



THE
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

NO PERSON IS ABOVE THE LAW

The media attention relating to the convictions and sentencing of Don Siegelman and Richard Scrushy hasn't slowed down much, and that really comes as no surprise. Neither is it surprising that the sentencing and subsequent events have received national attention. There is one strong message from all of this, and that is no person is above the law. Obviously, that should definitely apply to all public officials. The sentencings of these two men have branded that rule on the minds of every Alabama citizen. I am reasonably confident that all current officeholders in our state have gotten the message. For those who were present in the federal courtroom—seeing a former governor and a wealthy businessman taken away to jail in shackles—had to be both a shocking and a sobering experience.

I am not going to comment on the guilt or innocence of either of these men, nor will I comment on the stiff sentences handed down because I didn't attend the trial or any of the sentencing hearings related to the case. I will say, however, that I believe strongly in our jury system and also know that Judge Mark Fuller is a good man who also is a very good judge. More importantly, because I don't have any first-hand information concerning this matter, I won't be a party to second-guessing what happened in the courtroom at any stage in the highly publicized case. My knowledge of what happened is limited to what was reported by the media. Although that is usually a good source, what we read or hear is not always totally accurate.

In any event, I will say only that the convictions and sentences handed down will have a definite effect on Alabama politics and the operation of state government for years to come. If any good can come from what has tran-

spired thus far, it should be the passage of some meaningful campaign finance reform legislation, as well as strong ethics laws to control the activities of officeholders and lobbyists in the future, by the Alabama Legislature. I regret very much that families were hurt by the whole episode, and our prayers go out to all of the family members who were affected by this matter. Unfortunately, I suspect that we haven't heard the last of this most unfortunate chapter in our state's political history.

JUSTICE DEPARTMENT SHOULD CLEAR THE AIR

The U.S. House Judiciary Committee has requested that the Justice Department provide documents involving the Siegelman prosecution. According to a news release from the committee chairman, his committee is "exploring claims that (Siegelman's) recent conviction, among others, may have been a part of a pattern of selective, political prosecutions by a number of U.S. Attorneys across the country." As has been widely reported, the former governor has claimed that his prosecution was politically motivated. Recent allegations that White House officials were actually steering decisions at the Justice Department have drawn attention to the Siegelman case.

Forty-four former state Attorneys General had asked Congress to investigate the Siegelman prosecution. But, it appears that this inquiry actually stems from the panel's ongoing investigation into whether the Bush Administration fired federal prosecutors for political reasons. Although, I am convinced that Karl Rove is capable of doing anything, including directing illicit traffic at the Justice Department, I don't believe the U.S. Attorney's office in Montgomery would allow outside pressure, even from the powerful and ruthless Rove, to be involved in decision-making relating to criminal cases. But, the best way to resolve the matter is to have an independent and non-partisan inquiry into

the charges and counter-charges. The Justice Department has insisted there was no political involvement and I hope that will prove to be the case.

U.S. Attorney Leura Canary recused herself from the Siegelman investigation in 2002 after his lawyers complained that the probe was politically motivated. Because she was an appointee of President Bush and her husband, Bill Canary, was a Republican political consultant who had worked with the Bush White House, it was the proper thing to do. Although Bill and I seldom agree on political matters, I consider him a friend and

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also a man of the highest integrity. I don't believe this man would risk his good reputation by being involved in this sort of thing regardless of what political issues or parties were involved. Career Justice Department lawyers in Montgomery handled the prosecution of Siegelman and Scrushy and apparently did a very good job. Nevertheless, I believe that an investigation would clear the air and for that reason it's a good thing.

Source: Associated Press

NONE OF THE ABOVE LEADS THE GOP PACK

A recent national poll has found that "none of the above" is the leading GOP presidential candidate at this point in time. Frankly, that doesn't come as much of a surprise when you look carefully at all of the Republican candidates and examine their respective records and backgrounds. Twenty-three (23%) percent of the people who will vote next year say they don't like the current field. That is up from fourteen (14%) percent in June, which in my opinion is most significant. Rudy Giuliani, who is a real scary fellow, polled the best among the GOP candidates at twenty-one (21%) percent. Running second to "none of the above" at this stage isn't a good sign for the former New York Mayor.

To add to the problem, Giuliani is running virtually even with Fred Thompson, an unannounced candidate who will likely continue to rise in the polls because all of the others are either dropping out or are at a very low level of support. It does seem sorta strange that a GOP candidate with all of the baggage that Giuliani has could be the leading announced candidate for the most important job in the world. All of this may account for the fact that Mississippi Governor Haley Barbour is holding fundraisers out of his home state in his reelection bid. There is also some talk that our own governor, Bob Riley, is being encouraged by some folks in Washington to take a second look at the race. When you consider how weak the GOP field is, a Southern governor

with a very good record could be a viable alternative to the current crop of candidates.

MORE GOOD NEWS FROM THE SPIVEY CASE

All too often, the positive impact that comes from product liability litigation is ignored by the news media. For that reason, many people never realize the importance of the impact of this type of litigation. A great number of the safety measures that have been brought about and implemented by automobile manufacturers came about as a direct result of lawsuits. Although individual lawsuits involving a defective product don't always get a great deal of attention, that is understandable. Those events simply don't make for good headlines when so many bad things are going on in our society. It is generally bad happenings that make the nightly news. Recently, I received a letter from a lawyer friend, Frank C. "Ham" Wilson, who now lives in North Carolina and who was involved in a tractor accident. This tells how a lawsuit our firm handled several years ago had an effect on his life. Here's what Frank had to say:

I recently had an accident on a small farm tractor, and I am very fortunate to be alive. I rolled about 30 feet down a 75-degree embankment and lived to tell about it. If the tractor had not had a roll bar, and had I not been wearing the seatbelt, I am confident that I would not have survived. The roll bar absorbed a tremendous amount of force, and I stayed in the seat.

I have since talked to many people who have known others who have been involved in similar tractor accidents, and most of them did not survive or were severely injured. Most of those tractors either were older and not equipped with safety equipment or it was not used. Incidentally, the seatbelt and roll bar on my tractor

were included, at least in part, because of lawsuits that were filed against tractor manufacturers some years ago. Large verdicts and the threat of future verdicts forced the tractor industry to begin including the safety equipment on all tractors, and you will not find a later model tractor today without it. Despite what is often reported, not all lawsuits serve only to line the pockets of those involved; some result in safer products for us all. I am glad safety equipment was included on my tractor, because it worked and helped save my life. I also am thankful for all who kept me in their thoughts and prayers, some of whom I have never met. They worked, too. The bottom line is: if it has a seatbelt, wear it.

Over the past several years, I have received a number of similar responses because of the result in the Spivey case, which was a wrongful death lawsuit involving a Kubota tractor. Not only did the Spivey family receive \$10 million from Kubota, they exposed to the world how the entire tractor industry at the time was refusing to put roll bars and seatbelts on farm tractors—even though the companies knew thousands of persons were being killed in rollover accidents. By refusing to agree to confidentiality as a condition of settlement on the fifth day of trial, the Spivey family did a service to farmers and farm families everywhere. If you go to the Kubota Website today, you will see that this manufacturer considers itself a leader in rollover protection. But for the Spivey case, that wouldn't be the case. Kubota may have led the industry in putting roll bars and seat belts on their tractors, but it wouldn't have happened had the Spivey family not filed their lawsuit and fought a powerful corporation to the very end. It took a great deal of courage to refuse to accept a \$10 million settlement in their wrongful death case if they had to agree to confidentiality and to a return of damaging Kubota docu-

ments. Kubota finally agreed to drop the conditions and settle the case, and the rest is history. Ms. Spivey and her children held a news conference and told the Kubota story.

There are many other cases like the Spivey case that have had a positive impact on product safety. Although everybody probably remembers the Ford Pinto case, there has been much more media attention to the McDonald coffee case and more recently the infamous “pants case” filed by an administrative law judge in Washington, D.C. Consumer groups and lawyers who represent victims must do a better job of letting the public know about the role lawsuits play in bringing about safer products for U.S. consumers. I know first-hand the positive effect that litigation has had. But I realize that everybody doesn’t share that view. That must change!

JOE BORG SPEAKS OUT ON INVESTOR CONCERNS

Joseph P. Borg, President of the North American Securities Administrators Association (NASAA), told a Congressional panel last month that allowing public offerings of private equity and hedge fund management firms without appropriate regulatory protections puts retail investors at risk. Joe, who as you know serves as the Director of the Alabama Securities Commission, stated:

Due to a lack of transparency, the level of individual and systemic risk attached to these investments remains unknown to the individual investor. Their fee structures and lack of full disclosure obscure real returns. The structure of these new instruments places investors in a vulnerable position, subject to the whims of controlling persons and literally without recourse. In light of the complexity and uncertainty surrounding these instruments, allowing them to be offered to the public without appropriate regu-

latory protections poses serious risks to investors.

Joe’s remarks came during testimony in a hearing before the U.S. House of Representatives Committee on Oversight and Government Reform Subcommittee on Domestic Policy. The hearing examined the possible risks presented to retail investors by the recent Blackstone Group L.P. and similar upcoming initial public offerings of the management entities of hedge funds and private equity funds. In his testimony, Joe observed:

New investments with highly complex structures, opaque investment strategies, and dubious profitability have arrived on Main Street. Precisely because of this trend, the investor protections afforded by statutes like the Investment Company Act (ICA) are more important than ever.

Joe testified that public offerings, such as the recent Blackstone IPO, circumvent the governance protections mandated by the ICA, even though it is no longer a private investment company. For example, under the ICA, a fund must have independent directors who represent the interests of public investors, which is not the case with Blackstone. The securities laws favor substance over form and disdain structures whose only purpose is to evade their reach. In reality, both pre- and post-IPO, Blackstone functions as an investment company that earns its income through investments. From an investor protection standpoint, it is difficult to justify the exclusion Blackstone enjoys from the safeguards mandated under the ICA. According to Joe, the public policy issue is how much risk, even when disclosed, should be transferred to the general public.

Speaking as President, Joe emphasized that NASAA does not object to access to alternative investments by retail investors so long as they are accompanied by all appropriate and necessary investor pro-

tections, rights, and remedies. He says it “can only be accomplished by ensuring such investments are offered pursuant to the appropriate Act”, adding:

America’s retail investors are not accustomed to the realities of alternative investments: portfolios of illiquid securities; the use of substantial leverage; concentration of investments; and excessive compensation arrangements detrimental to their interests.

NASAA is the oldest international organization devoted to investor protection. Its membership consists of the securities administrators in the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, the provinces and territories of Canada, and Mexico. It is good to know that a dedicated public servant such as Joe Borg is their leader.

Source: *New York Times*

EXXONMOBIL IS THE WORLD’S MOST PROFITABLE CORPORATION

It’s pretty obvious these days that big oil means big profits, and I don’t believe that we have yet seen the worst. A recent report indicates that energy companies rule the roost among the 2007 Fortune 500 Global listing. I wasn’t surprised to read that six of the Top 10 companies by revenue on the list are petroleum producers. Three more are the corporations whose products run on gasoline, i.e., the major automakers. Neither was I surprised to see that ExxonMobil Corp, the top oil company, was number two on the overall list. In fact, the oil giant is also the world’s most profitable company, at \$39.5 billion in 2006. Not only is ExxonMobil profitable, it is extremely powerful from a political perspective and otherwise. I doubt that many folks actually realize how strong their political power and influence really is. I can tell you first-hand how strong it is and one of these days, if I ever write a book, I will include a chapter on ExxonMobil.

Source: *Dallas Business Journal*

DEATHS IN THE RANKS OF LAW ENFORCEMENT ARE AT THE HIGHEST LEVEL

There has been a large increase in the number of deaths of law enforcement officers during the first six months of this year. A series of fatal shootings is responsible for this sad assessment of what officers have to face. A recent report reveals that 39 officers were killed in the line of duty as the result of shootings in the first part of this year. That is shocking news and I hope this trend will not continue. Violent crime across the country appears to be the primary cause for the increase in shootings and deaths. The public should be alarmed over these numbers, and I hope will get actively involved in a movement to curb violent crime in our nation.

The first thing we can do is to demand that our public officials support programs that will give those in law enforcement all of the tools necessary to fight crime effectively and as safely as possible. The next step would be to make Congress and the FCC work to clean up the television programming that features extreme violence on a daily basis. Those who make movies should also be made to clean up their act. I believe that some reasonable gun control measures should be enacted that at least get weapons like assault rifles off the streets. We must have sensible and workable requirements for the sale of hand guns and rifles of all kinds. Background checks and waiting periods are a necessity. Finally, we should pay law enforcement officers a decent wage. Many officers have to work at one or more part-time jobs just to make ends meet each week. They and their families deserve much more than we usually provide for them. It's time for the political leaders all across the country to step up to the plate and really support law enforcement!

LAWSUIT DISMISSED

The lawsuit which had been filed by The Christian Coalition of Alabama

against its old leader John Giles was dismissed last month. It appears the differences between the parties were worked out and that's good. I believe that was the proper course of action and hopefully the settlement will end the matter. Neither Dr. Randy Brinson nor John Giles made any comment on the ending of their lawsuit, which is also very good

DEATH CASES SETTLED DURING TRIAL

Our firm settled a case involving two deaths arising out of a motor vehicle collision on the second day of trial. Both occupants in a Lincoln Town car were killed when the car was hit at the intersection of two state highways in a rural area of the state. The collision occurred at about 8:30 p.m. in June 2005. The driver of a tractor and trailer rig crashed into the car at the intersection causing the car to be literally torn into two separate pieces. It was hit so hard that the steel frames on each side were pulled apart which is almost impossible. The trooper who investigated the incident said it was a violent crash and the worst wreck he had ever seen. The truck driver, who was classified under the Department of Transportation (DOT) regulations as an "habitual speeder," was the only witness to the incident. Our accident reconstructionist testified that the tractor-trailer unit was traveling at 75 mph at impact. Interestingly, the defendants' expert put the speed at 55 mph and actually at one point testified in deposition that the impact speed was about 42 mph. That would have been most difficult to sell to a jury especially when it was shown that this expert formed his speed opinions without even knowing what the driver had testified about in deposition. In Fact, the defense didn't even know that the tractor-trailer rig had an ABS breaking system.

Julia Beasley, Boyd Whigham, and I represented one of the families and David Cowan, Robert Potter, and Tom Kelly represented the other family. Our experts were Byrant Buckner (accident reconstruction) and Roger Allen (DOT

regulations). Each of the experts did an outstanding job. The amount of the settlement is confidential at the request of the defendants. All documents that were obtained during pretrial discovery are now under seal by court order and cannot be discussed. Additionally, the names of the defendants are also under seal and cannot be revealed. We were pleased to have been able to resolve this matter for our clients and that's what is most important.

WRONGFUL DEATH CASE INVOLVING GM SETTLES

Our firm settled a wrongful death case last month arising out of an automobile accident that occurred in Perry County, Alabama, on June 26, 2005. Our client's father, Nathaniel Gary, was driving a 1995 Oldsmobile Cutlass when his car was struck by a 2004 Ford F150 in what was basically an offset frontal collision. Mr. Gary died as a result of injuries he sustained in the accident. The driver of the Ford F150 was intoxicated and has been charged with vehicular homicide. Mr. Gary was properly wearing his seatbelt and did absolutely nothing to contribute to the accident. Our accident reconstruction expert placed the speed of the Gary vehicle at 6.7 mph and the speed of the Ford F150 at 39.2 mph. The delta V for the Gary vehicle was 28.2 mph. This was confirmed by the SDM download of the Gary vehicle which showed a change in velocity of 27.9 mph. Our claim was that the Oldsmobile Cutlass Supreme, which was a GM "W" car, was not crashworthy. There were some extremely poor design choices made by General Motors concerning the vehicle involved in our case.

The GM "W" car was part of a cost reduction program known at General Motors as "Project 1800." Under this cost reduction program, GM reduced the overall production cost of the W car by \$1800 per vehicle. A great deal of the cost reduction was achieved by removing and/or thinning metal in the impact management system of the vehicle,

which created safety problems. Some of GM's greatest cost reduction success was with the W car. Evidence of how it affected safety was the poor performance of the Gary vehicle in this collision. Safety was compromised by GM in order to increase profits and that simply can't be justified.

In this accident, Mr. Gary was deprived of the benefit of his seatbelt and airbag due to the collapse of the occupant compartment. The collapse was a direct result of the design flaws put in place by GM. His head was driven into the A pillar of the vehicle and Mr. Gary died as a result of this massive trauma to his head. The occupant survival space, which is referred to as the "safety cage," was totally destroyed in the crash. It was significant that the W car performed poorly in GM's internal testing. In fact, several prototype vehicles did not even meet the company's internal standards. Our kinematics expert said that had the occupant compartment been preserved, Mr. Gary's seatbelt and airbag would have been able to perform properly resulting in no life-threatening injuries.

J.P. Sawyer and Cole Portis represented Mr. Gary's family in this case and did an outstanding job. The case was settled during mediation for an amount that is confidential. Our experts were: Bryant Buchner (accident reconstruction); Jim Mundo (design); and Dr. Joe Burton (occupant kinematics). Our firm has had other cases involving GM's \$1800 program and another called the \$2500 program. In each case, the compromising of safety by the company resulted in tragic consequences for innocent victims.

II. LEGISLATIVE HAPPENINGS

ALL IS QUIET ON THE LEGISLATIVE FRONT IN ALABAMA

Folks are still talking about the failures of the recently completed regular

session of the Alabama Legislature, and most of the comments are not too complimentary. Over the past several weeks, the continuing fight between Senator Charles Bishop and Senator Lowell Barron has also been a topic of conversation both in the media and at the coffee shops. Fortunately, their fight hasn't gotten back to the physical sort. Most folks are just happy to know that the legislators are back home. All of our Alabama readers should encourage their House members and Senators to put partisan politics aside when they come back to Montgomery for the 2008 regular session. Based on what I hear from folks I talk with, nobody wants a special session any time soon. In my opinion, calling a session for any reason would be a major and costly mistake.

THE PAY DAY LENDING BILLS FAILED

I failed to mention last month that the payday loan bills failed to pass in the regular session. Frankly, I really wasn't surprised because of the powerful lobbying influence the loan sharks enjoy. I hope that public pressure from people around the state will finally be enough to force legislators to pass a tough bill that will really regulate an industry that is totally out of control. Persons who have to deal with payday lenders must be protected, and the Legislature has an obligation to make that protection a reality.

III. COURT WATCH

CORPORATE FRAUD VERSUS FRIVOLOUS LAWSUITS

The so-called civil justice reforms that the giants of Corporate America have been pushing for years, do not register well with voters, according to the results of a recent national poll. But, the message has done extremely well with some politicians, especially in Washing-

ton, as well as with some in the news media. This poll revealed that voters worry more about corporate fraud than they do about so-called frivolous lawsuits. The U.S. Chamber of Commerce and other tort reform organizations have worked hard and spent millions pushing their anti-consumer agenda over the past 15 years. It has resembled the Chinese water torture, and it has worked with some media outlets and with a good number of politicians. The tort reform movement was planned by a number of persons, including Karl Rove and Neal Cohen, and has been carefully carried out throughout the country.

The poll, conducted by Peter Hart Research Associates Inc., showed that twenty-four (24%) percent of voters worry about personal injury or medical malpractice cases resulting in "too much money" being awarded to the plaintiffs in lawsuits. However, sixty-four (64%) percent said they were worried about "corporations giving huge salaries and bonuses to CEOs, while cutting the jobs and benefits of their employees." Sixty-five (65%) percent of voters polled said they would be more likely to vote for a candidate who "favors protecting Americans' legal rights and strengthening the civil justice system so that deserving individuals can get justice, and corporations are held accountable and insurance companies are required to pay legitimate claims" than for a candidate who "favors restricting lawsuits and says that they hurt patient care, drive up car insurance, and drive jobs overseas when doctors and American business are forced to spend billions of dollars on unnecessary legal bills." I believe those findings are most significant. There are some in Corporate America who want to destroy the jury system, but the American people believe in it and want to preserve it.

When you put corporate fraud up against a frivolous lawsuit in any poll, those surveyed will tell you that they don't like fraud. In fact, the tort reform message has been that all lawsuits are frivolous and that's obviously false. In

any event, it appears that the tort reformers have spent millions—and other than their influence with certain politicians—they have little to show for their efforts.

FEW AMERICANS KNOW WHAT THE ALEC IS ALL ABOUT

There is an organization, the American Legislative Exchange Council (ALEC), that has an agenda that would cause concern for most American citizens if they only knew about it. ALEC provides model legislation to state legislators, and one of their programs is aimed at global warming issues. Unfortunately, the agenda of AELC is to discredit state-level legislation aimed at providing incentives to cut global warming pollution. Funded by foundations and corporate grants, ALEC is a major player in the fight to curb global warming pollution, but unfortunately they are on the wrong side. You can go to the group's Website and you will find all sorts of information designed to discredit those who believe global warming is a real threat to our world. I had wondered where Jeff Sessions got the idea that carbon dioxide, a by-product of burning fossil fuels, was good for the environment.

Jeff told our local Chamber of Commerce at a meeting a few months ago that the pollution from carbon dioxide was actually a good thing because it made trees grow faster and better. Now, I read where the ALEC has had the very same thoughts. They say that the efforts to regulate carbon dioxide as a greenhouse gas are harmful to our economy and the environment. It would be interesting to see where the ALEC gets its funding. It is affiliated with the ALEC Foundation and claims to have 3,000 state legislators, 80 members of Congress, and 12 governors as members. It also has 300 corporate members that pay "dues." Incidentally, ALEC has also received about \$1.3 million from ExxonMobil.

CLERGY ABUSE SETTLEMENT APPROVED

A judge has approved a \$660 million settlement between the Roman Catholic Archdiocese of Los Angeles and victims of clergy sex abuse. In approving the settlement, the judge observed: "This is the right result." The settlement is by far the largest payout by any diocese since the clergy abuse scandal emerged in Boston in 2002. Individual payouts, to be made by December 1st, will vary according to the severity of each case. An apology was issued by Cardinal Roger Mahony after the settlement was announced and that was a good thing.

All 508 cases that remained against the archdiocese, which also paid \$60 million in December to settle 45 cases that weren't covered by sexual abuse insurance, are included in this settlement agreement. These settlements push the total amount paid out by the U.S. church since 1950 to more than \$2 billion. Previously, the Los Angeles archdiocese, its insurers, and various Roman Catholic orders had paid more than \$114 million to settle 86 claims.

Several other religious orders in California have also reached multimillion-dollar settlements in recent months, including the Carmelites, the Franciscans, and the Jesuits. My prayer is that all of this sort of thing has come to an end. The last place any parent should have to be concerned about their children's safety and well-being is in a church. There are a number of lessons to be learned from this scandalous episode in our nation's history, and that is, children must be protected from sexual predators. Any person put in a position to have access to children must be checked out carefully and monitored constantly in some manner. I am sure that the churches of America have learned this lesson. Unfortunately, the lesson learned came only after the infliction of a great deal of hurt, misery, and distress. It's now time to put this matter behind us!

Source: *Associated Press*

HIGH-LOW AGREEMENTS ARE USED BY PARTIES IN LAWSUITS

It has become fairly common for parties in litigation to agree to what is referred to as a "high-low" agreement. Those agreements are designed to give a level of protection to both sides of a legal dispute that is going to a trial. Normally, such an agreement is made between a plaintiff and all defendants. But, fairness dictates that all parties involved in a multi-defendant liability action must be notified when only one of them reaches a high-low agreement with a plaintiff to cap that defendant's exposure in the event of an adverse jury award ruling. The New York Court of Appeals, in a recent decision, ruled on such an agreement in a case involving more than one defendant. The New York Court stated that one of the defendants was "deprived of its right to a fair trial" because it did not know its co-defendant in an asbestos exposure case "had reached a high-low agreement with the plaintiff."

The appeals court ordered a new trial for the defendant not a party to the agreement. Whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action, and the agreement required the agreeing defendant to remain a party to the litigation, the parties must disclose the existence of that agreement and its terms to the court and each of the non-agreeing defendants. This decision is fair and just and should be the rule in all courts. It is obviously unfair for defendants who are not a party to the high-low agreement to go through a trial with another defendant that has limited liability. Trial strategy for the non-agreeing defendant would very likely be affected.

A high-low agreement guarantees a plaintiff a recovery regardless of the jury's verdict. For example, if a jury's award comes in for the low amount or more, but not over the high amount, the plaintiff would get the amount awarded. In other words, the plaintiff would get the actual amount of the jury verdict if the award was between the low and high numbers. The defendant's liability

would be limited to the high number if the verdict exceeded the high number. If the jury returned a verdict for the defendant, the plaintiff would still get the low number. The jury is not made aware of the existence of a high-low agreement for obvious reasons.

In the New York case, the trial court's failure to disclose the existence of the high-low agreement rendered impossible a fair determination of the non-agreeing defendant's rights and liabilities. The court stated that the defendant was compelled "to proceed blindly to trial without any meaningful opportunity to defend itself from the deleterious effects that the secret agreement may have had" on its defense. I believe that this ruling was fair and reasonable. The new trial in that case will involve only the plaintiff and the non-agreeing defendant.

Source: *New York Law Journal*

WE MUST KEEP TIRED TRUCKERS OFF THE NATION'S HIGHWAYS

A federal appeals court has again struck down a Bush administration regulation that increased both the consecutive hours and the weekly hours that truck drivers are permitted to drive without rest. The U.S. Court of Appeals for the D.C. Circuit for the second time sided with Public Citizen and ruled that the Federal Motor Carrier Safety Administration's (FMCSA) hours-of-service rule for truckers, issued in August 2005, could put motorists at risk. Like the nearly identical rule issued by FMCSA in April 2003—which the court unanimously struck down in 2004 – the 2005 rule dramatically increased both the consecutive number of hours that truckers may drive before taking a rest and the total number of hours truckers may drive per week.

Public Citizen's second lawsuit against FMCSA challenged these same two aspects of the 2005 rule: a provision that allowed truck drivers to drive for 11 consecutive hours before taking rest time, increased from the old rule of

10 hours; and a provision which allowed drivers to "restart" their weekly tally of hours after they had taken a break as short as 34 hours. The 34-hour restart allowed truckers to drive 77 hours in seven days or 88 hours in eight days—a more than 25% increase over the pre-2003 rules. On-duty hours during which truckers may drive also climbed, so that a driver working 14-hour shifts under the new rules can now work as many as 84 hours in seven days or 98 hours in eight days—the latter a 40% increase over the old limits. The lawsuit also criticized the agency's regulatory impact analysis used to justify these changes. FMCSA created a new model in response to the court's 2004 decision striking down the 2003 rule—supposedly to take into account the increased risk associated with driving longer hours—without providing any notice or opportunity for public comment.

The three-judge panel agreed with Public Citizen that the agency did not provide any opportunity for notice and comment on its new model or explain the methodology and assumptions that underlay it. The court also faulted the agency's model for failing to deal with the problem of the added cumulative fatigue that would be caused by the 34-hour restart, which permitted significantly greater hours of driving per week. The court struck down the portions of the rule that permitted the eleventh hour of driving and the 34-hour restart. Congress ordered FMCSA to make safety its highest priority and to revise the hours-of-service rules to decrease fatigue-related truck crashes. It also charged the agency with the obligation to safeguard truck drivers' health. It's high time for FMCSA to make safety its top priority. Issuing regulations that dramatically increased daily and weekly driving and working hours is going in the wrong direction.

Each year more than 5,000 people are killed and more than 110,000 are injured in large truck crashes. Truck driver fatigue is a major contributor to

severe crashes. Many studies have shown that truck driver alertness and performance begin to dangerously deteriorate after about eight hours of consecutive driving. After eight hours of driving, the risk of a truck driver having a crash begins to increase rapidly. The public would be outraged over FMCSA's performance if they knew what is going on. It's another example of where the Bush Administration has its priorities when it comes to the health and welfare of the American people, out of kilter. Safety on our highways should be extremely important for any administration. A federal court has once again given specific instruction to FMCSA. Let's see how they respond.

Source: Public Citizen News Release

SUDAN ORDERED TO PAY \$8 MILLION TO COLE VICTIMS' FAMILIES

A federal judge has ordered Sudan to pay nearly \$8 million to the families of 17 sailors killed in the 2000 terrorist attack on the USS Cole. The families had sought \$105 million, but because of a very bad law, U.S. District Judge Robert G. Doumar ordered Sudan to pay only \$7.96 million. Judge Doumar applied the Death on the High Seas Act, which permits compensation for economic losses, but not for pain and suffering. In his ruling, Judge Doumar wrote:

It is depressing to realize that a country organized on a religious basis with religious rule of law could and would execute its power for purposes which most countries would find intolerable and loathsome. It is a further tragedy that the laws of the United States, in this instance, provide no remedy for the psychological and emotional losses suffered by the survivors.

The families accused Sudan's government of providing support, including money and training, that allowed Al-Qaeda to attack the Cole while it was in the harbor of Aden, Yemen, on October

12, 2000. In March, Judge Doumar found the African country liable for the attack on the now-repaired Navy destroyer. His latest ruling reaffirmed those findings.

Sudan had sought unsuccessfully to dismiss the lawsuit on the grounds that too much time had passed between the bombing and the filing of the lawsuit in 2004. Lawyers representing the Sudanese government didn't offer opening statements or closing arguments. In fact, they didn't ever question any witnesses. It would now be up to the lawyers for the families to collect the damages awarded from Sudan's assets that have been frozen in the United States. While the result is good, Judge Doumar's hands were tied by the existing law that limited the amount of damages that he could award for the 17 deaths. That is most unfortunate for the families of the victims.

Source: CNN.com

DEFENSE VERDICT IN DRUMMOND CASE

The jury in the case against Alabama-based Drummond Coal returned a defense verdict on July 26th. You will recall the case, involving the killing of three union leaders in Colombia, was seen as a test of whether companies can be held responsible in U.S. courtrooms for their conduct overseas. The verdict came after two weeks of testimony in the civil lawsuit against Drummond Ltd. and Jiminez, its president in Colombia. Drummond Ltd. is a division of the privately owned Drummond Co. Inc., which was dismissed as a defendant before the trial began. Both companies are based in Alabama.

Relatives of the dead men and their union filed suit accusing Drummond of arranging the killing of the labor leaders by paramilitary forces in Colombia in 2001. The company denied any involvement with the slayings or with militia forces in the South American nation, where it operates a huge surface mine. The suit was the first to go to trial against a U.S. corporation under the Alien Tort Claims Act, a 1789 law, passed

to fight piracy, that lets foreigners file suit in federal court for alleged wrongdoing overseas.

Judge Karon Bowdre told the jury that in order to win, the families and union had to prove Drummond knowingly aided the killers and committed what amounts to a war crime in Colombia. Other U.S. companies have been accused of having ties to militias, which are illegal under Colombia law and considered terror groups by the United States. A congressional subcommittee held a hearing in June into the Colombian dealings of Drummond and Chiquita Brands International Inc. As I understand it, Chiquita admitted paying paramilitaries \$1.7 million in protection money beginning in 1997 and the Justice Department fined the company \$25 million for making the payments. More than 800 union members have been killed in Colombia in the last six years, according to government figures, making it the world's most dangerous country for labor. Thus far, only a few of the killings have been solved. But in this case the Drummond Companies were found not guilty. The plaintiffs' lawyers say they will appeal.

Source: *Associated Press*

IV. THE NATIONAL SCENE

THE STATE OF OUR NATION

The state of our nation is not so good when you consider how far our nation has slipped over the past six years. It's a crying shame that the federal government has been run in a manner that satisfied an agenda that was set by the giants of Corporate America during the six years of Bush-Cheney rule. While the oil, insurance and pharmaceutical industries have benefited greatly during this time, most Americans have not done so well. In fact, many are really hurting as a result of an agenda that is designed to benefit

only the rich and powerful. Those in control of our government made decisions that satisfied this agenda, and in the process, abused their power.

As a consequence, we now have our military forces bogged down in a civil war in Iraq with no end in sight, wages for most of our citizens are stagnant at best, the lack of health insurance has become a major problem, many Americans have slipped into poverty, gasoline prices at the pump are outrageously high with no relief in sight, global warming is being ignored, our national debt is totally out of control, and the costs of national elections are off the chart. Perhaps the one single thing—with the exception of the Iraq debacle—that will label this administration as a total failure will be the cost to the taxpayers for the Prescription Drug Act that President Bush and the pharmaceutical industry pushed through Congress. The projected cost is now in the trillions of dollars and it will get much worse.

Without any real dispute, our image and influence on the international stage are at an all-time low, and that's difficult to justify by any standard. All of the corruption in our nation's capital is being swept under the rug, and the Scooter Libby episode is a prime example of how bad things have gotten. I suspect Mr. Libby knows too much about what all has happened around the White House and with the Vice President to ever see the inside of a prison. The American people are badly in need of relief, and will make their frustration known at the polls next year in all national elections. Unless the Democratic Party blows it—and they are capable of doing just that—no Republican can be elected president next year. In my opinion, the Bush years will simply be too much to overcome for any Republican candidate.

HALLIBURTON MUST REALLY LOVE THIS WAR

To say that Halliburton has done extremely well since Dick Cheney became vice-president is a gross under-

statement. Much of the company's financial take has come from the federal government and has come about as a direct result of the war in Iraq. Since George Bush and Dick Cheney invaded Iraq, this massive military contractor has had an increase in government contracts of 600%. More than \$10 billion has come from Pentagon contracts, with most of them being of the no-bid variety. That really should come as no surprise when you consider how this Administration operates. Let's see what Halliburton has delivered to the taxpayers in return. For a start—how about gas-price gouging, contaminated food and water, and a constant pattern of overcharges? An example of how this privileged company has operated in Iraq involves its hiring of laborers, paying them as little as \$5 a day, and then billing the U.S. Government more than \$50 per day for each such worker.

In a recent analysis of \$10 billion in waste and overcharges by various contractors in Iraq, federal investigators found Halliburton responsible for \$2.7 billion of that waste and overcharging. It is impressive to note that the company's 2006 profits were \$2,428,000,000. Its overall profits have increased over 368% since George Bush and Dick Cheney came into power. For those who are still trying to justify the war in Iraq, the Halliburton success story has to give them heartburn. I have to wonder why the news media hasn't made Halliburton's success story in Iraq front page news, especially when you consider that the vice-president was one of the architects of the war effort.

WARS COSTING THE UNITED STATES \$12 BILLION A MONTH

The boost in troop levels in Iraq ordered by President Bush has increased the cost of war there and in Afghanistan to \$12 billion a month. According to congressional analysts, the total for Iraq alone is nearing a half trillion dollars. All told, Congress has appropriated \$610 billion in war-related

money. The figures come from the non-partisan Congressional Research Service, which provides research and analysis to lawmakers. If Congress approves President Bush's pending request for another \$147 billion for the budget year starting October 1st, the total bill for the war in Iraq and the fight in Afghanistan would reach more than three-fourths of a trillion dollars, with appropriations for Iraq reaching \$567 billion. Also, if the increase in war tempo continues beyond September, the Pentagon's request "would presumably be inadequate," according to the CRS. I am not sure that many of the American taxpayers can comprehend the vast amounts being spent on a most unpopular war.

Source: *Associated Press*

SETTLEMENT REACHED INVOLVING SECURITY GUARDS AT ARMY BASES

A New Mexico security firm has agreed to pay the U.S. government \$18 million to settle allegations that it violated terms of a contract to provide trained civilian security guards at eight Army bases. Akal Security was hired in September 2003 to provide guards at Fort Riley, Kansas; Fort Lewis, Washington; Fort Hood, Texas; Fort Campbell, Kentucky; Blue Grass Army Depot in Kentucky; Fort Stewart, Georgia; Sunny Point Military Ocean Terminal, North Carolina; and Anniston Army Depot in Alabama. An investigation indicated that Akal failed to provide as many guards or the proper training of these guards as the contract required. A lawsuit was filed on behalf of the federal government by guards who were hired by Akal to work at Fort Riley. U.S. Attorney Eric Melgren, commenting on the case, said:

This settlement sends a clear message to government contractors: There can be no shortcuts. Private companies hired to protect the security of U.S. Army facilities perform a vital service and they are paid millions of dollars for it.

In reaching the settlement, Justice Department officials dismissed all outstanding claims. The company agreed to repay the government an initial payment of \$8 million and an additional \$10 million, plus interest, over four years. Akal had agreed in 2003 to recruit, screen, hire, and train 1,800 guards to do security at the Army posts. The company said some of the new guards who failed to get the mandated training were assigned to work. Akal continues to provide guards at seven of the Army installations. Government investigators alleged that Akal sought payment for guards it failed to provide and for training it failed to provide, including on weapons and garrison-specific skills, such as use of force and administering first aid. When a corporation signs government contracts saying they will meet high performance standards, it's essential that they meet those standards.

Certainly, we can't afford to have any reduction in the security of our military installations. Akal, founded in 1981, is one of the largest security companies in the United States and employs 15,000 people worldwide. The company provides security services for federal courthouses, detention facilities, and military installations. The company said it has taken other steps to insure it is meeting federal contracts, including enhancing training programs and increasing audits of contract compliance. I hope they really mean it and will follow the law and the provisions of the contracts they execute. After all, that's not asking too much!

Source: *Associated Press*

ANOTHER SCANDALOUS KATRINA STORY

It was revealed last month that the U.S. government wasted millions of dollars buying and storing ice after Hurricane Katrina. After nearly two years, thousands of truck miles and \$12.5 million in storage costs, another flawed Hurricane Katrina relief effort was reported. It appears that the federal government got rid of thousands of pounds

of ice it had sent south to help Katrina victims, and then back up north when FEMA determined much of the ice wasn't needed. The ice was stored for over two years at 23 facilities nationwide and now, believe it or not, the ice is being melted.

The cost of storing the ice at all the facilities since Katrina was \$12.5 million. Truckers received up to \$900 a day to move the ice to storage sites around the country. FEMA contracts required disposal of the ice three months after purchase, but the agency decided to keep the excess ice for the 2006 hurricane season. Obviously, the ice wasn't needed during that year either. FEMA apparently decided not to save the ice for the 2007 season. It would appear that it would be lots cheaper to buy ice than store it at a cost of \$12 million. Just think what FEMA could have done with \$12 million, and all of the other money it wasted after Katrina, on the Gulf Coast and in New Orleans. I suspect we have seen just a drop in the bucket so far as graft and corruption in the post-Katrina era are concerned. I hope I am wrong!

Source: *Associated Press*

MYSPACE MUST BE CONTROLLED

MySpace.com has thousands of registered sex offenders who have profiles on their web site. I was glad to see that North Carolina Attorney General Roy Cooper is taking on MySpace. That is real good news. MySpace has admitted that it has more than 29,000 sex offenders on the social networking site. However, I suspect there are actually many more because of the use of fake names by offenders. MySpace tried to keep from disclosing this information to officials claiming the protection of federal privacy laws. Clearly, legislation is needed—both federal and state—to restrict access to social web sites like MySpace, Facebook, and Xanga. This is a most serious problem and our political leaders must get involved and protect children from sexual predators. We must

continue to find ways to protect young Web users. Also, parents must learn more about computer use and the internet. If you agree that something must be done, contact Governors, Attorneys General, and Legislators in your respective states and urge them to get involved in this fight to protect our children. This is a battle that we can't afford to lose!

Source: *Associated Press*

V. THE CORPORATE WORLD

CHINESE REGULATOR SENTENCED TO DEATH

With all of the reported safety and health problems relating to Chinese products being imported into the U.S., a recent announcement coming from the Chinese government really got my attention. In fact, to say it was a shocking bit of news is a gross understatement. In May, Zheng Xiaoyu, who served as head of China's Food and Drug Administration, was sentenced to death for taking bribes to approve substandard medicines, including an antibiotic blamed for at least ten deaths. The real shocking news was that Zheng was actually put to death on July 10th. It should be noted that his crime was "corruption," and he paid for the crime with his life.

In addition, a former department head at China's drug regulation agency was also sentenced to death on charges of accepting hundreds of thousands of dollars as bribes and neglecting his official duties. Cao Wenzhuang, a department director under Zheng Xiaoyu, was given the death sentence with a two-year reprieve. Such suspended death sentences in China are usually commuted to life in prison if the convict is deemed to have reformed. Cao, who oversaw the pharmaceutical registration department, had been secretary to Zheng during the 1980s. In the pharmaceuticals department, Cao had the power to approve drug production in

China from 2002 to 2006. He was convicted of accepting \$307,000 in bribes from two medical companies based in Jilin and Guangdong provinces that were seeking approval to sell their products. He also was convicted of neglecting his duties in approving drugs. Based on what happened to his boss, Cao may wind up being a most fortunate fellow. It was reported that Cao was given a two-year reprieve because he provided evidence that helped with the investigation of other cases.

Not being familiar with Chinese law, its regulatory processes, or even the magnitude of the public official corruption there, I find it difficult to really understand fully how a person could be sentenced to death for taking a bribe or allowing bad drugs to get to the market. But, I can say without reservation that some of our politicians had better be glad they don't work for the government in China.

Source: *Washingtonpost.com*

WAL-MART COLLECTED ON DEATHS OF EMPLOYEES

Several issues back, I wrote on a subject that dealt with what is referred to as "dead peasant insurance." A lawsuit was filed recently in a Florida federal court that deals with Wal-Mart's use of the "dead peasant insurance" concept. That type of insurance has stirred up a great deal of controversy because of how it works. Let's take a look at the Florida case. When Karen Armatrout died in 1997, her employer, Wal-Mart, collected thousands of dollars on a life insurance policy the retail giant had taken out without ever telling her. She was one of about 350,000 employees Wal-Mart secretly insured nationwide. It has been estimated that the company collected on 75 to 100 policies involving Florida employees who died. The Armatrout lawsuit, filed in U.S. District Court, seeks class action status on behalf of the estates of all the Florida employees who died while being insured by Wal-Mart without their

knowledge. But, this is a practice that I believe is nationwide in scope involving corporations other than Wal-Mart.

According to a report in The Tampa Tribune, Wal-Mart settled two similar lawsuits in Texas and Oklahoma—one for about \$10 million and the other for about \$5 million. Ms. Armatrout, who was 50 years old when she died of cancer, had worked several years in the pharmacy of a Wal-Mart store. The policy payouts in the “dead peasant insurance” ranged from \$50,000 to \$80,000, depending on the person’s age and gender. They were taken out on all full-time Wal-Mart employees who in December 1993 were between ages 18 and 70 and participated in the medical benefits plan. The company apparently stopped taking out the policies in 1995, but continued to receive payouts on employees who died, even those who had left the employment of Wal-Mart.

Wal-Mart claims that it canceled its policies in early 2000 because it was losing money on the arrangement. The company says the program was intended to reduce its income taxes to help pay rising employee health care costs. It claims that workers were notified and given the opportunity to opt out, which appears to me highly questionable. It’s alleged in the Armatrout lawsuit that the policies were all written in Georgia, where the laws allowed such policies to be obtained by companies such as Wal-mart. The lawsuit alleges that Wal-Mart used confidential information it received from employees for use in their employment, such as Social Security numbers and dates of birth, to obtain the life insurance policies.

Unfortunately, this corporate practice is not uncommon. It is estimated that up to 25% of Fortune 500 companies have taken out such policies on employees. The vast majority of the time, the employees had no idea their lives were being insured. In 2001, premiums on such policies grew to \$2.8 billion, having been \$1.5 billion the year before. This information comes from a report by CAST Management Consul-

tants of Los Angeles. The Florida lawsuit is being handled by Michael D. Myers, who is with the firm of McClanahan & Clearman, L.L.P., which is located in Houston, Texas.

Source: *The Tampa Tribune*

FORMER TYCO AUDITOR AGREES TO RECORD SETTLEMENT

PricewaterhouseCoopers LLP has agreed to pay \$225 million to settle a class action lawsuit brought by shareholders of Tyco International Ltd. The lawsuit arose out of the multibillion-dollar accounting fraud that sent Tyco’s top executives to prison. The settlement with Tyco’s former auditing firm comes on top of one reached in May with Tyco. The company agreed to put \$2.975 billion into a fund to settle most shareholder claims over the actions of Tyco’s former chief executive officer, L. Dennis Kozlowski, and the company’s ex-chief financial officer, Mark Swartz. With interest, the Tyco settlement is believed to be the largest ever by a single corporate defendant. The total settlement of more than \$3.2 billion from Tyco and PricewaterhouseCoopers brings to an end a four-year legal battle. The settlement will require court approval.

The settlement covers investors who acquired Tyco securities from December 13, 1999, to June 7, 2002. Tyco has its operating headquarters in West Windsor, N.J., and is nominally headquartered in Bermuda. The shareholders’ suit had claimed that as Tyco’s independent auditor, PricewaterhouseCoopers failed to uncover fraud in the accounting scandal at the conglomerate. Tyco overstated its income during that period by \$5.8 billion. Investors’ losses have been estimated at \$1 billion to \$2 billion. It’s unclear how many shareholders are involved, but Tyco had about two billion shares of stock on the market during the period in question. The class representatives in the suit included several trade unions and public pension funds, among them pension plans for office employees, teachers, and state employees in

Louisiana, and plumbers and pipe fitters around the country. As you will recall, Kozlowski and Swartz were convicted of grand larceny and other crimes for looting Tyco of about \$600 million to fund extravagant lifestyles and inflating the company’s value. The two are serving terms of 8 years to 25 years in prison.

Source: *Associated Press*

MAXIMUS SETTLES FRAUD CASE FOR \$30.5 MILLION

Maximus, a Reston company that provides consulting services for local and state social service agencies, has settled a Medicaid fraud lawsuit with the federal government for \$30.5 million. In addition, the company will hire UBS Investment Bank to review its strategic options. This settlement comes after an investigation by the federal government. The government alleged that Maximus had helped the District of Columbia’s Child and Family Services Agency submit false claims to the Medicaid program. The U.S. government had previously recovered \$12.15 million from the Child and Family Services Agency, bringing the total collected to \$42.65 million. The investigation began after a lawsuit was filed on behalf of the government by a former division manager at Maximus, under whistleblower provisions of the False Claims Act. This is just another example of how widespread corporate fraud is in this country and how frequently it occurs when federal money is involved.

Source: *Washington Post*

CHEMICAL MAKER SETTLES PRICE-FIXING SUIT FOR \$10 MILLION

Specialty chemicals maker Cabot Corp. has agreed to settle the federal class action lawsuits pending against the company that alleged it and other carbon black manufacturers violated antitrust laws in setting prices for carbon black sold in the United States. According to a filing with the Securities and Exchange Commission, Cabot’s

share of the settlement cost is \$10 million. As usual, Cabot denied any wrongdoing of any kind. It even claimed it had “good defenses to these claims.” The settlement agreement is subject to court approval. Boston, Massachusetts-based Cabot will apparently continue to defend the remaining antitrust lawsuits pending against it. There are suits pending in several state courts brought by purported classes of purchasers of carbon black, and a single federal case brought by a single party that did not join the federal class action.

Source: *Associated Press*

POZEN SETTLES CLASS ACTION LAWSUIT AGAINST COMPANY

Pozen Inc., which develops drugs to treat acute and chronic pain, has settled a class action lawsuit filed against the company and its chief executive officer. All claims against the company and the official will be dropped. The settlement agreement, which remains subject to court approval, will be funded with proceeds from the company’s liability insurance for directors and officers. The lawsuit, which was filed in June 2004, accused Pozen of making false and misleading statements about migraine drug candidates MT 100 and MT 300. Chapel Hill, North Carolina-based Pozen is currently developing Trexima with British drug maker GlaxoSmithKline Plc. The drug combines Glaxo’s popular migraine drug Imitrex, known generically as sumatriptan, with an older painkiller known as naproxen sodium.

Source: *Reuters*

FEDERAL GOVERNMENT JOINS WHISTLEBLOWER SUIT

The U.S. Justice Department has joined a whistle-blower lawsuit alleging Medicare fraud by Fresenius Medical Care AG, the world’s biggest dialysis care company. The suit against two units of the German company, called Renal Care Group and Renal Care Group Supply Company, alleges that claims submitted

between 1999 and 2005 for home dialysis supplies and equipment were false. Fresenius acquired rival Renal Care Group last year for \$3.5 billion to boost its presence in the U.S. market. The company contracts with the U.S. government’s Medicare health insurance program for the elderly.

Kidney or renal failure patients often require dialysis, a procedure which filters waste products from the blood. Medicare will pay companies selling dialysis supplies to patients only if the firms are independent from dialysis facilities and the patient chooses to receive those supplies. According to the complaint, the company set up a “sham” business that was not independent and that existed “little more than” to submit bills to the government. The suit was filed in the U.S. District Court in St. Louis, Missouri by two former employees of the company.

In 2004, Gambro Healthcare, now part of Fresenius’ major rival DaVita Inc., agreed to pay \$350 million in criminal fines and civil penalties to settle health care fraud charges with the U.S. Justice Department. That earlier case included allegations of a “shell” company selling supplies to home dialysis patients, and was also based out of the Justice Department’s Missouri office. At the time, it was one of the largest health care fraud settlements reached by the U.S. government. It’s good to see the federal government taking on those corporations that commit fraud in connection with federal programs and contracts.

Source: *Reuters*

HIGH COURT SHOULD PROTECT INVESTORS’ RIGHTS

Three former Securities and Exchange Commission (SEC) officials are attempting to intervene in the Supreme Court dispute that could determine whether defrauded investors can recover money from third parties. The reason that this case has triggered national attention is because it will have repercussions for

employees and shareholders who lost billions of dollars in the 2001 Enron collapse. The five-member SEC voted earlier this year to file court papers that support investors and their ability to sue accountants, lawyers and other third parties who did not make public statements about fraud but who nonetheless may have helped their clients carry out the schemes. For some rather strange reason, however, the SEC brief, however, was never filed.

As previously reported, the U.S. solicitor general, who speaks for the Bush administration before the Supreme Court, refused to accept the SECs brief. He let a deadline for filing legal briefs on shareholders’ behalf pass with no comment. The decision came after President Bush and Treasury Secretary Henry M. Paulson Jr. said that position could put U.S. companies at a disadvantage to foreign rivals and expose businesses to substantial financial risks. The case, in which Charter Communications investors want to sue business partners Motorola and Scientific-Atlanta, is scheduled to be heard by the Supreme Court in its coming term.

A bipartisan group of former SEC leaders, including former chairmen William H. Donaldson and Arthur Levitt and former commissioner Harvey J. Goldschmid, asked for permission on July 16th to file a post-deadline brief with the High Court in what they labeled a “critical” case. The lawyers for the group, New York University law professor Arthur R. Miller and former SEC lawyer Meyer Eisenberg, wrote:

Holding liable wrongdoers who actively engage in fraudulent contact that lacks a legitimate business purpose does not hinder, but rather enhances, the integrity of our markets and our economy. We believe that the integrity of our markets is their strength.

This case is being viewed as one of the most important securities-law issues to reach the Supreme Court in years. That’s why lots of folks, who have the

“W” decals on their cars, should pay attention to this case. I doubt they even know that the Bush White House has taken a position that is very much anti-investor and very much against their best interests. It’s impossible to justify the administration’s position, but that has never seemed to bother this president on other fronts.

Source: *Washington Post*

VI. CAMPAIGN FINANCE REFORM

A FAILURE OF MONUMENTAL PROPORTIONS

The failures of both Congress and most state legislatures to pass meaningful campaign finance reform litigation have to be considered major disappointments. The American people should be outraged over the refusal of politicians to tackle this problem. It’s proof positive of the power and influence of the giants in Corporate America and their highly paid and well-connected lobbyists. I am not sure how much longer the voters will put up with the continued failure to act in an area of concern that affects all American citizens. Eventually, the politicians will have to keep their campaign promises—at least, I hope that day will come and soon.

THE UPCOMING ALABAMA SUPREME COURT RACE

There will be a race for a single seat on the Alabama Supreme Court next year. Justice Harold See—who has never seen a jury verdict in favor of a consumer or victim of corporate wrongdoing that he didn’t want to reverse and render—will be up for reelection in 2008. If there has ever been a race in which campaign finance reform is badly needed, it clearly is this one. The Democratic and Republican party leaders should join forces and get a campaign finance reform bill passed in the regular

session of the Alabama Legislature that will bring some fiscal sanity to the 2008 court race.

VII. CONGRESSIONAL UPDATE

THE NEW CONGRESS HAD BETTER GET BUSY

What has happened to all of the promises by Democrats that were supposed to bring about a new day in Congress? When it’s all said and done, it appears that the powerful lobbyists still run the show in Washington. Unless those shackles are broken, special interests, and not the people’s interests, will continue to be served by the House and Senate, which are now ostensibly under Democratic control. Fortunately, there is still time to bring the people’s agenda to the forefront and for our lawmakers to get down to business. If you agree, let your House members and Senators hear from you. We need action—not words!

THE CONGRESSIONAL DEBATE OVER IRAQ HEATS UP

There is one area of concern in which lawmakers in Washington find themselves between a rock and a hard place, and that’s the funding of the war in Iraq, which is now costing the taxpayers about \$12 billion per month. There is overwhelming opposition to this war, but at the same time nobody wants to leave our troops in harm’s way without being adequately supplied and fully supported. Yet it’s quite obvious that no nation from outside the region can successfully referee a civil war of the sort that’s being waged in Iraq. People all over the country realize that invading and occupying Iraq was a monumental mistake. The question is, how does Congress get us out of the mess that the Bush-Cheney war machine put our troops into? As I was writing this part of

the Report, the U.S. Senate has been engaged in a full-blown filibuster over the involvement of U.S. troops in Iraq. Democratic attempts to stop the filibuster fell a few votes short of the 60 votes required to stop a filibuster in the Senate. I hope that the sleep-in wasn’t just a publicity stunt. If that proves to be the case, it will have been a costly mistake.

LOBBYING AND ETHICS REFORM BILL STALLED AGAIN

As this issue went to the printer, groundbreaking lobbying and ethics reform legislation was being held up in Congress. Public Citizen was hard at work trying to get a breakthrough on this badly needed legislation, and I hope they will be successful. Senator Jim DeMint (R-SC), placed a hold on appointing Senate conferees to iron out the differences with the House of Representatives and complete passage of the lobbying and ethics reform bill. Just before the July 4th recess, Senator Mitch McConnell (R-KY) in a like manner, blocked a motion to proceed with reconciling House and Senate lobbying reform bills S. 1 and H.R. 2316.

Public Citizen has demanded that Congress move ahead with cleaning up its act, appoint conferees to agree upon the strongest lobbying and ethics reform legislation, and pass these long-overdue reforms into law. Senator DeMint, who has orchestrated the latest in a long line of obstructionist tactics, claims to be blocking the reform legislation for a legitimate reason. But, it’s obvious that he is nothing more than a water-boy for the powerful special interests. Joan Claybrook, president of Public Citizen, had this to say about his tactics:

This is a bogus excuse to block ethics reform. The Senate has approved the earmark reforms sponsored by DeMint himself, which passed by a vote of 98-0 in the ethics and lobbying reform legislation, S. 1, that he is now blocking.

Also, the Senate already discloses most earmarks online even without the legislation in place.

Last year, when congressional Republicans were in the majority, they killed lobbying and ethics reform legislation by refusing to appoint conferees to finish the legislation. This year, the Senate and House again approved separate reform bills—with the next step being approval for a conference committee to resolve the differences. Congress needs to do what is right and pass this legislation. The public has been waiting for years on Congress to act. It's time for action!

Source: *Public Citizen*

HOUSE PASSES DRUG SAFETY OVERHAUL

The U.S. House of Representatives has approved a sweeping overhaul of the nation's drug safety system. The 403-16 House vote followed Senate passage in May of similar legislation to strengthen the ability of the Food and Drug Administration (FDA) to detect risky side effects of medicines already on the market. Congressional and independent inquiries that were conducted, prompted by the 2004 withdrawal of Vioxx, found the agency's safety office to be understaffed, ill-equipped, and overwhelmed. As a result, consumers have been placed in harm's way because of the failings of the public health system. I hope this bill, if finally passed, will lay the groundwork for restoring trust in the FDA. Unfortunately, the safety legislation that passed, however, is part of a measure reauthorizing the collection of industry user fees that fund more than half the FDA's budget for reviewing new drugs. Therein lies much of the problems with the FDA—its dependence on drug industry funding.

The House bill follows the same basic approach to safety as the Senate version, but consumer groups said it would give the FDA stronger regulatory powers in some areas. Both bills would set up a computerized network to scan

medical insurance and pharmacy records for patterns that could signal problems with new drugs. The FDA now relies on anecdotal reports submitted by doctors and drug companies, which are believed to capture only a small fraction of bad drug reactions.

But, a computerized system could take several years to deploy. Although, the Senate bill sets some benchmarks for the FDA, the House version does not. Both bills would give the FDA additional leverage in dealing with drug companies. This includes greater authority to require that prescribing literature for doctors and patients reflects the latest data on risks, as well as the power to order—not just request—follow-up safety studies. Such oversight would be carried out through risk management plans tailored to specific drugs. The rules for the risk plans are complex, but policy analyst William Vaughan of Consumers Union believes that, overall, the House approach appears to be stronger. The House bill also includes stiffer fines for drug companies that violate FDA requirements and tighter rules to reduce conflicts of interest among outside scientists who advise the agency.

I hope a House-Senate conference committee will work out differences between the two bills and report a strong bill. Congressional leaders say they want to send President Bush a final version this summer. It's unclear how the White House will react to the finished product. Before the Senate voted in May, the Administration said it agreed with the goals of the legislation, but had serious concerns about aspects of the risk plans. Interestingly, the pharmaceutical industry has expressed support for the Senate bill. That's sort of scary!

Source: *Los Angeles Times*

VIII. PRODUCT LIABILITY UPDATE

PRODUCTS LIABILITY CASES ARE SOMETIMES OVERLOOKED

Our firm has learned over the years that a products liability case can sometimes be overlooked in a motor vehicle crash unless you know what to look for and how to detect a potential claim. It's sometimes easy to miss such a case unless an experienced lawyer and qualified investigators and experts are involved early on after a motor vehicle crash occurs. Many times the crash is blamed on driver error, and the products liability claim is never even looked into. It's been my experience that any highway crash that involves death or serious injuries should be reviewed to see whether in fact there is a crashworthiness claim or some other claim that has a product defect as a cause. Of course, a serious injury in this context means one involving severe brain injury, paralysis, or some other injury that leaves a victim with permanent impairment at a significant level.

There are all sorts of products liability cases involving motor vehicle crashes, and I am limiting this writing to those events. Any time a crash involves a roll over or a tire separation, the investigation should include the possibility of a products case. The same rule of thumb applies if a fuel-fed fire is the culprit. Also, if there is a failure of a seat belt to restrain an occupant in either the front or back seats of the vehicle, you should definitely look to determine whether that event caused an injury or death. If there is a roof crush or a deformation of the roof in a lateral movement, it is likely that there is a defect involved. We have found that a significant number of vehicles—especially pickups—have roof structure problems. There can also be problems with airbags that don't deploy properly or late or not at all.

On crashworthiness cases, remember

that the front occupant compartment is referred to as the “safety cage” by most manufacturers and for a reason. The safety cage should protect front seat occupants in nearly all highway speed crashes. We have had cases in which companies intentionally weakened the safety cage by design decisions that put profits over safety. One company actually had a program called the 2500 program that had nothing to do with safety. As it turned out, we learned in a case involving a two-vehicle highway crash that the 2500 referred to dollars. That company was taking \$2,500 worth of “mass” out of each vehicle sold, and the reductions made were all safety features that were weakened. For example, the side rails were cut back in length and the “shot gun rail” was made out of weaker steel. The door rails were reduced in size, making them totally ineffective in a side impact or an offset frontal impact. The company didn’t reduce the sales price of the vehicle and pocketed the vast amounts it saved as a result of the so-called 2500 project.

Never assume that just because a vehicle has met a NHTSA safety standard, the vehicle is safe. For example, an aluminum pool chair meets the strength requirements of FMVSS 213. The minimum standards that automobile manufacturers have to meet—as promulgated by NHTSA—are oftentimes very weak and don’t satisfy the design engineering standards in the industry. The companies know this, and as a result, many vehicles are made and sold that have a defective component of some kind that put people using the highways at great risk for injury or death.

AN ESTABLISHED SAFETY HIERARCHY MUST BE FOLLOWED BY DESIGN ENGINEERS

Design engineers have a duty to design products that are safe when used in the intended manner. That duty applies in relation to all products and includes when the product is a machine used by workers in the workplace. Designing machinery from a safety per-

spective is best accomplished through application of the process of the well-known and widely accepted methodology of the “Safety Hierarchy” that has been developed over the years. The Safety Hierarchy is an ordered set of design criteria that should be incorporated into the machine design by the machinery or product designer in the following order:

- First, if possible, the design engineer should design out the hazard;
- If the designer cannot design out the hazard, they must provide safeguarding of the hazard;
- If safeguarding is not feasible, the operator must be warned of the hazard; and
- If warning the operator is not possible, procedures must be established so the hazard can be avoided.

Although the criteria are well known by all design engineers, unfortunately marketing forces in Corporate America are so powerful that design engineers’ advice and expertise are often ignored or overlooked. Profits sometimes are put over consumer safety. When that happens, people who use the products are put at risk.

THERE MAY BE MILLIONS OF FAULTY CHINESE TIRES ON THE MARKET

It now appears there may be millions of faulty Chinese tires on the highways in this country. The suspect tires have been sold in the United States and apparently are far more in number than initial estimates indicated. Two fatal crashes in which the tires were the culprit apparently led to a recall of the tires. This recall is the latest in a string of alerts about the safety of products made in China. As reported, Foreign Tire Sales (FTS), a Union, New Jersey tire distributor, was responsible for bringing the Chinese-made tires into the country. One of the crashes killed two Philadelphia

construction workers and severely injured another.

The federal government demanded the recall of 450,000 tires made by the Chinese firm Hangzhou Zhongce Rubber Co. and distributed in the United States by FTS. Reportedly, there are a half-dozen or more other distributors of Zhongce tires. It is being reported that as many as five million of the tires might have been sold in the United States since 2002. The manufacturer may have sold its tires under countless brand names.

As reported, the defect was the result of a failure of the manufacturer to place adhesive strips between the tire belts. This will cause the tires to degrade and eventually separate. The tires were sold under the names of Compass, Telluride, Westlake and YKS. FTS contacted the National Highway Traffic Safety Administration (NHTSA) in May to report that it had safety concerns about the tires triggered by the crash of an ambulance in New Mexico in 2005. Frankly, it’s real difficult to understand why it took NHTSA so long to complete an investigation and recall the tires. FTS launched its own tests of the tire as a result of the crash and complaints from customers seeking refunds because of poor quality.

The company has admitted that its own tests revealed that some tires, designed to last 40,000 miles, actually were coming apart after only 25,000 miles. The tires were made for vans and other light trucks. It is significant that FTS has now sued Zhongce, alleging that the manufacturer is responsible for the safety risks created. The Chinese government has aggressively defended the products, attributing the complaints to competitors in the United States seeking to protect their own sales. That will be a tough program to sell to the American public. In addition to lacking adhesive strips, the Zhongce tires were dangerous because their inner liners were too thin, permitting air to leak and damage the outer walls of the tires. Zhongce has been asked to disclose all sales involving tires that were manufac-

tured without the adhesive strip needed to prevent separation. I hope the tires will be taken off the market without further deaths and injuries. Incidentally, the Chinese company says it is free of fault and is cooperating with NHTSA.

Source: *Philadelphia Inquirer*

SUVs IMPROVE IN REAR CRASH TESTS

Most seat and head restraint designs in SUVs, pickup trucks, and minivans were rated marginal or poor, according to new crash test data released last month. The latest evaluations of occupant protection in rear-end collisions by the Insurance Institute for Highway Safety (IIHS) found that the seat and head restraints in more than half of light truck and minivan models fall short of state-of-the-art protection from neck injury or whiplash. According to the IIHS, seat and head restraint combinations in SUVs made by Subaru and Volvo and new designs from Acura, Ford, Honda, and Hyundai earned good ratings, the top rating the IIHS gives. Seat and head restraints in three minivan models from Hyundai and Ford earn good ratings. The redesigned Toyota Tundra is the only pickup model evaluated with seat/head restraints rated good for rear crash protection.

The designs of seats and head restraints in 21 models were rated good, with another 12 rated as acceptable. Those in 54 other models are rated marginal or poor. The ratings of good, acceptable, marginal, or poor for 87 current models are based on geometric measurements of head restraints and simulated crashes that together assess how well people of different sizes would be protected in a typical rear crash. David Zuby, senior vice-president of the Institute's Vehicle Research Center, observed:

In stop and go commuter traffic, you're more likely to get in a rear-end collision than any other crash type. It's not a major feat of engineering to design seats and head

restraints that afford good protection in these common crashes.

Rear-end collisions are frequent, and neck injuries are the most common injuries reported in automobile crashes. These collisions account for two million insurance claims each year, costing at least \$8.5 billion. Although such injuries aren't usually life-threatening, they can be painful and debilitating. Unfortunately, many injuries are highly suspect of what has become known as a "whiplash injury."

When a vehicle is struck in the rear and driven forward, its seats accelerate occupants' torsos forward. Unsupported, an occupant's head will lag behind this forward torso movement, and the differential motion causes the neck to bend and stretch. The higher the torso acceleration, the more sudden the motion, the higher the forces on the neck, and the more likely a neck injury is to occur. The key to reducing whiplash injury risk is to keep the head and torso moving together. To accomplish this, the geometry of a head restraint has to be adequate—high enough to be near the back of the head. Then the seat structure and stiffness characteristics must be designed to work in concert with the head restraint to support an occupant's neck and head, accelerating them with the torso as the vehicle is pushed forward.

In the latest evaluations, the seat and head restraint combinations in 17 of 59 SUV models are rated good, five are acceptable, 14 are marginal, and 23 are rated poor. In minivans, seat and head restraints in three models are rated good, two are acceptable, one is marginal, and five are rated poor. In pickups one is good, five are acceptable, five are marginal, and six are rated poor. Although there hasn't been much overall improvement among pickups and minivans since the last time the Institute evaluated protection in rear crashes, the performance of the seat/head restraints in SUVs is much better. In 2006 those in only 6 of 44 SUV models earned a good rating.

Automakers have updated or introduced many new SUVs since 2006, but minivans and pickups are being updated more slowly, and that may account for the improvements. In the latest tests seat/head restraints in the Mitsubishi Outlander improved to good from the previous design that was rated acceptable. Those in the Acura MDX, Honda CR-V, Honda Element, Hyundai Santa Fe, and Kia Sorento improved from their previous ratings of poor to good. Those in the Honda Pilot and Mercedes M class improved from marginal to good. The seat/head restraints in the Toyota Tundra pickup improved to good from acceptable.

In contrast, some manufacturers have introduced new models with subpar seat designs. The ones in the BMW X5, Dodge Nitro, and Suzuki XL7 are rated poor. Those in the new Mazda CX-7 and CX-9 are rated marginal. Under the new phase-in schedule, manufacturers must start to fit better front-seat head restraints in 80% of their models beginning in September 2009. Front-seat head restraints in all new vehicles made after September 2010 must comply. According to the Institute, there is a great deal of "room for improvement in the designs of seats and head restraints." Many manufacturers are trying to fit better head restraints in their vehicles. According to the Institute, some manufacturers have been working with the Institute to boost the vehicles' ratings as the manufacturers introduce new models.

Apparently, some manufacturers were waiting for resolution of regulatory issues before fitting better designs in their vehicles. It should be noted that some didn't get changes made in time for the Institute's tests. BMW is said to have plans to redesign the seats in the X5 and X3 SUVs to earn better ratings for the 2008 model year. I believe that the Institute's evaluations of seat and head restraint designs, which received worldwide attention, is responsible for the improved results. The Institute is seeing more seat and head restraints rated good and acceptable than in past years. It's

clear that many foreign and domestic automakers are moving in the right direction, according to the Institute.

Source: Insurance Institute for Highway Safety

COMPANY SETTLES LAWSUIT INVOLVING DEFECTIVE HEART DEFIBRILLATORS

The Boston Scientific Corporation has agreed to pay \$195 million to settle claims brought by thousands of heart patients who said they were not alerted to potential flaws in a defibrillator made by the Guidant Corporation, now a unit of Boston Scientific. The settlement came two weeks before what would have been the first federal court trial over claims related to the defibrillator. Guidant was charged with hiding from patients a defect in one of its most widely used defibrillators, a device that uses electricity to interrupt a chaotic and, at times, fatal type of heart rhythm. About 4,000 claims brought by patients from around the country had been consolidated for trial in United States District Court in Minneapolis. The settlement resolved all those claims as well as some others. At least seven patients died when the Guidant device, a unit known as the Ventak Prizm 2 Model 1861, failed to work because of faulty insulation.

The company first became aware of the problem in 2002 but did not alert doctors to it until mid-2005 when *The New York Times* published an article about the device's flaw. Even after Guidant improved that particular defibrillator, it shipped thousands of older potentially flawed units from its inventory, exposing more patients to risk. An outside panel of experts assembled by Guidant to review its behavior during the episode called the move unacceptable. The lawsuits in Minneapolis were unusual because they did not involve patients who died as a result of defibrillator-related failures, but rather involved those who had their units removed after learning about the problem or those who claimed to have suffered emotional or other injuries. The court had allowed

the claims to go forward and held that Guidant could be liable for punitive damages. In a recent ruling, the court indicated that a crucial issue in the trial was the right of the patients and doctors to know about potential product defects.

Source: *The New York Times*

BUS MAKER NOT LIABLE IN FATAL CRASH

In a recent opinion, the Supreme Court of Arkansas held that the manufacturer and distributor of a school bus that was involved in a fatal accident in that state cannot be held liable for failing to outfit the bus with seat belts. The High Court unanimously affirmed a lower court's ruling in favor of the defendants in a lawsuit involving an accident that occurred in 2003. One student was killed and 10 others were seriously injured when a school bus carrying 43 students ran off a highway and slid down an embankment. A lawsuit was filed against the manufacturer, Thomas Built Buses, and the seller, Merl's Bus Sales, claiming the companies were negligent in failing to equip the bus with seat belts or warn the purchasers and users about the dangers of riding in a bus without seat belts.

The defendants argued that the bus met all Arkansas Department of Education specifications for design and safety. Because the General Assembly had declined to require seat belts in school buses, the companies could not be held liable. The trial judge agreed, granting summary judgment for the defendants on all claims based on the absence of seat belts on the bus. The plaintiffs argued on appeal that although school bus manufacturers must comply with minimum specifications, nothing precludes them from exceeding those specifications if doing so would better protect passengers from injury. The plaintiffs contended that the Legislature had not spoken on the issue. The defendants argued that specifications are detailed technical descriptions of design requirements, and a manufacturer

cannot deviate from those specifications except at the direction of the customer. They also argued that the Legislature had addressed the issue repeatedly and had decided each time not to require seat belts on school buses.

In its decision affirming the lower court ruling, the Supreme Court said school bus manufacturers are required by contract to comply with design specifications. The court noted that in 1984 the Legislative Council issued a report on the feasibility of requiring school districts to equip buses with seat belts. The Council found that the disadvantages of requiring seat belts—students could use them as weapons; the belts would be vandalized; seating capacity would be reduced by 60%; a child's immature body could be injured by a seat belt in a crash; a small child could be trapped by a seat belt in a crash—outweighed the advantages.

In 1985, the Arkansas Legislature passed a law requiring school bus drivers to wear seat belts, but the legislation did not mandate the same for passengers. In 2001, a bill to require seat belts on school buses failed to get out of committee. The Supreme Court opinion stated:

Based upon the Legislature's extensive involvement in the regulation of school bus design and the Legislature's repeated consideration of mandatory seat belts in school buses, we conclude that the Legislature has indeed spoken on the issue of whether manufacturers should include seat belts in their bus designs. To decide for the plaintiffs would risk violating the separation-of-powers doctrine by deciding a public policy question over which the General Assembly has already affirmatively exercised its authority.

Although I disagree with this ruling, I must concede that it is difficult at present to hold bus manufacturers responsible for failing to put seat belts for passengers in school busses. This is in large part because of tremendous lob-

bying and public relations efforts by the manufacturers. Most likely, it will take legislative action on the state level most likely to finally get seatbelts for passengers in school buses. I don't believe the courts will take that step without legislation mandating the belts. The Alabama Legislature ignored the issue during the last session. Hopefully, they will see fit to at least take a look at this important matter at the next opportunity.

Source: *The Morning News*

IX. MASS TORTS UPDATE

THE FDA CONTINUES TO FAIL TO DO ITS JOB

There can be little doubt that over the years the federal Food and Drug Administration has been controlled to a great extent by the politically powerful pharmaceutical industry. That control has made it most difficult for the government agency to be an effective regulator. On too many occasions, when new drugs were being introduced, the FDA sat on its hands and as a result lives were endangered. A prime example is the regulatory agency's handling of the Vioxx problems. Many observers believe that Avandia—GlaxoSmithKline's diabetes drug—may wind up just like Vioxx. It has been reported that Avandia could cause a 43% increase in heart attack risk. That is most alarming.

The FDA has become too cozy with the companies it regulates, and that comes from the agency's dependence on industry money to fund its operations. That has come about because of the failure of Congress to adequately fund the FDA. The Prescription Drug User Fee Act (PDUFA), passed by Congress 15 years ago, allowed the drug companies to help fund the approval process. I would like for somebody to explain how that sort of thing is good for people who take prescription drugs. How in the world could anybody

expect that system to work? In my opinion, Congress should change that law as soon as possible and fund the agency properly from government sources. The fast-track avenue was also made available for the first time with the enactment of PDUFA, which allows new drugs to be put on the market much more quickly. History has shown that drug approvals completed too quickly are often associated with later safety problems. Interestingly, in 1999 the eight priority new drugs the FDA approved in only six months or less included Vioxx and Avandia.

Public Citizen raised warnings about seven drugs that were later approved by the FDA. Those drugs were: Vioxx (pain), Baycol (cholesterol), Propulsid (heartburn), Rezulin (diabetes), Razar (infection), Duract (pain), and Redux (weight loss). In each instance, Public Citizen issued "Do Not Use" warnings on these drugs months and even years before they were removed from the U.S. market for safety reasons. Dr. Sidney Wolfe, Director of Health Research for Public Citizen, made this observation relating to the FDA's effectiveness:

When you're getting paid directly from an industry you're supposed to be regulating, it takes quite a bit of edge out of the regulating.

In 2008 the drug companies will pay the FDA's Center for Drug Evaluation and Research over \$400 million in user fees. There are currently 181 drugs that Public Citizen says people should not be taking. Based on the track records of the FDA and the consumer advocacy group, I believe that the best course of action is not to take any of these drugs without first having a detailed conference with your personal doctor and pharmacist. It should be noted that the FDA spends far more of its limited resources on approving new drugs than it does on monitoring safety after the drugs are on the market. Two reports from the Government Accountability Office and the Institute of Medicine in 2006 are not good news on that subject.

Congress has yet to give the FDA the authority to require the drug companies to carry out post-marketing studies. When it comes to a dispute between the approval group and the safety folks at the FDA, guess who wins the debate? Congress must take action to make the FDA a good, effective regulatory agency. There is no time for further delay.

Source: Public Citizen

CLINICAL TRIAL REGISTRIES AND RESULTS DATABASES ARE NEEDED

Publicly available clinical trial registries and databases of the trials' outcomes are necessary to counteract the tendency of pharmaceutical companies to suppress unfavorable study results, according to a report released on July 17th by Public Citizen. The report compares existing and proposed registries and results databases and provides recommendations for federal legislation now pending before a congressional conference committee. Clinical trial registry databases are catalogues of hypothesis-testing clinical trials conducted on human subjects. Information about the trial, such as the drug being tested and the purpose of the study, is placed in an online registry before the trial begins and remains available regardless of whether the trial is completed or published.

Results databases provide online repositories for the results of clinical trials whether or not they are published in the medical literature. They allow academics, regulatory bodies, public interest groups, or study participants to review completed studies. They can also facilitate analyses that statistically combine other studies to evaluate the safety and efficacy of drugs. One such analysis of the diabetes drug Avandia used GlaxoSmithKline's results database to demonstrate an increased risk of heart attacks from the drug. The study found that, although the four public registries are generally of high quality, none is a results database. Conversely, although 12 of the 18 private Websites included registries and results data-

bases, these sites are voluntary, of variable quality and inconsistent design. Moreover, they are dispersed across the various company sites, forcing potential users to search multiple sites to find information. As with any non-public venture, there are significant questions as to transparency, enforceability, and quality assurance. Dr. Peter Lurie, deputy director for the Health Research Group at Public Citizen and an author of the report, observed:

Pharmaceutical companies that withhold data about unfavorable study outcomes can cause serious harm. In order to educate physicians and protect patients, there must be strong federal legislation to require clinical trial registries and results databases.

Currently, only federally and privately funded trials of experimental treatments for “serious or life-threatening diseases and conditions” are required to be included in a registry. In 1997, Congress required the National Institutes of Health (NIH) to establish an online registry—ClinicalTrials.gov—for these types of clinical trials. But ClinicalTrials.gov, which has grown significantly in recent years, serves only as a registry, not as a results database, and is voluntary for all other types of trials.

Both the U.S. House and Senate have recently passed bills that seek to formalize the information that must be posted in clinical trial registries and, potentially, results databases. The House bill, H.R. 2900, is better than the Senate bill, S. 1082, in creating and enforcing a registry and results database. Unlike the Senate version, the House bill has an important provision requiring a summary of clinical trials for patients that would describe the most important elements of the study design and results—and the risks involved—in non-scientific terms. The Senate bill’s approach has the potential to completely gut the results database initiative.

The Senate bill requires a feasibility study for the results database as well as

a later “negotiated rulemaking.” The 18-month study would recommend what types of information should be disclosed, the time frame in which disclosure would occur, and how the information would be released. The “negotiated rulemaking” would guarantee involvement by members of the pharmaceutical industry and could lead to an ineffective results database. The current Senate bill could “cripple the recent push for registry and results posting by deferring the crucial details of the results database to reports and industry-influenced proceedings,” according to Dr. Lurie.

Congress should put patient health above the pharmaceutical industry’s bottom line and pass a bill with strong guidelines for the disclosure of all clinical trials and their results. We have allowed the powerful and politically influential pharmaceutical industries to essentially dictate what happens both in Congress and at the FDA when it comes to the nation’s health and safety. This must change.

Source: Public Citizen

A MOST SIGNIFICANT VIOXX RULING

U.S. Food and Drug Administration approval of a drug label doesn’t release the manufacturer of claims that its warnings are inadequate. This rule of law was properly applied in a decision affecting thousands of federal suits against Merck & Co. involving Vioxx. “The FDA’s current view on the question of immunity for prescription drug manufacturers is entirely unpersuasive,” U.S. District Judge Eldon Fallon wrote in the opinion handed down last month. Judge Fallon, who is presiding over the Vioxx multidistrict litigation (MDL) cases, correctly rejected Merck’s attempt to have lawsuits brought by two people who began taking Vioxx after April 2002 dismissed, because the FDA had approved a label warning that the drug might increase the risk of heart attacks and related problems.

Like thousands of others, Lene Arnold,

who had a heart attack in December 2003, and the family of Joe G. Gomez, who died of a heart attack in January 2003, say the warning was inadequate. The Arnold case was filed in federal court in New Orleans, while the Gomez case originated in Texas. A “failure to warn” claim is a state law claim, but where there is no parallel federal law, federal courts apply state laws in the jurisdiction where a suit is filed. The FDA wrongly contends its requirements, which were placed in a preamble to rules set in 2006, set limits for prescription drug labels, preempting state claims that a company failed to warn users of a danger. Judge Fallon stated in his opinion:

Because there are no federal remedies for individuals harmed by prescription drugs, a finding of implied preemption in these cases would abolish state-law remedies and would, in effect, render legally impotent those who sustain injuries from defective prescription drugs.

This is a powerful order that will have tremendous ramifications. The claim of federal preemption over state law in failure to warn cases simply cannot be successfully argued in any court—state or federal—for a number of reasons. It flies in the face of the states’ rights position usually argued by conservatives. It also totally ignores established rules of law dealing with the preemptive issue.

CLASS ACTION LAWSUITS SENT BACK TO JUDGE

A federal appeals court revived a group of shareholder lawsuits that accused Merck & Co. officers and directors of violating their duties by concealing the health risks of Vioxx. The three-judge panel of the 3rd U.S. Circuit Court of Appeals ruled last month that the lawsuits should be sent back to the New Jersey federal judge who dismissed them last year. We are all familiar with the Vioxx problems. The appeals court

concluded that the lower court was wrong in not allowing the plaintiffs to amend their complaint with additional materials. That judge had ruled on the grounds that those materials were acquired as a result of a consensual discovery agreement. The panel said the district judge needs to determine whether the additional materials would affect the lawsuit's merit. I am not sure how this ruling will ultimately affect the lawsuit insofar as the merits of the claim are concerned. The appeals court pointed out that the conduct of the company's board must rise to the level of "egregiousness or bad faith."

Source: *Associated Press*

NEW STUDY SUGGESTS VIOXX'S HEART ATTACK RISKS WERE IMMEDIATE

As you know, Merck spent big bucks trying to entice the media, the medical community, and even potential jurors to believe that heart attack risks don't come about until after 18 months of use. Results from an unpublished study suggest increased heart risks associated with Vioxx began immediately. This exposes the 18-month myth, which had no basis in fact. This discovery can't be viewed as good news for Merck in its ongoing litigation. Currently, there are about 28,000 Vioxx lawsuits around the U.S. involving heart attacks and strokes. For a limited time, Merck got away with its manufactured and bogus defense that the higher risks were only experienced by patients on long-term treatments of 18 months or more.

The present study, known as VICTOR, was conducted by Oxford University scientists and was accepted for publication by the *New England Journal of Medicine*. According to a manuscript reviewed by the *Wall Street Journal*, and reported on July 3rd, half of the cardiovascular incidents associated with Vioxx occurred in patients taking the drug for less than 12 months. Elevated risks went away within 14 days of cessation (other studies have shown the risk continues for months afterward). There

had been earlier studies that indicate that heart attack risks could occur with a relatively short period of Vioxx use. Now this latest study puts the nail in Merck's coffin on this issue.

Source: *Wall Street Journal*

MERCK PUTS MORE MONEY IN THE VIOXX RESERVE

Merck & Co. has increased to \$810 million the amount it has set aside to pay for Vioxx lawsuits. Merck added \$210 million to increase the reserve to \$810 million as of June 30th, according to a filing with the U.S. Securities and Exchange Commission. The reserve represents the best estimate of costs to be incurred through 2008, according to the filing by Merck. Presently, as reported, Merck faces 26,950 U.S. Vioxx suits. Interestingly, Merck has spent \$258 million this year in suits worldwide with last year's costs at \$500 million.

Of suits filed in the U.S., 8,575 are pending in the multidistrict litigation (MDL) in federal court in New Orleans. Another 16,400 are in a New Jersey state court. Merck also has been sued in Europe, Australia, Brazil, Canada, Israel, and Turkey. Merck says it's not interested in a global settlement and boasts that it hasn't established a reserve to pay claims. Our firm has seen nothing to indicate that policy will change. Merck would rather pay defense lawyers and highly-paid experts than to pay anything to Vioxx victims. About 10 cases are scheduled for trial before the end of the year. I have to wonder how Merck shareholders view the company's litigation policy with all of the bad news now available to the public relating to Vioxx and how truly bad the company's conduct has been.

Source: *Bloomberg*

RULINGS CLEAR WAY FOR PRODUCT LIABILITY SUIT AGAINST DRUG MAKER WYETH

A New Jersey judge who is handling hundreds of lawsuits over Wyeth's

hormone replacement drug Prempro has ruled that a federal law does not bar state lawsuits alleging drug makers did not adequately warn about a product's risks. The ruling, released last month by Superior Court Judge Bryan Garruto, is another in a string of rulings by state or federal judges concluding that such product liability suits against drug makers are not pre-empted by the U.S. Food, Drug and Cosmetic Act. The ruling came in a lawsuit brought by Ellen Deutsch, who blames Prempro for her breast cancer. Ms. Deutsch's key claim against Wyeth will be allowed to proceed as a result of the decision. I believe the ruling will help plaintiffs across the country suing drug makers in a lawsuit involving other drugs.

Since at least early 2006, drug makers have been claiming that product liability suits are pre-empted, or barred. They argue that federal law gives the FDA the exclusive right to determine whether a drug's label, or detailed package insert, contains adequate warnings about any health risks. The ruling in the Deutsch case backs up earlier ones in New Jersey state court involving Vioxx and in a New York federal court involving Zyprexa. Clearly, just because a drug is approved by the FDA does not protect the drug company from being sued. The FDA regulations are a floor, not a ceiling. Drug companies under the law can strengthen warnings or add new ones at their option. Ms. Deutsch, who took Prempro from 1996 through 2002 and also took an older Wyeth menopause treatment, Premarin, before that, alleges the drugs caused her breast cancer. She is now in treatment for the cancer, which has spread to her bones. The Deutsch lawsuit, which was scheduled for trial on July 16th, would have been the first in New Jersey. However, the case settled just hours before opening statements were to start.

Currently, about 250 Prempro lawsuits are pending in New Jersey and about 10,000 have been filed nationwide. Judge Garruto also issued other pretrial rulings in the Deutsch case;

including one stating that a doctor's prescribing a drug does not preclude a patient from suing over alleged harm. This makes sense, and is legally correct, because drug companies advertise directly to patients. People might choose not to take a drug their doctor prescribed if they knew all of its risks. In a third ruling against Wyeth, Judge Garruto also ruled that a plaintiff bringing a product liability suit can separately sue for fraud or misrepresentation under New Jersey's Consumer Fraud Act. But, in Ms. Deutsch's case, he dismissed her consumer fraud claim because she had not provided evidence of what she paid for the hormone replacement drugs.

To Date, there have been nine Hormone Therapy (HT) cases set for trial. Of those, Wyeth has settled three and plaintiffs have received sizeable jury awards in four of the others. Ted Meadows, Russ Abney and Melissa Prickett are the primary lawyers handling the HT cases for our firm.

Source: Associated Press

COURT RULES AGAINST COMPANY IN PROPULSID CASE

It is pretty obvious that prescription drug manufacturers should have the same responsibility to warn consumers about potential risks from their products as other manufacturers have concerning their products. Writing for the West Virginia Supreme Court, Chief Justice Robin Davis said the "learned intermediary doctrine," which holds that drug makers have to inform only prescribing physicians about potential dangers, not every possible patient, should not be adopted in West Virginia. The Court's opinion stated:

Because it is the prescription drug manufacturers who benefit financially from the sales of prescription drugs and possess the knowledge regarding potential harms, and the ultimate consumers who bear the significant health risks of using

those drugs, it is not unreasonable that prescription drug manufacturers should provide appropriate warnings to the ultimate users of their products.

The ruling arose out of a 2001 product liability claim against Janssen Pharmaceutica, Inc., a foreign subsidiary of Johnson & Johnson. In 1999, Nancy J. Gellner took Propulsid, which is a name brand version of the heartburn medicine cisapride. Three days after going on the drug, Ms. Gellner died suddenly. Her family sued Janssen and the prescribing doctor. The pharmaceutical company contended that it was not liable in Ms. Gellner's death because it had warned her doctor about the risks associated with Propulsid. But the trial court allowed evidence that Janssen was obligated to warn Ms. Gellner personally. The company appealed that decision to the state Supreme Court.

In upholding the trial judge's decision, the state Supreme Court wrote that the justifications for the learned intermediary doctrine—that patients rely on their doctors' judgments regarding prescription drugs and that it would be too hard for pharmaceutical companies to get the warnings to the people actually taking the drugs—are "largely outdated and unpersuasive." When the learned intermediary doctrine was developed, years ago, direct-to-consumer advertising of prescription drugs was unknown, and the court felt that made the intermediary doctrine obsolete. The Supreme Court opinion noted that courts in 22 states have adopted the doctrine, 22 states have not adopted it, and six states have referred to it but not adopted it specifically in relation to prescription drugs.

Source: The Charleston Gazette

VERDICT AGAINST PAIN PATCH MAKERS IN FLORIDA

Last month, we wrote about the \$5.5 million jury award in the case involving Duragesic. I have been asked to expand

on what happened in the case. As you may know, Duragesic is a popular prescription pain patch manufactured by two Johnson & Johnson subsidiaries. In 1996, then-21-year-old Adam Hendelson shattered his hip in a car accident. Surgeons grafted a metal plate onto the young man's hip with bolts and pins. His spine, back, and hip were all degenerating, causing constant pain. In June 2003, he started using the prescription patch, which administers a powerful painkiller through the skin. While typing his resume in December 2003, Hendelson passed out while wearing a 75-microgram patch and never woke up again. He died December 16th at age 28. Doctors discovered he died from overdose of fentanyl, a painkiller in the transdermal patch. The Florida jury found that the two subsidiaries of New Jersey-based Johnson & Johnson, Alza Corp. and Janssen Pharmaceutica, produced a defective patch that killed Hendelson. The jury also found the companies failed to adequately warn the public about the dangers the patch poses.

Introduced in 1990, the Duragesic patch has a membrane that allows a painkilling gel to be absorbed through the skin over the span of three days. The patch is one of Johnson & Johnson's top five selling products. On June 15, 2005, the FDA announced it was investigating deaths from fentanyl overdoses related to the patch. Janssen recalled batches of Duragesic at least twice—once in February 2004 and again in April 2004—because of potential leaks caused by manufacturing flaws. The company also issued a statement in June 2005 updating prescription and warning information.

COURT APPROVES BAYER CLASS ACTION SUIT

Now that the Wisconsin Supreme Court has ruled, a long-running lawsuit accusing Bayer Corp. of blocking generic versions of an antibiotic can continue. The decision reaffirms the court's 2005 ruling that Wisconsin consumers can bring antitrust lawsuits against out-of-

state practices if the conduct substantially impacts them. The class action suit alleges Wisconsin consumers paid higher prices for Cipro as a result of an unlawful settlement between Bayer and three generic drug manufacturers. The 1997 agreement prohibited the manufacturers—Barr Laboratories Inc., Hoechst Marion Roussel Inc., and The Rugby Group—from selling a generic version of Cipro. The drug is used to treat sinusitis, respiratory infections, and more than a dozen other ailments.

A group of Wisconsin consumers filed suit in 2000 alleging that between January 1997 and December 1998, Bayer raised the price of Cipro 16.7%. The Supreme Court ruling notes Bayer's domestic revenues from Cipro from 1998 to 1999 rose from about \$834 million to \$1 billion and profits grew from about \$755 million to \$921 million. A Milwaukee County judge threw out the lawsuit in 2003, ruling Wisconsin's antitrust laws apply only to commerce within the state. The lawsuit deals with commerce between states, the judge said. A Wisconsin appeals court reinstated the suit last year. That court relied upon a state Supreme Court finding that Wisconsin's antitrust laws can apply to interstate commerce if the conduct "substantially affects" state consumers.

Bayer asked the Supreme Court to overturn the appeals court. The company contended the "substantially affects" test requires that the lawsuit show specific effects on Wisconsin consumers, not general national effects. The consumers countered that requiring such specific effects would set the bar for a lawsuit too high. The Supreme Court agreed with the consumers, saying that requiring more would close off consumer lawsuits and undermine Wisconsin's antitrust statutes, which exist to encourage competition. The court felt that the complaint contained enough information to stand. Writing for the court, Justice Louis B. Butler Jr. stated:

An allegation that a group of pharmaceutical companies conspired to maintain monopoly

prices on a best-selling prescription drug purchased by thousands of Wisconsin residents over several years meets the "substantially affects" test.

About 38 class action complaints have been filed in state and federal courts over the settlement. The federal complaints were consolidated into one case in New York, where U.S. District Judge David Trager ruled for the companies in 2005. That case is under appeal. It will be interesting to see how this case progresses.

Source: *Associated Press*

AVANDIA SIDE EFFECT REPORTS TRIPLE

We have written about Avandia in previous issues. Now reports of side effects to federal regulators concerning the blockbuster diabetes drug Avandia have tripled. The sudden spike is a sign that doctors probably were unaware of the drug's possible role in their patients' heart problems. Therefore, doctors may not have reported many such cases in the past. This revelation also exposes the flaws of the Food and Drug Administration's safety tracking system. Clearly, a better system should have detected a potential problem before the drug had been on the market for eight years. As we have reported, Avandia is used to control blood sugar, helping more than six million people worldwide manage Type 2 diabetes, the kind that is linked to obesity. These people already are at higher risk for heart attacks, so news that the drug might raise this risk by 43% was especially disturbing.

In the 35 days after May 21st, when the *New England Journal of Medicine* published the analysis on the Internet, reports of heart attacks, deaths, and hospitalizations increased significantly. The sharp rise in reports of heart problems appears in data that was obtained by Associated Press through a Freedom of Information Act request to the FDA. Only five heart attacks were reported in the 35 days before the study, compared with 90 in the same period afterward.

Heart-related hospitalizations went from 11 to 126. The reports involve rosiglitazone, sold as Avandia and Avandamet. Reporting a drug's side effects is voluntary, and only a crude indication rather than a scientific measure of how many problems patients are actually having.

The FDA relies on this voluntary system once a drug is on the market. This leads to haphazard oversight in which problems can be missed because doctors don't connect the dots between a drug and symptoms they see in an individual patient. Since doctors have been made aware of the problems with Avandia, more cases are being reported. The FDA started hearings on safety concerns about the drug on July 30th. Diabetes experts are advising users of the medication to talk to their doctors and not to immediately discontinue it. Most of the reports reviewed by *The Associated Press* seemed to involve serious side effects. Rosiglitazone was listed by the FDA as the "primary suspect" rather than other medicines the patient may have been taking. The side effects reported include sudden cardiac deaths.

Source: *Associated Press*

NEW STUDY SLAMS AVANDIA SAFETY

In another development, the safety of Avandia was again in serious question. This was because of a new analysis by German researchers on July 18th. Clearly, this was not good news for the manufacturer. After studying pooled data from 18 past trials involving 8,000 patients, the research group found little evidence that Avandia improved the quality or length of diabetics' lives and concluded it could actually worsen complications of the disease. Dr. Bernd Richter of Duesseldorf's Heinrich-Heine University, who led the research, questioned whether it was ethical to conduct any further clinical tests with Avandia because "less dangerous" alternative treatments were available. The group's conclusions were published in *The Cochrane Library* journal.

The German analysis found Avandia

produced about the same reductions in blood sugar levels as other oral anti-diabetic drugs, but patients taking Glaxo's pill gained up to 11 pounds in body weight, and their chance of developing edema, or swelling, doubled. Avandia was also linked to heart failure and bone fractures. The issue was to come to a head on July 30th, when FDA advisers were meeting to discuss the drug's safety. Since this issue went to the printer before that date, I don't know what transpired at the meeting.

Source: Reuters

CASES AGAINST BAYER CROPSCIENCE CONSOLIDATED IN ST. LOUIS FEDERAL COURT

Bayer CropScience negligently allowed Liberty Link Rice 601 (LL601) and Liberty Link 604 (LL604)—two genetically modified varieties of long-grain rice—to infiltrate the U.S. long-grain rice crop. As a result of Bayer's negligence, rice farmers, rice brokers, rice cooperatives, seed brokers, and other rice-related businesses in Louisiana, Mississippi, Arkansas, Texas, and Missouri have been damaged. Federal cases are being consolidated in the United State District Court for the Eastern District of Missouri in East St. Louis.

Bayer field-tested LL601 and LL604 in the U.S. Bayer was aware that during field-testing that conventional rice (non-genetically altered) could be contaminated by LL601 and LL604. Bayer failed to take steps to prevent LL601 and LL604 from commingling or cross-pollinating with other non-genetically altered strains of long-grain rice. On August 18, 2006, Mike Johanns, U.S. Secretary of Agriculture, announced that Riceland Foods, an Arkansas-based farmer-owned cooperative, had discovered that samples of the Cheniere rice variety had tested positive for LL601. During the spring of 2007, samples of the popular Clearfield 131 variety of long-grain rice tested positive for LL604.

Bayer has not tested LL601 or LL604 for human consumption. Before the genetically altered rice infiltrated the

U.S. rice crop, Bayer had not sought approval to commercialize the rice. After it was announced that U.S. rice tested positive for LL601, Bayer hastily filed an application for approval by USDA. The USDA approved LL601 for human consumption in November 2006. LL601 has not been approved for human consumption by any other country in the world. And LL604 has not been approved for human consumption by the U.S. or any other country in the world.

Bayer's wrongful conduct in allowing LL601 and LL604 to commingle with natural long-grain rice resulted in hundreds of thousands of bushels of rice being contaminated as well as thousands of acres of U.S. farmland. Farmers are not able to sell the contaminated rice on the world market. Farmers whose rice has tested positive are being required to dispose of contaminated rice and take extraordinary steps to eradicate from their farms any potentially contaminated seed. Farmers whose crops have not tested positive are being required to have their crops tested to certify that their crops are free of LL601 and LL604. In addition, the U.S. rice futures market has suffered significant losses, losing at one point over 5% of its value in one day. Andy Birchfield, Frank Woodson, and Leigh O'Dell of our firm currently represent numerous rice farmers who have been injured in the lawsuits filed around the country.

PERMAX AND DOSTINEX ARE TWO MORE DRUGS THAT CAUSE HEART PROBLEMS

The trend of medications that have recently been identified as increasing adverse events, such as heart related problems, continues with the drugs Permax and Dostinex. Permax and Dostinex are medications used to treat Parkinson's disease. But, studies published by the *New England Journal of Medicine* in January 2007 suggest a significant increased risk of heart valve disease associated with these drugs. Specifically, the studies have shown an increased risk of mitral, aortic, and tri-

cuspid regurgitation up to seven times greater than the comparator drugs. Additionally, on December 12, 2006, Permax enhanced its product label to give a stronger warning on the increased risk of valvular heart disease associated with this medication. This label revision was much stronger than the previous label in October 2003. As for Dostinex, the only warning for valvular heart disease was placed on its label in December 2006. Because of the heavy scrutiny that both drugs have come under, the FDA required that one drug be withdrawn from the market and the other to have a black box warning. A black box warning is the strongest warning a prescription drug can have.

Persons who used Permax and Dostinex for an extended period of time are advised to check with their doctors concerning the risk associated with these drugs, and to request tests to show whether any damage has been done to the user's heart valve, such as an echocardiogram. If an echocardiogram shows heart valve damage, and there is good proof of drug use, a user may have a potential claim. Currently our firm is investigating these claims nationwide. Frank Woodson and Navan Ward, Jr. are the primary contact lawyers for the firm on these claims.

LILLY MAY FACE MORE ZYPREXA LAWSUITS

There may be more lawsuits filed against Eli Lilly & Co., alleging it failed to warn users that a psychiatric drug was linked to diabetes, as the result of a letter received by the company from the federal Food and Drug Administration. The agency told Lilly in March it would delay the approval of Symbyax for hard-to-treat depression because the agency wanted more information about the risk of diabetes in the medicine's prescribing label. Symbyax combines Lilly's antipsychotic pill Zyprexa and the antidepressant Prozac. David Logan, Dean of the Roger Williams University School of Law, made this observation:

When the FDA says something damning about the warnings of a drug, it's admissible as evidence on the reasonableness of the manufacturer's decisions. It would likely carry some weight with juries.

In addition to the individual claims, at least eight states have sued the company on behalf of their Medicaid health programs for the indigent, alleging Lilly concealed risks and marketed the drug for unapproved uses. Studies have shown that Zyprexa and similar medications known as atypical antipsychotics are associated with weight gain and an increased risk of diabetes. These studies prompted the FDA to require Lilly and other drug makers to warn doctors of the risks in September 2003 and again in March 2004.

The FDA letter clearly bolsters claims in pending suits by showing that Lilly didn't properly warn people of the risks of using Zyprexa. About 500 personal injury lawsuits are pending in Judge Weinstein's court, with the first being set to go to trial in October. Judge Weinstein has also allowed a separate suit filed by private health insurers to go forward. The complaint, filed as a class action, claims that Lilly violated racketeering laws in its marketing of Zyprexa. None of this can be viewed as good news for Lilly.

Source: Bloomberg

X. BUSINESS LITIGATION

JUDGE APPROVES PLAN TO IMPROVE HEALTH CARE ACCESS FOR CHILDREN

Last month, a federal judge signed off on a \$1.7 billion agreement designed to give impoverished children on Medicaid greater access to health care and to bring more doctors and dentists back into the government-supported program by paying them more for services ranging from routine to lifesaving.

The order, entered by Senior U.S. District Judge William Wayne Justice of the Western District of Texas, effectively ends a 14-year-old lawsuit against the State of Texas in which more than two million Texas families with children on Medicaid were certified as plaintiffs. The head of the state agency that administers the federal program hailed the ruling as a victory.

The agreement, reached in April by the state and the plaintiffs, calls for the state to allocate more than \$700 million over the next two years to increase the rates paid to doctors and dentists who accept young Medicaid patients. The state money will be supplemented by more than \$1 billion in federal funds to help defray those costs. More than \$200 million of that will provide doctors an average of a 25% increase in their reimbursements. Nearly \$260 million will provide dentists an average of a 50% rate increase. In both cases, the actual increase will vary depending on the type of treatment. Funding will also be available for outreach programs to ensure that eligible families are aware of Medicaid services and to provide transportation to and from doctors' offices, dental clinics, and hospitals. This appears to be another very good outcome as a result of a successful lawsuit.

Source: Star-Telegram

SOME ENRON CLAIMS ARE SETTLED

Enron Creditors Recovery Corp., formerly Enron, it will receive \$149 million to settle claims over the recovery of payments it made to redeem short-term debt shortly before the company filed for bankruptcy in 2001. The settlement involves only a few of the 180 defendants Enron has sued over claims they weren't entitled to all of the \$1 billion the company paid to redeem commercial paper in the weeks before to its December 2001 bankruptcy filing. The companies included in the settlement are Lehman Commercial Paper, Northern Trust Co., Allstate Life Insurance Co., and Prudential Insurance Company of

America. Enron's lawsuit against the other defendants will continue. Enron Creditors Recovery Corp. exists mainly to sell assets, pay debts, and conduct litigation. The Houston-based company has said it has distributed some \$11.5 billion to creditors. I guess you would have to say that the court system is still good to have around—even for the Enrons of the world—when it is needed.

Source: Houston Chronicle

XI. INSURANCE AND FINANCE UPDATE

INSURANCE INDUSTRY PROFITS SOAR TO RECORD HEIGHTS

The property-casualty insurance industry, which insures most of the homes and motor vehicles in the United States, made record high profits for 2006. In the first three quarters alone the industry increased its profits by \$15.1 billion over the same three quarters in 2005. This is so even in light of the damage caused by the terrorist attacks of September 11, 2001 and Hurricane Katrina and other devastating storms that hit the Gulf coast over the last few years. Specifically, Hurricane Katrina caused \$40 billion in losses, which was twice as much as the previous most expensive hurricane season in 1992 (Hurricane Andrew). Remarkably, property casualty insurers that do business on the Gulf coast, made a record profit of \$44.2 billion in 2005. That was a 12% increase over their profits in 2004. Even considering these staggering numbers, the Insurance Information Institute, which is an analysis group made up of industry insiders, claims that the catastrophes of 2004 and 2005 took their toll on the profitability of the industry.

These record profits by the industry are the direct result of an across-the-board increase in property-casualty premiums by the insurers, which has created record levels of profit and

surplus within the industry. Insurers try to justify more than doubling the average property casualty premium by claiming they are exposing themselves to extreme risk, and therefore must charge more to their customers. The reprehensible practice of using disastrous events to jack up premiums only gets worse as the industry witnesses its profits doubling and tripling when it employs such practices. It appears the industry is no longer ashamed to admit it profits off the backs of those policyholders who are hurting the most. Instead, the industry chooses to answer to Wall Street analysts more than it does to its own customer base that pays the premiums.

Source: *Journal of the American Association for Justice*

INSURER TO PAY \$20 MILLION IN BAD FAITH INSURANCE CASE

In the largest settlement to date in a Pennsylvania insurance bad faith case, The Princeton Insurance Co. has agreed to pay \$20 million to settle a claim brought on behalf of a tavern that was hit with a \$75 million verdict in a Dram Shop Act suit. This came after the insurer refused to settle the case for the tavern's policy limit of \$1 million. The tavern had assigned its rights to pursue the bad faith claim to Joseph Tuski, a former highway construction worker, who was left quadriplegic after he was struck by a drunken driver and thrown more than 100 feet. Mr. Tuski had filed a Dram Shop Act suit against Ivyland Café Ltd., the employer of the driver.

In the dram shop case, a Philadelphia, Pennsylvania jury awarded more than \$75 million to Mr. Tuski—including \$25 million in punitive damages—but the award was later cut in half by the trial judge. The reduced verdict of \$37.5 million was later affirmed by the Pennsylvania Superior Court. A unanimous three-judge panel ruled that both the drunken driver and the tavern where he worked as a manager—and had served himself drinks on the morning of the accident—were properly held liable.

After pre-judgment and post-judgment interest amounts were added, the judgment was more than \$48 million.

A bad faith suit was subsequently filed alleging that Mr. Tuski's suit against the Ivyland Cafe could have settled for \$1 million, which was the tavern's policy limit, and that the insurer was guilty of bad faith refusal to settle. The plaintiff's lawyers argued that the insurer had "actual knowledge" of Mr. Tuski's "devastating injuries" and also knew within the first few months of litigation that Ivyland Cafe "had no possible defense" against his claim. Mr. Tusk's lawyer argued that Princeton repeatedly ignored the facts, the law, and the advice of its own lawyers, steadfastly refusing to make any offer whatsoever to settle the claim.

In the original verdict, punitive damage awards were awarded against both defendants. The jury said the owners of the Ivyland Cafe should pay \$5 million in punitive damages and that the drunk driver should pay \$20 million in punitive damages. The jury also awarded Mr. Tuski more than \$1.6 million for his past medical expenses, \$18 million for future medical expenses, and \$2 million for lost earnings. The verdict also included four awards of \$7.25 million each—or \$29 million—for pain and suffering, loss of life's pleasures, embarrassment and disfigurement. In a post-trial ruling, the trial judge granted a defense motion for remittitur and cut the jury's award in half, leaving Mr. Tuski with an award of \$25.34 million in compensatory damages and \$12.5 million in punitive damages.

Princeton tendered the \$1 million policy limit during the initial appeals. Mr. Tuski had already collected more than \$1.4 million from the bond that Ivyland Cafe posted at the time of the appeal of the dram shop case. The insurer agreed to take the case to mediation. A settlement, in which Princeton agreed to pay an additional \$20 million, was reached during mediation, making for a total recovery of more than \$21.4 million for Mr. Tuski. Robert Mongeluzzi,

Michael J. Hopkins, and Donna Lee Jones, who are with the Philadelphia firm of Saltz Mongeluzzi Barrett & Bendesky, and Louis A. Bove of Bodell Bove Grace & Van Horn, another Philadelphia firm, represented Mr. Tuski. They did an outstanding job for their client.

Source: Law.com

INSURANCE COMPANY SETTLES HUNDREDS OF KATRINA CLAIMS

Nationwide Mutual Insurance Company has paid more than \$25 million to settle hundreds of claims by Mississippi policyholders whose homes were damaged by Hurricane Katrina. Nationwide agreed in April to reevaluate and readjust 641 claims by policyholders. Most of those reopened claims were for homes that Katrina reduced to slabs, leaving nothing but foundations after the hurricane struck in 2005. The company has paid more than \$25 million to resolve 532 of those 641 claims, and negotiations are continuing for the 109 remaining claims.

Since Katrina, Nationwide is reported to have paid more than \$300 million to resolve more than 11,000 claims by policyholders in Mississippi's three coastal counties. According to a Nationwide spokesperson, "the company is committed to resolving outstanding claims quickly and fairly." But, it should be noted that hundreds of Mississippi homeowners had to sue Nationwide and other insurers for refusing to cover damage from Katrina's storm surge. The companies claim their policies covered damage from wind, but not rising water, including wind-driven surge.

Source: *Associated Press*

HURRICANE-RELATED LITIGATION IN FLORIDA COURTS

There are still a number of lawsuits arising out of the 2004 and 2005 hurricanes pending in Florida courts. One large insurer, Sydney, Australia-based QBE Insurance Corp., is the target of a number of lawsuits filed by condo-

minium associations claiming the insurer has stonewalled legitimate claims with the intent of forcing lowball settlements. There are at least 21 hurricane-related suits against QBE pending in federal courts in Florida, with more waiting in state court to be transferred to federal court and several soon to be filed. QBE is the state's top condo association insurer. Breach of contract lawsuits against QBE have been filed by several Florida condominiums claiming millions in damages.

QBE is the top private insurance carrier in the state for condo associations, writing windstorm damage policies for 1,707 condo associations. QBE insures \$19.2 billion in property, according to state records. State Farm Insurance is second, insuring 1,131 condo associations. Although perhaps not known as a big insurer in the United States, QBE has massive worldwide operations. The 121-year-old company specializes in property and casualty, health, and trade credit insurance. In Florida, the company operates through Intercoastal Underwriters in Coral Gables, which is owned by Daytona Beach, Florida-based Brown & Brown, the seventh-largest independent insurance broker in the world. From 2005 to 2006, complaints against QBE rose from 18 to 50, according to the state Department of Financial Services. So far there have been 17 complaints filed in 2007.

Source: *Daily Business Review*

INSURANCE BROKER TO REIMBURSE FLORIDIANS

Willis Group Holdings Ltd., a national insurance broker, has agreed to reimburse \$2.6 million to multiple Florida cities and counties, according to state officials. Florida Chief Financial Officer Alex Sink, Attorney General Bill McCollum, and Insurance Commissioner Kevin McCarty reported that under the settlement agreement, no formal action will be taken by state agencies. A joint investigation by the Attorney General's Antitrust Division and the Department

of Financial Services led to allegations that Willis improperly collected undisclosed fees or commissions when it placed various coverages with insurance companies.

Willis brokered multiple insurance contracts in Florida from 1999 through 2004. Its clients included more than a dozen public entities in Florida, including economic development councils, city and county governments, and school boards. "Florida's taxpayers deserve complete disclosure when local governments are conducting financial transactions with insurance brokers," according to Mr. Sink. Under the agreement, Willis also agreed to make full written disclosure of all such commissions in the future and to pay the costs of the investigation. The recovery of \$2.6 million in restitution funds is the result of an industry-wide investigation into insurance broker activities

Source: Florida Department of Financial Services

FARMERS INSURANCE GROUP FINED OVER CLAIMS HANDLING

Farmers Insurance Group has been fined \$750,000 for allegedly setting up incentives for auto insurance adjusters to underpay some claims and deny others. According to North Dakota Insurance Commissioner Jim Poolman, the fine is the largest the Insurance Department in his state has ever imposed. Because state law requires the money to go into the state's general treasury, however, it cannot be used to compensate customers. Concerning the fine, Commissioner Poolman stated:

It was to take a piece of their hide, basically, for treating policyholders unfairly. We felt...the program was egregious enough, and the penalty was appropriate.

An Insurance Department investigation, which began in August 2004, uncovered evidence that Farmers had quotas for denying vehicle insurance claims, and for referring others for fraud investigations. Farmers also settled

injury claims using a predetermined range of payments, rather than examining each claim on its own merits. If adjusters did not follow the company's guidelines, they could see cuts in their own paychecks. The investigation revealed that Farmers' programs created "a natural, inherent bias against policyholders." Farmers Insurance Group sells about \$11 million worth of car insurance to North Dakota policyholders each year, which ranks it as the third-largest vehicle insurer in the state. It was not made clear how many North Dakota customers the company has, but according to Commissioner Poolman, the number was "in the thousands."

A state Insurance Department report on the investigation said Farmers had begun an effort in 1994 to rebuild its financial reserves after a series of natural disasters, including a California earthquake near Northridge in January 1994. Its efforts included special employee programs targeted at cutting claims payments, according to the report. "A potential conflict of interest was created between meeting these goals and effectuating a prompt, fair and equitable settlement of each individual claim on its merits," the report says. Customers who learn of the Insurance Department's investigation and believe Farmers may have handled their vehicle claims unfairly can ask the agency to investigate those complaints. It is also possible that the policyholders would have grounds for civil litigation against Farmers.

Source: *Insurance Journal*

FEDERAL GOVERNMENT MAY JOIN INSURANCE LAWSUIT

The U.S. Justice Department says it is "highly interested" in an August 2006 lawsuit against Allstate Corp., State Farm Fire & Casualty Co., and other insurers. The lawsuit claims the companies defrauded the government by "grossly overstating" Hurricane Katrina flood damages to policyholders' properties and then submitting false claims

worth potentially billions of dollars to the federal flood insurance program. The suit was filed by Branch Consultants LLC of Metairie, La., in federal court in Louisiana. In May, the Justice Department said it wasn't able to make an informed decision by a court-imposed deadline whether to intervene in the case. At that time it elected not to get involved. On June 5th, however, the court directed the government to intervene or appear in court to explain why it was not taking over the litigation.

In a court filing on July 16th, the government lawyers said the Justice Department still hadn't changed its position about not intervening, but the plaintiff had "made significant, detailed allegations that deserve a full and careful investigation." U.S. Attorney David R. Dugas stated that "the United States remains highly interested in the progress of this particular case and intends to remain heavily involved in its development." The government is keeping its options open and might seek to intervene later.

The 2006 case noted that, the way it works, flood claim payments from the National Flood Insurance Program are used to reimburse insurance companies for their administrative services and for flood claim payments that they've already advanced to policyholders. So "the gross overstating of flood damages benefits" the insurance companies because "the damages that are misattributed to flooding should instead have been attributed to wind" or other causes typically covered by the private insurance companies, according to allegations in the Branch lawsuit.

It will be interesting to see whether the Bush White House will allow the Justice Department to take over the litigation. In my opinion, they should either take over or at least join the suit. So far, the National Flood Insurance Program has paid out \$15.7 billion in claims related to Hurricane Katrina, according to *Bloomberg News*. If allegations in this lawsuit prove to be true, the

government's failure to get involved will require lots of explaining.

Source: *Chicago Tribune* and *Bloomberg News*

XII. PREDATORY LENDING

MORTGAGE SCAMS IN THE SUB-PRIME LENDING MARKET

Predatory lending practices have plagued the poor since Biblical times. Advocacy groups have been fighting to bring the mistreatment of the working class and the poor by unscrupulous lenders to the attention of legislators. But due to the tremendous growth of the subprime market, spurred by lenders arguing the benefits for the lower class, the abuse of the poor has increased. As the number of Americans experiencing the American dream rises, the number of predatory lenders ready to pounce on and take advantage of these consumers is also on the rise, before and after the purchase of a home. Legislatures have sought to prevent predatory lending practices, which are primarily aimed at the less fortunate. In 1994, Congress passed the Home Ownership and Equity Protection Act (HOEPA) as an addendum to the Truth in Lending Act (TILA) to try to remedy predatory lending practices.

TILA requires disclosure of loan information so that borrowers can easily comparison shop among lenders. But Congress discovered that these disclosures were insufficient to prevent predatory lending problems and passed HOEPA to address the insufficiencies. But unfortunately for targets of predatory lending, HOEPA did not solve the problem. After the passage of HOEPA, the industry of subprime mortgage lending actually grew from a \$35 billion industry in 1994 to a \$140 billion industry in 2000. And as the industry grew, so did predatory lending practices. Congress responded in 2001 by amending

HOEPA to require additional disclosures, place certain substantive limits on home equity loans, and expand the types of loans covered by the legislation.

Historically, federal laws preempted state usury ceilings and regulations regarding balloon payments, negative amortization, and prepayment penalties prior to the passage of HOEPA, causing states to become less involved with the regulation of lending markets. But after 1994, states were allowed to enact more protective provisions. State legislatures quickly began addressing predatory lending by passing more specific laws with harsher penalties than that of HOEPA.

But as financial predators constantly evolve and find new ways to take advantage of people who desperately need a loan, consumers must still remain aware of these predators after the initial purchase of a home. This is because consumers often fall behind on their payments, creating more opportunities for them to be taken advantage of. So-called equity stripping schemes are advertised to people behind on their mortgage payments and desperately in need of a solution. People are lured by promises of receiving quick cash, remaining in their home while someone else makes the mortgage payment for a period of time, and all the while restoring their credit. But instead of the consumers' troubles vanishing, it is often the equity built up in their home that vanishes. The deeds of these houses are turned over to a straw person, who quickly takes out another mortgage on the home, pocketing the cash, and stripping the equity from the home.

As mentioned, the number of Americans falling behind on their mortgage payments, thus exposing themselves to the threats of predators, is on the rise. The Mortgage Bankers Association recently disclosed that nearly 19% of all loans to less-creditworthy consumers, or 1.1 million mortgages, were either delinquent by more than 30 days or in foreclosure. Schemers often check the property foreclosures as they appear at

the county clerk's office. These troubled homeowners are contacted either by phone, mail, or by knocks on their door, and then the scam begins. With mortgage rates on the rise, more homeowners are falling behind on their payments and finding that they cannot refinance, making the victims of these schemes more plentiful.

These foreclosure rescue deals vary in execution, but they all capitalize on two things: borrower desperation and mind-bogglingly complex mortgage loan documents. In fact, a recent study published by the Federal Trade Commission found that nine out of ten borrowers could not identify upfront fees on mortgage loans and half could not specify the amount they were borrowing. Predators take advantage of complicated terminology coupled with a consumer's fear of losing the largest investment of their life.

As lower income citizens chase the American dream, predators are following closely behind. State governments have taken notice, but predatory lending remains a big problem in this nation. Society has an obligation to protect its members who are the weakest among them and, hopefully, with the passage of laws with tougher penalties and the attention drawn to the problem, the number of predatory lending victims can at least be curbed. In a related matter, federal and state regulators announced a coordinated effort last month designed to weed out deceptive or unfair practices at some of the nation's largest subprime mortgage lenders. The pilot program, to begin in October, will target about a dozen of the most active firms offering subprime mortgages. The pilot program includes the Federal Reserve, the Office of Thrift Supervision, the Federal Trade Commission, the Conference of State Bank Supervisors, and the American Association of Residential Mortgage Regulators.

MORE THAN 2,000 IN MISSISSIPPI CAN GET REFUNDS IN PREDATORY LENDING SUIT

According to, Mississippi State Attor-

ney General Jim Hood, 2,209 Mississippians will be eligible to get refunds through the national settlement of a predatory lending lawsuit against Ameriquest Mortgage and its related companies. Letters were sent during the week of July 9th to those eligible. The Attorney General says people have until September 10th to respond so they can claim part of the money, which comes from the national settlement of \$325 million. About \$859,000 of that is going to Mississippians. The payments to individual consumers in Mississippi could be as high as \$1,800. However, the payments could be more, depending on how many consumers respond. Refunds are available to people who from 1999 through 2005 were customers of Ameriquest Mortgage Company, Town and Country Credit Corporation, and AMC Mortgage Services. AMC was previously known as Bedford Home Loans. The settlement resolves allegations by Attorneys General in 49 states that the companies did not adequately disclose the terms of home loans, among other things.

Source: *Associated Press*

XIII. PREMISES LIABILITY UPDATE

NORTH CAROLINA SUPREME COURT ALLOWS JAIL FIRE LAWSUITS TO GO FORWARD

Our firm represents two families who lost loved ones in a jail fire in Mitchell County, North Carolina on May 3, 2002. The fire started in a storage room that had been added on to the older jail facility many years before the fire. North Carolina statutes required the North Carolina Department for Health and Human Services to conduct bi-annual inspections of the jail facility, including this addition, to insure that all parts of the jail met all applicable fire and building codes. Nonetheless, the addition to the original jail facility did not meet

North Carolina State building or fire codes. As a result of the fire on May 3, 2002, eight men being held in the facility died from smoke inhalation when the jailer was unable to unlock the second floor jail cell to allow the prisoners to get out of the fire.

Following this fire, the North Carolina Department of Labor conducted an investigation into the fire. The Department of Labor determined that the Department of Health and Human Services had breached its duty to properly inspect the Mitchell County Jail facility to insure that it met all applicable codes. The Department of Labor also determined that the inspectors who conducted jail facility inspections had not been properly trained to determine all code violations.

We filed suit on behalf of our clients against the State of North Carolina for failure to perform its statutory duties to inspect the Mitchell County Jail. In North Carolina, a suit of this nature is brought before an administrative board within the Department of Industrial Relations. Immediately after suit was filed, the State of North Carolina sought to dismiss our clients' claims, asserting immunity under the public duty doctrine. The trial court denied the State's request. North Carolina immediately filed an appeal with the full Industrial Commission in an effort to reverse the trial court's decision. The full commission found in favor of the plaintiffs and denied the State's motion to dismiss the plaintiffs' claims. The State of North Carolina then filed a further appeal to the North Carolina Court of Appeals. The North Carolina Court of Appeals found that the plaintiffs' claims could proceed against the State in this case. Not to be deterred, the State of North Carolina filed a final appeal to the State Supreme Court. On June 28, 2007, the Supreme Court rejected the State's claim that it was immune from suit in this type of action and found that the plaintiffs could go forward with their actions.

These cases have been a long and difficult process for our clients and have

been appealed by the State of North Carolina for nearly five years while the families have been unable to find out what happened to their family members on the night of the fire. We attempted to take sworn testimony from eyewitnesses while these appeals were pending, but the State blocked every effort we made to find out what happened the night of this fire. Now that the Supreme Court of North Carolina has held that the families' claims can go forward, we finally will be able to help the families learn about the details of the fire and why their loved ones perished that night. Ben Baker is the lead lawyer on the case for our firm and has worked extremely hard to keep the cases on track.

A GOOD RESULT IN A CARBON MONOXIDE LAWSUIT

A Mobile, Alabama jury awarded more than \$7 million last month in a wrongful death lawsuit. It was proven at trial that a woman and her three children became ill and her mother died from carbon monoxide poisoning caused by a faulty furnace in 2004. The verdict was returned against Mobile Gas Service Corp. and two other defendants after a two-week trial. The wrongful death suit was brought against Mobile Gas; the one-time landlord, Tyrone Wilson; and Robert Harris. Harris and Wilson fired up the furnace. Jurors decided that a fourth defendant, an area heating and air conditioning company that once employed Harris, but knew nothing of his work at the home in question and didn't authorize the work, was not legally responsible.

The plaintiffs' lawyers argued that Mobile Gas should not have supplied fuel to the furnace because the gas company itself had already red-tagged the furnace as faulty. As we have written in previous issues, carbon monoxide is a colorless, odorless, toxic gas that, when breathed, prevents the blood from carrying oxygen. A victim can essentially suffocate and die. In 1999, long before the family in this case

took occupancy, gas company officials declared that the water heater and the gas furnace at the home were not up to standards—that the water heater rested too close to the floor and was a fire hazard—and also labeled the furnace a possible hazard. In June 2004, the family moved into the rental property, which was in Chickasaw, Alabama. The gas company supplied the gas but tagged the appliances. Significantly, the concerns expressed five years earlier were reiterated at that time. Nevertheless, Mobile Gas supplied gas to the property even with those concerns.

Six months after the family moved in, according to trial testimony, but within hours of the furnace being reactivated during a cold December night, the victims were overcome by the dangerous fumes the furnace produced. All were taken to the hospital, but one family member, who was 78 years old, died. The jury verdict was \$7.15 million, including compensatory and punitive damages, spread out among the three remaining defendants, with the gas company and the landlord bearing the bulk of the burden. Bobo Cunningham and Skip Finkbohner, who are with the Mobile firm of Cunningham, Bounds, Yance, Crowder and Brown, L.L.C., represented the plaintiffs and did an outstanding job in the case.

Source: Mobile Register

HAZARDS CREATED BY SWIMMING POOL DRAINS

Over the past year or so, we have written about the hazards created by swimming pool drains. But, we still find that most adults are unaware of how dangerous these drains are. A six-year-old Edina, Minnesota, girl is hospitalized in serious condition after an accident in which several feet of her intestine were pulled out by the suction of a swimming pool drain. Abigail Taylor was injured on June 29th in a wading pool located at the Minneapolis Golf Club. After freeing herself, the child was taken to Children's Hospital for surgery. This

type of injury, which results from becoming entrapped in the drain, is a life altering condition. Survival is actually a miracle. In this case, doctors had to perform surgery to remove the part of the child's intestine that remained following the incident. It is probable that she will have to be fed intravenously for the rest of her life.

In this incident, the protective cover on the pool's drain had come off. The scenario of this injury fits a pattern that the U.S. Consumer Product Safety Commission warned about in a 2005 report, *Guidelines for Entrapment Hazards: Making Pools and Spas Safer*. According to the report, if a child sits on an open drain, the suction, which can reach several hundred pounds per square inch, can rupture the rectum and eviscerate the child in a matter of seconds. There have been three such incidents since 1990, none of which were fatal. The most recent was two years ago when a 3-year-old was disemboweled by a hot tub drain. None of those accidents was fatal, although in the same time span 13 people, most of them children, drowned after being caught in underwater drains. It is most unfortunate that adults—and especially parents—haven't been adequately informed and warned about the entrapment hazard.

Regulation of the swimming pool industry has been very weak and largely ineffective. Congress has failed to pass new pool-safety regulations. Instead of having one main drain, both public and private pools would be required to have multiple drains with reduced suction. Owners of existing pools would be able to install safety release sensors that will turn off the suction if the system is blocked. Efforts to pass legislation were killed in Congress in 2006 as a result of intense lobbying efforts by the industry. If you have the June and September 2006 issues of the *Report*, I suggest that you read what was written relating to the legislation that was introduced in Congress. I attempted to lay out the need for enactment of strong laws dealing with the dangers and hazards created by swimming pool drains resulting in the entrap-

ment of children. The death of the legislation was described in detail in the April 2007 issue of the *Report*.

Source: *Minneapolis Star Tribune*

COLLAPSE OF BIG DIG CEILING IN BOSTON IS TIED TO GLUE

As we previously reported, a woman was killed when the ceiling collapsed in one of Boston's Big Dig tunnels a year ago. It appears the problem was that builders used the wrong epoxy to hold the anchor bolts in place. The National Transportation Safety Board released its findings last month. The epoxy selected apparently dried quickly, but lost strength weeks later. During construction, the builders tested the strength of the bolts; when some failed, the problem was attributed to installation errors, not breakdown of the epoxy.

It appears that the engineering in the project was clearly deficient. With concrete, steel, and asphalt, once you test them for strength, they essentially keep that strength forever. But, epoxy is not that way. It's a much different material. The failure dumped 26 tons of concrete and hardware on the 15-year-old Buick sedan in which Milena Del Valle was riding, and on the surrounding roadway. Litigation is still pending in the wrongful death case. It appears that this project was a real disaster, with a series of errors and problems being quite evident.

Source: *New York Times*

XIV. WORKPLACE HAZARDS

NINE FIREFIGHTERS LOSE THEIR LIVES IN SOUTH CAROLINA FIRE

A fire on June 18th at the Sofa Superstore in Charleston, South Carolina, resulted in the tragic deaths of nine firefighters. Nearly two weeks later, after the greatest single loss of firefighters

since the attacks on the World Trade Center in 2001, questions remain about the fire's cause and whether the nine firefighters should have been in the building. John Dean, the president of the National Association of State Fire Marshals, says that fighting fires in furniture stores can be a nightmare. There are always a good number of furniture pieces in the stores that are highly flammable. Once a fire starts, it spreads rapidly and is most difficult to control.

The showroom, which was about half of the 60,000 square-foot store that included a warehouse, also had a steel truss roof, which is a dangerous type of structure in fires. "Fires in truss systems can burn for long periods before detection and can spread quickly across or through the trusses," according to a 2005 report from the National Institute for Occupational Safety and Health. Steel trusses are also prone to failure in fires because the steel weakens when heated. In the Charleston fire, witnesses reported the roof collapsing. The coroner reported that the firefighters died of burns and smoke inhalation. Jim Bowie, executive director of the South Carolina Firefighters Association, which offers training and benefits to 16,000 firefighters, says they are trying to find out what caused the flashover.

All investigators have said for sure is that the fire began near a loading dock—an area where old furniture was kept for disposal and where cardboard and packaging awaited pickup by trash trucks—and where store employees took cigarette breaks. The warehouse was stacked with furniture five racks high. The store had neither smoke alarms nor sprinklers, but those were not required under city codes. It should be noted that sprinklers would be required only if the building were built today. A roof was added to the loading dock area without a city permit, but city officials have said it is unclear whether the construction would have required installing sprinklers. This tragedy that resulted in the loss of nine lives should motivate public officials to require

sprinklers and smoke alarms in all public buildings.

Source: *Insurance Journal*

TRAVELERS SETTLES ASBESTOS CLAIMS FOR \$365 MILLION

The Travelers Companies, Inc. has settled all current and future asbestos-related coverage claims relating to ACandS, Inc. Under the settlement agreement, Travelers will contribute \$449 million to a trust to be established pursuant to ACandS' plan of reorganization. In connection with the settlement, Travelers expects to cede approximately \$84 million to its reinsurers, for a net settlement of \$365 million. Travelers said it will fund the settlement from its existing asbestos reserves and does not anticipate any impact on earnings as a result of the settlement. ACandS was one of the company's "most significant and longest-standing asbestos exposures," according to Jay S. Fishman, chairman and chief executive officer.

The settlement is subject to a number of contingencies, including final court approval of both the settlement and a plan of reorganization for ACandS. From the time it commenced operations in January 1958, ACandS Inc. was an insulation contracting company, primarily engaged in the installation of thermal and mechanical insulation. In later years, ACandS also performed a significant amount of asbestos abatement and other environmental remediation work. These services were performed throughout the United States. Since 1969, ACandS has been a wholly owned subsidiary of Irex Corp., a holding company that also owns several subsidiaries that operate within the specialty contracting business. ACandS maintains its corporate headquarters in Lancaster, Pennsylvania. Certain of the products installed by ACandS between 1958 and 1974 contained asbestos. Effective January 1, 1974, ACandS adopted the policy that it would no longer handle,

furnish, or install friable asbestos-containing materials.

Source: *Insurance Journal*

U.S. MINE AGENCY ADMITS SHORTCOMINGS AND PROMISES TO IMPROVE MINE SAFETY

Federal inspectors missed obvious problems and failed to follow procedures before three high-profile accidents that killed 19 men at underground coal mines in West Virginia and Kentucky last year, according to the Mine Safety and Health Administration (MSHA). An internal accountability office will be created along with numerous other steps to make sure such lapses are not repeated, the agency said. The moves follow reviews of MSHA's actions before the Sago Mine explosion that killed 12 men in northern West Virginia on January 2, 2006, a conveyor belt fire that killed two men at the Aracoma Alma Number 1 Mine in southern West Virginia 17 days later, and an explosion that killed five more miners at the Darby Mine in Kentucky on May 20, 2006. Those accidents prompted sweeping changes to the nation's coal mining laws last year.

The agency also has asked the Department of Labor to investigate potential misconduct by MSHA inspectors. The agency reported finding several instances of questionable conduct by inspectors assigned to the Alma mine, which is owned by Massey Energy Co., based in Richmond, Virginia. MSHA's internal review teams identified a number of deficiencies in the agency's enforcement programs. It appears that there were significant shortcomings in the way MSHA discharged its responsibilities at the three mines, according to a memo to MSHA employees. MSHA found that inspectors missed numerous violations at the mine and didn't require Massey to take corrective action. MSHA officials admit that the number and nature of the issues identified in the inspections at the Aracoma Alma Mine Number 1 indicate significant lapses by inspectors, supervisors, and district

management. Effective oversight by supervision and management would have identified and possibly prevented many of these lapses. Lawsuits have been filed over the deaths at both mines. The Bush Administration's approach to enforcing mine safety laws has been awful and contributes to the low levels of mine safety.

TENNESSEE MAN FILES ASBESTOS SUIT

A Tennessee man suffering from mesothelioma has filed an asbestos suit in state court in Madison County, Illinois, claiming his disease was wrongfully caused. James Weese was employed from the early 1940s through the early 1990s as a pipefitter, laborer and welder in various locations, including Illinois. Mr. Weese claims that during the course of his employment and during home and automotive repairs he was exposed to and inhaled, ingested, or otherwise absorbed asbestos fibers emanating from certain products he was working with and around. He names 118 corporations as defendants, which include Alcoa, CBS, Discount Auto Parts, Dow Chemical, ExxonMobil, Ford Motor Company, General Motors, Goodyear, Honeywell International, Ingersoll-Rand, John Crane, Owens-Illinois, Pabst Brewing, Sears, and U.S. Steel. The plaintiff alleged that his "exposure and inhalation, ingestion or absorption of the asbestos fibers was completely foreseeable and could or should have been anticipated by the defendants."

Mr. Weese claims the defendants knew or should have known that the asbestos fibers contained in their products had a toxic, poisonous, and highly deleterious effect upon the health of people. He alleged that the defendants included asbestos in their products even when adequate substitutes were available and failed to provide any or adequate instructions concerning the safe methods of working with and around asbestos. It's claimed that the defendants failed to require and advise employees of hygiene practices

designed to reduce or prevent carrying asbestos fibers home. Mr. Weese, who was exposed to fibers containing asbestos, developed a disease caused only by asbestos, which has disabled and disfigured him. The lawsuit seeks both compensatory and punitive damages.

Source: *Edwardsville Bureau*

WORKER SETTLES CLAIM AGAINST POPCORN FLAVORING MAKER

An Iowa man has settled his lawsuit against the makers of a butter flavoring used in microwave popcorn. John Weimer Jr. and his wife had sued International Flavors & Fragrances Inc., of New York, claiming he suffered lung damage after being exposed to diacetyl, a chemical linked to a respiratory disease commonly called "popcorn packers' lung." This occurred while he worked as a manager at the Snappy Popcorn Company plant in Breda, Iowa. The amount of the settlement is confidential.

In his suit, filed in 2005 in U.S. District Court in Sioux City, Iowa, Mr. Weimer alleged that International Flavors & Fragrances knew of the flavoring's health hazards, but failed to warn users or inform medical, scientific, and government agencies. The National Institute of Health has linked exposure of vapors from butter flavoring to lung damage in popcorn plant workers. Health investigators have determined that the flavorings pose no danger to people who eat microwave popcorn. It appears that Snappy Popcorn, which was not named in the lawsuit, no longer uses the product.

Last fall an American Pop Corn worker in Sioux City settled a similar suit for an undisclosed amount. Another American Pop Corn employee has made similar allegations in a third lawsuit, which is scheduled for trial in November. Both suits named the flavoring's makers as defendants. But, American Pop Corn was not named in either suit.

Source: *Sioux City Journal*

ONE IN 12 EMPLOYEES IN THE U.S. ARE USING ILLEGAL DRUGS

One in 12 full-time workers in the United States acknowledges having used illegal drugs in the past month, the U.S. government reports. Most of those who report using illicit drugs are employed full-time, with the highest rates among restaurant workers (17.4%), and construction workers (15.1%), according to a federal study released last month. About 4% of teachers and social service workers reported using illegal drugs in the past month, which were among the lowest rates, but still too high. Federal officials said the newest survey is a snapshot and was not designed to show whether illicit drug usage in the workplace is a growing problem or a lessening one. The current usage rate is 8.2%. Two previous government surveys reflected a usage rate of 7.6% in 1994 and 7.7% in 1997, but those studies involved a much smaller sample of interviews.

The latest study comes from the Substance Abuse and Mental Health Administration, an agency within the U.S. Department of Health and Human Services. The data is drawn from the agency's annual surveys in 2002, 2003, and 2004 of the civilian, non-institutionalized population. Each survey included interviews with more than 40,000 people, who were each paid \$30 to participate. It appears that most of the illicit drug use involved marijuana. The survey's results were said by one of the researchers to be "very worrisome" because there are fewer treatment programs than there used to be to assist employees and employers with a dependence on drugs. But, testing programs for drug use are fairly prevalent, with 48.8% of full-time workers telling the government that their employers conducted testing for drug use.

The study also showed that the prevalence of illegal drug use reported by full-time workers in the past month was highest among younger workers. Nineteen percent of workers age 18 to 25 said they used illegal drugs during the

past month, compared with 10.3% among those age 26 to 34; 7% among those age 35 to 49; and 2.6% among those age 50 to 64. Men accounted for about two-thirds of the 6.4 million workers who reported using illegal drugs in the past month, the government said. Men were also more likely than women to report illegal drug use in the past month—9.7% for men, versus 6.2% for women. The study also looked at alcohol use by workers. About 10.1 million full-time workers, or 8.8%, reported heavy alcohol use. Heavy alcohol use was defined as drinking five or more drinks on one occasion at least five times in the past 30 days. Government initiatives in the United States have done a very poor job of dealing with the drug problem in this country. I wonder what it will take to give us a real wake-up call!

Source: Associated Press

AIG SUED OVER MINNESOTA WORKERS' COMPENSATION ISSUES

The Minnesota Workers' Compensation Reinsurance Association (WCRA) and the Minnesota Workers' Compensation Insurers Association (MWCIA) have filed suit against American International Group Inc to recover more than \$100 million in damages for fraudulent actions and violations of the federal Racketeer Influenced and Corrupt Organizations Act. The WCRA is a non-profit association created by the Minnesota Legislature in 1979 to supply reinsurance to all insurers and self-insurers in Minnesota. This reinsurance is used to pay catastrophic workers' compensation claims to injured Minnesota workers. In the complaint, WCRA and MWCIA allege that AIG underreported its workers' compensation premiums to MWCIA and WCRA for the last 22 years, in order to avoid paying reinsurance premiums to WCRA and assessments to MWCIA that were computed based upon AIG's reported premiums. The WCRA said it is seeking to recover underpaid reinsurance premiums from 1985 to present, plus the investment

income the WCRA would have earned on those premiums. MWCIA is seeking to recover underpaid assessments due from AIG for this same period.

Source: AFX News Limited

XV. TRANSPORTATION

STATE TROOPERS GET TOUGH ON SPEEDERS

The Alabama Department of Public Safety (DPS) is getting tough on speeders. During the week of August 13-18, 2007, DPS will have every supervisor and eligible staff person in uniform and on the Alabama roads. This effort will add approximately 150 more troopers to the highways during that week. It is my understanding that they will be maintaining a "zero tolerance" rule on speeding and other violations. That means that if a motorist is one mile over the speed limit, they will be ticketed. The troops will also be looking for other traffic violations, such as not wearing seatbelts and reckless driving. The purpose of this campaign is to emphasize public safety on the roads and hopefully save lives. Last year there were 1,208 deaths on Alabama highways—an increase of 5% over the previous year—which was the highest death count since 1973. There is a definite need for more state troopers since DPS is still understaffed. Hopefully the Governor and the legislative leaders will make traffic safety a top priority for the next session which will require more funds for the hiring of troopers.

DRIVER FELL ASLEEP BEFORE FATAL BUS CRASH

It has been determined that the tour bus driver fell asleep at the wheel before the crash on I-65 in south central Kentucky in June. Both the driver and a passenger were killed and many of the 64 remaining passengers were injured in the accident. The driver apparently dozed off and ran off the road, striking

an overpass support. An investigation revealed no mechanical or tire failures on the bus, the report said. The Federal Motor Carrier Safety Administration (FMCSA) has conducted a “compliance review” of the company. As we have previously reported, the 1987 model bus, made by Motor Coach Industries of Schaumburg, Illinois, was returning members of an extended family from a family reunion in Niagara Falls, New York, to Alabama. Most were from rural Forkland, Alabama, which is located in Greene County. There were 42 adult passengers, 23 children, and two drivers on the bus when it crashed. This was a tragedy that could have been avoided.

The tour bus company received an unsatisfactory compliance rating from the FMCSA. The agency gave C&R Tours, based in Birmingham, Alabama, the unsatisfactory rating in the compliance review of company records. The compliance review consisted of looking at log books, driver records and a check of the company insurance policies. The review looked at the company’s records from the last year and did not focus solely on the bus involved in the crash.

The agency normally doesn’t release the violations until an enforcement case has been concluded. Usually, carriers found in violation of federal safety guidelines are fined. If the carrier does not address the violations within 45 days of the report, the carrier’s license can be revoked. The company has two vehicles and three drivers. An investigation by Kentucky State Police showed the bus was overcrowded and had improper registration. There were 66 people on the bus at the time of the crash even though the bus had a capacity of only 55. The tags found on the bus involved in the crash actually belonged to a different bus, and expired in 2007. The registration tags, which were supposed to be on the bus, expired in 2005. C&R had a satisfactory safety rating when it was last reviewed in March, according to the U.S. Department of Transportation.

Source: Associated Press

FLORIDA MAN IS AWARDED \$21 MILLION IN CELL PHONE SUIT

All studies done on the subject have revealed that driving a motor vehicle while talking on a cell phone causes drivers to become distracted and that results in safety risks. Recently, a jury in a Florida court returned a \$21.6 million verdict in a lawsuit that involved cell phone use. A distracted driver caused the 2004 crash that resulted in the death of an innocent victim. Stephen Beers filed a wrongful death lawsuit against the corporation that owned the company car driven by one of its employees. A rush hour crash involving the employee killed Mr. Beers’ wife. It was proved that the employee was distracted while driving on the road because she was talking on her cell phone. The defendant’s lawyers conceded that the employee caused the wreck, but told the jury that it was not because she was talking on the phone. The jury disagreed and found for the plaintiff. As we have reported in previous issues, driving a vehicle and talking on a cell phone is a distraction that puts others on the highway at great risk. All employers must make sure they have rules in place concerning cell phone usage by employees who are either driving a company vehicle or who are on company business. To put it bluntly—driving a car and talking on a cell phone—just don’t make for a good mix.

Source: Associated Press

XVI. ARBITRATION UPDATE

PUBLIC CITIZEN URGES SUPPORT FOR THE ARBITRATION FAIRNESS ACT

Public Citizen is supporting the Arbitration Fairness Act that has been introduced in Congress. Senator Russ Feingold (D-WI) and Representative Hank Johnson (D-GA) are sponsoring this important legislation. Public Citizen is committed to passing the legislation,

and its president, Joan Claybrook, says they are proud to stand with these outstanding legislators. With mandatory predispute arbitration privatizing our civil justice system, fairness in the marketplace is undermined and consumers are denied any remedy for fraud and deception. The insertion by business entities of arbitration clauses in everyday contracts forces individuals to forgo their right to a court or jury if dangerous products, services, or workplaces harm them. Ms. Claybrook had this to say concerning the pending legislation:

Let me be blunt. Privatizing justice benefits big corporate interests like national banks and insurance companies but does not help ordinary people. Corporations have figured out that simply by inserting an arbitration clause in contracts for everyday consumer goods and services or employment, they can usually evade accountability for any harm they cause or laws they break—laws meant to protect consumers and employees from the misuse and abuse of corporate power in the marketplace.

How? First, the contracts are take-it-or-leave-it, so individuals have no choice but to accept the arbitration clause if they want the product, service or job, even if they are required by law to buy the service, as is the case with auto insurance, or required by life’s uncertainties to purchase a much-needed service like health insurance. Second, the lack of any meaningful independent review of arbitration decisions creates a climate ripe for abuse. The arbitration process is secretive and, of course, the courts have little involvement. Companies impose arbitration on consumers to keep their corporate misbehavior hidden from the piercing sunlight of our public civil justice court system. Third, arbitration companies are beholden to big corporate players for repeat business, which

creates a bias. They do not bite the hand that feeds them. For example, public data show that in the portfolio of one California arbitrator who ruled in 532 cases, 526 were in favor of business—a mere 1.14 percent for the ordinary consumer. Fourth, arbitration is costly: The more you play, the more you pay, which denies justice to many who cannot afford to play on an already uneven field.

The Arbitration Fairness Act of 2007 would change that terrible anti-consumer landscape. If we are to have any hope of restraining powerful corporate interests from abusing their overwhelming market power to the detriment of individuals, families, workers and whole communities, it must change. We cannot simply trust companies to do the right thing. Let us not forget our history. It took more than a century for the United States to develop consumer protections and other laws that hold corporations accountable when they harm individuals or otherwise abuse their power in the marketplace. It's time to stop the erosion of our hard-won protections and our civil justice system. It's time to enact the Arbitration Fairness Act and roll back the damage being done to our rights and liberties for the sake of profit.

I urge all of our readers to contact members of the U.S. House and Senate and ask for their support. Alabama citizens should put pressure on Senator Jeff Sessions, who is running for re-election next year, and see where he stands on the arbitration issue. Passage of this legislation is critically important for all American citizens. Arbitration is sort of like kudzu in that each had an initial reason for its existence and each has become a major problem. Although we have dealt with the kudzu problem, arbitration still hurts folks all over the U.S. I join with Public Citizen and urge Con-

gress to pass this needed legislation. I also want to express my thanks to Joan Claybrook and all of the folks at Public Citizen. They do a tremendous job for the American people on issues that affect them.

Source: Public Citizen

XVII. HEALTHCARE ISSUES

CHINESE FISH POSE A SERIOUS HEALTH PROBLEM

Federal health officials are examining five different kinds of Chinese seafood to make sure they are free of potentially dangerous antibiotics. The Food and Drug Administration detained the seafood—including catfish, shrimp, and eel—after repeated testing showed contamination in the farmed food. Although only low levels of the drugs were found, those levels, if consumed over a long period, can cause harm. Alabama and other Southern states found catfish laced with banned antibiotics earlier this year, as well. In a rare direct comment on the matter, Associated Press reports that China claims the safety of its products is “guaranteed.” We will see how accurate that statement proves to be.

A series of recent problems with imported Chinese products has caused federal and state regulators a great deal of concern. In addition to the food scares, federal regulators also have warned consumers about lead paint in toy trains, as well as defective tires and toothpaste made with a toxic ingredient more commonly found in antifreeze. It has become abundantly clear that China doesn't put a very high priority on the effects of its exported products on health and safety.

Source: Associated Press

XVIII. ENVIRONMENTAL CONCERNS

A STRONG VOICE IS NEEDED

The announcement by Kathleen Hartnett White, chairman of the Texas Commission on Environmental Quality (TCEQ), that she would leave her post is a victory for the environmental community. Although state officials claim they were aware of her impending departure, it wasn't until Public Citizen put up a billboard calling for her to be replaced that the public learned of Ms. White's plans. Whether pressure from environmental advocates hastened her departure, however, is beside the point. The focus in Texas must be on finding the best person for what will be a very challenging job.

The State of Texas needs to drastically reduce air pollution in the Dallas-Fort Worth and Houston areas. It must figure out how to deal with the growing threat of mercury poisoning of the fish in the state's lakes and rivers—poisoning that can ultimately hinder the neurological development of children. And that state must draft a plan, without delay, to deal with global warming. This means that Governor Rick Perry must appoint a strong environmental steward to the position. Public Citizen's position is that the next TCEQ chair should take all of these issues more seriously than did Ms. White.

When I got the news release from Public Citizen, I first thought they were discussing my state of Alabama—that is, until I read the names and realized the state was actually Texas. But, the very same problems, insofar as the environmental issues are concerned, exist in most all states. Alabama is certainly included on that list!

Source: Public Citizen News Release

SICK 9-11 WORKERS SUE THE INSURANCE FUND

Ailing Ground Zero workers have filed suit in New York, demanding that the company overseeing a \$1 billion September 11th insurance fund spend the money to pay for their health care. The workers had already filed a class action lawsuit claiming the toxic dust from the World Trade Center site gave them serious, sometimes fatal diseases. They sought compensation from the WTC Captive Insurance Co., the company in charge of money appropriated by Congress to deal with September 11th health-related claims. This latest lawsuit, filed in state Supreme Court in Manhattan, alleged that:

The WTC Captive has consistently refused to pay any of the Ground Zero workers who have become ill on the work site, including any compensation for lost salaries, pain and suffering, medical treatment, medical monitoring or burial expenses.

The suit involves thousands of workers who became ill after working to clean up the site while breathing toxic Trade Center dust, including more than 100 who have died.

The lawsuit, relying on testimony from federal officials over the years about the fund's purpose, said officials meant for the money to be used to compensate ailing workers. WTC Captive claims to have been operating as the federal government intended it, insuring the city and its contractors from September 11th claims. Since it began operating in 2004, the company has spent more than \$73 million of the insurance money in legal fees and other expenses, according to the lawsuit. Congressional leaders are being urged to get involved and require the company to make the \$1 billion available immediately for sick workers. Mayor Bloomberg and other city officials have estimated the cost of caring for the workers who are sick or who could become sick at \$393 million

a year, and urged the federal government to pay for their treatment and monitoring. Regardless of who all is at fault, there can be no excuse for not paying for the medical bills and expenses for all who put their health and safety at risk after 9-11.

Source: *Associated Press*

WORKERS SAY PESTICIDES MADE THEM STERILE

At least 5,000 agricultural workers from Nicaragua, Costa Rica, Guatemala, Honduras, and Panama have filed five civil lawsuits in this country claiming they were left sterile after being exposed in the 1970s to the pesticide known as dibromochloropropane or DBCP. The pesticide was designed to kill worms infesting the roots of banana trees on Latin American plantations. Jury selection for the first of the lawsuits began last month in California. This is the first time any case for a banana worker has come before a U.S. court. The cases raise the issue of whether multinational companies should be held accountable in the country where they are based or the countries where they employ workers, legal experts said. In the lawsuits, Dole Fresh Fruit Co. and Standard Fruit Co., now a part of Dole, are accused of negligence and fraudulent concealment in their use of the pesticide. Dow Chemical Co. and Amvac Chemical Corp., manufacturers of the pesticide, "actively suppressed information about DBCP's reproductive toxicity," according to allegations in the lawsuit.

The U.S. Environmental Protection Agency's Website says the chemical was used as a fumigant on more than 40 different crops in the U.S. until it was largely phased out by 1979. Long-term exposure to the pesticide causes male reproductive problems, including decreased sperm count, according to the site, which lists DBCP as a "probable human carcinogen." In April, all five lawsuits were placed under the jurisdiction of one judge in Los Angeles. The legal actions involve claims on behalf of

workers from Nicaragua, Honduras, Panama, Guatemala, and Costa Rica. Other growers and manufacturers are named as defendants. It is alleged that Dow and Amvac knew about DBCP's toxicity as early as the 1950s, and that scientists employed by Dow had noted atrophied testes in laboratory animals exposed to the pesticide. Defendants, however, continued to market, sell, and use pesticide products containing DBCP outside of the United States, including Nicaragua. The lawsuit claims the pesticide was sprayed under tree canopies and fell in droplets onto workers and seeped into the water supply. Plantation workers were allowed to ingest and bathe in contaminated water when they lived in company-supplied housing on Nicaraguan banana plantations, according to the lawsuit. It's alleged that Dole neither warned the workers of the dangers of exposure nor tried to protect them by issuing gloves, safety glasses, or masks.

Source: *Associated Press*

NORFOLK SOUTHERN SETTLES CLASS ACTION IN SOUTH CAROLINA OVER TRAIN DERAILMENT

On January 6, 2005 a train derailment unleashed a cloud of chlorine gas over the small mill town of Graniteville, South Carolina. The toxic release left nine dead, hundreds injured, and thousands more without a home for nearly a week. Last month, a federal judge approved a \$10.5 million dollar settlement to compensate those who were seriously injured as a result of the crash. The agreement will require the railroad owner, Norfolk Southern, to pay damages to approximately 480 people physically injured as a result of the chlorine release. Specifically, for those who sought medical treatment within three months of the toxic release, the settlement will give from \$10,000 up to several hundred thousand dollars. The disbursement of the settlement funds will vary according to a number of factors, including seriousness of

injuries, proximity of home to the derailment, and reasons for exposure. Surprisingly, there were no objections to the settlement terms among the class action members.

A settlement had already been reached between the railroad and families of those killed as a result of the toxic exposure. Additionally, the railroad previously reached an agreement with those who were forced to evacuate or suffered property damage because of the crash. Besides a host of independent lawsuits against the railroad, last month's settlement represents the conclusion of the class action lawsuits. As a result, a majority of the litigation has come to an end just two-and-a-half years after the derailment.

Source: *Forbes*

XIX. THE CONSUMER CORNER

CONSUMER CHIEF SEEKS MORE LEGAL AUTHORITY

The U.S. Consumer Product Safety Commission needs more authority in order to stop unsafe products from coming into the U.S. from China. Acting Chairman Nancy Nord wants more authority to use against companies that don't test enough to meet all U.S. standards. For example, the Customs Service should be given authority to seize products that don't meet voluntary standards. Currently, Customs can seize only products that don't meet mandatory standards. There are hundreds of voluntary industry standards that most U.S. manufacturers meet, but many imported products do not. For example, cigarette lighters must meet mandatory standards making the lighters difficult for children to operate. But U.S.-made lighters also meet voluntary standards that help prevent overfilling and flare-ups. It is reported that virtually none of the Chinese manufac-

turers meet any real standards. Under the current law, Customs can't block the import of these products.

Source: *USA Today*

TAINTED CHINESE TOOTHPASTE HAD WIDER REACH THAN FIRST BELIEVED

It now appears that thousands of tubes of contaminated Chinese-made toothpaste were shipped to state prisons and mental hospitals in Georgia. U.S. distribution of the tainted products was much wider than initially thought. The toothpaste contaminated with diethylene glycol, which is often found in antifreeze, was immediately taken out of use as soon as federal officials notified the state about the problem. As reported last month, the U.S. Food and Drug Administration (FDA) advised consumers to "avoid using tubes of toothpaste labeled as made in China." "Out of an abundance of caution, FDA suggests that consumers throw away toothpaste labeled as made in China," according to a statement on the agency's Website.

Chinese-made toothpaste has been banned by numerous countries in Asia and the Americas for containing diethylene glycol, or DEG. It is also a low-cost—and sometimes deadly—substitute for glycerin, a sweetener in many drugs. *The New York Times* has reported Thursday that about 900,000 tubes have turned up in the United States, including correctional facilities and some hospitals, not just at discount stores as initially thought.

Source: *Associated Press*

NEW DANGER LABEL REQUIRED ON ALL PORTABLE GENERATORS

The U.S. Consumer Product Safety Commission (CPSC) will now require manufacturers of portable generators to warn consumers of carbon monoxide (CO) hazards through a new "Danger" label. The label states that, "Using a generator indoors CAN KILL YOU IN MINUTES." Manufacturers will be required to place the "Danger" label on

all new generators and the generators' packaging. The label warns consumers that a generator's exhaust contains carbon monoxide, a poison that cannot be seen and has no odor, and that generators should never be used inside homes or garages, even if doors and windows are open.

The death toll from carbon monoxide associated with generators has been steadily rising in recent years. At least 64 people died in 2005 from generator-related CO poisoning. Many of the deaths occurred after hurricanes and major storms. The CPSC is aware through police, medical examiner, and news reports of at least 32 CO deaths related to portable generators from October 1st through December 31, 2006. Deaths from carbon monoxide poisoning are preventable. I hope the new warning labels will alert consumers to the hazards. Generators should be used outdoors only, far from windows, doors, and vents. The CO produced by one generator is equal to the CO produced by hundreds of running cars. It can incapacitate and kill consumers within minutes. The new "Danger" label requirement went into effect on May 14, 2007 and is required for any portable generator manufactured or imported after that date.

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

The demand for portable generators has increased greatly in recent years. So too has the number of people who have been killed or sickened by carbon monoxide (CO) poisoning from the improper use of those generators.

Portable generators are extremely useful machines, particularly after the loss of electricity in the wake of a storm or other unforeseen circumstance. But, the amount of CO emitted from a portable generator can be several hundred times that released by a modern car's exhaust, and can kill consumers in a very short period of time. Consumers need to be adequately warned of the hazards posed by the improper use of a portable generator.

Source: Consumer Product Safety Commission

CARBON MONOXIDE DETECTORS ARE NOW REQUIRED IN FLORIDA

A series of high profile deaths involving carbon monoxide has resulted in a new Florida law requiring special detectors in many new homes. Unfortunately, the effective date of the requirement may be too late to help some victims. Public housing, new homes with a gas heater, gas appliances, or an attached garage are all required to have carbon monoxide detectors. The new law was the direct result of families who lost loved ones as a result of carbon monoxide poisoning. The 2004—2005 hurricane seasons claimed a dozen lives when people fired up generators inside their garage. Although the law took effect July 1st, there is a one year grace period to incorporate the new standards into the state building code. The detectors cost anywhere from \$15 to \$50 and they are readily available in stores. Contractors should include these systems in all new homes. Although there is a one year grace period for new homes, fire officials in Florida say anyone with gas appliances should have a carbon monoxide detector now.

Source: WJHGF.com

CONSUMER CLASS ACTIONS ARE INCREASING IN NUMBER

An increasing number of class actions under state consumer-protection laws are being filed around the country. In these cases, a different "avenue of relief"

is sought. The suits involve an economic, rather than a physical, injury caused by the defendants' conduct. In most cases, the class actions seek reimbursements for people who contend they would not have purchased a product if they had known it might cause physical harm. People are beginning to realize that consumer protection laws are an effective way to hold Corporate America accountable for effecting change.

Source: *The National Law Journal*

ATVs ARE AS DANGEROUS AS EVER

The federal government released data in December 2006 on ATV injuries and deaths—based on those numbers, it appears that ATVs are as dangerous as ever. For 2005, the Consumer Product Safety Commission (CPSC) estimates there were 767 deaths and 136,700 injuries involving ATVs—and 30% of those injuries involved children younger than 16. Although the injury rate for children represents a 10% drop from 2004 figures, the CPSC report said the decrease was not statistically significant. But, the 2005 estimate was significant when compared to 2001 figures because injuries have grown by 18%, the report said. Historically children under 16 have accounted for about 36% of total estimated injuries, but the recent drop to 30% may reflect increased ATV use by other age groups. In fact, the CPSC report says the age group that experienced the largest increase in injuries was the 45-54 year-old group, with a 24% rise between 2004 and 2005.

The estimated risk of death per 10,000 4-wheel ATVs in use remains the same as in 2001: 1.1. Even so, the report notes, the injury estimates are high. That's why consumer advocates, including Consumers Union, the publisher of *Consumer Reports*, continue to press the CPSC to make ATVs safer. In September, the agency launched an educational campaign, including a new Website, in the hopes that increased information

will reduce risk-taking behavior. But these latest numbers only show that the government needs to do far more than education.

The CPSC should ban all ATVs designed for children. The agency should also evaluate the dynamics of ATV crashes, develop comprehensive mandatory safety standards, and require the vehicles to be redesigned to improve safety, especially to prevent rollovers. And it's not just the CPSC that should act. Consumers Union believes states should ban ATV use on paved roads, implement educational and training campaigns, create and enforce licensing requirements, and require appropriate protective gear, including helmets, to operate ATVs. Of course, Congress needs to step in and give states the funds to do all this.

Source: *Consumer Reports*

ATVs ARE NOT THE ONLY OFF-ROAD DANGER TO CHILDREN

Although ATVs are dangerous and get lots of media attention, dirt bikes, scooters, go-carts, and buggies can all pose a serious risk of injury to children, according to a report from a team of researchers. They are concerned that, while much media attention has focused on the very real hazards to children from riding ATVs, the dangers from these other off-road vehicles is substantial. In fact, the report, which is in the July issue of *Pediatrics*, found the number of child injuries linked to all types of non-automobile, motorized vehicles continues to rise. Overall, these accidents have increased from 70,500 injuries in 1990 to 130,900 injuries in 2003. That is an increase of 86%, which is most alarming. Lead author Christy L. Collins, from the Center for Injury Research and Policy at the Columbus Children's Research Institute at Children's Hospital, in Ohio, made this observation:

ATV injuries are a serious concern, but we believe that pediatric injuries related to other types of

non-automobile motorized vehicles are also serious. The bottom line is that accidents with each of these types of motorized vehicles can leave kids seriously hurt. Children don't have the judgment and motor skills to drive or ride on ATVs, and they don't have the judgment to drive or ride on other types of non-automobile motorized vehicles like go-carts and dune buggies and dirt bikes. There were a total of 1,203,800 U.S. children treated for injuries linked to any and all types of non-automobile motorized vehicles from 1990 to 2003. While the majority of injuries were associated with ATVs (44.8%), there were another 21.1% related to two-wheeled off-road vehicles, and 13.7% related to go-carts and buggies.

In the study, data were collected on pediatric injuries sustained in accidents involving non-automobile motorized vehicles. The researchers used the U.S. Consumer Product Safety Commission's National Electronic Injury Surveillance System as their source. The most common injuries were contusions/abrasions (28.3%), fractures (24.2%), and lacerations (20%). It was recommended that if children are allowed to drive these vehicles, they should wear a helmet—one that includes proper face protection. It was noted that parents should be aware too of the risk of injury to children who are bystanders, not just the risk to drivers or passengers.

Effective legislation covering the use of ATVs should also be extended to other non-automobile motorized vehicles. The researchers pointed out that there are enormous risks for children on motorized vehicles of all sorts in the United States. Unfortunately, these injuries are dramatically increasing. It's somewhat surprising that so little attention has been paid to the risks associated with vehicles such as scooters, go-carts, and farm vehicles. The fact that nearly one-quarter of the injuries to children under 12 years of age were on

these types of vehicles is both remarkable and alarming, according to one of the experts involved in the study. Stricter policies to promote use of safety equipment and to limit use of these vehicles by young children are needed to reverse the trend. I hope that will now happen.

Source: *HealthDay*

HOME DEPOT FACES MULTIPLE GROUT SEALER LAWSUITS

More than 160 people across the country have brought 31 separate product liability suits against The Home Depot and five other companies tied to the manufacture and distribution of Stand 'N Seal, claiming that using the product permanently damaged their health. Stand 'N Seal is an aerosol chemical spray containing Flexipel—an ingredient that experts say should never have been produced in aerosol form. It has been reported that two people have died after exposure to Stand 'N Seal with others being hospitalized and left with permanent lung damage. Lawsuits have been filed concerning this product. Northern District of Georgia Judge Thomas W. Thrash Jr. of Atlanta is presiding over the multidistrict litigation (MDL) proceeding. Frank Ilardi, who is with Houck, Ilardi & Regas, a firm located in Atlanta, is co-lead counsel along with Texas attorney William J. Maiberger Jr., of the Watts Law Firm in San Antonio in the MDL.

The serious health problems resulting from the grout sealer's use are said to have been compounded by Stand 'N Seal's manufacturer, the Illinois-based Roanoke Companies Group, doing business as Tile Perfect, which manufactured Stand 'N Seal exclusively for Home Depot. The lawsuits allege that Tile Perfect, after being put on notice of the safety problems, delayed notifying the U.S. Consumer Product Safety Commission and continued to sell the product. The actions further contend that when Tile Perfect finally alerted the Commission, the company withheld

critical information and listed the recall on its Website as voluntary rather than mandatory. Home Depot and Tile Perfect finally stopped selling Stand 'N Seal in March of this year—19 months after the Commission issued a product recall for 300,000 cans of Stand 'N Seal, according to allegations in the complaints. It will be interesting to see how this litigation progresses. At this stage, it appears all of the defendants are attempting to either blame each other or claim product misuse.

Source: *Fulton County Daily Report*

WASHINGTON SUPREME COURT STRIKES DOWN CINGULAR'S CLASS ACTION BAN

Public Justice's Access to Justice Campaign and Class Action Preservation Project have recently won a major victory for tens of thousands of cell phone customers and all consumers in Washington state! The Washington Supreme Court ruled recently in *Scott v. Cingular Wireless* that the cell phone company cannot insulate itself from liability by banning its customers from bringing class actions against it. The court joined the growing number of state and federal courts around the country striking down class action bans that would effectively prevent consumers from holding corporations accountable.

Public Justice successfully argued in the *Scott* case that Cingular's class action ban is "unconscionable" under state law because it denies them access to justice and essentially immunizes the company for wrongdoing. The court's decision emphasizes that Cingular's class action ban, if enforced, would "effectively deny large numbers of consumers the protection of Washington's Consumer Protection Act." It also stresses that class actions are necessary to "strongly deter future similar wrongful conduct, which benefits the community as a whole." Public Justice also argued that federal law does not preempt state laws that preclude companies from barring class actions in con-

tract provisions. The court strongly agreed on this point too, recognizing that federal law “favors arbitration, not exculpation.”

The case arose when Cingular allegedly charged roaming and long distance fees despite its promise to provide those services for free. When its customers sued in state court in 2004, Cingular tried to force them to arbitrate their claims individually. The trial court ruled in Cingular’s favor and the appellate court denied the consumers’ appeal, but the state Supreme Court granted review. The High Court’s decision invalidating the class action ban—and the arbitration clause, which applied only if the class action ban was legal—means that the plaintiffs’ claims can now go forward in court.

Source: Public Justice News release

NEW YORK WATCHDOG AGENCY WANTS TOUGH MESSAGE SENT TO SPRINT

Cell phone companies have a practice for charging customers large fees if they want to get out of their contracts early. Sprint Nextel Corp., one of these companies, dismissed 1,100 customers for complaining about the charges. Mindy Bockstein, chairwoman of New York’s Consumer Protection Board, has asked the company to pay \$200 in termination fees to each of the customers. She made this comment concerning Sprint’s actions:

If someone adheres to a contract and pays for service that carries a termination fee for quitting, it should be a two-way street.

Sprint, the nation’s third-largest cell phone carrier, claims it already has provided adequate compensation because it waived its \$175 termination fee and the customers’ final monthly bills. Ms. Bockstein, whose board actually has little regulatory authority over wireless carriers, was unsure whether the compensation was sufficient. The state board is concerned that “these customers are not being treated fairly,”

according to a letter Ms. Bockstein sent to the company. The Utility Reform Network, a San Francisco consumer advocacy group, believes that Sprint should review its policies. Regardless of the outcome of this matter, at least it’s good to see a state agency attempting to help consumers.

Source: *Los Angeles Times*

A GOOD RESULT IN AN ALABAMA TERMITE CASE

A verdict was returned recently in a termite damage case tried in an Alabama state court. In that case, a pest control company committed fraud in providing improper termite protection services for a homeowner. The case, filed on behalf of Mrs. Hardenia Daniels, was tried before a jury in the Bessemer cutoff which, for the uninformed, is in Jefferson County. I am going to describe more of the facts of the case than I usually do because of the story it tells. It’s a story that may occur more often than we realize.

In 1987, Mrs. Daniels and her now-deceased husband bought their first home after living in public housing for more than 20 years. APE, a termite company located in Irondale, Alabama, now called Alabama Professional Services, told Mr. and Mrs. Daniels that it thoroughly treated their home against termites and placed it under bond. APE also issued a clearance letter that disclosed nothing about previous termite activity or damage. The bond was originally issued in Mr. Daniels’ name. He died from cancer in 1994. After his death, APE’s records were changed to reflect that the bond was in Mrs. Daniels’ name. She believed all along that APE had properly treated and inspected her home. APE took Mrs. Daniels’ money each year and allegedly inspected her home for the next 12 years. But, the plaintiff proved that, in over 19 years of service, APE never stepped foot inside the home when doing its annual termite inspection. In fact, it appears that APE did only a

cursory inspection of the exterior.

Expert testimony on both sides revealed that APE had used only 20 gallons of termiticide chemical in 1987. That was only enough chemical to treat about 25 feet of one stretch of foundation wall and insufficient to create a chemical barrier under and around the home to keep termites from attacking it. APE admitted that the extensive termite damages discovered in 2006 had existed at the time APE placed the home under bond in 1987. In 1996, with full knowledge of the existing damage, APE sold Mrs. Daniels over \$2,000 worth of foundation work. The president of APE personally told the homeowner when she called and asked for his advice that she needed to pay APE to perform the work or her floors would “fall in,” according to trial testimony. Testimony at trial proved that APE concealed the existence of termite damages from Mrs. Daniels.

Mrs. Daniels, who has been on disability since the late 1980s, now lives on a very limited budget and suffers from poor mental and physical health. This lady, who has had the benefit of only a limited education, wrote letters to APE over the years indicating her trust in APE and its owner. In 2002, when a technician told Mrs. Daniels the truth about the damage under her home, she immediately took action and called the company. APE came to her home and told her that it had fixed her damage. After the State of Alabama and other experts inspected the home in 2006, Mrs. Daniels discovered that she had extensive termite and structural damage and that the foundation work APE allegedly did in 1996 was not workmanlike and was essentially only a “band-aid.” She had just emerged from bankruptcy, was living hand-to-mouth, and experienced emotional difficulties caused by her fear that she would have to live on the street.

APE defended the suit, claiming that Mrs. Daniels never even had a contract with APE, and even if she had, the applicable statute of limitations had run. APE

also presented expert testimony to the jury that because Mrs. Daniels' home was located in Bessemer, it deserved no more than \$7000 worth of temporary propping up measures so that it could be sold instead of being properly repaired. APE admitted that proper repairs would cost between \$30,000 and \$70,000. The jury returned a verdict for Mrs. Daniels on claims of breach of contract, and various fraud theories in the amount of \$435,000. Tom Campbell and Keiron McGowin, who practice in Birmingham, Alabama, handled the case for Mrs. Daniels and did a tremendous job for their client. They supplied the above information, which I appreciate very much.

MILLIONS OF CELL PHONE USERS ELIGIBLE FOR REPLACEMENT OR REFUND

More than ten million cell-phone users nationwide are eligible for a free replacement phone or a \$5 phone card as part of the settlement of a lawsuit in Miami. The class action lawsuit, filed in the U.S. District Court of Southern District of Florida, focused on claims that the nation's largest cell phone insurance carriers misled customers about replacement policies, including that the customers might receive used cell-phone replacements sometimes worth less than the insurance deductible the customers were required to pay.

It is believed that about 10.3 million consumers nationwide received a refurbished replacement phone between February 20, 2004, and February 28, 2007. About 15,000 of those consumers received refurbished replacement phones valued at less than the charged deductible. They insured their phones with Asurion Corp. and Lock/Line. Final approval was given to the settlement on July 5th, ending 2 1/2 years of litigation in Florida and California. Some customers learned that they might receive a used phone under the insurance policy at the time they filed a claim. Others found out when they received a phone that had phone numbers pro-

grammed in it from a previous owner. Consumers pay monthly premiums of between \$3 and \$8 to carry the cell-phone insurance and pay a deductible of between \$35 and \$110 to receive a replacement phone.

I hope the settlement will improve policy disclosures to consumers. Under the settlement, the 10.3 million eligible consumers can each claim a \$5 phone card, and the 15,000 customers who received used phones valued at less than the deductible will receive vouchers for a free replacement phone with a value of between \$75 and \$150. It appears the future relief in this settlement is much more important than the value of the phone card or replacement phone.

Source: South Florida Sun-Sentinel

APPRAISERS PUSH FOR REAL ESTATE FRAUD RULES

It's called "hitting the number"—or inflating a home's value—and real estate appraisers who don't do it often enough can find it hard to make a living. In prepared testimony recently before a Senate subcommittee on mortgage industry abuses, Alan Hummel, spokesman for the Appraisal Institute, stated:

Appraisers face pressure from various parties involved in mortgage transactions. They are told to doctor their appraisals or else never see work from those parties again.

Mr. Hummel blamed poor regulation of mortgage brokers and lenders, and weak or nonexistent enforcement of real estate practitioners. Unscrupulous mortgage brokers should be singled out for special blame, according to Mike Evans, a fellow of the American Society of Appraisers, who made this observation:

Mortgage brokers are on commission. If the deal doesn't go through, they don't get paid. They don't care about anything but making the deal. And the deal can run into trouble if a buyer thinks the home

is worth less than the selling price. If the appraisal comes in below, they can't get the deal done. That's when the mortgage brokers and real estate agents may hit the warpath. They have to go out and beat up the appraisers, and find one they can twist.

The National Association of Mortgage Brokers (NAMB) addressed the issue last year, changing its bylaws to prohibit pressure on any other players in the transaction, including appraisers. NAMB director Denise Leonard testified at the hearing:

NAMB opposes any effort by a mortgage originator to pressure or influence the work of an appraiser.

According to Joe Falk, Legislative Committee Chair for NAMB, there is a fine line between discussion and pressure. Many brokers will question appraisers if valuations come in lower than brokers think appropriate, and appraisers may feel pressured under those circumstances. He conceded that there are some rogue brokers out there who have used coercion and threats to try to get a higher appraisal, which is one of the reasons that NAMB has taken a harder line against pressure of any kind. It's been said that overvaluing helped push prices up during the boom and has made home buyers more vulnerable during the current slump. If a home was bought for \$200,000 that was really worth \$180,000 and prices have now dropped 5%, its value is \$171,000. Owners may owe much more than the property is worth. The damage from appraisal fraud can reach beyond the individual. The potential foreclosures can have serious impacts on entire neighborhoods.

According to a study by Dan Immergluck, a Georgia Tech associate professor of city and regional planning, foreclosures lower the property values of neighboring homes located within an eighth of a mile by about 1% per foreclosure. Clusters of foreclosures can destabilize fragile neighborhoods—the

vacant houses can attract squatters, drug dealers and scavengers—and send them on downward spirals. As long as prices were quickly appreciating upward, many of these problems didn't surface, but with the housing slump, they're bubbling up. The remedy for most appraisal fraud is greater scrutiny of mortgage brokers. Until they are faced with litigation, the problems will continue. It may take litigation to force the brokers to "clean up their act."

Source: CNNMoney.com

ILLINOIS ATTORNEY GENERAL ALERTS CONSUMERS ABOUT TIRE SAFETY HAZARDS

Illinois Attorney General Lisa Madigan has issued a warning to consumers about defectively manufactured tires that may have been sold in Illinois and could create a potential safety hazard for those riding in light trucks, sports utility vehicles (SUVs), and vans equipped with the defective tires. These are the Chinese tires manufactured without or with an insufficient gum strip between the steel belts of the tires, making the tires susceptible to tread separation. It is well documented that tread separation can cause serious and potentially fatal accidents. More than 7,000 affected tires may have been marketed in Illinois as light truck radial tires and sold under the brand names of Westlake, Compass and YKS between mid-2002 and mid-2006. As stated previously, the defective tires are manufactured in China by Hangzhou Zhongce Rubber Co. and imported into the United States by Foreign Tire Sales Inc. The recall involves the following tire sizes:

- LT235/75R-15 CR861 CR857
- LT245/75R-16 CR860 CR861 CR857
- LT225/75R-16 CR 861
- LT265/75R-16 CR860 CR861 CR857
- LT235/85-16 CR 860 CR861 CF857
- LT310X10.5-15 CR861 CR857

If consumers in Illinois discover that they own any of the tires in question, they should file a consumer complaint with the Attorney General's office. Consumers can download a consumer complaint form at www.IllinoisAttorneyGeneral.gov or can call the Consumer Fraud Hotlines in that state.

In addition, for safety purposes, consumers should immediately contact their dealer and ask to be refunded the cost of the defective tires. Owners should check the sidewall of their tires for the brand, size, model, and DOT number. If the DOT number contains "FTS" as part of the number, it may be subject to the recall. More information from FTS can be found at www.foreigntire.com/recallinfo.html. Consumers also can visit the NHTSA Website at <http://www.nhtsa.dot.gov>. The Illinois Attorney General's office is opening an investigation related to the distribution of defective tires in that state. As part of the investigation, the office will look into the possibility of obtaining restitution for consumers who replace defective tires. The Attorney General's involvement is a good course of action and will benefit the people in her state.

Source: *Claims Journal*

LAWSUIT AGAINST HONDA CHALLENGES HYBRID MILEAGE CLAIMS

A lawsuit has been filed in California that challenges Honda's mileage claims for its gas-electric hybrid. The gas-electric hybrid's advertised mileage was 49 miles per gallon in the city and 51 miles per gallon on the highway. The plaintiff paid at least \$7,000 more for the Honda Civic Hybrid than for a comparable non-hybrid Civic EX. After 6,000 miles of driving, the plaintiff said he averaged just 32 mpg in mixed city/highway driving. A class action lawsuit was filed in U.S. District Court in Riverside, California, in the first legal challenge to the mileage claims of hybrid vehicles. It will be interesting to see whether the lawyers handling this case will be able to meet the burden necessary to prove

a fraud case in court.

Source: *Detroit News*

PROBLEMS FROM CHINA

China claims to be stepping up enforcement of health and safety rules in the export industries that are driving its economic growth. China must overhaul its chaotic food and drug safety mechanisms, which are said to be handicapped by competition among government agencies, vague and extremely weak laws, and corruption. For example, from 1998 to 2005, the Chinese agency approved six medicines that turned out to be fake. The drug makers used falsified documents to apply for approvals, according to state media reports. In addition to the death sentences mentioned in a previous section, there have been other severe penalties handed down by Chinese courts. Verdicts were returned last month for four other drug supervision officials in China involved in corruption cases. Wang Guorong, former secretary-general of a think tank in charge of setting up drug standards, was sentenced to life in prison for accepting bribes. Li Zhiyong, another official in the think tank, along with Lu Aiyong and Ma Teng, two officials with the State Food and Drug Administration, were given jail terms of up to 15 years on graft charges.

Source: *Associated Press*

XX. RECALLS UPDATE

CHEVROLET AVEO RECALL

General Motors is recalling all 2007 Chevrolet Aveo vehicles due to a fault in the fuel line which could cause the vehicle to ignite if it crashes. The defect that relates to motor safety exists in certain 2007 model year Chevrolet Aveo Sedan vehicles equipped with a 1.4 liter engine. During a severe frontal crash test, the fuel line in the engine compart-

ment developed a fracture. In addition, the crash damage caused four short circuits in the fuse block, the combination of which allowed the fuel pump to continue running and fuel leaked onto the ground. If these conditions occurred in an actual crash, a vehicle fire could occur. The recall began on November 16, 2006 after NHTSA first found this fault.

Source: Express4me.com

NISSAN RECALLS MORE THAN 140,000 ALTIMA SEDANS

Nissan is recalling more than 140,000 of the 2007 Altima Sedans, one of its most popular cars, because of a potential fire problem. According to the company, the air filter on the car can catch fire if it comes in contact with a hot object such as a cigarette ash. Four fires were reported between February and March. If you have one of the cars, contact a dealer, who will replace the air filters.

Source: Chicago Tribune

MICHELIN TIRE RECALL

Michelin has recalled certain Michelin Pilot Power and Pilot Power 2CT front motorcycle tires. Adhesion is reduced between the tread rubber and the underlying textile reinforcement ply, which can manifest itself as a localized deformation, vibration, or the tearing out of pieces of the tread after operation at high speeds. The potential number of units affected by the recall, which began on July 1st, is 19,924. Michelin will replace the recalled tires free of charge. For more information, owners can contact Michelin Customer Relations at 1-866-324-2835. Customers can also contact the National Highway Traffic Safety Administration's Vehicle Safety Hotline at 1-888-327-4236 or go to <http://www.safercar.gov>.

Source: National Highway Traffic Safety Administration

THREE MORE RECALLS OF CHINESE PRODUCTS ANNOUNCED

The U.S. Consumer Product Safety Commission (CPSC) has announced three recalls of Chinese-made products, including jewelry that could cause lead poisoning, magnetic building sets, and plastic castles. About 20,000 sets of Essentials for Kids jewelry were recalled because the metal jewelry sets contain high levels of lead that can be toxic if ingested by young children. Additionally, 800 Mag Stix magnetic building sets and 68,000 Shape Sorting Toy Castles were pulled because they posed choking hazards to young children. The orders add to the list of recent U.S. government actions to ban, recall, or restrict Chinese imports—including juice, pet food, and toothpaste—because they are suspected of containing high levels of toxins.

The recalled metal jewelry sets contain high levels of lead. As we all know, lead is toxic if ingested by young children and can cause adverse health effects. There have been no reported incidents or injuries thus far. According to the CPSC, the recalled jewelry sets include a necklace, a bracelet, and a pair of earrings made of green, blue, or pink plastic beads. The necklaces have painted metallic pendants in the shape of shoes, girls, blackboards with "ABCD," or school buses. The other recalled jewelry sets include a necklace and seven pendants, one for each day of the week. The pendants are shaped as sandals, purses, or butterflies. "Essentials for kids" is printed on the packaging. The jewelry sets were manufactured in China and sold at gift stores, dollar stores, and small discount stores nationwide from August 2005 through April 2007 for about \$1. Consumers should immediately take the recalled jewelry away from children. The jewelry can be returned to the store where purchased for a full refund. Consumers can contact Future Industries for information on receiving a full refund.

Source: Associated Press

GERBER RECALLS CEREALS

Gerber is recalling some of its baby food over a potential choking hazard. The company is pulling its organic rice and oatmeal cereals because some of the packages contain lumps that will not dissolve in milk. The clumps can cause young children to choke. Gerber says it has had complaints of choking but no reports of injury. All codes of the two products, sold in eight-ounce boxes, are being recalled. The cereals were distributed nationwide, in Puerto Rico, and in the Caribbean. The voluntary recall includes about 475,000 packages. Customers can call Gerber at (800) 443-7237 or (231) 928-3000 to return the product and receive a refund.

RECALL OF EASY-BAKE OVENS

Hasbro has recalled about 1 million Easy-Bake ovens after getting 249 reports of children getting hands or fingers stuck in the opening. There were 77 reports of burns—including 16 of second- and third-degree burns. One 5-year-old girl's finger was burned so severely that she had to have a partial amputation. The U.S. Consumer Product Safety Commission said in a news release that adults should immediately take the recalled oven away from children and call Hasbro for instructions on how to return the toy oven for a voucher towards the purchase of another Hasbro product.

The purple and pink oven resembles a kitchen range with four burners on top and a front-loading oven. Model number 65805 and "Hasbro" are stamped into the plastic on the back of the oven. Ovens sold before May 2006 are not included in this recall. The ovens were sold at Toys'R'Us, Wal-Mart, Target, KB Toys, and other retailers nationwide from May 2006 through July 2007 for about \$25. For more information, consumers can call Easy-Bake at 800-601-8418 or visit EasyBake.com.

Source: Consumer Product Safety Commission

XXI. SPECIAL RECOGNITIONS

DR. KARL STEGALL RETIRES

My long time friend Dr. Karl Stegall retired recently as Senior Pastor of the First United Methodist Church in Montgomery. Karl, a devoted servant of Jesus Christ, served in the ministry for 40 years. He had the good fortune of marrying Brenda Bethea, a native of Flomaton, Alabama, some 41 years ago. Karl and Brenda have two married daughters and four grandchildren, all living in Montgomery. I can say without reservation that Karl Stegall is a good man who had done the Lord's work in the right way! He will be missed in his capacity as senior pastor in his church, but his work on behalf of Jesus Christ is far from over.

BRANTWOOD CHILDREN'S HOME

Our Managing Shareholder, Tom Methvin, is currently on the Board of Brantwood Children's Home, and has served as a board member for the past several years. Brantwood has been helping children in the Montgomery area for over 85 years. It provides a safe, stable, and structured environment for abused, neglected, and other at-risk children. Currently, Brantwood serves children and youth between the ages of 10 and 21.

Many times, these children arrive at Brantwood because they have no other place to go. Brantwood provides a loving environment to nurture these children, who can be considered "the least of these" in our society. Some of the stories about the abuse the children went through before coming to Brantwood are absolutely shocking. It's hard to imagine how bad some people can be to their own children. Without places like Brantwood, the Montgomery area would really be hurting. We are all grateful that Tom and so many of our lawyers and staff per-

sonnel volunteer their time to help such worthwhile places as Brantwood. One of Brantwood's success stories is detailed on the Website by a former resident named Quincy, who says:

I am very proud to have been part of Brantwood Children's Home. Today I am a fireman and a small business owner. Both of these are dreams come true for me. As my business grows, I hope to give back to Brantwood. Brantwood saved my life.

The statement by this young man really says it all. God will bless those who help others who are in need, and the blessings certainly include the recipients of the assistance. In fact, the blessings never seem to end, and Quincy's story is proof positive of that fact. If any of our readers would like to make a financial contribution to Brantwood, call Tom at (334) 269-2343 or go to our Website for more information.

RICHARD ALLEN HAS DONE AN OUTSTANDING JOB

Richard Allen, who has had a very good career as a lawyer in private practice and in the state Attorney General's office, now has one of the toughest jobs in state government. It's one that generally flies under the radar screen—that is until a problem occurs that stirs the interest of the media. Usually when that happens, the news is all bad. Richard was appointed Commissioner of the Alabama Board of Corrections by Governor Riley in February of 2006. In that capacity, Richard runs the entire prison system. In my opinion, he has done an outstanding job in dealing with an almost impossible challenge. Keeping the prison system operational with limited funds, court oversight from many directions, and prisons that are so overcrowded that they are literally "busting at the seams" is as close to impossible as it gets.

For your information, there are currently 29 facilities that make up the

prison system in Alabama with five of them considered maximum security. Alabama's prison population is over now 30,000 with almost all being male inmates. At last count there were about 2100 females in our prisons. I am not sure that these totals include the 1,000 inmates who are being shipped back from Louisiana private prisons.

Considering that no politician wants to get caught advocating new taxes for anything, and certainly not for prisons and prisoners, Richard has performed miracles over the past 15 months. I hope our readers who are from Alabama will let Richard know that you appreciate his efforts. I seriously doubt that he has gotten many pats on the back since he took on this job.

AN UPDATE ON THE RACE CAR

Our race car, ole number 82, has been very busy this year. I am pleased to announce that our driver, Grant Enfinger, is doing a super job. The Fairhope, Alabama, resident is racing all across the nation. His stops have included a number of tracks. Currently, Grant is tied for seventh in the Blizzard Series point standings, just 40 points behind the leaders. He and his crew have been making the car better and better every race. The Chevrolet Monte Carlo has run this season at Mobile International Speedway, South Alabama Motor Speedway, and Orange County, North Carolina. Future racing plans include Super Late Model races at Nashville, Tennessee, Lanier, Georgia, and Winchester, Indiana. On a more personal note, Grant, even with all of his racing activities, will wrap up his college degree in marketing at the University of South Alabama in December. That's about the same time he will be focusing on the Snowball Derby at Five Flags.

A CONFESSION TO MAKE

I have been asked on a number of occasions—mostly by news reporters—why I don't represent clients on an

annual retainer basis like lots of good lawyers do. My answer has generally been that I don't accept retainers from any source, including members of Corporate America, by choice. When I received my annual retainer from Dr. John Ed Mathison last month, I realized that I had best correct the record. I will now confess that I have been accepting One Dollar per year as a retainer from John Ed for the past ten years or so. Although I have never had to represent him in any legal matter, I suppose that the retainer makes me available if he ever needs my help.

In July, John Ed was customarily late paying my retainer, and when it did come, a shiny **dime** was attached, along with the **dollar**, as well as an apology for the payment being late again. In fact, the dime was properly designated as a "late fee."

In all seriousness, John Ed started this practice when we were eating breakfast in the Farmers Market, along with other members of his "court," over a decade ago. He and I have been friends for years and I have the deepest respect for this man of God who had been one of the truly great pastors of our time! Now, I feel much better about coming clean about my "retainer practice."

GIBSON VANCE WILL BE BUSY THIS YEAR

In addition to his active law practice, Gibson Vance will be busy on several other fronts for a while. He was recently elected at the national meeting to serve as Secretary for the American Association for Justice. In addition, Gibson is president of the Alabama Civil Justice Foundation and president-elect of the Alabama Association for Justice. We are very proud of Gibson's accomplishments and know that what he is doing will have a good effect on the well-being of lots of folks.

XXII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

MIKE ANDREWS

Mike Andrews, a shareholder in the Personal Injury/Product Liability Division of our firm, is currently handling all mesothelioma cases for the firm in addition to complex product liability cases. Mike graduated cum laude from Thomas Goode Jones Law School in 2001. While attending Jones, Mike served two terms as a member of the Law Review Board, held a position as Senator in the Student Bar Association, was the President of the Kenneth F. Ingram Senate of Delta Theta Phi law fraternity, and was the Chief Justice of the Student Bar Honor Court. Mike, a native of Dothan, Alabama, was recognized for Best Scholastic Achievement in Contracts and Criminal Law and was also the recipient of the West Publishing Corpus Juris Secundum Award for academic excellence.

Mike is a member of the Alabama Trial Lawyers Association, Montgomery County Trial Lawyers Association, American Bar Association, and the Alabama State Bar. Mike concentrates on product liability litigation. He has the technical knowledge required to handle cases of this nature. Mike is a very hard worker and has handled a number of significant cases. He and his wife Carol have three children, a daughter, Shelby, and two sons, David Michael II and Jack. They attend First Baptist Church of Dothan. Mike is a very good lawyer who does an outstanding job for his clients. His technical knowledge—along with his skills as a trial lawyer—gives Mike an advantage in products liability cases that many lawyers don't have and that's good for the firm and our clients.

LANCE GOULD

Lance Gould, a shareholder working in our Consumer Fraud Division, joined the firm in 1997. He handles actions brought by individuals who have been victimized by finance and insurance

companies. The Phenix City, Alabama native was a member of the trial team in a landmark case involving a door-to-door sales and finance scam, which resulted in a then-record verdict of \$581 million. As a result, the finance company in that case stopped its bad activities in the state of Alabama. Lance has also assisted clients in obtaining multi-million dollar settlements and has influenced, by way of litigation, a number of corporations to correct their predatory lending practices. He has been a guest speaker on consumer fraud litigation at both the state and national levels, including a lecture before the National Consumer Law Center. Lance serves on the Board of Governors for the Alabama Trial Lawyers Association. We are fortunate to have a person such as Lance Gould, a very good lawyer, in our firm. He does an excellent job for his clients.

CATHY HALL

Cathy Hall, who has been with the firm for seven years, works in the firm's Personal Injury/Products Liability Division and serves as LaBarron Boone's Legal Secretary. She has a Bachelor of Science in Criminal Justice from Faulkner University and enjoys interacting with folks. Cathy comes from a large family, being the sixth child of thirteen brothers and sisters, nine girls and four boys. Cathy and her two children, Christie and Cameron, are members of First Congregational Christian Church, where Cathy serves as President of the Progressive Christian Fellowship Organization. She and her children also sing in the choir. Cathy enjoys doing things for those who are less fortunate. She loves reading, watching A & E and old movies, spending time with her family, and doing the work of the Lord. Cathy is a very good and dedicated employee and we are most fortunate to have her on our team.

HEIDI BOWERS

Heidi Bowers, who joined the firm six years ago, is currently working in our Fraud Division as Legal Assistant to Clint Carter. She is working on average wholesale pricing litigation with Clint

and other firm lawyers. Heidi has also served in the firm's Mass Torts and Personal Injury Divisions. She is the daughter of Vicki and Terry Farris and has one brother, Greg Bowers. Originally from Elba, Alabama, Heidi graduated Magna Cum Laude from Auburn University Montgomery in 2001 with a Bachelor's degree in Justice and Public Safety/Paralegal Certificate. Currently, she serves on the Paralegal Advisory Board at AUM and is a member of Lambda Epsilon Chi, the national paralegal honor society. Heidi enjoys spending time with family and friends. Heidi is a great employee and we are fortunate to have her with the firm.

SUSAN HARDING

Susan Harding, who has been with our firm for six years, came to work as a clerical in the Business Litigation Division, now known as the Toxic Torts Division. She currently works as legal secretary to David Byrne and Alyce Robertson, who work mainly on environmental cases. In this position, Susan helps to prepare documents under the direction of the lawyers, files documents with the courts, coordinates all the lawyers' court docketing, and handles their scheduling and travel arrangements. Susan and her husband, Jack, have three children: Erik, 30; Ryan, 22; and Sarah, 20. Erik, who is married to Mari, is an environmental/civil engineer in California and is working on the first pilot desalination study with Pacific Ocean water in Santa Cruz. Ryan works in the family business, and Sarah, who attends AUM, plans to be a nurse practitioner. The Hardings attend Destiny Christian Center in Prattville. Susan is a very good employee who is dedicated to her work. We are fortunate to have her with the firm.

SHELLEY REISKE

Shelley Reiske, who has been with the firm for four years, works in the firm's Accounting Department. Shelley's duties include payroll, accounts payable for both Toxic Torts and Fraud Departments, firm reimbursements, and some

trust accounting, as well as general office duties. Shelley has three children, Erica, 17; Madison, 11; and Hunter, 9. Erica is a senior at Prattville High School, and Madison and Hunter both attend Daniel Pratt Elementary. When she is not working hard keeping the books, Shelley enjoys spending time with her family and friends, cooking, going to the theatre, and playing tennis. Shelley is a wonderful employee and an asset to the firm. I know it sounds like a broken record, but we really are fortunate to have Shelley with us.

XXIII. SOME CLOSING OBSERVATIONS

CHINESE IMPORTS

Since March of this year, we have witnessed a series of events that are most disturbing concerning the importing of Chinese products into the U.S. It started with the tainted pet food and since then there has been a string of dangerous products with a Chinese origin, including toothpaste, children's toys, seafood, and finally over 450,000 tires. China's primitive safety standards and its newly acquired position as a major world trader don't work well together. In fact, there in lies the problem. Add to that situation, America's outdated safety policies and standards and an Administration in Washington that doesn't seem to have a clue what it is doing in international trade and one that protects corporate wrongdoers at every turn, having no real regard for consumer safety or health concerns.

In combination, all of that compounds a most serious problem as it relates to Chinese imports. Currently, there are over \$300 billion of Chinese products coming into our country each year. Tragically, Chinese products made up more than 60% of all the product recalls in the U.S. in the last nine months, and I suspect that percentage will increase in the coming months. Congress must take

steps to find a quick, but permanent, solution to the China problem, and there is no time for delay. Senator Richard Shelby told me several years ago that China would eventually become a world power and wouldn't be able to operate on the world stage without causing tremendous problems for nations such as the United States. It appears that the Senator was right!

SCHOOL IS STARTING THIS MONTH

It's real hard to believe that the public schools are starting up this month in my state. I haven't really had enough time to enjoy my grandchildren because my trial schedule, which was heavier than normal for the summer months, had me occupied. I really don't see why schools have to start in August, but there may be a good reason. In any event, Sara and I have six grandchildren, all girls, and each of them is very special. I will give you a rundown of who they are and a little bit of information as to their activities.

The oldest, Sara (16) will be a junior at Auburn High School where she is in her second year as a majorette; Erin (15) is an outstanding cheerleader at AHS and will be a 10th grader; Frances (13) is the musician in the family, playing the piano extremely well, and she attends Auburn Middle School; Maggie (12), a terrific soccer player who has traveled in several states with her team, is in the same school as her cousin Frances; Hollan (11), the magician in the family, also plays basketball and will attend Alabama Christian Academy this year; and Florence (4 months) is the newest addition and so far she hasn't taken up sports or music.

Having six girls is most interesting and I must say quite a treat. Some of my friends have asked me how I can handle all of these girls. Sara has always run the show at the Beasley household, so I am used to having females in charge. On a serious note, we are blessed to have six beautiful girls in the family!

XXIV. MY PARTING WORDS

Life in today's world is filled with battles of all sorts, and sometimes it seems that evil is so widespread and strong that we might as well give up. That is exactly what Satan wants us to think. The battles we face are not ours but in reality they are God's. It has been said that if a person is a child of God, that person can be absolutely certain that Satan will "rage" against them. It is very clear that my battle each day is the Lord's battle. It is made certain in 2 Chronicles 30:15 and I believe it. That doesn't mean that I don't quite often try to fight the battles by myself, counting on my own strengths and ability to win. But I find out very soon that I can't win the battle on my own and that God is my strength and refuge. My responsibility is to trust and obey the Lord in all that I do and at all times, regardless of the circumstances. A good example of how God works in the lives of His people can be found in a very short book in the Old Testament. Read

Habakkuk and you will experience a real lesson in faith and trust.

I am closing this issue by responding to a request from one of our readers. I was asked to include in this issue the "daily prayer" that a friend of mine sent to me a few years ago. I had included this prayer in the March 2006 issue and will set it out below.

*I begin this day with you, God—
You are my loving Father, and I
place all my love and confidence
in You. Nothing can disturb me
when I trust You. I know that You
love me and sustain me in all
things, under all circumstances. I
lean on your mighty power to help
me. I rest in your love that bids me
not be troubled about anything.
With You all things are possible.
With you I can do all things. I trust
Your wisdom to guide me this day.
I trust Your life to renew me and
strengthen me. You are my help in
every need. You are my Shepherd
and I shall not want for any good
thing. You are my supply, and I
trust You to fulfill my needs. You
are my comfort—You work
through me to accomplish Your*

*good purposes. And I trust Your
perfect will for me. Whatever I
need to do today I shall do it
calmly, trusting Your spirit within
me to guide me to success. Your
light makes my way plain. You
love opens doors for me. My heart
is at peace, for I trust You, God.*

I always start my day at about 5:00 a.m. and I guess that comes as a result of growing up in the country in Barbour County. My dad, Browder Locke Beasley, was a farmer who got up each morning at about 4:00 a.m. and I guess I picked up the habit of getting up early from him. Some say I have to get to work early because I'm not as smart as some of the lawyers I have to face in court and as a result I have to try to outwork them. I can't dispute that assessment and won't try. In any event, while we all have our likes and dislikes on how to start our days, I can't think of a better way to start each day than by spending some time talking with our Heavenly Father. I don't always use the prayer set out above, but it's pretty hard to beat the message it contains.

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