLATIVE HAPPENINGS

ALABAMA SENATE DOES THE RIGHT THING

When the State Senate passed the Governor's legislation designed to help secure the location of the German steel mill that will employ thousands of people, it definitely did the right thing. Unfortunately, the package of bills was tied up for a few days in the Senate because of infighting engaged in by some of the senators. The official reason given for the "snag" was that Republican Senators were unhappy over the senate rules. However, some observers believe the real reason that the Senate was "tied up" might have been a lobby group's involvement which had absolutely nothing to do with the rules.

In any event, the log jam was finally broken after Governor Riley, Lieutenant Governor Folsom and President Pro Tem Hinton Mitchem and a number of Senators—both Democrats and Republicans—got involved and helped to negotiate a truce. All of the Senators from the opposing sides soon realized that the legislation was badly needed and had to be passed without delay. The House had already acted and so the Senate action guaranteed a successful outcome for our State in its pursuit of the ThyssenKrupp project. This was the single most important industrial announcement in our state's history, according to some observers. Everybody involved in the legislative process, both in the House and the Senate, must be commended for putting the people's welfare first and getting the job done. Hopefully, the bipartisan effort will eventually carry over into other areas requiring legislative action in the current session.

ALABAMA CITIZENS WON'T LIKE A SPECIAL SESSION

At press time for this issue, the Alabama Senate was still bogged down in a fili-

buster that is one of the weirdest of all such events that I have ever witnessed. There is too much that needs to be done for Senators to be arguing over the Senate rules. I have always suspected there were a few Senators from each group who are using this fight to avoid facing some controversial issues, and who are encouraging their fellow-senators to keep on talking. Members of the Senate need to get down to work and it doesn't take a doctor's degree in political science to come up with that opinion. There is one thing for certain, however, and that is the voters don't want a special session!

IV. COURT WATCH

THE ALABAMA SUPREME COURT RULES ON NURSING HOME ARBITRATION

The Alabama Supreme Court has handed down a very important arbitration decision recently in a nursing home case. The case of Peter Wright, suing as the Administrator of the Estate of Dorothy Willis, against Noland Health Services, was decided last month by the high court. In that case, the court ruled that an arbitration provision in a nursing home admission contract is invalid where the actual resident or a "legally appointed" representative of the resident didn't sign the admission agreement. As lawyers who handle nursing home cases know full well, that circumstance is quite common in nursing home admissions. The very last place where arbitration should be forced on a person or a family is in a nursing home setting.

Kathryn Harrington, a partner at Hollis, Wright & Harrington, P.C., in Birmingham, handled this case for the resident's family and did an outstanding job. The five members of the court, who were in the majority, are to be commended for this decision. Arbitration has no place in nursing home disputes. A person seeking admission to a nursing home is usually in no condition to make a determination of whether to sign a

forced arbitration agreement. Actually, in most cases the arbitration clause is never even mentioned to the resident or the family by the nursing home. Hopefully, this decision sets a trend on arbitration, not only in nursing home cases, but in consumer transactions generally. I also believe that at least three of the four justices who voted for arbitration would eventually see the light and reverse their position. However, there is one member of the court who in my opinion will never rule against arbitration regardless of the facts of the case.

A GOOD OPINION ON SUBROGATION FROM THE ALABAMA SUPREME COURT

Trott V. Brinks Inc., No 1050895 (Ala. May 4, 2007)

On a certified question from the United States District Court for the Northern District of Alabama, the Alabama Supreme Court ruled in a recent decision that the worker's compensation carrier for an employer is not entitled to reimbursement from the third party tortfeasor for medicals paid on behalf of employee who later died. The Court reasoned that Ala. Code 25-5-11 speaks of the employer's (including the insurer of the employer) right to "subrogation," and because subrogation is equitable, the rights available to the subrogee are no greater than that possessed by the subrogor (the employee). Since the action is in wrongful death, only punitive damages are recoverable. Thus, the subrogor (the employee or his estate) may not recover medical benefits at all. As a result, medical benefits are not the subject of "subrogation" under the Alabama statute. This is a very good opinion, which makes clear what I have always believed the law to be in wrongful death cases. The court should be commended for its stance on an important issue.

NEW STUDY RELIES ON DISCREDITED DATA AND JUNK ECONOMICS

As mentioned in a previous section of this issue, we are witnessing another

massive advertising and public relations effort, which is obviously designed to undermine our country's court system, by the so-called tort reformers. Most all of what they are putting out to the media is, as usual, bogus information. An example is a study released recently which leveled another attack on the nation's tort laws. That study is not scholarly research, but another public relations advance by corporate-funded "think tanks" in the ongoing campaign to gut our civil justice system and reduce corporate accountability. In its March report, "Jackpot Justice: The True Cost of America's Tort System," the Pacific Research Institute (PRI) claimed that the legal system is too costly and proposed eliminating many of the legal protections that Americans currently enjoy to reduce these costs. But the Institute's report relied on widely discredited cost estimates from an insurance industry consultant, Tillinghast-Towers Perrin. These "costs" are entirely speculative and include many factors unrelated to litigation, such as administrative expenses for the highly bureaucratic insurance industry.

According to the Economic Policy Institute in 2005, "Any work that relies on [Tillinghast's] seriously flawed reports is, to that extent, also unreliable." PRI, undeterred, greatly increased the already-bloated numbers from Tillinghast and applied even more irrelevant factors to produce a flawed and ridiculous estimate. PRI's calculations include formulaic cross-applications from unrelated studies of corporate taxes and double-counting. PRI's ultimate goal is said to be ideological. Joan Claybrook, president of Public Citizen, had this to say concerning the bogus study:

The study employs junk economics that ignores an important purpose of the justice system—fairness. The report's theories would, if taken to their logical conclusion, eliminate government altogether.

PRI's report also includes the now-debunked Hilda Bankston story about a Mississippi pharmacy owner who was

allegedly forced to sell her business after it was named as a defendant in a national class action lawsuit against a major drug company in New Jersey. The story was shown in a recent book by reporter Stephanie Mencimer to be riddled with falsehoods. Surely, the fact that PRI gets most of its income from the insurance industry didn't have anything to do with how the study was done.

The civil justice system has helped to make our citizens safer and healthier. The PRI report fails to adequately measure the benefits of litigation. Instead, the study parcels out a miserly benefits picture, ignoring clear benefits of the nation's court system such as compensation for life-threatening injuries or death, deterrence and punishment of wrongful conduct. Safer and healthier industries and products, and a safer work place are all evidence of the effectiveness of our court system. Access to the courtroom and a jury is a cornerstone of American democracy. Americans know that if they are injured by the fault of another party, there is a fair and impartial process to hold corporations and individuals accountable. Ms. Claybrook concludes by saying:

The business lobby and far-right groups like PRI want to return to a system of robber baron justice. Their attempts to dismantle the American legal system harm both individuals and the very fabric of our nation.

In my opinion, the public wants a strong court system. It's the only real protection ordinary citizens have when they are victimized by corporate wrongdoers. You might ask the U.S. Chamber of Commerce where all of the money is coming from to fund the tort reform movement and the bogus studies put out by the groups sponsored by the Chamber. The baseless attacks on the judicial system in Alabama are a classic example of how the U.S. Chamber and groups like AVALA play fast and loose with the truth. The tort reform groups are using the "Chicken Little's" of the

world for their own benefit. It's large corporations like the fox in the story of Chicken Little that the tort reformers are trying to protect. All you have to do is check out Alabama's business climate over the past 20 years and then decide who is telling the truth about Alabama. Even the poll run by the tort reformers—which talked to only in-house lawyers for corporations—ranked Alabama's judicial system as being the 3rd best in the U.S. Yet in Alabama the story was put out to the media saying how bad our court system was.

Source: Public Citizen

AN IMPORTANT FDA PREEMPTION DECISION

A very large challenge to federal preemption of state law claims against a prescription drug manufacturer was successfully met in a recent case. As we have reported previously, the U.S. Food and Drug Administration attempted—in the preamble accompanying new prescription drug regulations—to dramatically expand federal preemption, threatening to prevent victims of dangerous drugs from holding the manufacturers accountable under state law. We have written on that subject in several prior issues because of the serious nature of what the FDA—at the request of the Bush Administration—was trying to do.

In the case of *Kelly v. Wyeth*, the court held that the FDA's approval of a generic prescription drug's label does not preempt claims against a drug maker for failing to warn consumers of known risks. Janet Kelly, who was prescribed metoclopramide to remedy her so-called "delayed gastric emptying," was the plaintiff in the case. When Ms. Kelly went off the drug, she experienced severe "akathisia"—a state of extreme anxiety and restlessness, for over a year. A lawsuit was filed against the drug's manufacturer, Teva Pharmaceuticals, alleging that the company had failed adequately to warn of metoclopramide's known risks. Teva moved to dismiss the case, arguing that the claims conflict

with—and thus are preempted by—the FDA's approval of the label for the brand-name version of metoclopramide.

A Massachusetts State Court Justice denied the preemption motion and found that the FDA's new "Preemption Preamble" was "not entitled to the heightened deference afforded to an agency's rules." The court went on to reject Teva's claim that generic drug manufacturers are prohibited from strengthening their drug labels without prior agency approval. On that issue the court said that generic drug manufacturers "have their own independent obligation to warn users about the dangers associated with the use of their products." This decision is especially important because it is the first case in the country to be decided since the FDA filed its *amicus* brief in *Colaccico v. Apotex, Inc.*, which at press time was pending before the U.S. Court of Appeals for the Third Circuit. In its brief, the FDA contended that generic manufacturers are not free to alter their labels to strengthen warnings without prior approval from the agency.

The new FDA preamble has resulted in a wave of preemption defenses by prescription drug manufacturers. Public interest and consumers' rights organizations label this as the Bush Administration's latest power grab on behalf of corporate interests. Clearly, the court in Massachusetts was correct in its decision. The preamble should be accorded no deference by reviewing courts and that argument shouldn't be subject to serious debate.

The Access to Justice Campaign and Federal Preemption Project has been successfully fighting federal preemption for over two decades. Any person who is fighting FDA preemption—or has any preemption question for that matter—should contact Public Justice for advice and assistance. Public Justice Staff Attorney Leslie A. Brueckner and co-counsel Louis Bograd of the Center for Constitutional Litigation, and the plaintiff's lawyers, Ralph Pittle of Bellevue, Washington, and Hector Pineiro of Worcester,

Massachusetts, fought the preemption battle in the Kelly case. They are to be commended. Somebody needs to remind the bosses at the FDA and the Bush White House that the regulatory agency has the legal responsibility to stand up for consumers' rights—not trample on them—after all, drug safety is their legal and moral obligation!

A GOOD DECISION FOR LAW ENFORCEMENT PERSONNEL

The U.S. Supreme Court has ruled that police may use deadly force to stop a speeding motorist who ignores warnings and poses a danger to the public. The justices threw out a lawsuit brought by a Georgia teenager who was paralyzed after a police cruiser rammed the back of his car and sent it careening off the road. The teenager had run away from police and led them on a high-speed chase down narrow two-lane roads. In a first for the high court, the Justices said they decided the case based on watching a police videotape of the incident. Previously, a federal district judge and the U.S. Court of Appeals for the Eleventh Circuit in Atlanta had ruled that a jury should hear the Georgia teenager's case and decide whether the deputy's decision to ram the fleeing car amounted to an "unreasonable seizure," under the U.S. Constitution.

Although the 4th Amendment forbids "unreasonable searches and seizures," after studying the tape, the Justices concluded "no reasonable jury" could rule against the deputy. Justice Antonin Scalia, writing for the majority of the court, stated:

What we see on the video...closely resembles a Hollywood-style car chase of the most frightening sort. In the video, Victor Harris, the 19-year-old suspect, speeds in a black Cadillac in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-

yellow line and force cars traveling in both directions to their respective shoulders to avoid being hit. We are happy to allow the videotape to speak for itself.

There have been lots of discussion about the impact of this decision. In any event, the rule of law that comes out of this decision seems to be:

A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the 4th Amendment, even when it places the fleeing motorist at risk of serious injury or death.

A ruling against the police in this case could have forced law enforcement agencies around the country to limit their involvement in car chases. This decision was the second in a decade that largely shielded police from being sued in federal court for pursuing a speeding car. While we all have to have feel empathy for the young man who was injured, law enforcement officers have an obligation to take actions that are necessary and proper under certain circumstances. Much of what a police officer has to do in emergency situations involves split-second decisions. We don't pay law enforcement personnel enough and most departments at every level are grossly understaffed. In fact, in many locations, the criminals actually have better weaponry than do the law enforcement officers. I believe that we must support strong law enforcement at every opportunity.

Even with the protection of this court ruling, police departments have an obligation to adopt rules that limit the circumstances under which officers may initiate a pursuit. In my opinion, that is the proper course of action for departments to take. Clearly, there are situations where an officer should back off of a high speed chase. In any event, I tend to believe the high court made the right decision in this case.

Source: Los Angeles Times

A MOST UNUSUAL CLASS ACTION LAWSUIT

More than 20,000 individuals who have asbestos-related tort claims pending against the Robert A. Keasbey Co. won a major victory last month. A Supreme Court Justice in New York ruled that the defunct insulation giant's insurers may be liable for hundreds of millions of dollars in insurance coverage. The ruling came in an unusual defendant class action—in which the class constitutes a defendant, not the plaintiff—initiated by the Keasbey Co.'s primary insurers. The plaintiffs, Continental Casualty Coverage and American Casualty Co. of Reading, Pennsylvania, actually field the class action. The insurers sought a declaratory judgment holding that their policies were exhausted by \$8.7 million in previously made payments. In the alternative, they argued, numerous equitable doctrines precluded the defendant class members from pursuing their claims. The judge disagreed, ruling that the insurers may be liable for upwards of \$250 million.

Founded in 1885, Keasbey installed, repaired and removed job-site insulation. The company ceased doing business in 1995 and was dissolved in 2001. More than 20,000 employees, customers and others who came in contact with its asbestos products have filed suit against Keasbey, predominantly in Manhattan Supreme Court.

In turn, the failed company's primary insurers, Continental Casualty and American Casualty, initiated this preemptive class action, seeking a declaration that their liability had been exhausted. The court's decision in the case (*Continental Casualty Company v. Employers Insurance Company of Wausau*) turned on the narrow issue of whether the claimants' actions fell under the policies' "products hazard" and "completed operations" rubric, or rather their "premises" and "operations" coverage. The judge wrote in his order:

Products hazard insurance covers defective products placed in the "stream of commerce. Completed

operations refers to a company's off-premises, completed actions. The insurers' products hazard and completed operations policies totaled \$8.7 million in coverage, which all parties agreed had been exhausted by previously settled claims. On the other hand, the premises and operations insurance—which covers injuries from a defective product at Keasbey's premises or while the claimants worked with its products—is, aside from per occurrence caps, limitless.

The court found that risks of injuries at issue in the underlying 20,000-plus claims grew out of Keasbey's work with asbestos away from its premises, thereby falling under the company's limitless "operations" coverage. On that issue, the judge stated in the order:

Here, the claims by all of the claimants in the underlying actions were that they were injured away from the premises of defendant Keasbey. Plaintiffs have not demonstrated that the injuries occurred after relinquishment of the asbestos products or after the operations were completed ... To the contrary, the evidence has shown that the injuries happened while the installation operations of defendant Keasbey were ongoing, which were covered under the operations coverage provisions of the subject insurance policies.

The court also rejected all of the plaintiffs' affirmative defenses, including laches, ratification, estoppel and judicial estoppel. The decision opens the insurers to nearly limitless liability to the more than 20,000 claimants. The individuals were represented by the firms of Gilbert Randolph in Washington, D.C.; Hanly, Conroy, Bierstein & Sheridan; and Collier, Halpern, Newberg, Nolletti & Bock.

Source: *New York Law Journal*

EXPLORER ROLLOVER AWARD WILL BE REVIEWED

The U.S. Supreme Court has ordered a state appeals court to review a decision awarding \$82.6 million to a woman who was paralyzed in a Ford Explorer roll over case. The justices instructed a California appeals court to determine if its ruling was in line with a prior high court decision in a tobacco case earlier this year. The court said in that case that a jury may punish a defendant only for the harm done to the person who is suing, not to others whose cases were not before it.

In June 2004, a San Diego jury found that the Explorer was defective because of instability and a weak roof. A jury initially awarded \$369 million, including \$246 million in punitive damages. The size of the jury's award has been reduced on two occasions. The \$82.6 million approved by a California state appeals court now includes punitive damages of \$55 million. In the California case before the court, the 51-year-old female plaintiff was paralyzed from the waist down when the roof collapsed on her neck, severing her spine. Her case will now go back to the California appeals court for further review.

Source: *Associated Press*

V. THE NATIONAL SCENE

A POLITICALLY-MOTIVATED JUSTICE DEPARTMENT IS BAD FOR AMERICA

I hate to say it, but the performance by Alberto Gonzolas has been an absolute disgrace. In his brief stint at the Justice Department, this man appears to have used his position to reward political allies and promote politically motivated prosecutions. Clearly, he has undermined the federal administration of justice and that is something we as a nation cannot tolerate. First of all, Gonzolas should never have been

appointed to this critically important position. When you check the Attorney General's background in Texas you have to wonder how in the world he could have ever been appointed by President Bush. Gonzolas's time on the Texas Supreme Court was undistinguished at best. In fact, there is nothing in his background as a lawyer that qualifies the man for his current job. The lack of credibility exhibited by Gonzolas, however, is the thing that should concern all American citizens. Clearly, that's what makes him unfit to be Attorney General. He should resign immediately!

BOTH GONZALAS AND WOLFOWITZ HAVE TO GO

Just as this issue was being put in final form to go to the printer, Paul Wolfowitz resigned from his job as head of the World Bank. It's being said in Washington that Alberto Gonzales and Paul Wolfowitz are "poster boys for what's wrong with politics today—cronyism, incompetence and a brazen lack of accountability that has voters craving change." Many have forgotten that Wolfowitz was one of the men who is directly responsible for all of our problems in Iraq. He was rewarded for that effort with a choice job at the World Bank. Now he has to resign because he was paying his girlfriend \$180,000 per year. This was the straw that eventually broke the camel's back. Wolfowitz jeopardized his position by an ethical lapse of judgment.

It's very clear that we need an entirely new brand of leadership in Washington. We are suffering now in a number of areas because of a lack of strong and morally based leadership. The political performances by Gonzales and Wolfowitz were just the latest examples of the kind of folks we have allowed to be put in key positions in our government. The system in Washington is broken and it must be fixed!

Source: *Associated Press*

BUSH APPOINTEES INTERFERED WITH TOBACCO CASE

There has been so much reported concerning the activities of the Justice Department in recent weeks that it's real hard to keep track of everything. I missed one item that has been uncovered as a result of the U.S. attorneys being fired for political reasons. It was reported in the *Washington Post* that the leader of the Justice Department team that prosecuted the landmark lawsuit against tobacco companies was polled back. It was said that Bush Administration political appointees repeatedly ordered Sharon Y. Eubanks to take steps that weakened the government's racketeering case. This career prosecutor said Bush loyalists in Attorney General Alberto Gonzales's office began micromanaging the team's strategy in the final weeks of the 2005 trial, to the detriment of the government's claim that the industry had conspired to lie to U.S. smokers.

It was reported that a supervisor demanded that the trial team drop recommendations that tobacco executives be removed from their corporate positions as a possible penalty. The supervisor allegedly instructed the lawyers to tell key witnesses to change their testimony. Ms. Eubanks says she was ordered to read verbatim a closing argument they had rewritten for her. Concerning this matter, Ms. Eubanks said:

The political people were pushing the buttons and ordering us to say what we said. And because of that, we failed to zealously represent the interests of the American public.

Ms. Eubanks, who served for 22 years as a lawyer at the Justice Department, said three political appointees were responsible for the last-minute shifts in the government's tobacco case in June 2005. Those persons were reportedly then-Associate Attorney General Robert D. McCallum, then-Assistant Attorney General Peter Keisler and Dan Meron, who was Keisler's deputy at the time.

Ms. Eubanks, who retired from the Justice Department in December 2005, said she is coming forward at this time over concerns about what she called the "overwhelming politicization" of the department.

Source: *Washington Post*

VIRGINIA CLOSES GUN LOOPHOLE

Since the tragic events at Virginia Tech University there has been a great deal of discussion over our nation's "gun laws." It's significant that Virginia's governor closed the loophole in Virginia state law that allowed the Virginia Tech gunman to pass a federal background check and buy the weapons used in the massacre of innocent victims. Governor Timothy M. Kaine issued an executive order requiring that a database of people banned from buying guns include any person who is found to be dangerous and ordered to undergo involuntary mental health treatment. Governor Kaine said in a statement that the database "should include any determination that someone is mentally ill and so dangerous to himself or others as to warrant involuntary treatment." While I believe a review of our nation's gun laws should be carried out, because of the tremendous political power of the gun industry, I don't see very much of consequence happening. However, nobody can seriously dispute that a need is most apparent.

Source: *Associated Press*

THE GIANT OIL COMPANIES ARE RAPING THE PUBLIC

Big Oil is raising gasoline prices and raking in "obscene profits," while the consuming public is really hurting. Gasoline prices have topped \$3 a gallon at service stations across the country and predictions are we will see even higher prices at the pump this summer. Some observers say we will be paying \$4 a gallon for regular by mid-summer and I suspect that will happen. Several oil refineries, owned by giants such as

ExxonMobil, BP, ConocoPhillips and Chevron, were offline at press time, reducing gasoline production and making fuel supplies tight. I have been convinced over the years that the oil giants in the industry manipulate the system for their own financial benefit. It has become even more evident in recent months that they do exactly that. These multinational, huge companies are making obscene profits in the tens of billions of dollars and they have the full support of the Bush White House in their efforts.

The average U.S. household is already spending \$1,000 more per year on gasoline than it did five years ago, according to testimony given recently by two consumer groups to a House Judiciary Committee task force. That's an unbelievable increase of 85%. Rural households have been hardest hit because they spend about 20% more on gas than urban residents, according to the Consumer Federation of America and Consumers Union. At the hearing, the federal government was called on by the consumer groups to provide greater oversight on oil industry market practices, create strategic refinery and product reserves, and enact policies that promote reduced oil consumption. Hopefully, these recommendations didn't fall on deaf ears.

Congress should investigate these companies and determine the real cause of the soaring energy prices. The oil companies continue to announce record profits, but the consuming public is having to sacrifice in other areas in order to buy gasoline for their vehicles. Business owners are also feeling the pinch and that hurts both businesses and consumers. Clearly, it's time to get to the bottom of this matter. Years of Bush administration policies that have favored Big Oil over American consumers have resulted in record dependence on foreign oil and obscene profits for the companies. The Bush gang has allowed the oil industry, with its awesome political clout and resulting influence, to run roughshod over Con-

gress, the court system and the American people.

Source: Reuters

POLLUTERS SPENT BIG BUCKS TO LOBBY THE FEDERAL GOVERNMENT

Nearly half of the nation's toxic waste sites are connected to some 100 companies that spent more than a billion dollars lobbying Congress and the federal government from 1998 through 2005, according to a year-long investigation by the Center for Public Integrity (CPI), a nonprofit, nonpartisan Washington-based organization. Corporations responsible for hundreds of the most toxic sites in the United States spent nearly as much money lobbying politicians and funding political campaigns as they did repaying the government for cleaning up their messes, according to a new analysis by the watchdog group. As a result, the companies may dodge hundreds of millions in cleanup fees. Companies like Exxon Mobil Corp. and Raytheon, a defense contracting giant, are among the roughly 100 businesses responsible for the vast majority of privately controlled polluted or contaminated "Superfund" sites located throughout the United States, according to the new report by the CPI.

The investigation was based on a confidential EPA document listing the top 100 companies potentially responsible for Superfund sites. At least 61 companies on the EPA's list were among the Fortune 1,000 and Fortune Global 500 last year, with revenue of more than \$2.8 trillion and profits of nearly \$190 billion during 2006. CPI found that these 61 companies are linked to a total of 582 Superfund sites.

Source: Greenwire

FCC REPORT URGES LIMITS ON TV VIOLENCE

As we all know, the watching of television programming is an integral part of the lives of American families. An average American household has the tel-

evision set turned on over 8 hours each day. Studies reveal that children watch on average between two and four hours of television every day. Depending on their ages, many children have television sets in their bedrooms. By the time most children begin the first grade, they will have spent the equivalent of three school years in front of a television set. Unfortunately, much of the programming is not fit for children of any age to watch. We also know that violence in the U.S.—especially involving children—is at all time high. To say it's a serious problem is an understatement.

I have written on numerous occasions about the violence that is being shown on television in this country and have stated my firm belief that it must be controlled. Because voluntary parental controls on television violence haven't worked, Congress should step up to the plate and address the problem by passing appropriate legislation. In fact, that is actually what federal regulators have recommended in a long-awaited report. The Federal Communications Commission wants Congress to come up with an anti-television violence law that won't run afoul of free-speech rights and one which would actually protect children. Such a law is necessary, according to the FCC, because studies show that children's extended exposure to television violence can lead to more aggressive behavior. Frankly, I didn't need a study to figure that out. In any event, concerning the recommendation, FCC Chairman Kevin Martin said in a statement: "Clearly, steps should be taken to protect children from excessively violent programming. Some might say such action is long overdue."

But the FCC stopped short of proposing a definition of "excessive violence." Instead, because they label that as a legally tricky and controversial question, that was left for Congress. The agency says Congress should act because the V-chip—a blocking technology first touted by the television industry almost a decade ago—has "limited

effectiveness" to screen violent content. The FCC also said blocking controls aren't available on a "sufficient number" of cable-connected television sets to be considered effective. In 2004, a number of members of Congress asked the FCC for advice on how to deal with television violence and its effect on children.

It's being reported that Senator Jay Rockefeller (D-WV) plans to use the report as a basis to draft legislation. The report recommends that Congress enable the FCC to require cable operators to sell channels "a la carte," which is on an individual basis, instead of in multiple-channel packages that contain both family-friendly and more violent programs. An a la carte system would enable consumers to buy only those channels they want. Surely that is something that consumers are entitled to. But, cable and satellite television industries have long opposed such a mandate as unworkable.

It's unfortunate that we have to worry about what our young people are watching on television each day, but we do. I believe Congress has an obligation to act promptly in this area of concern. Hopefully, this report will motivate the television industry—both broadcast and cable—to step up to the plate, take responsibility for its product, and fix a problem that it not only created but perpetuated.

Source: Washington Post

SEX OFFENDER DATA SOUGHT FROM MYSPACE

Top law enforcement officers from seven states issued a letter to MySpace.com last month, asking the social networking site to turn over the names of registered sex offenders who use the service. The letter requests MySpace to provide information on how many registered sex offenders are using the site, and where they live. North Carolina Attorney General Roy Cooper signed the letter, along with attorneys general from Connecticut, Idaho, Mississippi, New Hampshire,

Ohio and Pennsylvania. Law enforcement agencies have identified more than 200 cases nationwide of children “lured out of their home by predators they met on MySpace.” In their letter, the attorneys general also asked that MySpace describe the steps it has taken to warn users about sex offenders and remove their profiles. While MySpace’s policy prevents children under 14 from setting up profiles, it relies on users to specify their ages. The site is owned by media conglomerate News Corp.

Source: *Associated Press*

MINNESOTA SUES IOWA INSURANCE COMPANY

The State of Minnesota has been investigating long-term annuities marketed to senior citizens. As a result of the probe, Attorney General Lori Swanson has sued Des Moines-based American Equity Investment Life Insurance, on behalf of the state, alleging the company exploited senior citizens by selling them annuities they couldn’t access for several years without significant penalty. In fact, some buyers wouldn’t see any money until they were in their 90s. In her first four months on the job, Attorney General Swanson has filed similar lawsuits against two other insurance companies accused of deceptive annuity practices. It’s clear that financial predators shouldn’t be allowed to prey on senior citizens. It’s good to see the State of Minnesota protecting the elderly. Other states should follow its lead.

In the American Equity case, the company was accused of breaking eight Minnesota laws. The primary allegation revolves around a law requiring insurers to take the suitability of products into account before offering them to customers. According to the lawsuit, American Equity sold more than 1,200 annuity policies to senior citizens 75 years old or older between 2000 and 2006, tying up more than \$46 million. The policies carried surrender charges of up to 25% if they were tapped prior to their maturity dates, which in some instances were 16 years after the poli-

cies were written. For example, Helen Nagell, a 72-year-old former nun, said she and her husband put \$250,000 into a 12-year annuity and weren’t told of the consequences for trying to access their money sooner. A year after buying it, they removed their investment at a cost of \$40,000 in early surrender charges. American Equity should change its annuity practices and repay people who were harmed by unsuitable policies. Since it refused to do so, a lawsuit was necessary.

Source: *Associated Press*

MORE BAD NEWS FOR VICTIMS OF HURRICANE KATRINA

Because the performance of the federal government, and specifically FEMA, was so bad after Hurricane Katrina’s devastation nothing new that’s uncovered should now come as a surprise. With all of the needs, it now appears that the U.S. government failed to take advantage of hundred of millions of dollars in foreign aid offered by our allies. It is being reported that a number of countries offered financial aid after Katrina struck. The U.S. has collected about \$126 million of the \$454 million in cash that was offered and only used just \$40 million, according to a report in the *Washington Post*. Some offers were rescinded or redirected to organizations such as the Red Cross. Other offers were tied up in a bureaucratic jungle, the *Post* reported. Sadly, more than 1,700 people died during the hurricane and its aftermath and thousands were left homeless. Nearly 20 months later, more than 100,000 households on the Gulf Coast still rely on the U.S. government for temporary housing. One would think that our government would have welcomed any assistance that was offered in an effort to deal with a massive problem.

Kuwait made the largest offer—\$100 million in cash and \$400 million in oil, according to the *Post*. The Kuwaitis ended up donating \$25 million each to the Red Cross and a private Katrina aid

group because it seemed to be “the fastest way to get money to the people that needed it.” They must have dealt with our government before! In any event, the oil donation was never collected, which is difficult to understand. The handling of Katrina-related issues by FEMA will go down in history as the worst examples of a government failing its people in our nation’s history.

There was a tremendous amount of waste involved in FEMA’s handling of Katrina problems. Wasted aid included medical supplies from Italy that spoiled in the elements for weeks after Katrina caused massive flooding and other damage in Louisiana and Mississippi. Also, the Department of Homeland Security accepted, then later rejected, an offer from Greece to use two cruise ships as hospitals or to house displaced residents for free because the ships could not arrive soon enough. However, the government paid \$249 million to use Carnival Cruise Lines vessels.

The *Post* reported that the U.S. turned down at least 54 of 77 aid offers as of January 2006 from three close allies: Canada, Britain and Israel. U.S. officials also turned down many offers of allied troops and search-and-rescue teams. FEMA has been criticized for being poorly prepared and slow to respond to the disaster. Audits and investigations have uncovered waste, fraud and flawed procedures for granting contracts. It’s a sad commentary when you consider how our government dealt with a national tragedy. Hopefully, lessons were learned!

Source: *Washington Post*

VI. THE CORPORATE WORLD

TYCO WILL PAY \$3 BILLION TO SETTLE LAWSUIT

Over the past several years, our country has experienced some massive frauds coming directly out of the board

rooms and at the top levels of Corporate America. You would think that everybody would be thankful for a court system that brought some real bad wrongdoers to justice. Instead, it seems that the tort reformers, who are trying to destroy the nation's judicial system, have actually intensified their efforts. A recent settlement of a fraud case is a classic example of why we need a strong and viable court system. Tyco International Ltd. has now agreed to pay about \$3 billion to settle shareholder claims from one of the largest corporate fraud cases ever. A \$2.975 billion cash fund will be set up to pay claims filed by shareholders against the company arising from actions by ex-chief executive L. Dennis Kozlowski and other top officers convicted of looting the company and inflating its value.

Investors, including union and state pension funds and Tyco retirees, were permitted last summer to proceed with a consolidated class action lawsuit in the U.S. District Court in New Hampshire, where Tyco was formerly headquartered. The settlement will have to be approved by the largest shareholders and the court. The settlement covers shareholders from December 1999 to June 2002 and, in some of the consolidated cases, investors who owned stock starting in October 1998. The settlement fund will draw interest and will top \$3 billion, making it the largest settlement ever by a single corporate defendant in a securities fraud lawsuit.

This case was an example of corporate fraud at its very worst. But, there have been others. Total settlements involving securities fraud lawsuits against Enron Corp. (\$7.1 billion) and WorldCom Inc. (\$6.1 billion) were larger, but those companies are now bankrupt and the settlement funds in those cases were paid primarily by outside co-defendants including investment banks and auditors. Also Cendant Corp. agreed to settle a shareholder lawsuit for \$2.83 billion in December 1999.

The investors in Tyco suffered signifi-

cant financial losses and this settlement is certainly justified. Hopefully, it will send a strong message to those who would engage in this type of misconduct in the future. Shareholder claims against the company's former auditor, PricewaterhouseCoopers LLP, are still pending. Tyco has agreed to assign its claims against PricewaterhouseCoopers to the shareholders, who can pursue them in addition to their own claims. The shareholders' lawsuits alleged the company misrepresented the value of Tyco and companies it acquired under Kozlowski's leadership in a giant accounting fraud scheme, causing losses estimated at \$1 billion to \$2 billion. Tyco makes everything from telecommunications equipment to home alarm systems. The company, which is registered in Bermuda, was run from Exeter, New Hampshire, at the time of the alleged fraud. It now operates from West Windsor, New Jersey.

Source: *Associated Press*

CORPORATIONS MUST PAY \$102 MILLION IN FINES

Three Bill L. Harbert construction companies with Alabama connections were found guilty of bid rigging in a Washington court last month. A \$102 million jury verdict was returned after the jury found the construction firms rigged bids for water and sewer systems in Egypt in the 1980s. The work was paid for with U.S. government money as part of the Camp David Peace Accords. Actually, this is the second time the Harbert companies have been in trouble over alleged bid rigging laws on the very same job. In February 2002, an affiliated company was fined \$54 million after it pleaded guilty to bid rigging on the Egyptian contract. A Justice Department investigation and criminal trial was halted after that guilty plea.

The latest case was a federal whistleblower civil action filed in 1995 in federal court. The whistleblower was a former executive with a Charlotte-based

contractor that was in on the scheme. The companies found guilty were Bill Harbert International Construction Inc.; Harbert Construction Services; Bilhar International Establishment; Harbert Corp.; and Harbert International. The jury found bid-rigging damages of \$34 million. Under the whistleblower laws, however, the damage awards were tripled. The lawsuit alleged that the Harbert companies, J.A. Jones and some European firms, which are no longer a part of the case, concocted fictitious pre-construction costs and complex arrangements that purported to sell and lease building equipment. But the complex arrangements were really designed to hide secret payments that were spread among the conspirators, according to allegations in the suit. An appeal of the jury verdict is expected.

Source: *Birmingham News*

THE BUSH ADMINISTRATION IGNORED WARNINGS ON STUDENT LENDERS

The \$85 billion-a-year student loan industry is currently under investigation concerning its questionable business practices. Not surprisingly, the Bush Administration killed a proposal to clamp down on the student loan industry six years ago following allegations that companies sought to shower universities with financial favors to help generate business. The proposed policy, which Education Department officials drafted near the end of the Clinton presidency, was circulated at the start of the Bush Administration. This would have been a significant government response to a problem that now appears to have grown into a major controversy. Some government officials believe the bad conduct could have been curtailed by the 2001 proposal. In any event, the Education Department has now embarked on a new effort to set rules for the industry to prevent conflicts of interest and other abuses. If approved, the rules would be implemented during the summer of next year.

The abandonment of the 2001 pro-

positional underscores what some consumer advocates believe is lax federal oversight of the financial aid system by a department they say is much too cozy with the industry. It is significant that more than a dozen senior department officials either previously worked in the student loan business or found high-paying jobs in the sector after they left the agency. No one has been charged with any crime in the investigations led by the New York state attorney general's office and other agencies, but there have been a series of revelations about conflicts of interest and financial links among universities, lenders and government officials. Almost daily we see a news account of some pretty bad conduct relating to student loans. It's time to clean up this mess.

Source: *Washington Post*

KAISER ACCEPTS PATIENT-DUMPING SETTLEMENT

Kaiser Permanente has agreed to a settlement aimed at ending patient-dumping. The settlement requires the HMO to establish new discharge rules, provide more training for employees and allow a well-known former U.S. attorney to monitor its progress. The agreement by the nation's largest HMO will likely settle criminal charges and civil lawsuits filed against the company last year in California. It was alleged that the HMO dumped a homeless woman who had been a patient onto the streets. The Kaiser case involved a 63-year-old patient who was discharged from Kaiser's Bellflower hospital last March. A video at a downtown mission shows the woman, Carol Ann Reyes, being dropped off by a taxi and then wandering aimlessly along a city street, dressed only in a hospital gown and slippers. Fortunately, she was rescued by the Union Rescue Mission.

Prosecutors, who are investigating more than 50 cases of dumping in downtown Los Angeles over the last two years, urged other hospitals to adopt the same rules that Kaiser has

accepted for its 11 hospitals in the region. It is unbelievable that any corporation running a hospital could allow this sort of thing to take place. Apparently, it's a national problem.

Source: *Los Angeles Times*

U.S. JOINS FALSE CLAIMS CASE AGAINST HEALTHESSENTIALS SOLUTIONS INC.

The United States has intervened in three qui tam lawsuits that accuse HealthEssentials Solutions, Inc. (HES) of false claims billings to Medicare. Specifically, HES is said to be guilty of upcoding, which is the practice of improperly assigning a diagnosis code to a patient discharge that is not supported by the medical record. That is done for the purpose of obtaining a higher level of reimbursement. It is alleged that the Kentucky-based provider of geriatric care knowingly charged Medicare for medically unnecessary services.

The three separate suits were filed in U.S. District Court in Louisville, Kentucky, by former employees of (HES) under the qui tam or whistleblower provisions of the False Claims Act. Under the Act, a private party, known as a "relator," can file an action on behalf of the United States and receive a portion of the recovery. Under the False Claims Act, the United States may recover three times the amount of its losses plus civil penalties. The three suits have been consolidated into a single case.

The complaints state that the company's nurse practitioners provided services to federal health care program beneficiaries in nursing homes, assisted living facilities, and private homes. On its Medicare claims, HES had to select a billing code that accurately described the level of service and the location where the service was provided. According to the complaints, HES allegedly upcoded in two ways in order to obtain greater reimbursement:

- First, HES used higher level billing codes than appropriate based on the services actually rendered.

- Second, HES billed for services that were provided in an assisted living facility, improperly using billing codes that describe services provided in a patient's home.

In addition, the complaints allege that HES provided and billed for services that were not medically necessary. The investigation of the allegations in the qui tam complaints was conducted by the U.S. Attorney's Office in Louisville, Kentucky, the Department's Civil Division, and the Office of Inspector General of the Department of Health and Human Services. These cases are prime examples of the need to keep whistleblower lawsuits alive and well. Cheating the government by companies that profit under federal programs would go undetected in many instances if it were not for whistleblowers.

VII. CAMPAIGN FINANCE REFORM

THE SO-CALLED DRUG SAFETY BILL

The need for campaign finance reform was never more evident than when what started out as a very strong drug safety bill in the U.S. Senate was greatly watered down in that body. It appears that members of the Senate, who had raised millions of dollars in campaign donations from pharmaceutical interests, were able to secure industry-friendly changes to the drug-safety bill that passed the Senate. Changes in the bill, S.1082, can be tied at least indirectly to campaign contributions from the drug companies to key Senators, according to an article that appeared in *USA Today* on May 11th. This article brought to light how much money was spent by the drug companies on campaign contributions and lobbying efforts.

The pharmaceutical companies spend more money on lobbying than any other single industry—\$855 million from 1998 to 2006, according to the

non-partisan Center for Public Integrity. Interestingly, the biggest drug trade group, Pharmaceutical Research and Manufacturers of America, praised the drug bill after it passed. As long as Congress drags its feet on campaign finance reform, the special interests, such as the powerful drug industry, will continue to have their way. Hopefully, they weren't able to hurt S.1082 too badly, but only time will tell. A conference committee will actually write the final version of the so-called drug safety bill.

Source: *USA Today*

SENATOR WALKS LINE BETWEEN REGULATION AND DONATIONS

Another example of a broken system involves campaign donations to Senators and Representatives who chair important committees in Congress. These contributions from industries that have a direct interest in what is being considered by the committees should be carefully scrutinized. For example, take the money that Connecticut Senator Chris Dodd has raised for his presidential bid this year. More than half of his contributions come from the very industries the Senator regulates as chairman of the Senate banking committee, according to a *USA Today* analysis of data compiled by the Center for Responsive Politics. While Senator Dodd doesn't appear to be a serious contender for the Democratic nomination for President, he is definitely raking in the campaign donations.

It should be noted that the Senate Committee on Banking, Housing and Urban Affairs, the committee chaired by Senator Dodd, deals with issues such as regulating mortgage-lending companies dealing with foreclosures and providing a federal financial security net to insurance companies in the event of terrorist attacks. Senator Dodd collected nearly \$2.7 million from the finance, insurance and real estate sectors in the first three months of this year for his presidential campaign, according to *USA Today*. It appears that more than \$2 million of

that amount came from the employees and political action committees of securities and investment firms, banks, insurance companies and other industries the committee regulates. Overall, Senator Dodd raised \$4 million from individuals and PACs in the first quarter.

The finance, insurance and real estate sectors also put nearly \$1.4 million into Dodd's Senate campaign fund during the past two years, although he would not be up for Senate re-election until 2010. Millions of dollars have been transferred from the Senate fund to help fuel his presidential race. While Senator Dodd has done absolutely nothing wrong from a legal perspective and hasn't violated any laws, the flow of campaign money points out how weak the current laws are. The American people deserve a political system where an ordinary citizen's vote counts. Because of the tremendously high costs of political campaigns, and the weak laws that regulate campaigns and ethics, the powerful special interests run the show in our nation's capitol. We must demand that this situation be changed.

Source: *USA Today*

VIII. CONGRESSIONAL UPDATE

THE DRUG INDUSTRY MUST BE CONTROLLED

Anybody who has ever dealt with the giant pharmaceutical industry won't be surprised to learn that the powerful drug lobby has been hard at work in our nation's capital trying to kill any drug safety reforms in Congress. When you consider that drug manufacturers knew the safety risks of bad drugs like Vioxx, Paxil, & Zyprexa, and put them on the market, but failed to tell the public, it is apparent that drug reform is badly needed. Tens of thousands of Americans suffered or died from taking the three medications alone. We mentioned earlier that the bill that would have

done lots to fix our nation's drug safety system, (S.1082), passed in the U.S. Senate last month, but in a watered-down form. While the bill, as passed by the Senate, is good in parts, a great deal of the drug-safety provisions in this legislation were diluted considerably. That's most unfortunate.

The politicians need to realize they can't cave in to the drug lobby with impunity and continues to get away with it. While the bill passed by the Senate is an improvement over the current state of affairs, the amendments added that were pushed by lobbyists for the drug industry aren't good. The Senate and House versions of the bill will go to conference. Hopefully, the conference committee's final version will be stronger, but don't count on it. You could help by contacting your Senators and Representatives and ask them to demand a strong safety bill that will make the FDA stronger and more effective in regulating the drug industry.

CONGRESS MUST PUT A HALT TO THE FDA'S DEPENDENCY ON DRUG INDUSTRY MONEY

There is one specific need insofar as the drug industry is concerned that warrants special attention. Congress has again failed to do the right thing concerning the drug industry's influence over the FDA. The House and Senate should not reauthorize the user fees at the core of the Prescription Drug User Fee Act because of the unacceptable conflicts of interest the fees create at the FDA. Unfortunately, it appears that neither the House nor Senate can get totally loose from the shackles put on their members by Big Pharma and their big money. As the gatekeeper for America's prescription drug supply, the FDA has the duty to review all prescription drug applications. This work can be done only by an agency that is beholden only to the public and not to the very companies it regulates.

The FDA shouldn't be in a posture where it can be swayed by the business

concerns of companies seeking product approval. But the current bill, S. 1082, which has now passed the Senate, as mentioned above, would allow for one-fifth of the FDA's budget, \$393 million, to come from user fees from pharmaceutical companies. This is up from \$305 million in fiscal year 2007, and would force the FDA to become even more dependent for its funding on the very industry over which it has regulatory authority.

Numerous scientists, regulatory experts and senior FDA staff oppose the user fee program and have concluded that the money saved by taxpayers through industry funding of the FDA is insignificant compared to the injuries and deaths caused by dangerous drugs allowed onto the market. Congress should properly fund the FDA with tax dollars and thereby protect the American citizens who depend on the regulatory agency to protect them. Since the Senate and House bills must be reconciled by a joint conference committee, I still hold out hope that public pressure will prevail over the campaign donations from the drug industry. The FDA should protect the public from unsafe drugs and not work for the drug companies. If you agree, let your Senators and Representatives in Washington hear from you.

Source: Public Citizen

IX. PRODUCT LIABILITY UPDATE

AUTOMOBILE SAFETY IS CRITICALLY IMPORTANT

There is a great deal of confusion about crash tests and safety features when it comes to automobile safety. Not only are lay persons confused, but I find that many in the legal community don't fully understand automobile safety in all of its aspects. Because motor vehicles are the number one killer of children

and adults in age groups 1 to 34, causing more fatalities than most all other causes combined, all of us need to become more knowledgeable about automobile safety. The high death rate should cause all of us—including automobile manufacturers—to be extremely safety-conscious. That means we have an obligation to become knowledgeable about automobile safety.

Many people believe that if a motor vehicle is put on the market it has been designed with safety as a top priority and that once it is in production, that all proper testing has been done. A number of automakers confuse the issue of which tests and features are important when it comes to safety. When their vehicles do poorly, some try to discredit tests. However, they endorse the same tests on models that performed well. Consumers should look for a vehicle that performs well in all crash tests, has a low rollover risk and a good array of advanced safety features. Vehicles with poor results in any test, those with injury/fatality ratings worse than most vehicles in their class, or those noted for a lack of advanced safety features should be avoided if safety is really a priority when selecting a vehicle.

First, it must be recognized that all vehicles meet minimum government safety requirements and pass standard crash tests. It is abundantly clear that minimum safety requirements are no assurance that all available safety standards are being met. The National Highway Traffic Safety Administration and the Insurance Institute for Highway Safety (IIHS) also conduct additional tests, which can be used to compare the crashworthiness of vehicles over and above the minimum requirements. In addition, NHTSA has static and dynamic ratings for vehicle rollover risk. These tests and comparisons are complementary and ideally a car should perform well in all of them. Full-width frontal crashes, like the NHTSA test, are one of the most common types of collisions. That test is usually considered a good test of restraint systems, including seat-

belts and airbags. IIHS also conducts a separate frontal offset crash. Frontal offset crashes are often more severe to the vehicle's safety cage. This test is also conducted at a higher speed, and tends to show a greater distinction among vehicles than the NHTSA frontal test. The NHTSA frontal and IIHS frontal offset crash tests are complementary and should be used by the automobile manufacturers together. The two tests should be used together in an overall safety evaluation. Safe designs should get top scores in both of these tests.

Automobile manufacturers should conduct side impact tests on all of their models. NHTSA conducts a side-impact test. Though somewhat less frequent, side impacts are the most deadly to properly restrained passengers because there is less structure between occupants and the oncoming vehicle. The IIHS has now rated many vehicles with its side impact test. Their test simulates being struck by higher vehicles, such as SUVs, using dummies that represent smaller adults than those used in standard tests. Again, these tests are complementary to the NHTSA side impact tests. Properly designed vehicles should do well in these tests.

Fatal rear impacts are not very common, but they do occur. Moderate rear impact crashes, however, can cause serious injury. For this reason, the IIHS includes a rear crash rating of vehicle seats and head restraints. The government does conduct a standard rear impact test for fuel system integrity, and all vehicles must pass. New attention is also focused on 3rd-row seating that is very close to the rear glass and bumper.

As we have mentioned repeatedly, rollovers are among the deadliest of motor vehicle accidents. Many trucks and SUVs are particularly susceptible to rollovers. A dynamic test and rating has been developed by the NHTSA. Since tall vehicles like SUVs have a much higher tendency to rollover, more attention to additional safety features are necessary. These vehicles should be equipped with rollover side curtain

airbags, stability control, independent suspensions and tire pressure monitors for safety.

Finally, crashworthiness is a concept that all manufacturers, as well as NHTSA, are fully aware of. Vehicles must be designed so that occupants can survive crashes at highway speeds. In fact, most safety advocates believe that the most important concept in vehicle defect cases is crashworthiness, which is the ability of a vehicle to prevent injuries to the occupants in the event of a collision. During a collision, a vehicle's occupants are subject to a number of forces that can result in injury, including rapid deceleration and rapid acceleration, depending on the direction of impact in the collision. Crashworthiness deals primarily with the "second collision" that results from these forces, in which the driver and passengers collide against the interior of the vehicle. An effective crashworthy vehicle design will distribute these injurious forces over as great a period of time and distance as possible, including the direction of the forces to parts of the body that are more capable of withstanding them. Crashworthiness features, which are designed to minimize occupant injuries, prevent ejection from the vehicle, and reduce the risk of fire, include: seat belts; crumple zones; and, airbags, which should include side impact protection.

The cause of the initial crash is usually considered irrelevant in crashworthiness cases. The manufacturer of a vehicle is responsible for injuries sustained in a car crash because of a defect that was not the cause of the accident, but caused or made worse the injuries suffered in the initial crash. Basically, crashworthiness is concerned with whether the manufacturer designed the vehicle and its components so that it is safe for any reasonably foreseeable use. A vehicle's reasonably foreseeable use includes the possibility of its involvement in a collision. Therefore, a manufacturer's duty extends to the design of a vehicle that is reasonably safe should a collision occur. Injuries caused by a vehicle's crashwor-

thiness are considered separately and apart from the injuries that were caused by the initial crash itself. If the original crash would have caused the injury or death, in such a case the crashworthiness claim won't exist.

INSURANCE INSTITUTE GIVES A STATUS REPORT ON FATALITY RISKS

On April 19, 2007, the Insurance Institute for Highway Safety released its status report on the fatality risk of vehicles by make and model. The report, a follow up to an initial report released in the mid-1990s, is a very insightful report as it compares the risk of death in vehicles by make and model. The report states that more than 125,000 occupants of passenger vehicles died in crashes during 2002-2005. Fatality rates in some models were found to be more than twice as high as others, while rates in other vehicles were only a fraction of the average. The status report assesses the fatality rates of more than 200 vehicles. Chevrolet models were ranked as both the best and worst insofar as fatality rates were concerned. The lowest death rate is 7 deaths per million registered vehicle years for the Chevrolet Astro minivan. The highest death rate is 232 deaths per million vehicle years for the 2-door, 2-wheel drive version of the Chevrolet Blazer.

On a positive note, the report indicates that as high as death rates are in some models, the average death rate for all vehicles has decreased over time. The average driver death rate in 1989 through 1993 model vehicles during the time period 1990 through 1994 was 110 deaths per million registered vehicle years. The average driver death rate in the current report is down to 79 deaths per million registered vehicle years. This indicates an approximate decrease of 30% since the mid-1990s.

Vehicle type and body style appear to have an influence on the vehicle death rates. Eleven of the 16 vehicles with the highest death rates are small models. A noted exception to this trend are large

4-wheel drive SUVs. The Ford Excursion was found to have a driver death rate of 115 per million registered vehicle years. About one-half of the deaths in 2001 through 2004 model Excursions occurred in rollover crashes. In comparing "light" to "heavy" vehicles, pound for pound, cars were almost always found to have lower death rates than pickups or SUVs.

One of the more impressive vehicles was the 2-wheel drive Lexus RX330 in which there were no recorded driver deaths. A possible explanation for this is the availability of electronic stability control (ESC). Electronic stability control has been shown to significantly reduce the risk of fatal single-vehicle crashes including rollovers. All but 3 of the 15 vehicles with the lowest overall death rates have electronic stability control as a feature, usually standard. In contrast, electronic stability control is not standard on any of the 16 vehicles with the highest death rates and is only optional on one of the vehicles.

In my opinion, IIHS does a very good job and is to be commended. I would encourage all of our readers to review information on the Insurance Institute Web site (www.iihs.org) in detail. It is an excellent indicator of the safety of vehicles that are available for consumers on today's market. If only NHTSA functioned as well as the Institute does an automobile safety issues!

Source: Insurance Institute for Highway Safety

TRACTOR ROLLOVER CASE FILED IN AN ALABAMA COURT

Our firm has filed a significant lawsuit in Bullock County, Alabama, involving serious injuries suffered by the operator of a backhoe. The case also involves a tractor rollover. An employee of the county, who was operating a New Holland LB75B3 backhoe, which was manufactured by CNH America, was seriously injured when the tractor went out of control and rolled over. We will prove at trial that the tractor was defectively designed and dangerous and that

the manufacturer knew it. Greg Allen and I, along with Myron Penn and Shane Seaborn of the firm of Penn & Seaborn, will handle the case for the employee and his family.

ANOTHER DEFECTIVE TIRE LAWSUIT FILED IN CALIFORNIA

A lawsuit filed recently in California alleges that a defective tire caused a pickup truck crash on a Southern California freeway that killed five family members. The wrongful death suit, filed in federal court, accuses Continental Tire North America Inc. of negligence, product liability and breach of implied warranty. The suit was filed on behalf of two women whose mother, father and 4-year-old brother died in the March 15th crash. Two others died and two children were hurt when a 2000 Ford F-150 pickup went out of control on an Interstate highway and first struck a tree and then a wall. A left rear tire lost its tread, which caused the driver to lose control. The lawsuit claims the tire had a manufacturing defect, which caused a detread, resulting in the crash. The tire, which was purchased new in March 2006, was the same size and type as the model that was recalled in 2002 because there was a chance that the tread could separate. Our firm handled a Continental tire retread case in Montgomery County recently. The results of that case were highlighted in the May issue of the Report. There are still lots of defective Continental tires on our nation's highways and our case and the California case are classic examples of what can happen when a tire separation occurs at highway speeds.

Source: Associated Press

15-PASSENGER VANS ARE HIGH-RIDING DEATH TRAPS

Unfortunately, we continue to see a number of cases involving the rollover of 15 passenger vans. As I have previously written, these vehicles are extremely unstable and have a high

propensity to roll over. The propensity to roll over increases with more passengers. In fact, the more passengers you add, the higher likelihood there is of a tire failure on the rear of the van. As we have pointed out repeatedly, these vans are among the most dangerous vehicles on the road today. At one time, the vans were very popular for transporting preschool, school-age, college, and church groups. Fortunately most people have learned that these vans are involved in rollover crashes more often than all other vehicles.

The National Highway Traffic Safety Administration said in 2005 that new research reinforced its existing concerns about 15-passenger vans. As a result, NHTSA reissued its consumer advisory for users of 15-passenger vans for the third time in four years. Unfortunately, from a safety perspective, little has changed since 1999. These vans are still on the highways of this country and are still causing deaths and injuries. Without nationwide regulation that truly addresses safe vehicle performance and occupant protection, the vans will continue to kill and maim innocent victims. If you want additional information on the hazards relating to 15-passenger vans, you may visit our Web site at www.jlbreport.com or contact Shanna Malone at shanna.malone@beasleyallen.com or call 800-898-2034. We will be happy to furnish you with this information on request.

APPELLATE COURT UPHOLDS \$18.6 MILLION VERDICT IN ROOF-CRUSH CASE

The Nebraska Supreme Court has affirmed an \$18.6 million verdict for the plaintiff in a roof-crush case involving a 1996 Chevrolet S-10 Blazer. In reaching its decision, the state's high court rejected the contention of General Motors Corp. that the jury was improperly instructed and improperly denied a proper verdict form. The crash giving rise to the lawsuit occurred in 1997, when Kenneth Long, the driver of the blazer lost control of his vehicle and it

rolled over four times. A passenger, Penny Shipler, suffered injuries rendering her quadriplegic.

Ms. Shipler sued GM and the driver claiming that the Blazer roof was defective and had crushed inward, causing her injury. She charged GM with negligence for failing to use reasonable care in designing the roof or failing to issue adequate warnings. She also alleged strict liability based on the theory that the roof structure was defective at the time the vehicle left GM's possession and that the defect made the Blazer unreasonably dangerous. The driver admitted liability in the case and the parties stipulated that his operation of the Blazer was the cause of the accident. The remaining issues to be decided by the jury were:

- whether the driver's negligence was the sole cause of the injury;
- whether the Blazer's roof was the sole cause of the injury, or
- whether both GM and Long proximately caused the injury.

The jury awarded nearly \$19.6 million, which was reduced to \$18.6 million. That reduction came after a seat belt defect claim was dropped in exchange for a 5% reduction in the judgment. The Supreme Court refused to reverse the case on the merits or reduce the amount of the award.

TIRE FAILURES ON RECREATIONAL VEHICLES CAUSE INJURIES AND DEATHS

LawyersUSA

We have written about the problems related to tire failures on recreational vehicles in several previous issues. It concerns me that the average person is still pretty much uninformed when it comes to this problem. I am including below an excellent article on the subject authored by Nora Lockwood Tooher that appeared in Lawyers USA recently. Rick Morrison from our firm was featured in the article because of work he has done in this type litigation.

A retired aerospace mechanic, Billy Wayne Woods babied his \$200,000 luxury motor home, conscientiously cleaning it, covering its tires with wheel covers and even constructing a special RV-carport. In October 2003, Woods and his family were returning to Alabama from a vacation at Disney World when the treads came off the left front tire of his 2001 Monaco Diplomat on I-75 in Georgia.

The RV crossed over the median and cut across two lanes of traffic, then slammed into two embankments and bit a sign before finally stopping at a rest area. Woods was paralyzed. His wife and daughter-in-law both suffered broken backs while his son had a broken hip. His two grandchildren were not injured. Woods never left the hospital after the accident; he died seven months later of complications from injuries sustained in the crash. "Their retirement dream vacation turned into a nightmare," said the family's attorney, Rick Morrison, of Beasley Allen in Montgomery, Alabama. Woods's family is suing Goodyear Tire and Rubber Co. and Monaco Coach Corp., alleging that the tires on their RV were defective and unreasonably dangerous. The case, slated for trial in September, is one of a growing number of lawsuits linking tire failures in large motor homes to serious and fatal accidents. Morrison estimated that about 20 lawsuits have been filed nationwide involving tire failures in large RVs.

The cases involve Class A recreational vehicles—large, luxurious motor homes that resemble buses and cost from \$150,000 to \$500,000. A large RV typically seats up to six people and has a kitchen, living area, bathroom and bedroom. Many are loaded with pricey extras, such as ceramic floors, granite countertops and

slide-out sections that enlarge the motor home when it is parked at a campground. These heavy loads, coupled with weight-shifting inside the RV, put too much pressure on tires that are inadequate for the load, resulting in sudden tire failures, according to Sean Kane, head of Safety Research and Strategies, a research and consulting firm in Rehoboth, Mass. that has assisted plaintiffs' attorneys.

The problem, Kane said, is that RV manufacturers under-rate the axle weight of their vehicles and equip them with tires that can't bear the load. The tire failures typically occur in the front end of the RV, which has only single tires on each side instead of doubles. This is particularly dangerous because a front-wheel blowout makes it almost impossible to steer. Robert E. Ammons, head of the Ammons Law Firm in Houston, said the risk is compounded when RV owners load their vehicles with luggage, food, gasoline and passengers. Also, because many RVs are used only a month or two a year, the tires are often old, heightening the risk of tread separation (See "Aging tire lawsuits gain traction," Lawyers USA, July 3, 2006. Search words for Lawyers USA Archives: aging and tires and Tooher). "The tire will pass inspection because the tread depth is fine, but it's being run during the summer during high ambient temperatures. It may be five or six years old, and it's not really designed for the application for which it's being used," Ammons explained. "Those factors combined are simply a recipe for disaster," he said.

Ammons is representing the family of a woman who was killed in an RV tire failure accident in 2005 in Louisiana. The woman was the passenger in a large RV that went out of control after the treads separated on the right front tire. When

the RV smashed into several trees, an overhead television fell onto the woman's head, killing her.

Several lawsuits—including the one filed by the Woods family—cite the Goodyear G159 tire. Morrison said the tire—which was designed for use on commercial pickup and delivery trucks—is inadequate for large RVs. Hugh N. Smith, a tire litigation specialist with Smith & Fuller in Belleair Bluffs, Florida, said he is aware of eight lawsuits involving G159 failures. Smith is representing a family involved in a serious accident on August 11, 2004, when a G159 tire on their 2000 Fleetwood American Tradition motor home failed and their vehicle crashed into a tree in Chitley, Florida. Several RV manufacturers, including Fleetwood and Newmar, have replaced the original tires on their large RVs with larger-sized tires.

Goodyear no longer markets the tire as a RV tire, and in 2000 introduced a tire made specifically for Class A motor homes. But Dave Wilkins, a spokesman for Goodyear, denied that there is a problem with the G159 tire. "We never really had a problem with that tire," he said. "Most of the situations that came up were application problems. They were put on RVs, but they [the RVs] were overloaded. A lot of time people didn't maintain them with enough inflation pressure," he said.

Responding to consumer complaints, however, the National Highway Traffic Safety Administration is investigating tire failures in Class A motor homes. NHTSA has requested information from Goodyear and other tire makers. In a December 5, 2006 report, the agency said: "It appears that as manufacturers offer, and purchasers of 'Class A' motor home vehicles select...an increasing

number of features such as 'slide-out' galleys and bedrooms...the weight of the vehicles increases, resulting in higher axle and tire loads." The agency recommends that RV makers install larger tires and upgrade other load-carrying components, or increase the specified inflation pressures for tires. It recently completed an investigation into reports of failures of Toyo tires on Country Coach motor homes. A total of 44 Toyo front tire failures on Country Coach motor homes were reported between October 2001 and June 2006. Several of the tire failures resulted in injuries.

One death has been linked to a Toyo tire failure: On July 3, 2003, a Country Coach RV equipped with Toyo front tires crashed into a tree near Mound, Illinois, resulting in a fatality. Post-crash photographic evidence indicated that the left front tire failed and likely caused or contributed to the crash, according to NHTSA. In response to the NHTSA investigation, Country Coach last June filed a defect report stating that the Toyo tires were defective and "could fail unexpectedly, causing a loss of vehicle control." In October 2006, Country Coach said it would replace Toyo tires with Michelin tires on its RVs. Kane said the RV industry needs to increase safety standards and work with tire makers to ensure the tires on their RVs are safe. The RV industry performs little of the safety testing that is standard in the automobile industry, several attorneys noted. "When I found out what little engineering these RVs have, it shocked me," Morrison said. "My clients paid almost \$200,000 for theirs. This particular RV company did not have one engineer on staff."

Lawyers USA
May 7, 2007

Source: Lawyers USA, www.lawyersusaonline.com

A PREVENTABLE HAZARD EXISTS IN MILLIONS OF AMERICAN HOMES

A significant hazard exists in many American homes that most folks know little about and as a result, the hazard goes unnoticed until there is an injury or death to a person in the home. Public Citizen refers to the hazard as one involving "killer stoves." A good number of persons have been killed or severely injured when stoves tip over. Manufacturers and sellers have known for years that some stoves are prone to tip over. These stoves, ordinary, freestanding gas and electric ranges found in millions of American homes, have caused unconscionable harm for more than 25 years. Manufacturers and retailers have known for years that the stoves have a tendency to tip over when weight is applied to the open oven door. Numerous cases have been reported to the U.S. Consumer Product Safety Commission of death and injury from scalding and burns due to hot foods and liquids spilling from the stove top and from the crushing weight when the range falls over on top of the victim. We handled our first case of this sort a few years ago in Mississippi involving the death of a woman. She was simply opening the oven stove's door in her kitchen to take out a dish when the stove tipped over, striking her head, causing her death.

This safety problem arose in the early 1980s, when manufacturers of both gas and electric ranges began using lighter-gauge steel to reduce costs. They quickly learned that this cost reduction measure resulted in a tendency for the appliances to tip over when weight was applied to the oven door. To address this hazard, Underwriters Laboratories (UL) and American National Standards Institute (ANSI) both developed national, voluntary safety standards that require electric and gas ranges manufactured after 1991 to remain stable when 250 pounds of pressure is applied on the oven door for five minutes. These standards also require that metal brackets be delivered with the stove and that they be installed at the time of delivery

to secure the stoves to a wall or the floor. But, because these are voluntary safety standards, only a small fraction of stoves of this kind are installed in homes with the anti-tipping devices.

While the retailers are all aware of the safety hazard, the delivery people they contract with are usually not equipped or trained to perform the bracket installation service. In fact, the sales personnel rarely mention the issue to buyers. Owners' manuals are supposed to mention these issues, but owners have to search hard to find the information. The manufacturers and sellers all know this rarely happens in the real world. As a result, most homeowners who purchase the ranges don't know that the units are not secure and are totally unaware that the brackets are even necessary. In recent years, Home Depot and Lowe's have become major players in this sector, but Sears has historically dominated the consumer appliance market. While their dominance may be ending, it's most revealing to look at the involvement of that giant retailer on this safety issue. Public Citizen reported concerning Sears:

Sears still sells approximately 800,000 ranges a year in the United States. Sears' staff were told to proceed with a plan to secure the stoves in December 1986. But after initially telling its service and installation managers in 1987 that this additional hardware "will be very simple [to install] in most cases" and "should require very little time," Sears admitted in an internal memo the same year that the brackets were not typically installed. An internal memo from 1996 said that the brackets were installed for only an estimated 5% of ranges sold—and possibly as low as 2-3%.

In May 1994, Sears re-evaluated the issue, weighing the pros and cons, and "bottom line" decided it would "take no action to provide installation of anti-tip devices." In

a 1999 letter to Sears, Underwriters Laboratories informed the retailer that it expected the ranges with the UL Listing Mark to be installed with the anti-tip safety devices supplied by the manufacturers. Sears wrote back a highly misleading letter saying it had been assured by its vendors and suppliers that their electric ranges "have the proper components, warnings, and instructions to be in full compliance with the UL 858." Sears never mentioned it was not installing the brackets as UL 858 requires.

Sears maintained its refusal to protect its customers even after receiving reports available from the CPSC concerning horrific stove-tipping injuries and deaths. The reports detailed more than 18 deaths and 70 serious injuries between 1980 and June 1999, mostly involving children—some as young as 12 months—and the elderly. There could be as many as 20 million families in America with this safety hazard in their kitchen, and just as many injuries waiting to happen.

The CPSC has been aware of the stove-tipping problem since at least 1984. But it never took any steps to require notification to owners and installation of the brackets. Neither did the agency require redesign of the ranges by the manufacturers. The CPSC has the responsibility to protect consumers, but it has failed consumers miserably when it comes to the "killer stoves." The sellers of ranges should notify all owners of the danger of tipping stoves and the need for safety brackets. While this action would come far too late for the many people who have been maimed and killed by this preventable hazard, it would be in time to save countless others. Public Citizen is to be commended for its work in this area of concern. Without their involvement, the public would be pretty much

in the dark when it comes to this safety issue. If you want more information on this subject, you may visit our Web site at www.jlbreport.com or contact Shanna Malone at shanna.malone@beasleyallen.com or 800-898-2034.

Source: Public Citizen

HYDROGEN SULFIDE IS ANOTHER SILENT KILLER

Hydrogen Sulfide, commonly known as hydrosulfuric acid, sewer gas or stink damp, is a colorless, flammable, and extremely hazardous gas. This gas has a distinct smell, similar to a rotten egg. This smell can be detected at low levels; however, after continuous exposure the ability to smell the gas is lost even though it may still be present. At high concentrations the ability to smell the gas can be lost instantly. Just a few breaths of air containing high levels of hydrogen sulfide can cause death.

Hydrogen Sulfide occurs naturally in crude petroleum, natural gas, volcanic gases and hot springs. It can also result from bacterial breakdown of organic matter. Our firm is currently investigating and preparing to file multiple cases involving deaths caused by hydrogen sulfide. One of the deaths followed an exposure at an oil and gas facility while the other death followed an exposure to decaying chicken remains from a chicken processing facility. In both instances, the persons died following a brief exposure to hydrogen sulfide. Witnesses to both incidents described seeing the victims faint never to regain consciousness. Additionally, in both instances others sustained inhalation injuries trying to rescue their fallen co-employees.

While some exposure incidents cannot be anticipated and are unavoidable, most exposures can be avoided with the proper precautions. Corporate entities that are involved in business activities that are known to create this dangerous gas must take the necessary precautions to protect their employees and the general public. Both victims in our cases were killed unnecessarily

because their employers failed to follow established safety protocol that includes detection, ventilation and/or protection from hydrogen sulfide. In one case the deceased had absolutely no detection or protection procedures/equipment from the gas and in the other case the deceased had severely inadequate detection and protective procedures/equipment. The Occupational Safety and Health Administration (OSHA) set an acceptable ceiling for hydrogen sulfide of 20 parts hydrogen sulfide per 1 million parts of air (20 ppm) in the workplace. Needless to say, the exposure in both of our death cases greatly exceeded OSHA's limit.

Since there are no known means of preventing the creation of hydrogen sulfide, corporate entities must focus on detection of and protection from exposure to this deadly gas. If a corporate entity engages in business activities that create hydrogen sulfide, it must employ persons qualified to set procedures and ensure compliance with those procedures. The air should be tested for the presence of the gas by a qualified person using proper testing equipment. When the gas is detected beyond OSHA's limit, the area should be evacuated and ventilated. Additionally, these entities are responsible for supplying its workforce with the appropriate respiratory protection like a self-contained breathing apparatus (SCBA). Failure to employ safety procedures and use safety equipment can result in serious bodily injury or death. The families we represent have first hand knowledge of the consequences of dealing with this threat improperly. Kendall Dunson is the primary lawyer from the firm who will be handling these cases. Cole Portis and I will also be involved.

SIGNIFICANT VERDICT AGAINST FORD IN FLORIDA

Just as this issue was being put in final form to go to the printer, I received word from Chris Glover that his firm had won a tremendous case against

Ford Motor Co. A jury in Orange County, Florida returned a \$32.5 million verdict in a door-mounted passive seat belt case. The jury found for the plaintiff on both defect and failure to warn theories of liability. The vehicle involved was a 1993 Ford Escort. Ben Hogan of Hogan and Glover, P.C., was the lead lawyer for the plaintiff who I understand suffered a severe brain injury in the highway crash that gave rise to the lawsuit. Obviously, Ben and his firm did an outstanding job for their client in this case.

X. MASS TORTS UPDATE

FDA ALERT RELATING TO SHELHIGH MEDICAL PRODUCTS

The FDA has issued a statement that says all Medical devices manufactured by Shelhigh, Inc., a company located in Union, New Jersey, may be "contaminated." The company had refused to recall its products after the FDA requested their removal. At that point, the FDA requested seizure of the products at the contaminated manufacturing facility. Our firm is investigating claims involving the Shelhigh products that are involved. Individuals who suffered a severe reaction, serious infection or their Shelhigh device failed and had to be replaced may have a valid claim. If you need any additional information, feel free to contact our Mass Torts Section. Frank Woodson, Chad Cook and Melissa Prickett are the primary lawyers handling these claims. A list of the specific products that are involved will be furnished on request or you can get them from our Web site, www.jlbreport.com. Obviously, this appears to be a most serious matter.

VICTIM WHO SUED PHARMACEUTICAL FIRM LOSES HER BATTLE FOR LIFE

There have been some real courageous people in the battle for safe drugs

in this country and Carol McCreary is one of these folks. After a six year struggle with breast cancer, Mrs. McCreary, who sued Wyeth Pharmaceuticals died recently. She had filed a lawsuit against the maker of menopause-treatment drug Prempro for causing her breast cancer. Mrs. McCreary, who was diagnosed in January 2001, took Prempro for 33 months. A 2000 mammogram was negative for breast cancer. She began taking Prempro, a combination of estrogen plus progestin, in 1998. According to her husband, Terry McCreary, his wife just "wanted to bring it out, so other women might not suffer the way she did." At her funeral, Mrs. McCreary's pastor made this profound statement: "Carol knew the source of her breast cancer and by her actions saved many other women from suffering that fate." That will be a lasting tribute to this courageous lady who died much too young.

Results released from a Women's Health Initiative survey in 2003 revealed a 24% increase in the risk of breast cancer for women taking combined estrogen and progestin. The Women's Health Initiative is a long-term national health study focusing on health issues for older American women. Before her case went to trial, Mrs. McCreary and Wyeth agreed to an out-of-court settlement for an undisclosed amount. She was credited with causing hundreds of women to stop taking these drugs and as a result lives were saved. Mrs. McCreary is survived by her husband, mother, sister, two children and five grandchildren. While Mrs. McCreary ultimately lost her fight to cancer, her battle with Wyeth will help other women live and that's what her pastor was saying at the funeral. Our prayers go out to the McCreary family.

VIOXX TRIAL IN WEST VIRGINIA CONTINUED

A significant Vioxx trial, which had been scheduled to take place this fall in a West Virginia court, has been continued to next year. The trial will then take

place in Mingo County Circuit Court. The lawsuit, which alleges that taking Vioxx caused the death of Mike Smith three years ago, is being handled by my good friend Mark Lanier, an outstanding lawyer from Houston, Texas. Mark calls this case "the accountability trial." Of course, Merck is gearing up for the trial and will use some of its \$1 billion lawsuit defense fund to defend the case when it comes up. It will be watched with interest.

THE TURNER CASE IS SET FOR TRIAL IN ALABAMA

Our firm will try our first Vioxx case in Alabama in Bullock County early next year. We had hoped for a trial setting this year, but because of scheduling problems, that didn't happen. The case will be tried in the Circuit Court of Bullock County, starting on January 7, 2008, before Judge Art Haynes, an experience and well-respected judge from Birmingham, who was assigned specifically to hear this case. Since it will be the first case to be tried by our firm in Alabama, I am looking forward to it. We represent the family of a man who died much too early because of Vioxx. Hopefully, we will get a good result for his family.

OXYCONTIN'S DECEPTION CAUSED TREMENDOUS DAMAGE AND HURT

Purdue Pharma L.P., the Connecticut-based maker of the powerful painkiller OxyContin, along with three of its current and former executives, pleaded guilty last month to misleading the public about the drug's risk of addiction. The drug company, its president, top lawyer and former chief medical officer will pay \$634.5 million in fines for claiming the drug was less addictive and less subject to abuse than other pain medications. This development came two days after Purdue agreed to pay \$19.5 million to 26 states and the District of Columbia to settle complaints that it encouraged physicians to overprescribe OxyContin. U.S. Attorney

John Brownlee, speaking for the government, said:

With its OxyContin, Purdue unleashed a highly abusable, addictive, and potentially dangerous drug on an unsuspecting and unknowing public. For these misrepresentations and crimes, Purdue and its executives have been brought to justice.

Purdue Pharma has finally accepted responsibility for its employees' actions. However, that acceptance came after years of lying to the government, the courts and more importantly to victims. This conduct is criminal and deserves more than just money fines. OxyContin, a trade name for oxycodone, is a time-release painkiller that is highly addictive. Designed to be swallowed whole and digested over 12 hours, the pills can produce a heroin-like high if crushed and then swallowed, snorted or injected. From 1996 to 2001, the number of oxycodone-related deaths nationwide increased 400% while the annual number of OxyContin prescriptions increased nearly 20-fold, according to a report by the U.S. Drug Enforcement Administration. In 2002, the DEA said the drug caused 146 deaths and contributed to another 318.

The fines will be distributed to state and federal law enforcement agencies, the federal government, federal and state Medicaid programs, a Virginia prescription monitoring program, individuals who had sued the company and used for the creation of an internal monitoring program. Hopefully, the drug industry will finally understand that this kind of malicious, death-dealing behavior will not be tolerated. However, the message could have been much stronger. From 2000 through 2006 alone, according to data from Drug Topics, the news magazine for pharmacists, there have been \$9.6 billion in retail sales of Oxycontin in the U.S. It was one of 25 top-selling drugs from 2000 to 2005, reaching as high as number 11 in 2003. Many believe the

government should have forced the company to disgorge far more of its ill-gotten profits. Hundreds of thousands of people find themselves in jail for relatively minor drug possession or distribution crimes involving illegal drugs. The drug company in this case was no less of a drug dealer and should have been punished more severely.

All of the company's deception went on over a long period of time. In 2003, a warning letter was sent by the Food and Drug Administration to Purdue relating to the illegal advertising of Oxycontin. A large number of similar charges were leveled at the company at that time, including overstating the safety profile of the drug by not referring to the large number of fatalities it had caused and overselling the benefits. Because the FDA lacks the authority to impose civil monetary penalties for any prescription drug violation, Purdue didn't have to pay a red cent at that time. Now, it has paid about \$650 million for its gross and intentional wrongdoing and will now be allowed to go on its way.

Source: *Associated Press*

AN IMPROVED PAXIL SETTLEMENT IS APPROVED BY THE COURT

A federal judge has approved the \$64 million national class action settlement for parents who bought Paxil for their teenagers who were struggling with depression. As previously reported, there had been strong objections to the settlement. It was not at all clear how much GlaxoSmithKline would have to pay and that was a primary concern. Public Citizen objected to the settlement, saying it wasn't fair to the class members. It should be noted that sales of Paxil specifically for minors reached more than \$500 million. GlaxoSmithKline has repeatedly been accused of not revealing all that it knew about the drug. The Food and Drug Administration recommended against giving it to minors after some studies showed it increased suicidal tendencies in young people. Paxil was once touted as an

answer to teen depression. It was later thought to have increased the risk of suicidal thinking in young people, some of whom ultimately killed themselves. As a result, in 2004, public outcry pushed the FDA to call for tougher warnings on antidepressants.

The complaint in the case (*Hoormann, et al. v. SmithKline Beecham Corporation*) sought economic damages against GlaxoSmithKline, the maker of Paxil, alleging that the company misled parents by not disclosing that the drug was dangerous and ineffective when taken by children younger than 18. Under the agreement, Glaxo is required to put \$63.8 million into a settlement fund to pay class members' out-of-pocket expenses and attorney's fees. After fees and the costs of publicizing and administering the settlement are deducted, about \$44 million will be available for refunds to class members. A provision was added to the agreement which says that anyone, without documentation, can still ask to be reimbursed up to \$100 that they paid for Paxil. That amount had previously been only \$15 and it was only to come from a special reserve of \$300,000, not from the entire fund. People with documentation can still file for their full out-of-pocket expenses. How much anyone actually gets paid will depend on how many people file claims. If not all of the money is claimed, the remaining settlement funds will be returned to the drug maker, which is hard to defend.

On February 23rd, Public Citizen filed an objection to the proposed settlement on behalf of a class member whose daughter was prescribed Paxil in 2002 and 2003. The Prescription Access Litigation Project, a national coalition of more than 125 organizations, including consumer, senior citizen, health care, labor, legal services and women's health advocacy organizations was also involved. Judge Ralph J. Mendelsohn of the Third Judicial Circuit of Madison County, Illinois, granted approval of the revised settlement, subject only to receiving a

proposed final order. The new settlement will provide up to \$100 for class members who are unable to produce documentation and eliminates the \$300,000 cap. Mail and e-mail notices will be sent to membership organizations at the end of May, June and July, encouraging the groups to contact class members. Members can also receive information about the new settlement at <http://www.paxilpediatricsettlement.com>. The deadline to submit a claim is August 31, 2007. The controversial settlement does not end lawsuits that are pending nationwide against Glaxo-SmithKline over injuries sustained by teens taking Paxil. Neither does the agreement preclude insurance companies and the government from pursuing money paid to the drug maker on behalf of people who were prescribed the drug.

Source: *St. Louis Post Dispatch*

WHISTLE BLOWER LAWSUIT RESULTS IN SETTLEMENT

A drug company that illegally promoted a topical skin preparation to treat diaper rash will pay \$9.8 million in settlement of a whistle-blower suit. **Medicis Pharmaceutical Corp.** of Scottsdale, Arizona, will pay the money to the government to settle allegations that it urged pediatricians to use Loprox as a treatment for diaper rash, although the drug has not been approved for use on children younger than 10. Although doctors are allowed to prescribe medications for so-called off-label uses, it is illegal for drug companies to do so. Loprox, an anti-fungal preparation, has been approved to treat skin infections in individuals older than 10 years of age.

The settlement ends the case brought under the False Claims Act by a former sales representative for Medicis, who was joined by three other one-time sales representatives of the company. The primary whistleblowers worked for Medicis for seven years, but quit after managers pressured her to market Loprox to pediatricians. In her complaint, she said the company saw pediatricians as attractive

targets because many of their patients had Medicaid coverage. Medicis is a public company specializing in drugs for dermatological, cosmetic and podiatric conditions. The lawsuit alleged that, beginning in early 2002, Medicis trained its sales force to pitch Loprox as a diaper rash treatment, including "making false and misleading representations to pediatricians, nurses and pharmacists about data and studies showing the safety and efficacy of Loprox on infants." But for the whistleblower, this company's wrongful practices would have gone undetected. Efforts in Congress to weaken the laws relating to whistleblower lawsuits should be exposed and defeated. There is a definite need for the threat of such lawsuits to keep those in Corporate America and in government who might want to lie, cheat and steal from doing so. That's why some lobbyists are working so hard to weaken the existing law.

Source: *Kansas City Star*

ORTHO EVRA PATCH AT CENTER OF OHIO SUPREME COURT HEARING

The Supreme Court of Ohio heard a case recently involving Ortho Evra birth control patches. Lawyers for the plaintiff, who was injured after using Ortho Evra, contend that an Ohio law that limits pain and suffering damages violates an injured party's constitutional rights. The plaintiff, Melisa Arbino, filed a lawsuit claiming that her use of Ortho Evra caused permanent physical damage, life-threatening blood clots, and may result in an inability to have children. Ms. Arbino first used the patch in 2005 after the birth of her son. Within days she suffered from severe headaches and vomiting and was hospitalized with a blood clot on her brain. Two weeks later she was again hospitalized, this time with blood clots in her lungs. Ms. Arbino still has a blood clot in her brain and will be required to take blood thinners if she ever becomes pregnant again.

Currently, pain and suffering awards in Ohio are limited by law to between

\$350,000 and \$500,000 for less severe injuries. Limits on jury awards that are meant to punish companies for faulty products are also imposed. The fundamental rights to trial by jury includes the right for an individual who is injured and disabled to be fully compensated and made whole. No legislature should take away that right and especially when a person has been severely injured and permanently disabled and impaired. Interestingly, a number of consumers and safety groups are in support of the plaintiff's position against limiting pain and suffering damages. Among them are the Ohio Conference of the NAACP and Mothers Against Drunk Driving.

As we have reported, Ortho Evra is a birth control patch manufactured by Ortho McNeil, a subsidiary of Johnson & Johnson. It works by releasing norelgestromin (a progestin hormone) and ethinyl estradiol (an estrogen hormone) through the skin and into the blood stream to prevent pregnancy. The Ortho Evra patch consists of three layers and is worn continuously for one week. In 2005 Ortho McNeil released a public warning that the patch exposes women to high amounts of estrogen and could have a higher risk of developing blood clots. This followed the 2004 death of an 18-year-old who died from a blood clot after using the Ortho Evra patch. Women who use the Ortho Evra patch are exposed to 60% more estrogen than women on typical birth-control pills.

At least 500 lawsuits have been filed against Johnson & Johnson claiming that the company did not adequately test the patch's safety before releasing it on the market and that it downplayed the risk of blood clots. The company has settled a few lawsuits, but because of confidentiality details can't be released. Our firm is handling a number of these cases against the manufacturer. Chad Cook and Frank Woodson are the primary lawyers from our firm assigned to this litigation and have more information if needed.

ANOTHER VICTORY FOR HORMONE THERAPY VICTIMS

As we prepared to send this issue to the printer, we received word that a jury in Philadelphia, Pennsylvania, had returned a verdict for a New Jersey woman in the amount of \$1.5 million. The plaintiff, Mrs. Merle Simon, took Premarin and Provera starting in 1992 and switched to Prempro in 1996. She stopped taking hormone replacement drugs after being diagnosed with hormone positive breast cancer in 2002. As we have reported, until 1996, many menopausal women combined Premarin, a product manufactured by Wyeth which contained estrogen, with Provera, a product manufactured by Pharmacia & Upjohn which contained progesterin, to relieve their symptoms. In 1996, Wyeth combined the two substances in its Prempro pill.

The jury in the Pennsylvania found that Pharmacia & Upjohn, a unit of Pfizer, did not adequately warn women about Provera's breast cancer risk. The drug, on the market since 1959, was developed by Upjohn, which Pfizer acquired in 2003 along with Pharmacia Corp. Interestingly, the jury apportioned 100% of the liability in this case to Pfizer. In their verdict, jurors concluded that Upjohn's Provera was a cause of Mrs. Simon's cancer and the company provided "inadequate warnings" about its health risks. They cleared Wyeth's drugs of playing any role in Simon's cancer. Mrs. Simon's claims is the first Provera case to go to trial over against the unit of New York based Pfizer, the world's largest drug maker.

As we have reported, there have been five other hormone therapy cases that have gone to a verdict against Wyeth with the plaintiffs winning three of them. There has been one other case settled on the eve of trial. In addition, there has been a significant new order from the HT Multi-District Litigation Judge. On May 8, 2007, after several months of briefing and oral argument, Judge Wilson entered PPO number 9 which directs that case-specific discovery

proceed for a set of randomly selected MDL cases. Our firm represents the Plaintiffs in some of the cases selected by Judge Wilson.

In other news, Pharmacia & Upjohn, one of the Defendants in the HT litigation, recently pleaded guilty to one criminal charge of offering a kickback to a pharmacy benefit manager. Pharmacia & Upjohn was fined \$20 million and barred forever from participating in government-sponsored studies. Our Mass Torts HT team continues to prepare for its first trial scheduled for November in Minnesota. Ted Meadows and Melissa Prickett are the primary lawyers handling the HT cases for our firm and will try the first case with lawyers from the firm of Pearson, Randall & Schumacher, P.A., located in Minneapolis, Minnesota. Our Mass Torts lawyers are also in the process of preparing other HT cases for trial.

Sources: *MSNBC/Newsweek*, and *Bloomberg*

DEPO PROVERA LITIGATION

Our firm is currently investigating injury claims resulting from Depo Provera, a hormonal contraceptive, which is administered by intramuscular injection once every eleven to thirteen weeks. Depo Provera is manufactured by Pfizer, Inc. A recent study shows that using Depo-Provera long-term may result in significant loss of bone mass density (BMD), resulting in osteoporosis. The loss of bone mass density increases the longer Depo-Provera is used. On November 17, 2004, the FDA issued a "black box" warning regarding the long-term use of Depo-Provera and its strong causal relationship to significant loss of bone mass density, including development of osteoporosis and osteopenia. The warning reads:

Use of Depo-Provera may cause you to lose calcium stored in your bones. The longer you use Depo-Provera the more calcium you are likely to lose. The calcium may not return completely once you stop using Depo-Provera.

Due to the concerns over bone loss, both the FDA and Pfizer now recommend that Depo-Provera usage be limited to two years, unless there is no other viable method of contraception. After its introduction, Depo Provera became a favorite form of birth control in low-income medical clinics across the country due to incentives provided by the manufacturer and because the drug stayed active in the body for several months after one injection. Therefore, injuries resulting from Depo Provera may be disproportionately higher in the lower income populations. All individuals who have taken Depo Provera as a method of birth control may consider requesting a bone scan from their doctor to determine if they are suffering from osteopenia, the precursor to osteoporosis, or osteoporosis. Long term complications of osteoporosis are significant, including spinal fractures, broken bones, and compressions of the vertebrae.

To date, hundreds of lawsuits have been filed against Pfizer for damages sustained as a result of using Depo-Provera. Currently, our firm has one Depo Provera case filed and pending in Alabama, and we are investigating numerous other cases in Alabama and Florida. In December 2005, a \$700 million class-action claim was filed against Pfizer on behalf of Canadian women who used Depo-Provera and developed osteoporosis. Recently, an order was issued by the New Jersey Supreme Court ordering the consolidation of all pending and future Depo Provera cases in New Jersey state court before one judge assigned to handle mass tort cases. Over 150 individual lawsuits claiming injuries resulting from Depo Provera have been filed against Pfizer, Inc., in New Jersey. Roger Smith is the primary lawyer handling these cases for our firm.

FOSAMAX LITIGATION UPDATE

Our firm has recently filed three more lawsuits against Merck, the makers of

Fosamax. This drug, which is classified as a bisphosphonate, is used to treat osteoporosis. But, it has been linked to serious bone disease called Osteonecrosis of the Jaw (ONJ), also known as “dead jaw.” Recent reports have also suggested a link between Fosamax and irregular heart rhythms in women. These reports have been published in the *New England Journal of Medicine*. In a letter to the *Journal*, Dr. Steven Cummings of the California Pacific Medical Center Research Institute, wrote about a decade-old Merck-sponsored study of postmenopausal women which suggested an increased risk in women taking Fosamax. We will continue to evaluate Fosamax cases and will keep you updated on any new litigation developments. If you need additional information, contact Chad Cook in our office.

Source: *Associated Press*

EVIDENCE CONFIRMS PUBLIC CITIZEN'S WARNINGS ABOUT THE RISKS OF DIABETES DRUG

Avandia, a widely used diabetes pill, raises the risk of heart attacks and possibly death, according to a scientific analysis. This is another Vioxx-like example of the federal government failing to protect the public from an unsafe drug. More than 6 million people worldwide have taken the drug since it came on the market eight years ago to help control blood sugar in people with the most common form of diabetes. Currently, about one million Americans use the drug. Public Citizen has taken a strong stance on this drug and it now appears they were right in their opposition.

Pooled results of dozens of studies on nearly 28,000 people revealed a 43% higher risk of heart attack for those taking Avandia compared with people taking other diabetes drugs or no diabetes medication, according to the analysis, which was published online on May 21st. The study, published by the *New England Journal of Medicine*, also

found a trend toward more heart-related deaths. Avandia's maker, British-based GlaxoSmithKline PLC, disputed the results of the analysis, but acknowledged that its own similar review found a 30% increased risk—information it gave last August and possibly even earlier to the FDA.

The *Journal* study, showing a 43% increase in heart attacks in people using Avandia, should come as no surprise either to the government or to the drug manufacturer. In animal studies done prior to its approval, one of the most constant findings was damage to the heart. Within the first six years of approval, there have been 689 cases of heart failure reported to the FDA in patients using the drug. In addition, there have been reports of anemia which, along with heart failure, increases the risk for a heart attack.

Despite prior knowledge of serious cardiac problems, the FDA has failed to require Glaxo to adequately warn about the dangers of this drug. Because of inadequate warnings about Avandia and massive advertising campaigns, the popularity of this drug has grown so that 11 million prescriptions were filled for the drug in the United States in 2006 alone. Avandia is used to treat Type 2 diabetes, the most common form of the disease, which is linked to obesity and afflicts 18 million Americans and 200 million people worldwide. This form of diabetes occurs when the body does not make enough insulin or cannot effectively use what it manages to produce. Avandia, or rosiglitazone, helps sensitize the body to insulin and was considered a breakthrough medication for blood-sugar control. It also is combined with metformin and sold as Avandamet. Avandia had total U.S. sales of \$2.2 billion in 2006, according to IMS Health, a health-care information company. About 13 million Avandia prescriptions were filled in the U.S. last year.

The study was led by Dr. Steven Nissen and statistician Kathy Wolski at the Cleveland Clinic. It should be noted that Dr. Nissen accepts no personal fees

for consulting for any drug makers which is certainly a good thing. While the analysis doesn't spell out the actual rate of heart attacks among Avandia users, the 43% excess risk is in line with what a similar analysis found for lower doses of Vioxx use, according to Dr. Nissen.

FDA officials have issued a safety alert saying it most likely would convene an advisory panel. However, the FDA says it plans no immediate changes to the current side effect warnings on the drug's packaging.

Our firm will look at heart attack cases involving the use of Avandia. Frank Woodson and Ben Locklar will be the primary contact lawyers on this drug. If you need additional information, feel free to contact one of these lawyers.

Source: *CNN* and Public Citizen

XI. BUSINESS LITIGATION

BLUE CROSS TO PAY DOCTORS \$128 MILLION IN SETTLEMENT

Twenty-three Blue Cross and Blue Shield organizations across the country, including the plan in Alabama, will pay \$128 million to settle a nationwide class action lawsuit filed on behalf of doctors who complained about the insurers' payment and medical practices. Virtually all doctors in the country stand to benefit from the settlement, not because of the money, but because of the business changes that were agreed to by the Blue Cross defendants. Changes involve how the Blue Cross plans determine medical necessity for coverage of procedures, how fast claims are paid and how billing disputes are resolved. The lawsuit against the Blue Cross plans, filed in 2003, was the second wave of similar lawsuits filed on behalf of doctors against Aetna Inc. and 10 other for-profit insurance companies.

The settlement should involve about

900,000 medical doctors nationwide. The settlement covers more than 90% of all Blue's plans in the country, covering 77 million lives, as well as the Blue Cross Blue Shield Association. The American Medical Association has issued a statement "praising" the agreement. The AMA is calling on all health insurers to voluntarily and permanently establish business practices that permit fair and open dialogue with physicians." Archie Lamb of Birmingham and Harley Tropin, a Miami attorney, were co-lead counsel for the doctors. Some of the terms of this settlement include:

- Using a definition of medical necessity that ensures patients get care their doctors say they need, with doctors using proper medical judgment.
- Using clinical guidelines based on credible scientific evidence published in peer-reviewed medical literature.
- Giving doctors access to independent medical necessity external review.
- Establishing an independent external review board for billing disputes.
- Paying "clean" electronic claims within 15 days and paper claims within 30 days.
- Providing 90 days' notice of changes in practices and policies.

In a separate class action lawsuit, also filed in Miami, doctors reached settlements with Aetna, Cigna, Humana, HealthNet, Wellpoint about reforming payment systems. The total amount of that settlement was in excess of \$650 million. Last June, U.S. District Judge Federico Moreno threw out all claims in that lawsuit against the remaining defendants, UnitedHealthcare and Coventry Health. The doctors have appealed that decision.

Source: *Associated Press*

KPMG SUES FANNIE MAE FOR DECEPTION

KPMG LLP has sued former auditing client Fannie Mae, the biggest source of money for U.S. home loans, for "fraudulent deception" that prevented KPMG from uncovering \$6.3 billion in overstated earnings. It was alleged that Fannie Mae, from 1998 until 2004, withheld and distorted its accounting, engaging in "breach of contract, fraudulent misrepresentation, fraudulent inducement" and other wrongdoing. The lawsuit is pending in a U.S. District Court in Washington. As you may recall, Fannie Mae had sued KPMG and that case is pending. KPMG is the fourth-largest U.S. accounting firm by revenue. Fannie Mae had alleged that KPMG failed to serve its role as an independent watchdog and prevent accounting errors that Fannie Mae says led to \$1 billion in costs to restate earnings. Now, KPMG puts the blame back on Fannie Mae, saying the company's misrepresentation caused KPMG to suffer "injury to its reputation, legal costs, exposure to legal liability, costs and expenses of responding to investigations related to Fannie Mae."

Source: *Bloomberg News*

BANK GROUPS FILE SUIT AGAINST TJX OVER DATA THEFT

Bank associations in Massachusetts, Connecticut and Maine are filing suit against TJX Cos. over a data theft that exposed at least 45 million credit and debit cards to potential fraud. Banks have been saddled with costs to replace cards and cover fraudulent charges tied to the theft from TJX, the owner of nearly 2,500 discount stores, including T.J. Maxx and Marshalls. Since it disclosed the data theft four months ago, TJX has been sued in the U.S. and Canada by consumers, financial institutions and investors. The Massachusetts Bankers Association, the Connecticut Bankers Association, the Maine Association of Community Banks and at least three individual banks joined in the lawsuit filed in U.S. District Court in

Boston. The associations represent nearly 300 banks. Other state bank groups nationwide are being contacted to see whether they are interested in joining the lawsuit, which seeks class action status. The complaint will make an unfair trade practices argument under Massachusetts law, alleging that TJX failed to adequately protect sensitive customer data and misrepresented how it handled data.

The Massachusetts Bankers Association reported that its members had been contacted by credit and debit card companies about fraudulent purchases tied to the TJX breach that had been made in Florida, Georgia, and Louisiana, and overseas in Hong Kong and Sweden. The banks will try to recover "tens of millions of dollars," although the damages the banks ultimately will seek depend on future expenses from replacing cards and covering fraudulent purchases. As you will recall, on January 17th, TJX disclosed a breach of its computer systems by an unknown hacker or hackers who accessed card data from transactions as long ago as late 2002. On March 28th, TJX said at least 45.7 million of its shoppers' cards had been compromised. Independent organizations that track data thefts say the TJX case is believed to be the largest in the U.S., based on the number of customer records compromised.

TJX now says about three-quarters of the 45.7 million cards had either expired by the time of the theft or the stolen information did not include security code data from the cards' magnetic stripes. However, TJX also has said the intruders could have tapped the unencrypted flow of information to card issuers as customers checked out with their credit cards. The company and the U.S. Secret Service are investigating. The only arrests so far have come in Florida, where 10 people who aren't believed to be the TJX hackers are accused of using stolen TJX customer data to buy Wal-Mart gift cards.

Source: *Associated Press*

FORMER STUDENTS SETTLE FRAUD CASE IN WASHINGTON

Students in Washington State, who alleged they were defrauded by the now defunct Business Computer Training Institute, have reached a \$9 million settlement. An insurance company for BCTI, once based in Gig Harbor, Washington, agreed to pay \$9 million to settle claims that the school preyed on low-income students, charging them almost \$11,000 for 30 weeks of basic computer training that wasn't worth it.

If approved by the trial court, the settlement would close one phase of a class action lawsuit filed two years ago, just before BCTI closed its seven campuses in Washington and Oregon. The lawsuit claims BCTI targeted low-income students with promises of high-tech training and good-paying jobs. Instead, students got substandard training and low-paying jobs at fast-food restaurants, retailers, convenience stores and telemarketing firms. An investigation conducted last year revealed that BCTI recruited students outside welfare and unemployment offices, sometimes in violation of state law. BCTI allegedly pressured recruiters to meet enrollment quotas and fired them when they fell short. Instructors said they were pressured to keep unqualified students enrolled so the school could collect their financial aid from federal and state governments.

All of the details of the initial settlement have yet to be worked out, including how the money will be divided among the former students. Some 28,000 students who attended BCTI from 1985 to 2005 could potentially benefit. The parties have an "agreement in principle" on another feature of the case. A stipulated judgment for an additional \$55 million will be entered. That figure represents one-tenth of the estimated economic damages for the 28,000 students who attended BCTI. However, that money would have to come from a second insurance company. But that company says that its policy would not cover such damages.

Consequently, whether the students will receive anything from that aspect of the case is yet to be determined.

Source: *Associated Press*

INSURER AGREES TO PAY \$58.5 MILLION TO STATE FOR BIG DIG

In several previous issues, we have written about all of the problems in Boston relating to the tunnel project referred to as the Big Dig. The workers' compensation insurance carrier for the project has now agreed to pay \$58.5 million for excess profits it failed to return to the state. American International Group Inc.'s settlement with Attorney General Martha Coakley includes \$26 million in losses to the state, with the rest being interest. The money will be returned to the Big Dig project, which at nearly \$15 billion, is the most expensive construction project in U.S. history. AIG, one of the world's largest insurers, has been the workers' compensation carrier for the entire project. This is included for the sole purpose of letting our readers know how irresponsible some can be when they are dealing with a government project or contract and taxpayer money.

Source: *Associated Press*

XII. INSURANCE AND FINANCE UPDATE

JURY AWARDS \$39.5 MILLION TO INSURANCE COMPANIES

Two insurance companies providing insurance coverage for Deere & Co. were awarded \$39.5 million in a case arising from a warehouse fire that occurred six years ago in Mount Joy, Illinois. The jury decided in favor of Royal Indemnity and Federal Insurance after a lengthy trial. The companies sought compensation from FM Global, a loss-prevention engineering firm, which had

evaluated the massive warehouse for Deere before it moved in. Ten weeks after Deere moved in \$70 million worth of equipment—based on the recommendation from FM Global—the building burned down. The fire is believed to have started when a high-intensity lamp exploded. There was not adequate water available to fight the fire. Propane tanks on forklifts inside the building exploded as flames tore through the structure. No one was injured. While Deere & Co., based in Moline, Illinois, was not a plaintiff in the lawsuit, the company had previously received payment from its insurance company for the fire. It's rather interesting to see that insurance companies really like our judicial system when it's their "ox" that was "gored."

Source: *Insurance Journal*

SENATOR LOTT SETTLES HIS KATRINA CLAIM WITH STATE FARM

Senator Trent Lott has agreed to settle his lawsuit against State Farm Fire and Casualty Co. for refusing to cover the Katrina damage to his Gulf Coast home. Terms of the settlement with State Farm were not disclosed. Senator Lott, whose case was set to be tried in a federal court in Gulfport, Mississippi, in September, agreed to the settlement. The Senator, who in the past has publicly called for limits on lawsuits, is now sponsoring legislation that would end the insurance industry's exemption from antitrust laws. Hopefully, now that his personal claim has been settled, the powerful senator won't forget about his plans to help others who are victimized by the insurance industry.

AMERIQUEST CULTURE OF DECEPTION

Our firm is currently representing clients who have been abused by Ameriquest. We have seen a number of clients who tell us that Ameriquest inflated the appraisal on their homes, had them sign blank income statements and lied to them about the true nature

of their loans. Unfortunately this appears to be a pattern with Ameriquest. Although they won't admit any wrongdoing, Ameriquest has settled with all of the states Attorneys General for their practices. Despite the size of this settlement it will not allow for meaningful recovery to many customers who find themselves stuck in loans teetering on the brink of foreclosure because they were promised a fixed rate mortgage and delivered an adjustable rate.

A recent NPR piece had former Ameriquest employees discussing what amounted to a culture of deception. In Tampa an employee was required to watch the movie Boiler Room on his first day as training for how to call and coerce customers into refinancing. His manager encouraged him and other loan officers to actively conceal the actual costs and interest rates on loans. He says it was routine for W-2s and bank statements to be whited out and revised to make the loan work.

We have found that Ameriquest specialized in bait and switch. Former employees say it was quite common for fake fixed rate documents to be placed on the top of a stack of adjustable rate mortgage paperwork. After a customer signed everything the fixed rate forms were trashed and the customer would have no idea of the true cost of their loan for about two years when their interest rate adjusted upward drastically. Buyers, mad about a prepayment penalty were promised they would be waived and were shocked to learn later that too was a lie. Ameriquest has left thousands in a position to lose their homes. A message has to be sent that folks can't be treated like this. Scarlett Tuley is the primary lawyer from our firm handling these cases.

Source: NPR

LITTON LOAN SERVICING

Last year we successfully represented a number of clients against a large loan servicer. This year we're again finding

that servicers such as Litton are taking advantage of their borrowers. Servicers do the collection work for loans owned by other entities. The servicer's primary duty is to collect mortgage payments from borrowers and remit the payments to the investors holding an interest in the loans. The other major function is loss mitigation which is where the abuse often occurs. Servicers are typically paid a percentage of the total value of the loans they service, normally 25 basis points for prime loans and 50 basis points for subprime like the ones Litton services. However, the servicer, not the loan holder, has the right to keep any and all late fees or fees associated with default. This payment system encourages servicers to milk customers for all the fees they possibly can. Subprime borrowers are generally less sophisticated than prime borrowers and cannot prove their payments were made on time and often that all of their payments have been made.

We have seen a number of Litton-serviced loans where insurance has been force placed, payments have not been credited and late fees were charged for payments timely made. Customers should not put up with this, but often do because they feel trapped by their poor credit. Hopefully, our work for these clients will have a positive impact on the way Litton and other servicers treat their customers in the future. Scarlett Tuley is the primary lawyer from our firm handling these cases.

XIII. PREDATORY LENDING

WELLS FARGO SETTLES SUBPRIME LENDING LAWSUIT

Wells Fargo & Co. has agreed to pay up to \$6.8 million to settle a class action lawsuit over nonprime mortgage lending practices in California by its Wells Fargo Financial, Inc. unit. Wells Fargo Financial will earmark \$2.4

million for plaintiffs who are more than 60 days late on loan payments. Under the settlement, which will require court approval, qualifying class members may receive up to \$4.4 million of additional cash payments. The Association of Community Organizations for Reform Now had alleged in the lawsuit that Wells Fargo Financial failed to properly disclose points and prepayment penalties to borrowers, and inaccurately reported loan balances for some California customers to credit reporting agencies. San Francisco-based Wells Fargo is the fifth-largest U.S. bank by assets, and one of the largest U.S. subprime lenders.

Source: Reuters

GEORGIA'S PAYDAY LOAN BAN STANDS

Georgia's ban on payday lending has survived a legal challenge and that's great news. The state Supreme Court upheld the conviction of two South Georgia lenders who tried to skirt the law. The court decision says that high-interest lenders cannot avoid criminal prosecution in Georgia by disguising a payday loan as another type of transaction. While Georgia law prohibited the high-interest loans being charged for more than 100 years. The state was not successful in shutting down the payday lending industry until 2004. The General Assembly enacted the toughest payday lending law in the nation by authorizing felony and racketeering charges and permitting class action lawsuits. This decision upheld the first criminal convictions under the 2004 law.

ALABAMA LEGISLATION STALLS

It appears that efforts to strengthen Alabama's weak laws relating to payday loan sharks will die in the Alabama Legislature. My sources tell me that some lobbyists who were paid very well have used their influence to help slow things down in the Senate in order to make sure nothing passes relating to payday loans. While that may not be totally accurate, it's always easy to kill legisla-

tion when the Senate kills legislative days while engaging in “lengthy debate” on unrelated issues. Hopefully, the Senate will break the logjam and pass the bill that was sponsored by Senator Bradley Byrne, who is leaving the Senate and will take up another “line of work.” I hope that he has somebody ready to take up his bill and push it hard.

XIV. PREMISES LIABILITY UPDATE

A GREAT RESULT IN A SECURITY LIABILITY CASE IN CHAMBERS COUNTY, ALABAMA

On May 10, 2007, a Chambers County, Alabama jury returned a \$9 million verdict in favor of a resident of an apartment complex who was raped by the apartment complex’s maintenance man. The evidence at trial showed that the maintenance man raped and assaulted the plaintiff over a four-hour period after he let himself into her apartment with a key he obtained from the office at the apartment complex. The verdict consisted of compensatory damages entirely.

Testimony at trial proved that the maintenance man was a career criminal with a long felony history and that in violation of its own policies and procedures and industry standards, the apartment complex failed to run a criminal background check on the man before hiring him. Plaintiff further proved at trial that the defendants could have obtained a criminal history on the maintenance man from the Alabama Department of Public Safety and that it would have shown that he had an extensive felony history and that he was a multi-state offender. Defendants’ management employees admitted during trial testimony that:

- as part of the employment screening process, they should have obtained the man’s criminal history,
- they should not hire convicted felons, and

- had they obtained his criminal history, they never would have hired him.

Plaintiff also proved at trial that management knew the maintenance man had somehow obtained a key to the office of the apartment complex, which gave him access to keys to all of the apartments, and yet permitted him to keep it even though he was not authorized to have an office key. Plaintiff also presented testimony from a scientist at the Alabama Department of Forensic Sciences that the DNA from the rape kit obtained from the plaintiff matched that of the maintenance man.

This case was tried by Peter A. Law and E. Michael Moran of Atlanta, Georgia and Charles G. Reynolds, Jr. of Lanett, Alabama. The trial was presided over by Circuit Judge Steven Perryman. The lawyers for the plaintiffs did a tremendous job for the client.

XV. WORKPLACE HAZARDS

OSHA LETS THE FOX GUARD THE HENHOUSE

OSHA’s practices relating to workplace safety under the Bush Administration, which vowed to limit new rules and roll back what it considered cumbersome regulations that imposed unnecessary costs on businesses and consumers, have been pretty weak. Political appointees—who are quite often former officials of the industries they oversee—have eased regulations or weakened enforcement of rules on a number of safety issues. In fact, since George Bush became president, OSHA has issued the fewest significant standards in its history. To my knowledge, the agency has imposed only one major safety rule. It did issue one significant health standard, but only after it was ordered to do so by a federal court. The agency has killed dozens of existing and proposed regulations and delayed

adopting others. For example, OSHA has repeatedly identified silica dust, which can cause lung cancer, and construction site noise as health hazards that warrant new safeguards for nearly three million workers, but it has yet to require a single safeguard to my knowledge. That has done nothing for worker safety.

OSHA has adopted a “voluntary compliance strategy,” reaching agreements with industry associations and companies that allow the companies to police themselves. That news is bad for workers when it comes to workplace safety. But Administration officials claim such programs are less costly, allowing companies to hire more workers and keep consumer prices down. While the number of voluntary agreements has grown in recent years, they cover only a fraction of the seven million work sites that OSHA oversees. That means it covers less than 1% of the nation’s work force. The voluntary programs tend to have little focus on specific hazards and have no enforcement power. To put it in plain understandable language—it simply doesn’t work!

You might wonder what motivates the politicians in our nation’s capital when it comes to workplace safety. Some say it might just have something to do with campaign donations. The *New York Times* reports that three of the largest industries regulated by OSHA—transportation, agribusiness and construction—have given more than \$630 million in political campaign contributions since 2000. I wasn’t surprised to see that nearly three-quarters of that money went to Republicans. In one of his first acts in office, President Bush signed legislation repealing one of OSHA’s good accomplishments during the Clinton Administration.

The repeal was of an ergonomics standard intended to reduce injuries to factory, construction and office workers from repetitive motions and lifting. Business groups and manufacturers had lobbied against the measure, saying it would cost \$100 billion to carry out, which I suspect was a figure pulled out

of the air. In any event, by the end of 2001, OSHA had withdrawn more than a dozen proposed regulations. The agency was able to identify several safety priorities: rules on the hazards posed by dust from silica, used as a blasting agent, and noise from construction sites, which was causing a growing number of workers to suffer hearing loss. But, as expected, the agency has yet to produce either standard. But don't worry—OSHA officials say they are "working on them." There is one thing that is as sure as death and taxes and that's OSHA should know better than to allow "voluntary compliance" to be the standard for workplace safety. Hopefully, OSHA will be allowed to do its job during the next administration and get about the business of protecting U.S. workers.

MORGAN STANLEY SETTLES LAWSUIT FOR \$46 MILLION

Morgan Stanley has settled a gender bias class action suit that alleged the New York investment bank discriminated against female brokers and trainees in promotion and compensation. Under the terms of the settlement, the company has set aside \$46 million to pay claims of discrimination. The firm also will adopt new methods to ensure women aren't discriminated against when accounts of brokers who depart or go into management are redistributed and will establish new programs for training female brokers for management jobs.

It was reported that over the next five years the bank will spend \$7.5 million on training and that female brokers' pay will go up by \$16 million. The suit was filed in the U.S. District Court for the District of Columbia by six former Morgan Stanley female brokers. The class includes about 2,700 claimants who worked at the firm's retail brokerage division between August 5, 2003, and the present. Currently, Morgan Stanley employs about 8,000 brokers. The suit alleged the company discriminated against women in training and

mentoring, account assignments, and participation in company-approved "partnership" arrangements with other brokers. Some of the plaintiffs also claimed they were discriminated against during a round of layoffs in August 2005, when the company fired around 1,000 underperforming brokers. Some have claimed they were discriminated against on the basis of age.

Source: Houston Chronicle

FAMILY CONTENDS DEATHS CAUSED BY TALC EXPOSURE

The family of a 67-year-old man has filed a lawsuit against a mining company after he became the third family member to die from a rare cancer allegedly contracted from exposure to asbestos-tainted talc. Donald Lozo, who was exposed to talc while working for the Carbola Talc Mine located near Watertown, New York, died in August 2005 from the asbestos-related cancer mesothelioma. The mine ceased operations in the early 1970s and its assets and liabilities now belong to R.T. Vanderbilt Co. of Norwalk, Connecticut. Vanderbilt takes the position that its industrial talc does not contain asbestos and does not pose a cancer risk. The lawsuit accused Carbola and 75 other defendants of being negligent, careless and reckless in permitting Mr. Lozo to work in dangerous and unsafe conditions and failing to warn Mr. Lozo and other employees about the possible dangers of talc exposure.

Mr. Lozo's sister and mother also died of mesothelioma. As you may know, Mesothelioma is a rare disease associated with asbestos exposure and without hereditary basis. It occurs in approximately only one out of 100,000 persons, and even less frequently in women. Mr. Lozo's father began working at the Carbola mine in the 1930s. For decades his father would return from work at the mine with talc dust on his clothing and in the family car. The family was constantly exposed to this asbestos-laden talc dust, which also made its way

into the Lozo residence when it was released from the talc operation into the air. Mr. Lozo's father died of silicosis, a lung disease caused by inhaling silica dust. Donald Lozo, who worked for Carbola for more than a decade in the 1950s and early 1960s, experienced further exposure while continuing to work as an iron worker.

For years scientists have noted the high rates of mesothelioma in New York talc mining counties, including Jefferson County. Talc mine workers had no reason to believe that the mineral was dangerous. Additionally, published studies have independently confirmed a total of at least 15 mesothelioma deaths among talc workers in New York State. The National Institute of Occupational Safety and Health and New York State Department of Health have previously concluded New York talc was contaminated with asbestos.

Source: Associated Press

NEW YORK JURY AWARDS \$30.3 MILLION FOR INJURIES RESULTING FROM COLLAPSE OF A DEFECTIVE LADDER

A New York man has been awarded \$30.3 million for career-ending injuries when he fell from a defective ladder five years ago. The 44-year-old worker suffered severe spinal and other injuries in a building then owned by the town of Amherst that he was repairing. The fall, which occurred when the ladder failed and collapsed because of a defect, left him partly paralyzed. After a two-week trial in state Supreme Court, the jury ruled in favor of the worker and ordered insurance carriers for McGonigle & Hilger Roofing Co. to pay the sum of \$30.3 million to the worker. In 2005, another jury had found the town liable for the worker's injuries under New York's Labor Law. The town then sued McGonigle & Hilger, the roofing company. As a matter of interest, the town is self-insured for up to \$10 million, which means it pays the first \$10 million of any judgment. The verdict will likely be appealed.

COMPANIES FINED IN GAS EXPLOSION

The largest possible fine under federal guidelines was levied against Falk Corp., a Milwaukee company, and a mechanical contractor for a factory explosion that killed three people last year. The December 6th propane explosion at the Falk Corp. facility, caused by an underground pipeline leak, injured four dozen workers and left extensive damage to the complex where the company makes gears, couplings and other industrial components. The families of employees killed in the explosion have filed a wrongful death lawsuit against J.M. Brennan claiming the mechanical contractor improperly installed the pipeline, did not test it properly and discouraged a quicker evacuation that could have prevented the workers' deaths.

Falk's parent company Rexnord Industries was fined \$56,000 for eight violations of safety standards by OSHA. A mechanical contractor, J.M. Brennan Inc., was also fined \$16,800 for three violations. OSHA cited the contractor for improperly installing the underground pipeline and Falk for failing to protect the pipeline from corrosion. Both were cited for problems with training and emergency response. Rexnord says it will use OSHA's findings to improve its procedures and training. But, J.M. Brennan contends that it installed the pipeline properly and its workers acted appropriately on the day of the explosion. The mechanical contractor blamed Falk for allowing the pipeline to corrode. Both companies have asked for an informal conference with OSHA's area director.

JURY AWARDS \$6.5 MILLION TO OIL FIELD WORKER

A Texas jury awarded George Coley, an oil field worker, \$6.5 million in damages recently, after finding Midland companies, Big Dog Drilling and Endeavor Energy Resources, at fault in causing his injuries. The 51-year old casing crew worker was injured in 2003 when an eight hundred pound casing pipe fell and

crushed his left elbow. It was reported that when the worker was injured, the first response from the drilling company was to get the drilling operation restarted before caring for his injuries. Mr. Coley was employed by Lewis Casing Crews. The defense lawyers argued at trial that he and his company were at fault and caused the incident.

The verdict in this case consisted of \$1.58 million in compensatory damages and \$4.92 million in punitive damages. Punitive damages assessed by the jury against Big Dog amounted to \$420,000 and \$4.5 million against Endeavor. However, the punitives will likely be reduced due to a Texas state law that limits such awards. It was contended at trial that the safety supervisor for Big Dog Drilling had never even read the company safety manual, which is certainly not a good practice. The defendants say they will appeal the jury verdict. The case was handled by Christopher Carver, who is with the firm of Gibson Carver, located in Lubbock, Texas.

Source: Midland Reporter-Telegram

XVI. TRANSPORTATION

THE ATTACK ON DRUNK DRIVING BY MADD SHOULD BE SUPPORTED

Over 17,000 Americans are killed in alcohol-related vehicle crashes each year. Tragically, that's a death every 30 minutes on the highways in this country. MADD has a campaign to eliminate drunk driving under way. All of us have an obligation to get involved and do all that we can to stop this senseless tragedy that affects not only the victims who are killed, but also their families and friends. Those tragic events also affect the families and friends of the drunk drivers who cause the deaths since they have to share the pain and grief, but in a different way. All of us have known people—with some of them being family members—who lost their

lives in a crash caused by a driver who was legally drunk. Our firm has handled hundreds of cases where alcohol was the cause of a motor vehicle crash that resulted in deaths of innocent victims. If you want to help on this project, I suggest that you send a contribution to Madd at 511 East John Carpenter Freeway, Suite 700, Irving, Texas 75062. You can get more information by calling 1-800-GET-MADD or by going to MADD's web site, www.madd.org.

AMBULANCE CRASH RESULTS IN JURY VERDICT

A federal jury in Huntsville, Alabama, awarded \$3.1 million in damages to the family of a Madison County woman who was killed in a collision with a speeding ambulance from Tennessee in 2005. A felony charge of manslaughter is still pending in Madison County Circuit Court against the ambulance driver, Charles Christopher Eakes of Tennessee. Dianna Christine Bowden, 18, of Meridianville died in a two-vehicle crash last year involving the ambulance owned by Lincoln County Medical Center Emergency Services. The wreck occurred around at night about seven miles north of Huntsville. The wrongful death lawsuit was filed on behalf of Kurt Bowden, Dianna Bowden's father. The lawsuit alleged that Eakes was careless and negligent when the ambulance collided with Dianna Bowden's vehicle.

The case was tried before U.S. District Judge Lynwood Smith, an experienced and well-respected jurist. According to trial testimony, the ambulance was transporting a patient to Huntsville Hospital from Fayetteville on a non-emergency basis. The ambulance was traveling 81 mph in a 60 mph speed zone when it ran a signal light at the intersection and struck Bowden's automobile. The 10,000-pound ambulance pushed the 3,000-pound Dodge Neon 217 feet before both vehicles came to a halt. During his testimony, the driver said he didn't know he was violating his employer's rules. The company's rules state that a driver was not to exceed the

speed limit when transporting a patient on a non-emergency basis. The rule is on a non-emergency run where the patient is stable and non-critical, the driver is supposed to abide by the speed limit and not run red lights.

On emergency runs, the ambulance drivers are to exceed the speed limit by no more than 10 mph. A company executive, confirmed in his testimony the company's rule, but said that their driver's conduct was acceptable. A Madison County grand jury indicted Eakes in September on a felony charge of manslaughter in Dianna Bowden's death. The indictment charges that Eakes recklessly caused Bowden's death by driving in excess of the speed limit when he ran a red light and struck Bowden's vehicle. Joe King of the firm of Morris, Conchin, & King, located in Huntsville, Alabama represented the Bowden family.

LAWSUIT IN FATAL GREYHOUND CRASH SETTLED

A settlement has been reached in the lawsuit filed by three passengers in a fatal Greyhound bus crash that occurred in Santa Maria in 2005. The terms of the settlement of the lawsuit, filed in Santa Barbara County Superior Court in Santa Maria by a San Francisco children's home director and two staff members against Greyhound Lines, are confidential. The plaintiffs alleged in the complaint that the crash caused them personal injuries, severe emotional trauma and economic damages for medical bills and lost earnings. It was alleged that the Greyhound bus driver fell asleep and caused the crash in 2005. It appears, however, that the driver may have suffered an epileptic seizure, which if true could have caused the crash.

Two Greyhound passengers were killed in the early morning hours when the San Francisco-bound bus ran off the highway, and rolled onto its right side before it slammed into a tree. A 22-year-old female, who was seven months pregnant, and another passenger died in

the crash. Also forty-three people were injured. A wrongful death lawsuit filed against Greyhound was settled with the terms being confidential on March 6th. A second wrongful death lawsuit filed in a Fresno court by the survivors of another passenger who was killed had been settled in August for an undisclosed amount.

Source: *Lompoc Record*

JURY RULES FOR MOTORCYCLE RIDER IN HIGHWAY CRASH

A jury ruled in favor of a man on a motorcycle who was struck by a car. As a result, a Taiwanese shipping firm must pay \$17.7 million to the motorcyclist who was severely injured when the wife of the company's U.S. president, driving a company car, struck the motorcycle. Wen-Ting Tai turned a Wan Hai Lines company car into the motorcycle's path and caused the crash. This incident occurred four days after the woman made at least 16 mistakes and failed to pass the California driving test. The jury decided that the motorcyclist, Joyson Mallabo, was 5% at fault even though he appears to have been blameless. Many people believe riding a motorcycle is inherently dangerous and that probably accounts for the 5%. Mr. Mallabo, who was 23 at the time of the crash, was riding his motorcycle when the driver of the automobile turned left in front of him at an uncontrolled intersection. He suffered massive injuries and must now use a cane to walk. The jury decided Wan Hai Lines must pay Mallabo \$3.6 million for medical bills and lost wages and \$15 million for past and future pain and suffering. Tai's husband Ching Tarng Lin was transferred to the company's Long Beach office and his wife moved with him from Taiwan. California law allows drivers to rely on foreign licenses as long as they don't move permanently. Tai attempted to obtain a California license four days before the accident, but, as mentioned above, failed the road test. Failure means a driver made at least 16 mistakes during the test. The company must pay the price for allowing a company official's wife,

who was obviously a "bad driver," to drive a company car.

Source: *Associated Press*

PUBLIC CITIZEN FILES SUIT RELATING TO MEXICO-DOMICILED TRUCKS

In the April issue of the Report, we reported on the pilot program that the U.S. government was putting in place that will authorize up to 100 trucking companies based in Mexico to perform long-haul operations within the United States. Now, Public Citizen has joined environmental and labor groups in suing the federal government to challenge what they refer to as "an illegal pilot program." The project clearly violates federal requirements that the public receive notice and time to comment. The project also would have significant environmental and public safety repercussions.

Public Citizen, the Sierra Club, the Environmental Law Foundation, the International Brotherhood of Teamsters, the Brotherhood of Teamsters' Auto and Truck Drivers Local 70 and the Owner-Operator Independent Drivers Association filed the lawsuit in a California federal court against the U.S. Department of Transportation (DOT) and the Federal Motor Carrier Safety Administration (FMCSA). The groups are seeking an injunction requiring the DOT and FMCSA either to comply with the law by providing public notice of the pilot program and an opportunity for the public to comment on the program—or to set aside the pilot project as unlawful.

Mexico-domiciled motor carriers currently are permitted to operate in the United States only in specified commercial zones along the southern borders of California, Arizona, New Mexico and Texas. The zones vary in size from approximately three to 20 miles inland from the U.S. border. On February 23rd, DOT Secretary Mary Peters announced a pilot program to authorize select Mexican trucking companies to perform long-haul operations within the U.S. beyond the current commercial zone and across the nation's roadways.

Despite numerous requests by Congress and by environmental, public interest, labor and industry organizations to Secretary Peters and the DOT for information about the pilot program, the details of the project are still shrouded in secrecy. The plaintiffs in the group are asking the court to find that the failure to publish a detailed description of the pilot project in the Federal Register and the failure to provide notice and an opportunity for public comment violate federal law. They are also seeking an injunction against further implementation of the pilot program unless the agencies comply with these requirements.

The Clinton Administration refused to open the U.S. to Mexican trucking companies because of concerns that the trucks present safety and environmental hazards. Mexico filed a challenge under NAFTA, and in 2001, won a ruling from a NAFTA tribunal ordering the U.S. to open the border or face permanent trade sanctions. The Bush Administration announced it would comply with the tribunal's order. There have been a number of battles fought since that time—both in the courts and in Congress—and the fight continues. The Bush Administration should realize that safety and protecting the environment are important and put a stop to the pilot program.

Source: Public Citizen

JURY FINDS TRUCK DRIVER AND EMPLOYER RESPONSIBLE FOR DEATHS IN FATAL CRASH

In a case tried in Texas, a jury has ruled that a truck driver and his employer, EnviroClean Management Services Inc. of Dallas, were responsible for a crash that resulted in injuries and a death. The driver, who had cocaine in his system, crashed into a line of cars, and three people were injured, including a 76-year-old man, who suffered from his injuries for months before dying. The jurors awarded about \$9.7 million in actual damages and \$11 million in punitive damages to the widow in the death case.

Jurors heard evidence during the trial that EnviroClean had never checked the employee's driving record, which included convictions for driving with a suspended license, and that the company's personnel records on the driver had strangely "disappeared." Regulators had previously cited the company for not screening its drivers for drugs. This case is a typical example of what can happen when companies don't check out their drivers before turning them loose with company vehicles. That is happening in fact in far too many cases.

Source: Dallas Morning News

XVII. ARBITRATION UPDATE

SENATOR SESSIONS' BILL WILL GUARANTEE ARBITRATION FOR CONSUMERS

A bill was introduced recently in the U.S. Senate by Senator Jeff Sessions—which if passed—will lock in mandatory, binding arbitration for all consumers. While the bill, S.1135, has some appearance of fairness, the reality is it will guarantee that arbitration will apply and govern from now on in all consumer transactions. I hope that all of the Democratic Senators and those Republicans in the Senate who are really concerned with the rights of individuals, will take a long and hard look at this bill. The bill, which has a catchy title, "The Fair Arbitration Act of 2007," should be amended to ban mandatory, binding arbitration in consumer transactions. Incidentally, any bill that labels itself as being "fair" should always be examined very carefully. Real fairness would require arbitration only when both parties to a transaction agree to it **after** a dispute arises and not allow one party to require it **before** a dispute ever occurs. As we all know, large corporations demand arbitration at the outset or slip it in later, but before any dispute arises. It would certainly appear that

approach would be the only fair thing to do would be to impose a ban!

SENATOR WANTS TO CURTAIL ARBITRATION IN THE FARM INDUSTRY

A bill that would limit mandatory arbitration in contracts farmers sign with agribusinesses is being considered by the U.S. Senate Judiciary Committee. The bill (S. 221), sponsored by Charles E. Grassley, (R-IA), would allow arbitration only when both parties agree it would be the best way to settle grievances. Livestock farmers often contract out their services, equipment and land to large firms, which stipulate that all complaints must be settled through binding arbitration. If a contract includes such a clause, farmers are forced to bring any complaint to an arbitrator (a private court) rather than exercising their constitutional right to file a lawsuit. Consolidation in the livestock industry has created a "take it or leave it" environment where farmers must either sign the contracts or risk not being able to sell their hogs and cattle, according to Senator Grassley. At the risk of going bankrupt, farmers often ignore unfair treatment rather than take a firm to court. Anybody who has been in the farming business understands what the phrase "short end of the stick" really means.

Senator Grassley's measure has the support of Committee Chairman Patrick J. Leahy, (D-VT), and other members of the committee and that's good. The bill is part of Senator Grassley's overall effort to restore competition to the farming industry. Consolidation of small operations into agribusinesses makes it hard for the family farmer to survive. I encourage all of our readers to contact their senators and urge them to back this bill. I am told that Senator Jeff Sessions opposes the bill. Even so, our Alabama readers still need to let him know farmers in Alabama still vote.

Source: Congressional Quarterly

BILL WOULD BAR MANDATORY ARBITRATION IN CONSUMER CONTRACTS

There is another bill addressing predatory mortgage lending practices that is currently in a house committee. This bill contains a prohibition on the enforcement of mandatory pre-dispute arbitration agreements in consumer contracts. According to Rep. Stephanie Tubbs Jones (D-OH), who introduced H.R. 2061, this prohibition is designed to “allow consumers to settle disputes through the court system if they choose to and not be held to mandatory arbitration.” However, nothing in the bill would restrict the ability of parties to agree to use arbitration after a dispute arises or place limitations on those agreements. I believe this legislation is absolutely necessary and is badly needed. There is no way to justify mandatory, binding arbitration in consumer contracts and this legislation, if passed, would solve a problem for all consumers.

Similar legislation was introduced in the past two Congressional sessions, however, none ever emerged from committee. H.R. 2061 would add a new Title X to the Consumer Credit Protection Act, 15 U.S.C. 1601 et seq. Its operative provision is Section 1001, which says, “A written provision in any consumer transaction or consumer contract which requires binding arbitration to resolve any controversy arising out of such transaction or contract, or the refusal to perform the whole or any part of the transaction shall not be enforceable.” This prohibition would apply to any transaction involving the sale or rental of goods and services, the extension of credit, or the provision of any other product or services to an individual “primarily” for personal, family, or household purposes. It also applies to any consumer credit transaction secured by the consumer’s principal dwelling.

However, Title X expressly does not apply to post-dispute arbitration agreements involving consumers. Furthermore, if enacted, it would not affect existing state or federal arbitration laws unless in conflict with its purposes, and

then it would affect them only to the extent of the inconsistency. Title X could affect a great many transactions if enacted because it would not only apply to all consumer transactions and consumer contracts entered into on, or after the date of the enactment—it would also apply to “all controversies pending or filed on, or arising after,” that date. At press time, this bill was awaiting action in the House Committee on Financial Services. I urge all of our readers to contact the House member in the Congressional District and ask for their support of H.R. 2061.

Source: ADRWorld.com

XVIII. NURSING HOME UPDATE

NURSING HOME SETTLES LAWSUIT

A nursing home company in Nebraska has settled a lawsuit that accused it of gross neglect of its residents. A female resident developed an infection during her stay at the Life Care Center of Elkhorn that required surgery. Terms of the settlement between the resident’s family and Life Care Centers of America of Cleveland, Tennessee, are confidential and can’t be disclosed. According to the lawsuit, which was pending in federal court, the nursing home staff allowed the woman to lie in her own feces and urine for extended periods after her back surgery. On at least one occasion, a staff member told her to get her own water even though she couldn’t get out of bed. Near the end of the woman’s stay at the home, she discovered a discharge from her surgical incision, but staff at the facility did not tell her doctor about the condition for several days. Later, she developed blood clots in the artery leading to her lungs and a “super-infection of the bowel,” which led to surgery to remove most of her colon.

Life Care Centers of America owns and manages more than 260 facilities in

28 states, including retirement communities, assisted-living facilities and nursing homes. According to the state Health and Human Services System, Life Care Center of Elkhorn was placed on probation for six months in 2003 because of care issues. Nurses who used to work at the home in west Omaha said the facility was often short on nurses, and some evenings one registered nurse was responsible for 120 patients, according to depositions taken in the case. The nurses also said they occasionally had to do laundry at night before they could change a patient’s sheets. The Life Care Center of Omaha also served a six-month probation in 2004, according to HHS. This is a classic example of why mandatory, binding arbitration has no place in nursing home admission forms. Had this case been in arbitration, it would have never settled.

Source: Associated Press

XIX. HEALTHCARE ISSUES

FDA REJECTS MERCK’S VIOXX SUCCESSOR

The Food and Drug Administration has rejected Merck & Co.’s request to market a successor to Vioxx in the United States. The move was widely expected, after a panel of FDA advisers voted 20-1 against approving Arcoxi, a drug in the same class of drugs as Vioxx. Despite the safety concerns in the United States, Arcoxia is on sale in 63 other countries. Merck intends to keep trying to get it on the U.S. market. It appears that Arcoxia had been poised for approval until Vioxx was pulled from the market. Two months later, the FDA issued what’s called an “approvable” letter, saying it could approve Arcoxia, but only if Merck provided further safety and efficacy information for the drug. Since that time, Merck has produced results from further studies of Arcoxia, but doctors questioned those

results because Merck compared Arcoxia in its tests to another painkiller that has elevated risk of heart attacks and strokes. The FDA did its job in this case, but the strong opposition from groups like Public Citizen was a definite factor in getting the agency's attention.

FDA SEEKS ANTIDEPRESSANT SUICIDE WARNING

The Food and Drug Administration reports that young adults face an increased risk of suicidal thoughts and behavior when they first begin taking antidepressants and should be warned about the danger. The agency asked makers of the drugs to expand its warning labels to include adults between the ages of 18-24. Currently, the labels include similar warnings for children and adolescents. Eli Lilly and Co. and Pfizer Inc., the makers of Prozac, and Zoloft respectively and other pharmaceutical companies claim that they will comply with the FDA's request. The proposed labeling changes would note that studies have not shown this increased risk in adults older than 24 and that adults 65 and older taking antidepressants have a decreased risk of suicidal thoughts and behavior. The expanded warnings would emphasize that depression and certain other serious psychiatric disorders are the most important causes of suicide.

While antidepressant medications benefit many patients, it's critically important that doctors and patients are made aware of the risks. That is the position taken by Dr. Steven Galson, the FDA's drugs chief, in his public statement. The FDA advises that patients of all ages starting on antidepressants should be "monitored appropriately and observed closely" for worsening symptoms, suicidal thoughts or behaviors or unusual changes in behavior.

For every 1,000 patients ages 18-24 treated with antidepressants, the FDA would expect there would be five additional patients who have suicidal thoughts or exhibit suicidal behavior,

according to Dr. Thomas Laughren, who oversees psychiatric drugs for the FDA. The agency's analysis was based on studies of 11 antidepressants in more than 77,000 patients. The proposed changes came with the endorsement of FDA expert advisers. While some experts have argued that the changes are overdue, others maintain they could keep drugs from those who need them. This is a classic example of where the benefits of treatment are balanced against the risk of increasing suicidal thoughts and behaviors in some patients. *The Journal of the American Medical Association* study actually found the risk with these drugs is lower than what the FDA identified in 2004, the year the agency warned the public about the risks of the drugs in children. After that warning, doctors wrote children fewer prescriptions for antidepressants. It was reported that U.S. youth suicides increased. The FDA apparently doesn't know if the previously strengthened warnings led to the decrease in prescriptions or the increase in youth suicides. Nevertheless, the agency has shown its concern, which is always good.

Source: *Associated Press*

CHROMIUM IN DRINKING WATER CAUSES CANCER

A type of chromium highlighted in the film "Erin Brockovich" causes cancer in lab animals when they drink it in water, and it could be harmful to people, according to the U.S. National Institutes of Health. Hexavalent chromium, also called chromium 6, already has been shown to cause lung cancer when inhaled and is controlled by the EPA, as well as by states. It is best known as the contaminant exposed by Erin Brockovich, which led to a great movie. The sad part of that story is that it was truth and not fiction.

Environmentalists, who have been fighting for decades for tighter limits on how much chromium can be present in drinking water, believe that the findings offered a basis for such restrictions.

High doses of chromium 6 given to rats and mice in drinking water caused malignant tumors, the two-year study by the NIH's National Toxicology Program or NTP found. The animals were given much higher doses of chromium than people would ever encounter in drinking water, which is the usual practice in testing chemicals for cancer-causing potential.

Hexavalent chromium compounds are often used in electroplating, leather tanning and textile manufacturing and have been found in some drinking water sources. From 1987 to 1993, according to the Toxics Release Inventory, chromium compound releases to land and water in various U.S. states totaled nearly 200 million pounds. Renee Sharp, a senior analyst at the Environmental Working Group, whose group has lobbied tirelessly for tighter regulation of chromium and other chemicals, observed:

The chromium industry has been trying to convince regulators for years that hexavalent chromium is actually quite safe when consumed via drinking water, even though it has long been known to be carcinogenic when inhaled. NTP's findings will finally allow state and federal regulators to set drinking water standards based on up-to-date sound science, rather than having to rely on old, inadequate, and/or biased studies often funded by chromium polluters.

Source: *Reuters*

XX. ENVIRONMENTAL CONCERNS

JUDGE DENIES DELAY IN RHODE ISLAND LEAD PAINT CLEANUP

Plans for a large-scale cleanup of Rhode Island homes contaminated with lead paint will move forward after a

request by manufacturers who lost the landmark lawsuit to delay the process was denied. As you will recall, a jury verdict last year requires three former lead paint makers—Sherwin-Williams Co., NL Industries, Inc., and Millennium Holdings LLC—to clean up homes containing the toxic substance. The process has been estimated to cost billions of dollars. The defendants had asked Superior Court Judge Michael Silverstein to put the entire process on hold until the Rhode Island Supreme Court rules on their appeal.

The judge denied that request, saying he believed the companies did not have a good chance of getting the verdict overturned. Judge Silverstein has asked both sides to recommend experts, or special masters, who could help him in devising an abatement plan. The state recommended a single person, while the defendants suggested a panel of experts drawn from different disciplines. The judge will ultimately decide whom to select as the special master. A jury in February 2006 found the companies liable for creating a public nuisance by manufacturing and selling a toxic product. A fourth defendant, Atlantic Richfield Co., was found not responsible.

EPA PROPOSALS COULD CRIPPLE THE CLEAN AIR ACT

The Environmental Protection Agency recently issued proposed rules that would permit coal-fired power plants to increase emissions, which contradict not only the Clean Air Act but also the recent United States Supreme Court opinion we wrote about in May. The proposed rules would exempt coal-fired power plants from the Clean Air Act's key provisions requiring modern pollution controls for plants upgrading their facilities, thereby increasing pollution. This proposal is substantially the same as the industry's position that was rejected by the Supreme Court in the Duke Energy case.

The Clean Air Act provision at risk specifically requires older plants under-

going major changes to also limit their emissions to current standards. Large soot and smog producing companies that have been searching for a way around this provision may use the new rules, if adopted, to avoid meeting emissions standards. John Walke, the clean air program director for the National Resources Defense Council, made this observation:

This move by EPA represents defiance of the Supreme Court decision and a rush to reward coal-fired power plant lawbreakers. It's breathtaking, as a matter of logic and public safety, that the Bush administration would adopt the dirtier, losing position of polluting lawbreakers that EPA is prosecuting, and make lawbreakers' demands the law of the land.

The EPA should be taken to task by Congress for its defiance of the U.S. Supreme Court. However, it seems very clear that the real culprit may well be the Bush White House.

Source: National Resource Defense Council

DUPONT SETTLES BIRTH DEFECT LAWSUITS

Dupont Company has agreed to pay \$9 million dollars to settle two lawsuits alleging that the fungicide Benlate caused birth defects in children. Dupont reached a tentative settlement of lawsuits filed in 1997 on behalf of children in Britain and New Zealand born with no eyes or with abnormally small eyes. The allegation in the complaint was that the birth defects were the result of children being exposed to Benlate while in the womb. This settlement comes after the Delaware Supreme Court last year upheld a lower court ruling granting Dupont summary judgment in a third lawsuit, after rejecting opinions offered by two expert witnesses for the plaintiffs as being inadmissible. I understand that if this settlement is approved by the court and finalized, it will resolve all birth defect claims known by Dupont to exist. Hopefully, the court will look long

and hard at this settlement before approving it considering that the amount of money seems small for this type case.

As we have reported, Dupont has had other legal problems. For example, six Hawaii plant nursery operators who had claimed that Benlate damaged their crops, have settled their lawsuit against Dupont. The settlement was reached one day before a federal judge in Honolulu was set to start jury selection for the trial of the case.

Dupont, which began manufacturing Benlate in the 1950's, decided to halt production in 2001 in the face of mounting crop damage claims. The company has paid more than \$1 billion dollars in settlements and legal fees on claims of damage from Benlate.

CHILDREN FACE EXPOSURE TO PESTICIDES

An Associated Press investigation has found that over the past decade hundreds, possibly thousands, of schoolchildren in California and other agricultural states have been exposed to farm chemicals linked to sickness, brain damage and birth defects. The family of at least one California teenager believes that pesticides caused her death. There are no federal laws specifically against spraying near schools, and advocates say California and the seven other states that have laws or policies creating buffer zones around schools to protect them from pesticides don't do enough to enforce them.

The Environmental Protection Agency does not keep comprehensive national figures on students and teachers sickened by drifting pesticide. In California, the number one farm state, there were 590 pesticide-related illnesses at schools from 1996 to 2005. More than a third of those were due to pesticide drift. Activists say that those numbers are low and that many cases are never even reported. As suburbs push closer to farmland, the rate of pesticide poisoning among children nationwide has risen in recent years, according to a 2005 study

in the *Journal of the American Medical Association*. The study found that 40% of all children sickened by pesticides at school were victims of drifting pesticides carried on the breeze. Research on pregnant women exposed to common pesticides has suggested higher rates of premature birth, and poor neurological development and smaller head circumferences among their babies.

The effects on children of small, repeated exposures over a long period of time are unclear, said University of California, Berkeley epidemiologist Brenda Eskenazi. But acute pesticide poisoning can cause nausea, blurred vision, an abnormally fast heart rate, paralysis and death. EPA officials say they have no real idea how often pesticides drift onto school grounds. The EPA must register pesticides before they are sold, but federal law does not restrict where they can be sprayed. Once the EPA approves a product, federal law requires manufacturers to report any “unreasonable adverse effects on the environment of the pesticide” that their products cause. Activists say the industry is essentially allowed to police itself. As you may know, California has some of the strictest pesticide laws in the nation. Under that state’s law, growers and pest control companies can be fined if pesticide drifts from a field and sickens people. A 2002 law allows county authorities in California to establish a no-spray buffer zone of a quarter-mile around schools.

Source: *Associated Press*

XXI. TOBACCO LITIGATION UPDATE

CALIFORNIA SMOKER WINS IN SECOND TRIAL

A second trial of the Whiteley tobacco case has taken place in California. A San Francisco jury has again found two major tobacco companies liable for

damages related to Leslie Whiteley’s habit of smoking cigarettes. The jury awarded about \$2.5 million in compensatory damages to Mrs. Whiteley’s husband, which was more than the \$1.7 million in damages the family won in the first trial. An appellate court had ordered a retrial of the case after that verdict. Back in 2000, the jury in the first trial awarded Mr. Whiteley and his wife a total of \$21.7 million—including \$20 million in punitives, \$10 million each against two tobacco companies. An appeal court overturned the entire verdict in 2004 and in its order substantially limited the plaintiffs’ case for a second trial. The appeals court concluded the defendants could not be held liable for certain conduct during a 10-year window closed by the legislature beginning in 1988. In the retrial, it appears that only R.J. Reynolds will face punitive damages.

The jurors found that R.J. Reynolds & Philip Morris had made “false promises” and committed “intentional” and “negligent” misrepresentations in statements about the dangers of smoking cigarettes. A smoker since age 13, Mrs. Whiteley sued in 1999 claiming the tobacco companies misled her about the dangers of their products. She died at age 40 after the first trial ended. In order to get punitive damages, the plaintiff needed nine of the 12 jurors to answer any of six questions regarding the companies’ conduct in the affirmative. The plaintiffs got no more than eight votes on all but one of those questions. The vote on a single finding of malice against R.J. Reynolds came out with 9 jurors voting yes and 3 no. Philip Morris escaped exposure on the same question by a vote of 8 to 4. In the second phase the jury awarded only \$250,000, which was substantially less than the \$20 million awarded in the first trial. This makes the total verdict about \$2.8 million, which hopefully will now be paid to the family. Madelyn Chaber of the firm of Paul, Hanley & Harley LLP in California represented the family in both trials and even though the punitive phase didn’t

go well, she has done a great job for the family.

Source: *Associated Press*

XXII. THE CONSUMER CORNER

PUBLIC SERVANTS JOIN FORCES TO FIGHT FOR CONSUMERS

Two public servants, working hard for the public good, are joining forces in an effort to protect consumers on important safety and health issues. The federal government is doing such a sorry job of protecting America citizens when it comes to our food supply, it’s downright scary. Hopefully, things will get better and soon. I don’t believe that most folks realized how unsafe our food supply actually is in all too many cases. Commissioner Sparks and Rep. Artur Davis, who are true consumer advocates, are taking the lead in an effort to make our food supply safe.

Commissioner Sparks has revealed the results of tests conducted on samples of imported fish from Malaysia, Indonesia, China, Thailand, and Vietnam. The samples were obtained from nine different food storage warehouses between February 13, 2007, and March 29, 2007. The two types of fish that were tested include catfish from China and a farm-raised basa type fish from Indonesia, Thailand, Vietnam, and Malaysia. Based on the results of analysis from thirty-three fish samples, Commissioner Sparks has issued an automatic Stop Sale order for all catfish from China. Additional testing will be required for the farm-raised basa type fish products from Thailand, Vietnam, and Malaysia.

Twenty samples of catfish from China were collected for analysis. Of those twenty, fourteen tested positive for fluoroquinolones, an antibiotic banned for use in the United States by the FDA. The samples found in violation represent approximately 214,260 pounds of catfish and there are approximately

300,000 additional pounds of product suspended pending analysis. Thirteen samples of basa type fish products from Indonesia, Thailand, Vietnam, and Malaysia were tested. Five of these samples tested positive for fluoroquinolones. The five samples that tested positive were from Thailand, Vietnam, and Malaysia. All samples tested negative for malachite green.

Joining with Commissioner Sparks, Rep. Artur Davis (D-Birmingham) has called on the FDA for tougher inspection standards for catfish products imported from China. This move by Rep. Davis follows the “stop sale order” issued by Commissioner Sparks last month. In a letter addressed to the FDA Commissioner, the Alabama congressman offers his support of the decision by Commissioner Sparks’ to enact the ban. He also calls for tougher inspection standards for Chinese imports, as well as a renewed interest by the agency for global food and safety standards, based on the continuously emerging worldwide economy. We must do a better job in this critically important area of concern. It’s good to see two very dedicated public servants working together for the common good. They need more help in Congress, at the FDA and in the Bush White House.

PET FOOD PROBE POINTS OUT SERIOUS PROBLEMS

It actually took a sad episode relating to pets to get the public’s attention concerning our food supply problems. We have witnessed hundreds of dogs and cats dying and thousands more made sick because of “bad” pet food. That was unbelievable and sad. How a \$15 billion industry could go virtually unregulated by the federal government is indefensible. It has become quite apparent that the pet-food companies don’t have a clue what’s in the food they sell. It’s even more tragic that neither does the federal government.

An industry, whose profits depend on the trust of consumers to escape regula-

tion, is sickening in itself. The government should be regulating the industry. In its defense, the FDA has neither the budget nor the staffing to do an adequate job of dealing with this problem. Maybe it took a wake-up call like this to get Congress’ attention. The FDA has an obligation to protect this nation’s food supply for both humans and pets. That means the domestic, as well as the foreign imports, of food products. From all accounts the FDA gets a failing grade on this score. Congress must insist that the FDA do its job and make our nation’s food supply as safe as it can be. President Bush should be leading the effort to make sure we get food inspections and other regulation on the right track.

THE ROLE OF THE CPSC IS VERY CLEAR

The U.S. Consumer Product Safety Commission has received a great deal of attention recently because of the nomination of a person with an anti-consumer record to head the commission. As you may know, the CPSC is charged with protecting the public from unreasonable risks of serious injury or death from more than 15,000 types of consumer products under the agency’s jurisdiction. Deaths, injuries and property damage from consumer product incidents cost the nation more than \$700 billion annually. The CPSC is responsible for protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard or can injure children. The CPSC is tasked with protecting the public—and especially children—from serious injury or death and monitors more than 15,000 types of consumer products. Reports about product hazards are mandated by the Consumer Product Safety Act, one of the key laws governing the CPSC’s role in protecting consumer safety.

There has been a 30% decline in the rate of deaths and injuries associated with consumer products over the past 30 years. The CPSC’s work to ensure the safety of consumer products—such as

toys, cribs, power tools, cigarette lighters, and household chemicals—is said to have contributed significantly to this decline. That’s why it’s so critically important to have a director of the commission who is independent and free from ties to any industry. It’s no time to stop the progress that has been made and certainly not the time to reverse the trends. The President is making a nomination of a person to head the CPSC—which if approved by the U.S. Senate—will be a step back into the dark ages for this most important agency.

Michael Baroody, President Bush’s nominee to chair the CPSC, was the top lobbyist for the country’s most powerful industry trade association. He served in that capacity when the group supported weakening guidelines for reporting information about dangerous products. According to a report released last month by Public Citizen, the requirements that the National Association of Manufacturers (NAM) and its allies sought to weaken had been responsible for more than 80% of the fines issued by CPSC over the past decade. NAM’s members and its coalition partners were responsible for paying more than half of those fines. The report’s findings underscore the inappropriateness of President Bush’s choice of Baroody, a career lobbyist for the manufacturing industry, to chair the agency that is charged with protecting consumers from unsafe products.

With Baroody serving as its executive director for lobbying efforts, NAM supported a move to weaken agency protocols that dictate when companies—including NAM members—must immediately report information about potentially hazardous product defects. The changes NAM successfully pressed for could affect the agency’s ability to issue timely decisions to recall dangerous products. Public Citizen President Joan Claybrook hit the nail squarely on the head when she stated:

As head of the CPSC, Baroody would be in charge of administering the weakened disclosure guid-

ance his industry association sought, presenting a serious and unavoidable conflict of interest. Under his authority, consumer and public safety would be at risk, while the companies he represented for years would save millions in future fines.

To appoint a person such as Baroody—with his record of unrelenting hostility to the safety of consumers, including small children—is unthinkable. He should not be confirmed to lead a safety agency that has such a vital role in protecting American families.

DELL FACES NEW YORK SUIT OVER CONSUMER COMPLAINTS

New York State Attorney General Andrew Cuomo has sued Dell, Inc. over consumer complaints against the computer maker, contending that the company engaged in deceptive financing practices. The suit, filed in New York state court in Albany, accuses Dell and its financial services unit of misleading customers with enticing financing offers that carry many restrictions and limitations. The Attorney General wants an injunction against Dell's practices, and unspecified damages to affected customers.

The complaint says that while Dell offers promotions such as a "no-interest" period of financing to computer buyers, the company uses "ultra-restrictive underwriting guidelines" that prohibit the vast majority of consumers, even those with excellent credit records, from qualifying. Dell then offers many of those who are denied the promotional financing the regular plan under which consumers receive an open line of credit at interest rates that often exceed 20%.

Source: Reuters

LAWSUIT FILED IN TENNESSEE OVER PEANUT BUTTER ILLNESS

A class action lawsuit stemming from the massive peanut butter recall has

been filed in Tennessee against Con Agra, the makers of the Peter Pan and Great Value peanut butter brands. Five plaintiffs allege that they became sick after eating peanut butter contaminated with salmonella. There have been more than 300 cases filed in 39 states. This lawsuit alleges that Con Agra failed to provide a safe product for consumption. The suit also claims salmonella killed one of the plaintiffs, a man who was getting chemotherapy treatment for cancer.

Con Agra says after a two-month long investigation it was determined the salmonella came from moisture from a leaky roof and faulty sprinkler. Apparently, all potentially contaminated peanut butter has been recalled. Death can occur from salmonella especially if a person's immune system is already weakened. While salmonella infection may cause nausea and diarrhea in some people, the infection can be fatal. The class action lawsuit is being handled by the firm of Craft and Sheppard, a Tennessee firm, with offices in Columbia and Murfreesboro.

BILLING BY HOSPITAL OF UNINSURED PATIENTS QUESTIONED

The growing number of Americans who find themselves without health insurance are being billed top dollar for their hospital care. A recent study shows just how costly that is. Uninsured patients on average are billed 2-1/2 times more than what the insured are billed through their health plans, and more than three times what is billed to patients through Medicare, according to the study that appears in the May 8th issue of *Health Affairs*. In effect, the uninsured are billed at full price, while health plans and Medicare receive deep discounts.

Hospitals might charge \$12,500 for an appendectomy, for example, but collect only \$5,000 from a health insurance plan. Members of the plan actually pay a lot less, through nominal co-pays or deductibles. Health plans can negotiate

such discounts because they can direct a large number of patients to certain hospitals by making them part of their provider network. Uninsured patients do not have such leverage and may face full hospital prices. As a consequence, uninsured patients, who are billed full prices, are left with exorbitant hospital bills that are impossible to pay, said Dr. Gerard F. Anderson, author of the study and a healthcare researcher at Johns Hopkins University. As Dr. Anderson observed: "Hospitals shouldn't be charging three times Medicare rates especially from poor people who are uninsured." As expected, hospital groups criticized the study.

According to the Kaiser Family Foundation, a research institute, about 15% of the nation's 45 million uninsured earn above 350% of the federal poverty income level, meaning they make too much to qualify for hospital discounts in many cases. But they are also too poor to afford health insurance. There have been a number of lawsuits filed around the country alleging price gouging and aggressive collection methods. Last year, two California-based hospital systems, Sutter Health and Catholic Healthcare West, paid hundreds of millions of dollars to settle lawsuits charging they gouged uninsured patients. Sutter now offers discounts to all uninsured patients, the amounts depending on their incomes. Our firm is currently handling a lawsuit that is scheduled to be tried later this year in Alabama.

Source: Los Angeles Times

BUSH ADMINISTRATION FINALLY RECOGNIZES ID THEFT AS A MAJOR PROBLEM

The U.S. Attorney General and the Federal Trade Commission have announced completion of the President's Identity Theft Task Force strategic plan to combat identity theft. The plan, which is sort of late in coming, focuses on ways:

- to improve the effectiveness of criminal prosecutions of identity theft;

- enhance data protection for sensitive consumer information maintained by the public sector, private sector, and consumers;
- provide more effective guidance for consumers and the business community; and
- improve recovery and assistance for consumers.

It has been recognized for a good while that identity theft is a crime that goes far beyond the loss of money or property. It's a crime that can rob innocent people in a number of ways. The strategic plan released by the government is part of a comprehensive effort to fight the crime of identity theft, protect consumers, and help victims put their lives back together. Highlights of the government's recommendations include the following:

- The unnecessary use of Social Security numbers by federal agencies, the most valuable commodity for an identity thief, will be reduced;
- National standards will be established that require private sector entities to safeguard the personal data they compile and maintain and to provide notice to consumers when a breach occurs that poses a significant risk of identity theft;
- A broad, sustained awareness campaign by federal agencies will be implemented to educate consumers, the private sector and the public sector on methods to deter, detect and defend against identity theft; and
- A National Identity Theft Law Enforcement Center will be created to allow law enforcement agencies to coordinate their efforts and information more efficiently, and investigate and prosecute identity thieves more effectively.

The Task Force's recommendations also include several legislative proposals designed to fill the gaps in current laws criminalizing the acts of many identity thieves, and ensure that victims can

recover the value of the time lost attempting to repair damage inflicted by identity theft. These proposals include the following actions:

- The identity theft and aggravated identity theft statutes will be amended to ensure that identity thieves who misappropriate information belonging to corporations and organizations can be prosecuted;
- New crimes will be added to the list of offenses which, if committed by identity thieves in connection with the identity theft itself, will subject those criminals to a two-year mandatory sentence available under the "aggravated identity theft" statute;
- The statute that criminalizes the theft of electronic data by eliminating the current requirement that the information must have been stolen through interstate communications will be broadened;
- Existing statutes will be amended to assure the ability of federal prosecutors to charge those who use malicious spyware and keyloggers; and
- The cyber-extortion statute will be amended to cover additional, alternate types of cyber-extortion.

In addition to the release of the Task Force's Strategic Plan, a Web site was launched, <http://www.idtheft.gov>, which contains the full Strategic Plan. It is designed to serve as clearinghouse for educational resources for consumers, businesses, and law enforcement on ways to prevent and detect identity theft, and help victims recover. While the government seemed to move much too slow on this most critical issue, at least, it did take action that should bring about some needed relief. However, the recommendations that take will require legislative action could slow things down.

SPRINKLER RECALL FINALLY NEARS AN END

The Consumer Product Safety Commission and Tyco have announced plans

to conclude the six-year recall of 35 million defective sprinkler systems, including a media blitz to get the remaining bad sprinklers in schools, nursing homes, hospitals and residences replaced. Six fire-related failures of sprinklers that resulted in property damage were reported. Fortunately, no deaths or injuries have been reported. Howard Tarnoff, the CPSC lawyer who negotiated the recall in 2001, says people and institutions with faulty sprinklers will have until August 31st to seek replacements. After that time, Tyco won't be required to replace the sprinklers, although it could still choose to, according to the CPSC.

Tyco says that more than 60% of the defective sprinkler heads have been replaced or are being replaced. The seals on some of the sprinkler heads can corrode, causing them to fail to activate during fires. It's probable that a number of the sprinkler systems have been replaced or taken out as buildings were destroyed. Central Sprinkler, a subsidiary Tyco acquired in 1999, approached the CPSC about closing the recall because the number of replacement claims coming in had slowed. Last year, Tyco set aside an additional \$100 million on top of the \$370 million it had earmarked for the recall. The CPSC says it can take from one to two years from the time Tyco receives a claim before a sprinkler system is replaced. Tyco plans to devote additional manufacturing and installation resources to the recall in its closing months. The new media and information campaign will be almost as extensive as the one when the recall was announced in 2001. Advertisements will be placed in local, regional and national newspapers as well as trade publications. The CPSC says the campaign should reach about 90% of sprinkler users. Tyco also will distribute information on how to tell if sprinklers are part of the recall. However, John Dean, president of the National Association of State Fire Marshals, believes that the recall should be extended "indefinitely under the same conditions" because of the risks inherent in nursing

homes and hospitals. He says that this is “not like an office building, where there are good detection and alarm systems, and people are alert and mobile.” I tend to agree with him. Safety of persons who may be in a facility like a nursing home should be the top priority it would seem.

Source: *USA Today*

FDA WARNS CONSUMERS ABOUT BAD WEB SITES

In my opinion, it's very dangerous to buy prescription drugs over the Internet. Now the Food and Drug Administration has warned U.S. consumers about that danger. The alert was issued based on information the agency received showing that 24 apparently related Web sites may be involved in the distribution of counterfeit prescription drugs. According to the FDA, on three occasions during recent months, the agency received information that counterfeit versions of Xenical 120 mg capsules, a drug manufactured by Hoffmann-La Roche Inc., were obtained by three consumers from two different Web sites. Xenical is an FDA-approved drug used to help obese individuals who meet certain weight and height requirements lose weight and maintain weight loss. None of the capsules ordered off the Web sites contained orlistat, the active ingredient in authentic Xenical, according to the FDA.

In fact, laboratory analysis conducted by Roche and submitted to the FDA confirmed that one capsule contained sibutramine, which is the active ingredient in Meridia, an FDA-approved prescription drug manufactured by Abbott Laboratories. While this product is also used to help people lose weight and maintain that loss, it should not be used in certain patient populations, and therefore, is not a substitute for other weight loss products, according to the FDA. In addition, the drug interactions profile is different between Xenical and sibutramine, as is the dosing frequency; sibutramine is administered once daily while Xenical is dosed three times a day.

Other samples of drug products obtained from two of the Internet orders were composed of only talc and starch. According to Roche, these two samples displayed a valid Roche lot number of B2306 and were labeled with an expiration date of April 2007. The correct expiration date for this lot number is actually March 2005.

Roche identified the two Web sites involved in this incident as brandpills.com and pillspharm.com. Further investigation by the FDA disclosed that these Web sites are two of 24 Web sites that appear on the pharmacycall365.com home page under the “Our Web sites” heading. Four of these Web sites previously have been identified by the FDA's Office of Criminal Investigations as being associated with the distribution of counterfeit Tamiflu and counterfeit Cialis. It appears that these Web sites are being operated from outside of the United States. According to the FDA, consumers should be wary of three things:

- If there is no way to contact the Web site pharmacy by phone be concerned;
- if prices are dramatically lower than the competition, it bears careful scrutiny; and
- if no prescription from a doctor is required that is a big “red flag.”

As a result, the FDA strongly cautions consumers about purchasing drugs from any of these Web sites which may be involved in the distribution of counterfeit drugs and reiterates previous public warnings about buying prescription drugs online. Consumers are urged to review the FDA Web page for additional information prior to making purchases of prescription drugs over the Internet. The 24 Web sites appear on pharmacycall365.com. My recommendation is to never buy prescription drugs on the internet!

Source: *Associated Press*

RENT-A-CENTER CASE SETTLED

A settlement has been reached in a case involving about 100,000 New Jersey customers of Rent-A-Center Inc. Each of the plaintiffs would each get an average of \$800 for claims they were charged in illegal interest, under the proposed settlement. It would provide about \$85.8 million to the customers, who sued the company and won an important ruling in March 2006 from the New Jersey Supreme Court. That decision said the rent-to-own industry must observe the same 30% interest rate cap that other retailers charge. Rent-A-Center, the nation's largest rent-to-own company, appealed the ruling, but the U.S. Supreme Court in January declined to hear the challenge. The settlement will fully reimburse excess interest charged to customers who got contracts with Rent-A-Center from April 23, 1999, to March 16, 2006. The money would cover interest above 30%.

The Plano, Texas-based company also will pay \$23.5 million in administrative costs and fees to the customers' lawyers. The settlement must be approved by state Superior Court Ronald J. Freeman in Camden, New Jersey. In connection with the lawsuit, Rent-A-Center had recorded a pretax expense of \$58 million for the fourth quarter of 2006. It added an additional \$51.3 million for the first quarter of 2007, which it reported with its quarterly financial results. The lawsuit, which sought class action status, was filed on behalf of persons who contended they paid improper interest. The suit was filed after Rent-A-Center sought to repossess items she got from the company and then fell behind on payments. The single mother of seven was being charged approximately 80% interest for some furniture, a television, a washing machine and other appliances. The goods had a combined cash price of \$9,301. However, if the consumer paid the weekly rates and the additional purchasing option payments, she would have spent \$18,613 to own the items. The chain of 3,658 rental stores in the

United States, Canada and Puerto Rico has 43 stores in New Jersey.

Source: *Associated Press*

JUDGE APPROVES CLASS ACTION SUIT AGAINST CARRIER OVER FURNACES

A federal court judge in Tacoma, Washington, has certified a class action lawsuit allowing Washington consumers to sue Carrier Corp. over its residential furnaces. Current and former owners of Carrier, Bryant and Payne high-efficiency furnaces had sued Carrier Corp., alleging their condensing furnaces fail before their warranted life ends. The suit also alleges that in the mid- to late 1980s, the Farmington, Conn.-based company began manufacturing high-end furnaces out of inferior material that corrodes and prematurely fails, without disclosing that fact to consumers. The suit was filed on behalf of 60,000 or more Washington consumers who purchased Carrier, Bryant and Payne high-efficiency furnaces since January 1, 1989. Now that the lawsuit has been certified as a class action, the case will go forward. I am not sure if other states will be involved at this point, but similar cases are likely.

Source: *Seattle Post Intelligencer*

AGING BUSES ENDANGER STUDENTS' HEALTH

It has become apparent that riding the bus to school is more dangerous for children than many parents' realize. Children riding older school buses are breathing dangerous, polluted air that has been estimated to be up to five times dirtier than the outside air. The problem comes with diesel emissions which circulate in the buses through exhaust. The federal government recognized this issue in 2005 by passing a measure to replace or retrofit diesel bus engines across the nation, but because Congress has not funded the initiative, little has been done.

Breathing diesel particulates can cause a variety of health ailments, such as headaches, wheezing, and dizziness, and has been linked to asthma and lung

cancer. It is estimated that about 100,000 of the nation's 390,000 diesel school buses were manufactured before 1990, when stricter emissions standards took effect. This is a serious health issue that has gone largely under the radar screen, so to speak. Hopefully, safety and health groups will become involved and bring this issue to the public's attention. Additionally, the federal and state government's have a duty to act.

XXIII. RECALLS UPDATE

The following accounts are some of the more significant recalls that have come to our attention since our May issue.

STATESIDE POWERSPORTS RECALLS YOUTH MODEL ATVs

Stateside Powersports, of Bluffton, Indiana, has recalled Long Chang Lion 90cc All-Terrain Vehicles (ATVs). The ATVs lack adequate tire labeling, tire pressure gauge, adequate stop engine switch and other safety requirements which could result in injury to consumers. Thus far, no injuries have been reported. The recall includes all Long Chang Lion 90cc ATVs sold in black, blue, green and red. "Lion" is printed on the side of the gas tank and "90" is printed below the seat area on each side of the ATV. The ATVs were sold at ATV dealerships and online nationwide from May 2006 through December 2006 for about \$1,000. Registered owners have been notified about this recall by mail. Consumers with a recalled ATV should contact Stateside Powersports or their local dealer to schedule a free repair. For additional information, call Stateside Powersports at (888) 801-4424 between 9 a.m. and 5 p.m. ET Monday through Friday, or go to the firm's Web site at [\[powersports.com\]\(http://powersports.com\), or e-mail at \[support@statesidepowersports.com\]\(mailto:support@statesidepowersports.com\).](http://www.stateside-</p></div><div data-bbox=)

450,000 EVENFLO CAR SEAT/CARRIERS RECALLED

The Consumer Product Safety Commission, the National Highway Traffic Safety Administration and Evenflo Company, Inc. have announced a recall of Evenflo Embrace Infant car seat/carriers because of a malfunctioning handle. When used in the carrier mode the handle can unexpectedly release, allowing the seat to rotate forward and causing the infant to fall. The units, manufactured in the United States and China, were sold nationwide through department stores and baby items stores from from December 2004 through September 2006, according to a release from NHTSA. Evenflo received 679 reports of handles unexpectedly releasing. The recall affects about 450,000 Evenflo Embrace Infant car seat/carriers made before April 8, 2006. Evenflo has reported 160 injuries to children. Evenflo is sending a notice to all registered owners of the car seat/carriers and will send a free repair kit to strengthen the handle latch, the release said. Consumers should not use the handle until the unit has been repaired. The affected car seat/carriers have model numbers beginning with 317, 320, 397, 398, 540, 548, 549, 550, 556, 597, 598 or 599. Consumers can contact the company through www.embracehandle.com.

CHAR-BROIL RECALLS TWO-BURNER GAS GRILLS

The U.S. Consumer Product Safety Commission, in cooperation with Winmax, which is based in China, has recalled Char-Broil Two-Burner Gas Grills Model 463720407. The recalled grills could have an incor-

rect heat shield that does not fit the grills. Without the correct heat shield, the propane tank, hose, and regulator could overheat and damage these components, presenting a risk of fire and burn to consumers, if a propane leak occurs. Thus far, no injuries have been reported. Five consumers have received grills without the correct heat shield.

Only Char-Broil gas grills with model number 463720407 are included in the recall. This is a two-burner 360 square inch cooking surface gas grill with a 170 square inch swing-away rack, two side shelves and a condiment basket. Char-Broil's logo is on the top of the lid of the grill. The serial number is located on the white rating label on the back of the upper front panel of the grill. The serial numbers range from G305040611002821 to G305040611003420. Big Lots stores nationwide sold the grills from January 2007 through March 2007 for about \$115 and \$130.

Consumers should inspect their grill to determine whether the heat shield is properly installed. If the heat shield is missing or cannot be installed per instructions, stop using the grill and immediately contact Char-Broil. Char-Broil will send the consumer, free of charge, the correct heat shield and installation instructions. For additional information, contact Char-Broil toll-free at (866) 671-7988 between 8 a.m. and 5 p.m. ET Monday through Friday, or visit the firm's Web site at www.charbroil.com. To see this recall on CPSC's web site, including pictures of the recalled product, please go to: <http://www.cpsc.gov/cpsc/pub/prerel/prhtml07/07170.html>

TARGET RECALLS ANIMA BAMBOO COLLECTION GAMES

HaPe International Ltd., of Ningbo, China has recalled about 5,000

Anima—Bamboo Collection Games. The games were sold at Target stores nationwide from December 2006 through April 2007 for \$10. The toys in the bamboo game sets could contain lead paint, which is toxic if ingested by young children and can cause adverse health effects. No incidents or injuries have been reported. This recall involves Anima-Bamboo Collection Games. The games contain 38 bamboo pads, four ghosts, and one dice. The product's packaging is an orange box with the words "Anima" and "BAMBOO Collection Games" printed on each side. Consumers should return them to the nearest Target store for full refund, including applicable sales tax. For additional information, call Target at (800) 440-0680 between 7 a.m. and 6 p.m. CT Monday through Friday, or visit the firm's Web site at www.target.com.

PAYLESS SHOESOURCE RECALLS CHILDREN'S CLOG SHOES DUE TO CHOKING HAZARD

Payless ShoeSource, Inc., of Topeka, Kansas, has recalled Children's Airwalk(r) Compel Shoes due to plastic rivets used to attach the strap to the shoe that can detach, posing a choking hazard to young children. Payless has received one report of a child who began to choke on a detached rivet. No injuries have been reported. This recall involves Airwalk(r) Compel clog shoes sold in prewalk sizes 3 through toddler size 10. The flexible shoes have air ventilation holes on the top and side and plastic rivets with the Airwalk(r) logo attached to the strap. Airwalk(r) and the shoe size are printed on the sole of the shoe. No other sizes, styles or models are included in this recall. Consumers should return the shoes to Payless for a refund or exchange. For additional information, call

Payless at (800) 654-0697 between 7:30 a.m. and 7 p.m. CT Monday through Saturday, 9:30 a.m. and 6 p.m. Sunday. Consumers can also visit the firm's Web site at www.payless.com.

ORIENTAL TRADING COMPANY, INC. RECALLS CHILDREN'S NECKLACES DUE TO LEAD HAZARD

Oriental Trading Company, Inc., has recalled about 132,000 children's Religious Fish Necklaces. The recalled children's necklaces contain high levels of lead. Lead is toxic if ingested by young children and can cause adverse health effects. No injuries have been reported. The recalled necklaces have a silver fish pendant that hangs from a black cord. The necklaces were sold exclusively through Oriental Trading Company, Inc. Web site and catalog from January 2005 through January 2007. Consumers should contact Oriental Trading Company Inc. for information on how to receive a full refund or credit. For additional information, contact Oriental Trading Company, Inc. at (800) 723-6155 anytime or visit the firm's Web site at www.orientaltrading.com.

CARDINAL DISTRIBUTING HAS ANOTHER RECALL OF CHILDREN'S RINGS

Cardinal Distributing Co. Inc., has recalled 200 children's rings that were sold in vending machines located in malls, discount, department and grocery stores in the Baltimore, Maryland area from August 2004 through March 2007. The recalled rings are silver with either dice or horseshoes on top. The numbers on some of the dice are painted in various colors, others are not painted. The horseshoes have either pink and green or purple and yellow painted polka dots. The rings

contain high levels of lead. Lead is toxic if ingested by young children and can cause adverse health effects. These rings were subject to the July 2004 recall of 150 million pieces of children's metal jewelry. The firm placed the recalled rings that it had pulled from stores back into circulation. No incidents have been reported. For additional information, contact Cardinal Distributing Co. Inc. at (800) 368-2062 between 9 a.m. and 5 p.m. ET, Monday through Friday, or visit the firm's Web site at www.vendingdepot.com.

GRACO CHILDREN'S PRODUCTS RECALLS SOFT BLOCKS TOWERS ON ACTIVITY CENTERS

Graco Children's Products Inc., has issued a recall for Soft Blocks Tower Toys on certain activity centers. The plastic covering on the soft block towers can detach, posing a choking hazard to infants. Graco has received 137 reports of infants mouthing and chewing pieces of the plastic film covering, some of whom required medical attention. Serious incident reports include 32 infants who gagged and 49 who choked on the plastic covering. The soft block tower is a stack of three different shaped stuffed fabric blocks in red, yellow and blue. Pictures of apples, fire engines, ducks, bananas, birds and blueberries on the blocks are covered in plastic film. The soft blocks are one of nine toys that snap onto the tray of the activity center. Only model number 4635BEE with serial numbers 012705 through 063005, which indicates the manufacture dates of January 27, 2005 through June 30, 2005, are included in this recall. Model and serial numbers are located underneath the activity center's tray. Consumers should contact Graco for a free replacement Tower toy without the plastic

film. Consumers can continue to use the activity center after the soft block tower has been removed. For additional information, contact Graco at (800) 345-4109 between 8 a.m. and 5 p.m. ET Monday through Friday, or log on to www.gracobaby.com.

WAL-MART BABY BIBS ARE PULLED FROM STORE SHELVES

Wal-Mart has pulled baby bibs, sold under the Baby Connection brand name, from the market. The bibs came in packs of two to seven bibs, with embroidered prints or images of Sesame Street characters. Some were sold as long ago as 2004. The bibs were made by Hamco Inc. exclusively for Wal-Mart. The vinyl portion of the bibs exceeded the lead levels set by Illinois for children's products, according to Wal-Mart. The giant retailer worked with the Illinois attorney general's office to pull the items and later decided to expand the recall nationwide. About 60,000 of the bib bundles were sold in Illinois, but no injuries were reported.

Interestingly, even though Wal-Mart referred all questions about the products' manufacturing to Hamco, officials at Hamco, a subsidiary of Crown Crafts Inc. referred all questions back to Wal-Mart. The Illinois attorney general's office identified bibs sold between June 2004 to the end of March this year in Wal-Mart stores throughout the state. Tests there on three styles of the bibs tested positive for lead more than 600 parts per million, the state's standard for lead in children's products. The lead in the product, which is a PVC product, makes the vinyl softer.

While Wal-Mart pulled the product from its shelves nationwide, only customers in Illinois are eligible to receive refunds or replacements. It isn't clear why the refunds only per-

tained to Illinois since the recall was nationwide. Wal-Mart's recall comes after a lawsuit over the bibs by the Center for Environmental Health, based in Oakland, California. Alexa Engelman, a researcher there, said the center became aware of the bibs in September. A report by an independent laboratory test contracted by the center showed the bibs contained 16 times the amount of lead allowed in paint. Lead, used as a stabilizer in vinyl plastic, can be "easily substituted" for other products. The bibs' manufacturing tags show they were made in China.

Public health experts consider elevated levels of lead in blood a significant health hazard for children. Studies have repeatedly shown that childhood exposure to lead can lead to learning problems, reduced intelligence, hyperactivity and attention deficit disorder. There is no lead level that is considered safe in blood, and recent studies have shown adverse health effects even at very low levels. The U.S. Consumer Product Safety Commission issued a statement saying that the bibs were safe if in good condition. However, if a bib "deteriorates to the point that a baby could pull or bite off and swallow a piece of vinyl containing the lead, then the amounts of lead consumed could approach levels of concern," the agency said. Those who purchased the bibs in Illinois can return them at their local Wal-Mart for a full refund or can receive a free replacement by calling (877) 373-3812 between 9 a.m. and 5 p.m. CDT.

HALOGEN TABLE LAMPS SOLD AT LOWE'S STORES RECALLED

About 97,000 Halogen Table Lamps have been recalled due to fire hazard. These lamps can short circuit, therefore presenting a fire hazard. The recalled table lamps have a plastic base and two extendable arms connecting the base to

a halogen lamp. The lamps were sold in white, red, blue, orange and purple. Item number 101988 is printed on the bottom of the lamp base. They were sold exclusively at: Lowe's retail outlets nationwide from April 2006 through March 2007 for about \$10. Consumers should return the lamps to any Lowe's retail outlet to receive a full refund. For additional information, contact L G Sourcing toll-free at (866) 284-9162 anytime, or visit www.lowes.com.

CRACKER BARREL RECALLS ROOSTER KITCHEN STOOLS

CBOCS Distribution Inc., of Lebanon, Tennessee, has recalled Rooster Kitchen Stools that were sold at Cracker Barrel Old Country Store. The stools can unexpectedly collapse during use, causing a consumer to fall to the floor. Cracker Barrel has received two reports of incidents in which the kitchen stool collapsed. The Rooster Kitchen Stool is about two feet tall and one foot in diameter. It has light brown wood and has a rooster painted on the seat. "Made in China" and item number 260161 are printed on a sticker under the seat. Consumers should stop using these kitchen stools immediately and return them to any Cracker Barrel Old Country Store for a full refund. For additional information, contact Cracker Barrel at (800) 333-9566, or visit the firm's Web site at www.crackerbarrel.com.

CPSC RECALLS HEATED MESSAGE RECLINER

The Berkline Heated Massage Recliners are being recalled because the control device that adjusts the heat and massage settings can overheat, posing a burn hazard to consumers. The recall involves the Berkline heated massage recliners with model

number 13071 and piece code number 2700. The brand name, the model number, and the piece code can be found on the bill of sale and/or product packaging. The recliners were sold in brown and burgundy. They were sold exclusively at Value City Furniture and American Signature Furniture stores nationwide from December 2006 through February 2007 for about \$400. For more information on the recall, call (800) 235-0822.

GENERAL ELECTRIC RECALLS DISHWASHERS DUE TO FIRE HAZARD

GE Consumer & Industrial, of Louisville, Kentucky, has recalled about 2.5 million GE Dishwashers. Liquid rinse-aid can leak from its dispenser onto the dishwasher's internal wiring which can cause an electrical short and overheating, posing a fire hazard to consumers. GE has received 191 reports of overheated wiring including 56 reports of property damage. There were 12 reports of fires that escaped the dishwasher. Fire damage was limited to the dishwasher or the adjacent area. No injuries have been reported. The recall includes GE built-in dishwashers sold under the following brand names: Eterna, GE, GE Profile(tm), GE Monogram(r), Hotpoint(r), and Sears-Kenmore. The dishwashers were sold in white, black, almond, bisque and stainless steel. The brand name is printed on the dishwasher's front control panel.

Consumers should immediately stop using the recalled dishwashers and contact General Electric for a free repair, a \$150 rebate towards the purchase of a new GE dishwasher, or a \$300 rebate towards the purchase of a new GE Profile or GE Monogram dishwasher. For additional information, contact General Electric toll-free at (877) 607-6395 from 8 a.m. to 8 p.m. ET Monday

through Saturday. Consumers also can visit the firm's Web site at www.geappliances.com.

XXIV. SPECIAL RECOGNITIONS

FCA Is On The Right Path

Les Steckel, John Gibbons, and Eric Armster, all of whom are with the Fellowship of Christian Athletes, came by our office recently for a visit. Les, a former head coach in the National Football League and an offensive coordinator of two Super Bowl teams, the Patriots and Titans, is the president of FCA. He also was a Colonel in the U.S. Marine Corp., with 30 years in service both active and reserve. You would think that with all of Coach Steckel's accomplishments he would list one of them as having involved his most exciting victory. However, the following is found on Les' business card:

The most exciting victory any person can experience is his total surrender to Jesus Christ as Lord!

That speaks volumes for this man. Based on all accounts, Les is a true follower of Jesus Christ who has committed his life to Him. The FCA is reaching young people at a time in their lives when direction and guidance are badly needed. It's critically important that the FCA be allowed to continue their work. With Les in charge, I am convinced the mission of the FCA is in good hands!

NATIONAL DAY OF PRAYER

The National Day of Prayer was held nationwide on May 3rd. It was a time for all of us to pay tribute to God for His divine role in our lives and in that of our nation. Our country is at a crossroads and the choices we make will determine how long we will continue as a world power. As the 21st century

unfolds, America must take stock of where we are as a nation. Fundamental changes in the way we live, the way we work, and the threats we as a nation face, have brought challenges that past generations never had to face. To say we live in a much different world today is an understatement. Two hundred and thirty years have passed since our forefathers crafted a Constitution guaranteeing us the freedoms and benefits of a democratic society. Unfortunately, we have drifted far from our roots. Many are asking if we will continue to fall further into selfishness, complacency and apathy, or will we humble ourselves before God and ask Him to bring us back to the spiritual foundations upon which this great nation was built?

The following statement, attributed to an 18th century professor at the University of Edinburgh, has been quoted in speeches by political leaders and statesmen in our country for years:

A democracy cannot exist as a permanent form of government. It can only exist until the voters discover that they can vote themselves largesse from the public treasury. From that moment on, the majority always votes for the candidates promising the most benefits from the public treasury with the result that a democracy always collapses over loose fiscal policy, always followed by a dictatorship. The average age of the world's greatest civilizations has been 200 years. Great nations rise and fall. The people go from bondage to spiritual truth, to great courage, from courage to liberty, from liberty to abundance, from abundance to selfishness, from selfishness to complacency, from complacency to apathy, from apathy to dependence, from dependence back again to bondage.

On May 3rd, we marked the 56th Annual National Day of Prayer. Ceremonies were held throughout the U.S. This year's observance comes at a time when

our nation is really in need of prayer and spiritual guidance. If you doubt that simply watch the nightly news. The Bible offers the assurance that God listens when His people humbly seek His face. Our Heavenly Father is waiting for His children to come together in prayer on behalf of our nation and its leaders. However, it must be a sincere effort and not one designed to get votes in the next election. We must search our hearts and repent, both individually and corporately, if we are to move this country back in the right direction. It's high time for America to not only unite in prayer, but to really trust God for guidance and direction and do so on a daily basis.

THE MAYOR'S PRAYER BREAKFAST

Bobby Bright, who is completing his second term as Mayor of Montgomery, is to be commended for sponsoring an annual prayer breakfast in the Capital City. The Mayor's prayer breakfasts are really unusual in one sense—they are all about worship and praising God for His goodness and faithfulness. This year's event followed that format and it was a tremendous event. Folks from all walks of life came together, joining the Mayor and his wife, Lynn, in a most impressive display of honoring God in the right way. Jo Hancock, who heads up a ministry, His Vessel, located in Montgomery, handled the details of setting up the event with the help of lots of folks.

LAW DAY WAS A GREAT SUCCESS

The Alabama State Bar Association and the Alabama Trial Lawyers Association jointly sponsored a special event last month celebrating Law Day. A large crowd assembled on May 1st for the breakfast meeting, which was held in Montgomery. Chief Justice Sue Bell Cobb and Eleventh Circuit Court of Appeals Judge Bill Pryor spoke to the group and each did a tremendous job. Hopefully, the event will be held in an annual basis for years to come.

MULLETT TOSS WINNER

Last month, we put Elizabeth Kidd, one of our employees, in the spotlight. Now I hear that Elizabeth won 3rd place for her age division at the 23rd Annual Interstate Mullet Toss which was held in Orange Beach, Alabama, by tossing her fish 66 feet. That warrants a special mention for Elizabeth. There were several hundred participants and the first place winner threw her fish 71 feet. The Mullet Toss raises money each year for a different charity and this year's event raised money for the Local Youth Charities. The event is always held during the last full weekend of April and consistently draws very large crowds. Individuals who participate as contestants throw a mullet from a 10-foot-circle in Alabama across the state line into Florida. Elizabeth wanted to mount her mullet on the wall behind her desk, but that was promptly vetoed by Martha Taylor.

XXV. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

RHON JONES

Rhon Jones joined the firm in 1994 and now manages the Toxic Torts Section, as well as maintaining an active practice in business, predatory lending and class action litigation. He is currently involved in toxic exposure cases in Colorado, Minnesota, New Jersey, Florida, Georgia and Alabama. Rhon has been involved in many settlements or verdicts totaling over \$400 million dollars.

Rhon has served as an adjunct Professor at Jones School of Law in Montgomery and he is a regular speaker at national, regional and state seminars on various subjects for both plaintiff and defense counsel. Rhon is an Advisory Board Member of the Family Sunshine Center, whose mission is to prevent domestic abuse. He is also a former

member of the Board of Directors of the Janice Capilouto Center for the Deaf, which fills special needs for the hearing impaired. Rhon is a member of the First Baptist Church in Montgomery, where he teaches Sunday School. He is married to the former Deanne Rawls, and they have four children. Rhon is doing a very good job of managing a most important section in our firm. He also does outstanding work in the many cases he is involved with. He deals with a number of lawyers both in Alabama and in other states who work with us on Toxic Tort cases.

MIKE CROW

Mike Crow, a Shareholder in our Personal Injury Section, primarily handles car and truck litigation and premise liability cases. Mike, who has been with the firm since 1986, has a special interest in brain injury cases. He has been successful in litigating against the "Big Box Stores," such as Wal-Mart, Home Depot and the others. In the process, Mike has developed a wealth of knowledge relating to their practices and procedures. Mike has recently started to handle 1983 (civil rights) claims and Title IX (sexual harassment) claims. He recently tried a "skylight" case for two clients who were injured and obtained a \$4 million verdict for them. Mike has tried a tremendous number of jury cases and is well-respected by his fellow lawyers and extremely well-liked by his clients. Only Greg Allen and I have been with the firm longer than Mike.

Mike is married to the former Marla Taylor and they have two children. The Crow family attends Frazer United Memorial Methodist Church in Montgomery, where Mike has served on the Administrative Board since 2002. Mike and Marla are involved with a number of Christian-based groups and are excellent role models for young married couples. Mike is a valuable member of our firm, who cares about his clients and works hard for them.

NAVAN WARD

Navan Ward is a lawyer in our firm's Mass Torts Section. Currently, Navan is

heavily involved with the Vioxx, Celebrex and Bextra pharmaceutical drug litigation. He represents thousands of Celebrex and Bextra clients who have suffered serious injuries as a result of these drugs throughout the nation. Navan has also had the opportunity to speak at conferences around the country concerning different aspects of the Vioxx litigation.

Navan graduated from the University of Alabama in 1999 and received his Juris Doctorate in 2002. While attending Alabama, Navan was the recipient of the Authurine Lucy Foster Outstanding Minority Leadership Award. Navan was also a member of Bench and Bar Legal Honor Society, served as an Honor Court Associate Justice, was the president of Student Farrah Law Society and was a member of the Black Law Student Association. Navan is a board member of Faith Outreach Ministries, Inc. Additionally he is a member of Leadership Montgomery's Class XI. Navan is married to the former Bridget L. Maynor, who is from Irondale, Alabama. Navan's childhood church was Bethany Seventh Day Adventist Church, but he now attends Northview Christian at Safe Harbor Church. Navan is being recognized as one of the outstanding young lawyers in our state and we are most fortunate to have him in the firm.

SCOTT BARTON

Scott Barton started at the firm as a Runner in March of 1995. In 1997, the firm created an internal Information Technologies Department (one of the best moves we have made) and Scott was a founding member in the role of a Hardware Technician. Since then, he has climbed his way up the ladder and is now the Computer Operations Supervisor. In this position, Scott is responsible for overseeing the day-to-day operations of the Information Technologies Department. This includes server functionality and maintenance as well as assisting the Hardware Technicians and Network Administrators. Scott has had a great deal of computer training. He has a daughter, Brianna, who just finished 2nd

Grade at Robinson Springs School in Millbrook. Scott does an outstanding job in a most important firm function.

ANNA PENDER-PIERCE

It's hard to believe, but Anna Pender-Pierce has been with our firm for nearly 17 years. She currently serves as Secretary for our Managing Shareholder, Tom Methvin. Anna assists Tom with the day-to-day operations of the firm, which is much more than a full-time job. Anna is married to John Pierce. In the mid-80's, Anna served four years as a Petty Officer in the U.S. Navy, which Anna says was one of the best experiences of her life. It gave her the opportunity to meet and work with people from all over the United States. It also helped give her valuable perspective outside of her own personal experiences, which helps immensely in her day-to-day interactions with folks both inside and outside the firm. One thing I really like about Anna is that if you ask her opinion or view on a subject, you will get a straight answer. Anna is a most valuable employee and a real asset to the firm.

LISA BRUNER

Lisa Bruner, who works in our Mass Torts Section as Legal Assistant to Andy Birchfield and Leigh O'Dell, is a member of our Vioxx trial litigation team. Lisa assists lawyers in the courtroom, helps to answer discovery requests, assists in preparing witness deposition testimony, and coordinates with experts regarding medical records and other related discovery. Lisa has a Bachelor of Science degree in Justice and Public Safety from Auburn University Montgomery. She is a Certified Paralegal and attended one year of law school at the University of Alabama. Lisa has worked in the legal field for approximately 10 years. Lisa and her husband Darrell have two daughters. Grace is 6 years old and Hope is 5. Because Hope has juvenile diabetes (Type I), Lisa is avidly involved with the Juvenile Diabetes Research Foundation. She makes phone calls and contacts members of congress requesting proper funding for diabetes research. Lisa has applied to attend Chil-

dren's Congress in Washington, D.C. and is in the planning stages for a "Walk for a Cure" in the fall at her daughter's school. Lisa and her family attend Eastmont Baptist Church in Montgomery. Lisa is a dedicated, hard worker who does exceptionally good work for the firm. She is a definite asset.

KELLI GRIFFIN

Kelli Griffin, who has been with the firm for five years, currently works on the Vioxx Litigation team, which is led by Andy Birchfield, as the MDL Coordinating Attorney. Kelli is primarily responsible for the organization and maintenance of Vioxx trial documents and discovery materials. In an effort to lend assistance with other Vioxx trials, on behalf of our firm, Kelli spends a good bit of time providing information and material to lawyers around the nation. Kelli also does a great deal of document research in support of our trial lawyers. She has been a part of the litigation team in five Vioxx trials and really enjoys the work that is involved in serving our clients. Kelli previously worked on Baycol, Welding Rod and Hormone Therapy litigation. However, she has worked in Vioxx litigation since the withdrawal of Vioxx from the market in September of 2004.

Kelli graduated from Troy University in 1999 and from Jones School of Law in 2003. She has been a member of the Alabama Bar since 2003. Kelli enjoys spending time with her "children" Xena, a Chocolate Lab and Abby Gayle, a Westie. She also enjoys reading and music and spending time with her friends and family. Kelli is an extremely hard and dedicated worker who does outstanding work. She is a valued employee of the firm.

KELLI FLANAGAN

Kelli Flanagan, who joined our firm in April of 2000, currently works as a legal secretary for Mark Englehart and Scarlett Tuley in our Toxic Torts section. In this position, Kelli is responsible for, among other things, keeping files organized and handling the calendars for

these very busy lawyers. Kelli graduated from Faulkner University with an Associates Degree in Legal Studies in May 1999. Over the past five years, Kelli has proudly headed up the Lee National Denim Day Fundraiser Campaign for the firm, raising funds in the battle against breast cancer. The firm allows those who participate to wear denim on a specified day, in addition to our usual "denim Fridays." Kelli has done a great job organizing this event each year.

Kelli and Stephen have been married eight years and have three daughters: Alissa, seven, is finishing the first grade at Forest Avenue Academic Magnet School; and, five-year-old twins, Emilee and Bailee will begin Kindergarten this fall. Kelli and her family live in Shorter and make the 60-mile round-trip trek daily. Kelli enjoys watching her girls play and grow as they are constantly learning new things. She also enjoys curling up on the couch to watch one of her favorite shows or with a good book. Kelli is another excellent employee and a person who contributes greatly to the firm's success.

XXVI. SOME CLOSING OBSERVATIONS

THE BUSH-CHENEY WAR

The war in Iraq is now in its fifth year and the time has come for all of us to realize what a monumental disaster it has been. The decision to invade Iraq was made based on a number of false premises. The subsequent efforts over the last several years to justify the invasion and occupation have been even more intentionally misleading if not totally false. Our real enemy at the time of the invasion was in Afghanistan, but our efforts were focused on Saddam and Iraq. Now, after four long years, our enemies in the region have actually moved into Iraq and are creating a real terrorist threat to the U.S. and our allies. It appears that our troops are bogged

down in an untenable situation.

This war has cost the U.S. greatly—to date, over 3,400 American troops have been killed and over 33,000 seriously injured. We sent our troops into Iraq with an undersized force and one that was inadequately equipped. Now we are fighting a war with a significant segment of our force being made up of National Guard units. The monetary cost of the war is now over \$400 billion. Unfortunately, even with the great cost in lives and money, it is impossible to find any real progress that has been made. However, our troops are doing the very best they can under the worst of circumstances.

The civilian death toll in Iraq has reached a number in excess of 600,000 according to one source. The U.N. reports that 34,452 citizens were killed in 2005. Hundreds of thousands of innocent Iraq citizens who were not combatant's have been killed. That is something no American can be proud of. Their country has been largely destroyed and to rebuild it will cost billions. Thus far, the projected use of oil money hasn't materialized. In fact, it appears—according to media reports—that oil is being stolen daily and oil revenues the victim of fraud.

Unfortunately, there have been a number of politically-connected corporations that have profited greatly from this war. Companies such as Halliburton have done extremely well over the past four years. With very little real oversight, there has also been a great deal of corruption and graft relating to the billions of dollars spent in Iraq. I find it impossible to justify the profit-making and corruption and have to wonder how much more of this sort of thing Congress will allow.

I have always supported our military and do so today as strongly as ever. But, the time has come for the President to admit his mistakes and withdraw our troops in a strategic manner. Our mission in Iraq has become little more than a monumental police action where our troops trying to maintain order in a sectarian civil war that is out of control.

The President and the small number of his close advisors, including the Vice-President, the now deposed Paul Wolowilz, and Karl Rove, all of whom wanted this war, are now attempting to justify what many believe was the worst political decision involving a military judgment in our nation's history.

The American fighting men and women in Iraq are paying a heavy price for the gross mistakes of judgment made by the Bush Administration. It's now time for the President to admit the mistakes of the past and bring our troops home as quickly as possible. How many more soldiers and marines will have to be sacrificed and how many more billions of dollars will be spent before the President and Vice-President will listen to the American people. The military advisors, who know the truth about Iraq, should have been calling the shots in Iraq from the outset and not the politicians. Nevertheless, in any event, the time has come to get out of Iraq!

XXVII. SOME PARTING WORDS

The following prayers are examples of some that were put up in public places throughout the land on May 3rd. Those came about when the National

Day of Prayer was observed and all are worth repeating. However, it will take more than one day of prayer to put our nation back on the right track from a spiritual perspective.

Heavenly Father, we ask Your blessing on Your Church. Create in us a renewed desire to love You wholeheartedly, and to serve others in Your Name. Grant us the grace and wisdom to make an impact on our nation and our world for Your glory. (Ephesians 4:3-6; 2 Thessalonians 1:4; Acts 16:15)

Lord, we lift our elected leaders before You and ask that You would grant each one wisdom and discernment. We pray that believing leaders would be bolstered and strengthened in their roles, and that unbelieving leaders would, through the work of Your Spirit, place their faith in You. May our legislatures and courts honor You as they confront the myriad challenges facing our cities, states and nation. (Exodus 18:21; Proverbs 11:3; Romans 13:1-2; 1 Timothy 2:1-2)

Holy Father, we acknowledge ways we have allowed a breakdown of the family. We confess allowing things in our home that do not honor You. May you redeem families across the nation. (Genesis

2:24; Ephesians 5:22-24, 6:1-3; Deuteronomy 11:18-19, 7:26; Ephesians 5:21; Mark 3:25)

Father God, forgive us for allowing You and Your Word to be thrown out of schools, and for allowing Your truth to be replaced with lies. Please guide our teachers, our students and our schools across the nation. (Ephesians 4:1-17, Psalm 34:7, Matthew 19:14)

To be as blunt as I can be, there is only one hope for our nation—Jesus. Last month, I mentioned 2 Chronicles 7:14, which gives us the key to how this country can survive in spite of all of our problems and the serious threats we presently encounter and will face in the future. In the event you didn't read and digest what the scripture says, I am repeating it in this issue.

If My people who are called by My name will humble themselves, and pray and seek My face, and turn from their wicked ways, then I will hear from heaven, and will forgive their sin and heal their land.

2 Chronicles 7:14

Those instructions are just about as clear as they can be and are the hope for our nation which has lost its way. May God give us the will to follow His word and trust Him!

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218 COMMERCE STREET (36104)

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