

November 2007

*****CAPITOL OBSERVATIONS**

HOUSE SPEAKER CREATES TASK FORCE TO STUDY POVERTY

House Speaker Seth Hammett has formed a task force to study poverty in Alabama. Seth created the House Task Force on Poverty to identify conditions that create or worsen poverty and to propose legislation or public policy initiatives to reduce or eliminate poverty. The commission includes eight House members and representatives of state agencies and organizations that deal with issues related to poverty. The task force, which held its first meeting on October 9th, will look at policies that adversely impact those in poverty and look at new policies that could lift people out of poverty.

Patricia Todd, a member of the House from Birmingham, will serve as chair of the task force. The group will review proposed legislation that could be introduced in the upcoming regular session of the Legislature, which begins February 5, 2008. I hope there will be some good proposals coming out of this study. It's pretty easy to identify poverty, but unfortunately dealing with the problem and coming up with permanent solutions have proved to be much harder. I will give the group a few unsolicited hints for places to look while they are trying to learn what has caused our poverty problems. First, the task force should look at the failure of political leaders over the years to work hard for the location of good paying industrial jobs in areas where poverty exists. The group should then check out the local school systems and the drop-out rate for students in those areas. The solutions proposed must address each of these areas of concern, and when that is done, the levels of poverty will then drop drastically. That approach is probably too simplistic but I am convinced it will work. Let's give it a try!

Source: *Associated Press*

RURAL ALABAMA'S COMMITTEE OF 100 MEETS

Rural Alabama's Committee of 100 met last month at the Department of Agriculture and Industries. The keynote presentation was made by Mac Holladay of Market Street Services in Atlanta. Holladay, who has a wealth of community and economic development experience, has been head of development for South Carolina and Mississippi and the Chief Operating Officer for the Governor's Development Council of Georgia. The focus of the meeting dealt with the central issue of poverty in rural areas of Alabama. It's good to see so many public officials being concerned about poverty in our state. Although studies and meetings are good, it's time to start working toward solving the problems that

cause poverty. The task of putting into effect solutions to the very real challenges facing rural Alabama is important to our state without question.

Rural Alabama's Committee of 100 serves as an advisory council to the Center for Rural Alabama under the Department of Agriculture and Industries. Its mission is to promote and implement sound strategies to improve the way of life in rural Alabama. There are more than one million citizens in what is considered rural Alabama, and unfortunately, many of them live in poverty. The advice I gave to Seth, I will also pass on to my friend Ron Sparks. In addition, I would add this bit of advice for each of these gentlemen – if you are studying poverty and looking for answers to age-old problems, include Alabama Arise and its staff members in your work. They can be of great help in any such understanding. Clearly, it's time for our state to solve the problems that cause poverty!

GOVERNOR URGES BUSINESSES TO PROTECT INTELLECTUAL PROPERTY

Governor Bob Riley is urging business owners to protect their companies from counterfeiting and piracy of their intellectual property. The State of Alabama held seminars in Huntsville, Birmingham, and Mobile last month and gave advice about protecting inventions, brands, and business methods. The seminars included federal and state officials working with local lawyers to show how to protect intellectual property in the global marketplace. It's significant that Alabama companies shipped their products to 179 nations last year. Alabama companies are now realizing that it's important for them to be able to protect their intellectual property. Accordingly, there is a great need for this type of advice and information to be made available to Alabama business owners.

Source: *Associated Press*

STATES FOCUS ON ENVIRONMENTAL POLICY

The Bush Administration has generally pursued a hands-off regulatory policy for the entire time George Bush has been in office. This approach has resulted in products being less safe, a food supply that is experiencing very serious safety and health issues, and low and middle-income citizens being hurt by the subprime lending crisis. This disdain for regulation by the Bush White House has opened the door for both Congress and state Attorneys General to play a proactive role in defining and setting regulatory priorities. Although that is a good thing, the failure of the Bush White House to do its job is impossible to justify.

The Bush Administration has been the worst in recent memory when it comes to regulating the activities of Corporate America. The Administration has

also failed miserably in its job to make sure that products imported from foreign countries are safe for use and consumption by folks in this country. Hardly a day passes that we don't hear about either a defective product or unsafe food coming into the U.S. from China or some other country. In addition, the Bush record on the environment is awful, and that's a crying shame. Future generations will pay the price for the many failures to deal with environmental issues.

Fortunately, state Attorneys General are now turning their intention to environmental policy. States have had to take the lead in environmental lawsuits, including a major lawsuit in 2004 against the five largest global warming polluters, and the number of states filing suits of their sort is increasing. The following are examples of what some of the states are doing:

- **State fuel-efficiency standards.** New York was one of a dozen states to follow a California model in developing regulations to reduce emissions from passenger vehicles. A federal district court judge refused to overturn these state rules in a September ruling.
- **State global-warming rules.** Nearly two-thirds of the states, led by California, have passed some form of global warming statute. This patchwork of various state laws will serve as the regulatory framework until the federal government tackles this issue. It is clear that the current Administration has failed to tackle the climate change issues and the prospects for any change are slim at best..
- **Carbon caps.** In conjunction with other northeastern states, New York is enacting a program to cap emissions and allow trading of credits among participating states.

Institutional investors have also emerged as a major force in fostering change in general corporate policies, especially public pension funds in states including California, Connecticut, New York and North Carolina. In addition, union pension funds have gotten involved. Previously, investors had largely focused on corporate governance issues, using techniques such as forcing shareholder votes on various resolutions, and engaging in class-action securities litigation. Climate change has become a principal concern of certain institutional investors.

Measures so far have targeted corporate disclosure of "climate risk," in the form of global warming resolutions on company proxy statements, and demands for improved disclosure of these risks. The federal government should be the leader in the regulation of such things as product design, food supply, lending practices, and much more. Hopefully, the next president won't be controlled by those in Corporate America who won't allow the federal government to do its regulatory job.

Source: *Forbes.com*

\$2.9 BILLION IN HIGH BIDS PUT UP FOR OFF SHORE LEASES

As expected, there was a great deal of interest in the federal off-shore leases that involve the Gulf of Mexico in the most recent sale. A good number of oil and gas explorers interested in the Gulf submitted bids, with companies putting up \$2.9 billion in high bids. There were 723 tracts off the coasts of Alabama, Mississippi, and Louisiana involved in the sale. Interestingly, these were the largest total of high bids for a Gulf lease sale since 1983. That was when the Minerals Management Service conducted an initial sale of tracts across the entire Gulf. Later, the area was divided into three regions. This sale dealt only with the central Gulf. As a matter of interest, the United States consumes roughly 5.7 billion barrels of crude oil in a year. Nine of the bids in this sale came in above \$50 million each. It has been estimated that a 300-square-mile region where Chevron now has a test well could hold between 3 billion and 15 billion barrels of oil and natural gas liquids.

Shell Offshore submitted the largest total of high bids with \$554.6 million, nearly twice that of Chevron USA Inc., a unit of Chevron Corp., which was the second-highest bidder with \$283.4 million in winning bids. All bids totaled \$5.2 billion. The agency will examine the winning bids for fair-market value before issuing the leases. Under a royalty-sharing formula enacted last year, the revenues from these tracts will continue to go to the federal government because the revenue-sharing formula for the three states involved in this sale won't start until next year. However, because of a provision in the federal law, the states will collect a share of revenue from these leases starting with production in 2017. Beginning with tracts offered in March 2008, the four Gulf states will get a portion of the 37% of the royalties received by the federal government from wells located in federal tracts. Each state's share will be determined by a formula based on the location of the wells.

Source: *Associated Press*

- **TRUCK ROLLOVER CASE SETTLED IN ALABAMA COURT**

Firm Ann.

Our firm settled a wrongful death case on October 22nd after a week of trial in an Alabama State Court. We represented the child and mother of a truck driver who was killed when the 10 wheel straight line truck he was driving rolled over on a Mississippi highway. The driver was operating his vehicle well within the speed limit when two of his tires got off the road and the truck turned over. When the truck came to rest it was upside down. The roof of the cab failed and resulted in the driver being crushed by the structure. Since there are no NHTSA standards

that apply to large trucks, in many cases, the manufacturers totally ignore the need for improvements in design that would make the vehicles safer. A prime example is in connection with weak roof structures.

The sad truth is that heavy truck cabs could very easily be made much stronger. The industry formed a Heavy Truck Task Force Committee several years ago. This committee hired an engineering firm to study real world rollovers to assist them with developing a recommended practice. During one of the meetings the engineering firm recommended that manufacturers increase roof strength by 200 to 300%. Instead of following this recommendation, the Task Force criticized the recommendation and instructed the engineering firm to remove it from the final report. The industry has also criticized any design changes that would have made roof structures safer, but would cost more money.

Another important suggestion was made to the Task Force. This time, Kim Parnell, an engineer with Finite Element Analysis, modeled a roll cage that would increase roof strength. In addition to modeling the cab, the engineer used a computer simulation to show how much stronger a roof is with a roll cage than would be without one. Roll cages, in use in Nascar and other arenas, have been around for many years. Again, instead of taking the opportunity to save lives, the Committee instructed this engineer to destroy his file on his roll cage. Rather than developing better roofs with current technology, the industry continues its policy of defending unreasonably weak cab roofs and allowing truck drivers to die needlessly. Mr. Parnell testified at our trial before the case settled and told the jury exactly what had happened.

The trial revealed evidence that most heavy trucks have totally inadequate roof structures. The study of heavy truck roof issues mentioned above was designed solely to hold off government regulation. The manufacturers actually dominated the work of the supposedly independent group doing the study. The purpose of the study was supposedly to recommend roof strength tests. The heavy truck engineers insisted, successfully, that evidence of alternative and stronger design recommendations be removed from the final report.

This crashworthiness case was a prime example of how manufacturers cut corners and ignore safety in order to increase corporate profits. The case was tried under Mississippi law which allows both compensatory and punitive damages in a wrongful death case. We were able to prove future economic losses as well as other types of non-economic damages at trial. Our experts in the case were: Dr. Charles Benedict – design; Dr. Joe Burton – biomechanics, occupant kinematics and injury causation; Mel Richardson - accident reconstruction; and Dr. Robert Hebert – economist. All of these experts testified at trial and each did a very good job.

Greg Allen and Kendall Dunson from our firm, along with Jock M. Smith from the Cochran firm, represented the widow and did an outstanding job for her and the family. We wanted the jury to have an opportunity to return a verdict in the case, but that didn't happen. In any event, our client and her family are most pleased with the outcome. The amount of the settlement, the names of the parties and the make and model of the vehicle are all confidential at the request of the defendants.

*****LEGISLATIVE HAPPENINGS**

A GOOD DECISION BY GOVERNOR RILEY

Governor Riley has elected not to call a special session of the Alabama legislature. In my opinion, that was a wise decision. I believe all of the issues that were being considered for a possible call can wait until next year. There wasn't any real support from legislative leaders for a fall session, and that was quite evident. The governor stated that there was no consensus to bring ethics reforms or four-year appraisals up in a fall special session. He called on both political parties to come up with an acceptable approach to these issues before the 2008 regular session. Hopefully, that will happen. I believe a complete reform of our election laws and much stronger regulation of lobbying activities should be top priorities when the legislators come to the Capital next year.

PROBLEMS STILL EXIST IN THE SENATE

It was most disturbing to hear recently that some in the Republican leadership in the Alabama Senate plan to continue with their stalling tactics in the 2008 regular session. It was pretty obvious that the failures of the 2007 session were largely the result of constant stalling by some of the Senators under the direction of the Republican leadership. Although the leadership blamed all of the problems on the Senate rules, which were adopted prior to the session, I really find that difficult to believe. In my opinion, there must be lots more behind their game plan and the tactics that followed. Actually, it reminds me of little children who get their feelings hurt, pick up their marbles, leave the game, go home, and refuse to play calming foul play. I believe folks expect more than that sort of performance from the men and women they elect to high office. I also believe a vast majority of the Senators from both parties want a better performance in 2008. The powerful and influential lobbyists who I believe were behind the stalling tactics in 2007 should step aside and let the system work. A more bipartisan approach should be adopted by both the Republican and Democrat leadership before the session starts up next year. If that happens the people's business will get top priority for a change.

MORE ON THE REGULAR SESSION

The regular session next year will showcase at least three potential candidates for Governor. It appears that Lt. Governor Jim Folsom, Speaker Seth Hammett, and House Minority Leader Mike Hubbard will definitely run for the state's highest office next year and are considered major candidates. A successful session would be a boost for each of these men. On the other hand, a repeat of 2007 wouldn't be a good thing for their chances at grabbing the brass ring in 2008. It will be most interesting to see how each of these candidates deals with the trials and tribulations of a session that will have a number of troubling issues to deal with.

*****COURT WATCH**

COURTS MUST BE PROTECTED FROM BIG-MONEY POLITICS

Tommy Wells, a very good lawyer from Birmingham, is the incoming president of the American Bar Association. Tommy represents corporate defendants in all sorts of lawsuits and does an outstanding job for his clients. Recently, he wrote an op/ed piece that appeared in the *Birmingham News* dealing with our court system. I am setting out what Tommy had to say about our courts and judges for your edification. Tommy literally hit the nail squarely on the head, and I believe you will agree with that assessment after you read what he had to say.

Judges play a special role in our democracy. When a case comes before a court of law, we expect judges not to play favorites, or cater to constituencies, but to be fair, impartial umpires. For much of our history, we've been blessed with courts that are accountable to the law and not to special interests. Unfortunately, Alabama is leading a national trend which threatens to change that.

Since the early 1990s, when tort-reform laws were being weighed by state appeals courts, judicial elections have stopped being quiet affairs in Alabama. Today, they are marked by big money, buzz-saw rhetoric and televised attack ads. The trend has been echoed in other states that elect judges. From 2000 to 2004, the amount of money spent nationally on TV ads in state Supreme Court elections shot up from \$10.6 million to \$24.4 million. The rise in money spent on judicial elections has brought a drop in public trust.

It is time for Alabama to lead the way back from this destructive path. It is important that all Alabamians, not just lawyers, understand why we must pick judges based on merit, not politics. The Alabama State Bar is seeking to end partisan elections for Supreme Court and appellate judges, and instead use a merit-based appointment process. As I become president of the American Bar Association in 2008, I will work to make merit-based appointments the national norm. The Alabama State Bar proposal focuses on ability, and impartiality, in identifying candidates for our Supreme Court and appellate courts. A nine-member Judicial Nominating Commission would identify top candidates for each opening, and the governor would make selections from that list.

Once appointed, judges would face periodic nonpartisan "retention" elections, in which voters would decide whether to keep them. Experience shows that such elections attract considerably less money and are substantially milder in tone, than partisan, two-candidate elections. Nationally, merit selection is endorsed by the American Bar Association. It is used for all judges in 15 states, and for some judges in 18 others. At the other end, 13 use nonpartisan elections, and only eight states use partisan elections to elect Supreme Court judges. Some will ask what's wrong with electing judges. Why should they be different from lawmakers and governors? The simplest answer is that judges are different. Legislators make laws, and voters should know what laws they intend to enact. Judges apply existing law to the facts of each case. They make hard decisions, and they must be neutral.

In reality, court rulings often affect large, powerful interests - both plaintiff and defendant - that are more than willing to underwrite runaway campaign costs. In Alabama, business interests and plaintiff trial lawyers have led the way in pouring unprecedented amounts of money into state judicial elections.

Candidates in the state's 2006 Supreme Court races raised a total of \$7.3 million, making them the most expensive such races in the country. That is, frankly, an obscene amount of money. According to the Annenberg Public Policy Center, 63% of people surveyed believe pressure from campaign donors would affect a judge's impartiality to a great or moderate extent. That is a dangerous erosion in public trust. Our justice system should belong to all of us, not to an inner circle of special interests. By taking our appellate judges and Supreme Court justices out of the partisan political process, we preserve confidence in our courts.

H. Thomas Wells Jr., a lawyer in the Birmingham office of Maynard Cooper & Gale PC, is president-elect of the American Bar Association. E-mail: twells@maynardcooper.com.

The time has come for the Alabama Legislature to deal with the issues that they mentioned. We can no longer allow our court system to be controlled by large campaign donors. In fact, no special interest group should ever be allowed to control the courts in any state for that matter. In my opinion, the people of Alabama will support a complete reform of how our judges are selected and how campaigns are financed. Tommy Wells should be commended for taking a stand for restoration of a system of real justice in the Alabama Appellate Courts.

Source: *Birmingham News*

CONFIDENTIALITY MUST BE DOLED OUT BY THE COURTS ONLY IN EXTREME CASES

I have never believed that courts should routinely allow documents and evidence that reveal bad corporate conduct to be kept confidential under protective orders. There is a case in point that is a classic example of the public's right to know about bad conduct. The case involved a widely publicized jury verdict in New Jersey dealing with alcohol sales. A New Jersey court's decision to seal documents in that personal injury case, involving a paralyzed girl and a drunk driver, violates state law, according to Public Citizen. That's exactly what the consumer advocacy group told a New Jersey court in a motion filed in the case. When a drunken fan left a Giants football game in 1999 and slammed into a car, a little girl in the other vehicle was paralyzed. That set into motion a lawsuit that resulted in the girl's family winning New Jersey's largest personal injury verdict in a decade against the driver and the stadium's beer vendor. But, the court overturned the \$105 million verdict and ordered a new trial. But, the case never got there. In June the New Jersey Superior Court ordered all future proceedings in the case sealed. Public Citizen, in its motion to unseal, is requesting that all filings sealed since June be opened by the court and that its order to seal future filings be vacated. It appears that the case was settled quietly and that the court's order was a part of the settlement. Quite often corporate defendants make confidentiality and protective orders conditions of the settlement offers.

Public Citizen told the court that, under established case law, the public has a presumptive right of access to judicial records that can be overcome only by a strong showing of an important countervailing interest. Thus, the burden is on the parties who want the records sealed to show the need for secrecy. But in this case, there's no way of knowing whether that burden was met, because there is no indication in the public record of the reasons supporting the court's decision to hide the records from public view. Public Citizen contends that at a

minimum, the court must release any orders that justify its decision to seal the balance of the proceedings. I agree that the court should justify the sealing of each record, rather than providing a blanket seal.

I have never believed that the sale of alcoholic beverages at a sporting event was a good thing. But, realistically I know that such sales are permitted and that will likely continue. This case started a national debate about the culture of public intoxication at ballparks, and that was a good thing. Also, the responsibility of venues and vendors for the actions of their customers became a hot topic of debate. It was hoped that the initial verdict would send a strong message that would make a difference concerning alcohol sales at sports arenas. The court's decision to overturn the verdict, however, sent a different message about liability. Sealing the record seems to be entirely unappropriate under the circumstances.

By filing this motion to unseal, Public Citizen seeks to restore basic rights of access and ensure that the critical conversation about drunk driving, liability and justice isn't squelched. When the public interest would be served by making the record of a trial readily available to the public, it should require an extreme case of necessity to seal the record. The interests of the public's right to know and be warned about bad corporate conduct must be weighted against a corporation's interest in secrecy. The burden of proof should be on the corporate defendant in such a case. It will be most interesting to see what the court does in this case relating to this most important issue.

Source: Public Citizen

GOVERNOR RILEY PROPOSES TOUGHER DRUNKEN DRIVING PUNISHMENT

Governor Bob Riley is asking the Alabama Legislature to increase the punishment for drunken drivers with high levels of intoxication and to lengthen the minimum sentence for some repeat offenders. The Governor outlined his plans last month at a news conference with state troopers, legislators and prosecutors in attendance. Currently, Alabama's level of intoxication is .08% blood alcohol level. The proposed legislation would double the minimum punishment when a motorist measures .15, which is nearly double the level of intoxication. It should be noted that 39 states already have similar laws on the books. Under the proposed legislation, the minimum sentence for a fourth conviction would be increased from 10 days to 120 days. Attorney General Troy King is backing similar legislation and hopefully the two plans are similar. A bill should be passed making it tougher on drunk drivers so that our highways can be made safer. If you agree and live in Alabama let your legislators hear from you.

Source: *Associated Press*

LOTS OF FOLKS ARE WATCHING A MAJOR FRAUD CASE IN THE SUPREME COURT

A recent article written by Carrie Johnson and Robert Barnes, Washington Post staff writers, discusses corporate fraud and a major case that is currently being considered by the U.S. Supreme Court. They say that the largest corporate frauds in recent history couldn't have happened without the brainpower of accountants, bankers and lawyers who partnered with executives at the corporations who were committing massive frauds. It's believed the case before the court could help determine the future integrity of the financial system in this country. This case involves the California State Teachers Retirement System, which invests the retirement savings of 750,000 teachers. At issue is the role of third-party businesses who are claimed to be accessories to the fraud committed by the principal corporations.

Some of the nation's most powerful industry lobbyists are working hard for the defense in the case. They argue that regulators already have the authority to punish lawbreakers. They say that allowing investors to expand the targets of their lawsuits will only put U.S. companies at a global disadvantage. The dispute is widely viewed by many observers as a stand-in for one of the worst frauds of the past decade – the sorry mess involving the old bosses at Enron and that may be an accurate assessment. The High Court's ruling will likely tip the balance of scales in the lawsuit that Enron shareholders filed against Credit Suisse, Merrill Lynch, and other banks that allegedly helped Enron commit massive frauds and disguise its financial problems. That case is on hold, but a judgment in support of investors could revive it. The fraud committed by Enron could never have occurred without outside assistance. Certainly, it would never have lasted so long, and without being detected without this type help.

The issue in the case, *Stoneridge Investment Partners v. Scientific-Atlanta*, is whether a group of investors can seek damages against two technology companies for allegedly helping a St. Louis firm, Charter Communications, inflate its revenue through a series of fraudulent deals in 2000. A lower court ruled that because the two companies, Scientific-Atlanta and Motorola, failed to make public statements about the deals on which investors based their decision to buy or sell Charter stock, the third-party companies were not guilty of fraud when the information was ultimately discovered.

The U.S. Solicitor General, who speaks on the Bush Administration's behalf at the High Court, rejected the judgment of the U.S. Securities and Exchange Commission, which sets policy to protect investors and which had voted to support the plaintiffs in the case. The *Post* reported that two justices recused themselves and that Chief Justice John G. Roberts Jr. apparently sold stock last summer he owned so that he could participate in the Stoneridge argument.

Thirty groups have filed briefs in the case on both sides. It's significant that more than half of the states support the investors. The Council of Institutional Investors, whose members include the country's largest pension funds, told the *Post* reporters that a Supreme Court ruling in support of third-party businesses could tempt accountants and bankers to curry favor with wayward clients and could offer safe harbor for fraud "so long as they do not publicly announce their involvement" with a client company's financial mistakes. On the other hand, business groups claim that supporting the investors would expose U.S. and foreign companies to lawsuits. Washington Legal Foundation, which is a business-friendly interest group, is lobbying hard for the defense in this case.

Companies that assist another company – like Enron and countless others – to commit massive frauds that damage investors must be held accountable in the courts. In most of these cases, no corporation could pull off such fraud over a length of time without the assistance of others such as accountants, banks, lawyers and the like. It will be very interesting to see how the Supreme Court deals with this most important case. Reports from oral argument indicate that Chief Justice Roberts is likely to come down on the side of the White House in this case. If that turns out to be the case, it will be bad news for the investors.

Source: *Washington Post*

APPARENTLY THIS FEDERAL JUDGE DEMANDS FAIR PLAY IN HIS COURT

A federal judge has come down hard on lawyers and their corporate clients in a class action lawsuit, saying they deliberately dragged their feet in producing evidence in the case. Sanctions were ordered by U.S. District Judge James Knoll Gardner in a case involving alleged discovery abuses. The lawyers and their clients could face as much as \$5 million in damages based on the judge's order. What the judge describes as unnecessary delay, however, the lawyers say represents good-faith lawyering in a case with difficult issues and computerized record keeping. The lawyers involved are representing insurance companies in a lawsuit brought by doctors in 2001. Dr. Natalie M. Grider, a family practitioner, sued the insurers, saying that they were not properly reimbursing her for services rendered. The case was certified as a class in December of last year and now involves about 6,000 Pennsylvania doctors.

In addition to being tough on the lawyers, the judge also came down very hard on Keystone Health Plan Central Inc., Capital Blue Cross, and Highmark Inc., the Pittsburgh health insurer hoping to merge with Independence Blue Cross in Philadelphia, all of whom were defendants in the case. The judge described an incident in his opinion that I believe is noteworthy. For months, Capital Blue Cross had said it didn't have documents and other materials that the plaintiffs' lawyers requested. After the court assigned a special discovery master to the case, the defendants "located" the documents and produced them. It

appears that the defendants had represented that the documents didn't exist. The judge said the lawyers and clients must divide up the plaintiffs' costs in the case, which could amount to \$5 million, according to media reports. I expect that lawyers across the country will be watching future developments in this case with great interest as they unfold. The lawyers involved in the case all say an appeal will be taken challenging the judge's order.

Source: *Philadelphia Inquirer*

LAWYERS FACE SANCTIONS IN QUALCOMM SUIT

In another important case involving sanctions, U.S. Magistrate Judge Barbara Major is considering sanctions against 19 lawyers who represented Qualcomm Inc. in a patent lawsuit. The lawyers hired by chipmaker Qualcomm and the company are blaming each other for what the judge called "gross misconduct on a massive scale" during the trial of the case. The cell phone chipmaker, which has become the world's second-largest chipmaker for cell phones, filed the lawsuit against rival Broadcom Corp.

It's reported that the judge was struggling to understand how Qualcomm and its lawyers committed "the fundamental and monumental error" of failing to share more than 200,000 pages of documents with Broadcom until after the trial was over. Qualcomm had 19 lawyers representing the company during the trial. A lawyer who is now representing 11 of these lawyers says that Qualcomm hamstrung his defense by deciding to keep its communications with its lawyers confidential.

It appears that a central issue before the court involves the company's decision to prevent disclosure of privileged communications with the hired lawyers. The question of privilege comes up with our firm quite often in product liability and mass tort cases. The lawyers call the failure to produce the thousands of documents an "unintentional mistake." Qualcomm already has been fined \$8.5 million and ordered to pay Broadcom's lawyers' fees. The sanctions hearing focuses on the actions of two law firms who handled the case for Qualcomm. The lawyers, in a pleading filed with the court, contended they never sought to mislead anyone. The judge is clearly troubled by Qualcomm's behavior at the trial, which it lost in January. During a post-trial hearing, the judge observed: "If there isn't some kind of sanction for that conduct, what's the deterrence?" Qualcomm had sued Irvine, California-based Broadcom Corp. in October 2005, claiming it violated Qualcomm's patents on technology used to compress video signals in DVD players, digital televisions, and music players.

Near the end of the trial, a Qualcomm engineer disclosed that lawyers had discovered 21 key e-mails that had not been shared with Broadcom as required during pretrial discovery. Broadcom learned months later that Qualcomm also

failed to share the thousands of pages of documents that are now at issue. Some of the information Qualcomm failed to share, as I understand it, would have been damaging to its witnesses' testimony. Interestingly, they supported the later finding that Qualcomm deliberately concealed patents it holds from an industry standards group.

U.S. District Judge Rudi Brewster ruled in August that Qualcomm's behavior exposed a "carefully orchestrated plan and deadly determination to hold hostage the entire industry" that would use the technology. Judge Brewster also found that Qualcomm and its outside lawyers engaged in "constant stonewalling, concealment and repeated misrepresentations" during the course of its trial against Broadcom. He described it as "an organized program of litigation misconduct" and asked the magistrate judge to consider sanctions against the outside lawyers. Although I only know what I have read about the case, discovery abuse is a very big problem. We run into this sort of thing in product liability and mass torts litigation, and it's a most serious matter when it occurs. We will watch this case with great interest.

Source: *Associated Press*

CIRCUIT COURT THROWS OUT \$42.5 MILLION MEDCO SETTLEMENT

A federal appeals court has vacated the \$42.5 million settlement between employee welfare benefit plans and Merck-Medco Managed Care LLC. The pharmaceutical benefits manager had been accused of breaching its fiduciary duty under the Employee Retirement Income Security Act (ERISA). A three-judge panel of the U.S. Court of Appeals for the Second Circuit vacated a district court order certifying the class. The appeals court overturned the settlement agreement based on concerns over its allocation of the proceeds. Self-funded health plans, as opposed to the insured health plans that dominated the class, deserve their own subclass and counsel because of their differing circumstances in order to justify the insured plans' certification, the circuit court ruled. The appellate court's order reads in pertinent part:

While we agree with the district court that the plans advanced similar theories of liability against Medco predicated on the same or similar facts, we are persuaded by the challenges to class certification raised by the self-funded plans based upon the nature of their relationship with Medco. Self-funded plans differ significantly from insured or capitated plans because only self-funded plans assumed the direct risk of absorbing any increases in prescription drug costs that were caused by Medco's conduct. Because the antagonistic interests apparent in the class should be adequately and independently represented, we remand to the

district court for certification of a subclass encompassing the self-funded plans in order to better protect their claims in this litigation.

The court said the self-funded plans would in turn help establish an equitable settlement and allocation of that settlement among class members with the help of the independent counsel that will come with having their own subclass. The plaintiffs had accused Medco of violating ERISA by not serving as a responsible fiduciary. It is alleged that Medco favored drugs produced by its parent company, Merck & Co. Inc., without regard to cost; signed drug purchase contracts that favored itself at the expense of the plans; and did not disclose certain arguably adverse activities.

Source: *Employment Law Reporter*

MISSISSIPPI SUPREME COURT OVERTURNS DUPONT RULING

The Mississippi Supreme Court has reversed the \$15.5 million judgment against DuPont and the justices, in a split decision, sent the case back for a new trial. The lawsuit was brought by an oyster fisherman who claimed chemicals from a dioxin plant caused his rare blood cancer. In 2005, the jury found DuPont DeLisle at fault for causing the Bay St. Louis, man's multiple myeloma and awarded \$14 million in compensatory damages. The jury also awarded his wife \$1.5 million for loss of "love and companionship." No punitive damages were awarded by the jury.

Presiding Justice Oliver Diaz Jr., in a dissent, said he felt there was substantial evidence to support the verdict for the plaintiffs. Judge Diaz said the majority of the court was ignoring that DuPont knowingly deposited tons of toxic material into the waters of St. Louis Bay for years, was cited by the government for its dioxin emissions and was aware of the risks to humans exposed to dioxins. It will be interesting to see what happens when the case is retried in the lower court.

Source: *Associated Press*

*****THE NATIONAL SCENE**

THE PRESIDENT KILLS A BADLY NEEDED BILL FOR CHILDREN

It's impossible to justify our government turning its back on children when they are badly in need of help. But, that's exactly what happened in Washington recently when President Bush vetoed a bill that would have helped low-income

children. It was clearly wrong for the President to veto the bipartisan Children's Health Insurance Bill. The measure, which passed the House and Senate, was to add \$35 Billion over 5 years to the State Children's Health Insurance Program. This program subsidizes health coverage for those who live in families who earn too much to qualify for Medicaid, but not enough to afford their own private insurance coverage. Low-income children in this country deserve to be protected and not hurt. In my opinion, this program should be extended to accomplish a worthy goal.

I understand that the president's action will affect some 52,400 uninsured children in Alabama and will keep them in the category of being without health insurance. That is a sad state of affairs. I believe what the President did was clearly wrong, but unfortunately his veto was sustained. The votes to override in the Senate were available, but the House vote fell slightly short of the required two-thirds majority. I had hoped that there would be enough public pressure from folks back home to turn around House members who had voted against the bill when it passed. The *Birmingham News* – in a strong editorial – wrote:

Alabama's congressmen should think hard about what's more important: protecting the health of children or protecting the veto of a misguided president.

Unfortunately, that message did not register with any of the Republican members of the House from Alabama. Our children – who have the misfortune of being in a low income family – deserve much better than what they have gotten from the Bush Administration. Because all of the Republican members of the House from our state supported the president on the veto vote, there may well be some real unhappy voters in next year's elections. It should also be noted that Jeff Sessions, who has to run for reelection in 2008, had voted against the bill in the Senate. Maybe those who turned their backs on Alabama children fail to understand that a "compassionate Republican" should show compassion for the needy among us.

FACEBOOK COULD FACE CONSUMER FRAUD CHARGES

The Web site Facebook has been warned that it could face a consumer fraud charge for failing to live up to claims that youngsters there are safer from sexual predators than at most sites and that it promptly responds to concerns. New York Attorney General Andrew Cuomo announced last month that he had subpoenaed Facebook after he said the company failed to respond to "many" complaints by investigators who were solicited for sex while posing as 12- to 14-year-olds on the site. Officials from the Attorney General's office have contacted Facebook, and apparently put Facebook on notice that it had better straighten up and fly right from now on. It's good to see the New York Attorney General taking on those who are making big bucks and putting young folks at great risk.

Source: *Associated Press*

WRONGFUL DEATH SUIT AGAINST BLACKWATER UNIT WILL PROCEED

A three-judge panel in Florida has ruled that a lawsuit can proceed against the operator of a plane that crashed in Afghanistan in 2004, killing three U.S. soldiers. The contractor operating the plane, Presidential Airways Inc., is the aviation subsidiary of none other than the now infamous Blackwater USA. Three Blackwater employees were also killed in the crash. Presidential had argued in an appeal to the U.S. Court of Appeals for the Eleventh Circuit in Atlanta that the lawsuit should be thrown out because it was immune from prosecution because it was operating under a government contract. The company also claimed that the lawsuit should not go forward because it would involve one branch of government reviewing another branch's decision making. The three judges correctly rejected those claims, upholding a lower court's ruling.

The plane crashed into a mountain near the Iran border, according to reports. The crew was "sightseeing in the mountains" and "joyriding," at the time of the crash. The families of the three soldiers are claiming in their wrongful death lawsuit that Presidential "committed numerous egregious violations" of federal air safety regulations. The weather was good, there was nothing wrong with the aircraft, and there was no enemy fire when the plane crashed. According to allegations in the lawsuit, the pilots were newly deployed to the region and unfamiliar with the route. The pilots failed to file a flight plan and strayed from the normal air route between two bases. Rescue efforts were delayed because the company failed to use the electronic location transmitter. This crash was clearly preventable, and those responsible should be held accountable in the courts. The more we learn about Blackwater and the private army operating in Iraq, without any real control by our military, the worse things look. It will be most interesting to see who the political friends of Blackwater are in our nation's capital.

Source: *Insurance Journal*

*****THE CORPORATE WORLD**

STATE OF MINNESOTA FILES SUIT AGAINST SPRINT FOR VIOLATION OF CONSUMER PROTECTION LAWS

Minnesota Attorney General Lori Swanson has filed a lawsuit against Sprint Nextel Corp. charging the cell phone company with violations of Minnesota consumer protection laws. Actions by Sprint representatives improperly subjected subscribers to hundreds of dollars in early-termination fees and

violated the state's consumer protection laws, according to the Attorney General. When announcing the filing of the suit, General Swanson stated:

When you receive complaints across the board, from firefighters to lawyers, from retirees to construction workers, all of whom feel they were unfairly manipulated by their cell-phone company, you have a problem.

Sprint has failed to provide adequate notice or explanation to consumers, engaged in fraudulent conduct, and is responsible for deceptive practices, according to the lawsuit. Sprint has been the target of numerous complaints from its customers. The company cancelled 1,000 subscribers earlier this year when they filed complaints involving all sorts of problems.

The lawsuit seeks a court order against Sprint, payment of civil penalties, and recovery of restitution for the affected customers. This case comes at a time when Sprint is trying to regain momentum in attracting large numbers of new subscribers. The company is slipping behind industry leaders AT&T Inc. and Verizon Wireless and battling a perception it offers inferior service.

Source: *Kansas City Star*

THE HOUSE JUDICIARY COMMITTEE DESERVES TO KNOW WHY THE CRIMINAL PROBE OF GEN RE WAS ABORTED

JLB

The House Judiciary Committee wants to know why the Justice Department abruptly dropped a federal criminal probe into allegations of insurance fraud at Berkshire Hathaway's General Reinsurance (Gen Re) unit. In a letter sent to Paul J. McNulty dated July 9, 2007, the Judiciary Committee asked detailed questions about the aborted investigation. McNulty was the U.S. Attorney in Alexandria, Virginia at the time. In March 2006, McNulty left that position to become the Deputy Attorney General. He is now a partner at Baker & McKenzie in Washington, D.C. I don't believe there has been a response to the Judiciary Committee's questions.

The Committee wants to know whether anyone pressured McNulty or his successor, Chuck Rosenberg, the current U.S. Attorney, to close down the investigation. The letter asked McNulty a direct question and one that deserves an answer:

Did you, or to your knowledge, did any other Department of Justice employee, discuss these cases with any individuals associated with or speaking for General Reinsurance, Berkshire Hathaway, or (Berkshire CEO) Mr. Warren Buffett?

The case was also looked at by the Justice Department's Inspector General, Glenn Fine. It has been reported that evidence was presented the Inspector General's office indicating that federal officials may have destroyed more than 100 boxes of grand jury information in April 2007. That was just days after the *Virginia Lawyer's Weekly* published an article titled "Further Federal Indictments In Reciprocal Case Unlikely."

It appears that the driving force behind the criminal investigation of Gen Re was David Maguire, the Assistant U.S. Attorney in Alexandria who was charged by McNulty with handling the case. Maguire had worked on the criminal prosecution of the top executives at Reciprocal of America (ROA), a major Virginia insurance company that was declared insolvent in January 2003. As we have written about in previous issues, the collapse of ROA resulted in unpaid liabilities totaling more than \$500 million. It was reported that the work of Maguire, his experts, and a handful of FBI agents led to the February 2003 guilty pleas of former ROA President Kenneth Patterson and former ROA CFO Carolyn Hudgins. Patterson was sentenced by a federal judge to 12 years in prison and Hudgins to 5 years in prison. They are both currently serving their sentences in federal prisons in Texas.

Gen Re company – a unit of the Omaha, Nebraska-based Berkshire Hathaway – was also involved in the ROA case. While a case was being built against Gen Re, it seems there were powerful folks working against this effort. It was reported that lawyers for the giant reinsurer were pressuring the government to drop the case or settle it as part of an overall global settlement with other matters the government was looking at involving Gen Re. The investigation was derailed shortly after McNulty left in March 2006 to become the Deputy Attorney General at the Justice Department.

Our firm has been involved in some massive and extremely significant civil litigation that involved Gen Re and the ROA matter. This case is still pending in a Tennessee court. We know a fraudulent scheme that included, but was not limited to, the execution of "side letter agreements" between the reinsurer and ROA, resulted in a misleading balance sheet impression for the insurance regulators. Gen Re was permitting the insurer to literally "rent" reinsurance certification, but there was no true shifting back of risk. The case involves the largest single insurance collapse in the history of Virginia. That collapse cost more than \$500 million and has left more than 80,000 policyholders with an insolvent and liquidated insurer. The case exposed a serious problem existing in the reinsurance industry.

From the mid 1980s until approximately 2001, ROA grew from a small marginally capitalized Virginia reciprocal insurer of approximately 100 hospitals and a few hundred doctors and lawyers into four commonly managed reciprocal insurers of more than 80,000 insureds in many different states across the

country. This phenomenal growth would never have happened without everybody involved believing that ROA was fully reinsured by Gen Re and without ROA receiving consistently high ratings from A.M. Best, a national respected ratings service of insurance companies, which also believed ROA was truly backed by Gen Re.

Unfortunately, for more than eighteen years, material facts about the true nature of ROA's reinsurance relationship with Gen Re were falsely represented and concealed from Best, the insurance commissioners, state legal and medical societies and hospital associations that endorsed ROA to its members, and the insureds themselves. The losses that drove ROA into insolvency were the very losses that were supposedly covered by reinsurance contracts with Gen Re. I hope that the House Committee gets some real answers. In the meanwhile, we are continuing our efforts in the civil case on behalf of the State of Tennessee. Because we are involved in this most important civil case, we are staying out of the congressional inquiry. Our goal is to get a good result for our client in the civil litigation. The criminal aspects should be handled by the appropriate prosecutors and we are not involved in that effort.

Source: *Corporate Crime Reporter*

A LIST OF TOP 100 CORPORATE CRIMINALS OF THE DECADE WAS PUBLISHED

JLB

Every year, the major business magazines put out their annual surveys of big business in America. Their lists rank big corporations by sales, assets, profits, and market share. The goal of these surveys is to identify the biggest and most profitable corporations. But, there is another list – compiled by the Corporate Crime Reporter – that tells quite another story. The point of the list contained in a recent report by the Corporate Crime Reporter, “The Top 100 Corporate Criminals of the Decade,” is to focus public attention on a wave of corporate criminality that has swamped the offices of prosecutors around the country. It is said in the report that the list reveals the “dark underside of the marketplace that is given little sustained attention and analysis by politicians and news outlets.”

To compile what they refer to as “The Top 100 Corporate Criminals of the 1990s,” the report used the most narrow and conservative of definitions – corporations that have pled guilty or no contest to crimes and have been criminally fined. The activities of the 100 corporations that apparently label them as “corporate criminals” fell into 14 categories: Environmental, antitrust, fraud, campaign finance, food and drug, financial crimes, false statements, illegal exports, illegal boycott, worker death, bribery, obstruction of justice, public corruption, and tax evasion. It was said that there was no attempt to assess and compare the damage committed by these corporations or by other corporate wrongdoers. Although there are millions of Americans who care about morality in

the marketplace, few Americans realize how many large corporations have actually violated criminal or quasi-criminal laws in the past. Many of the violations involved governmental contracts.

Six corporations that made the list of the Top 100 Corporate Criminals were criminal recidivist companies during the 1990s. In addition to Exxon and Royal Caribbean, Rockwell International, Warner-Lambert, Teledyne, and United Technologies each pled guilty to more than one crime during the 1990s. A few caveats were set out by *Corporate Crime Reporter* relating to the report and those are set out below:

- **Caveat one:** Big companies that are criminally prosecuted represent only the tip of a very large iceberg of corporate wrongdoing.
- **Caveat two:** Corporations define the laws under which they live.
- **Caveat three:** Because of their immense political power, big corporations have the resources to defend themselves in courts of law and in the court of public opinion.

It was the opinion of the authors of the report that “corporate crime and violence inflicts far more damage on society than all street crime combined.” According to the authors of the report, the FBI estimates that burglary and robbery – street crimes – costs the nation \$3.8 billion a year. The report compares this to the hundreds of billions of dollars, that resulted from corporate and white-collar fraud, and that tells the story. For example, health care fraud alone costs Americans between \$100 billion to \$400 billion a year. The savings and loan fraud -- which former Attorney General Dick Thornburgh called “the biggest white collar swindle in history” – cost American citizens between \$300 billion to \$500 billion.

The following are the first 10 of “The Top 100 Corporate Criminals of the 1990s,” as reported by *Corporate Crime Reporter*:

1. **F. Hoffmann-La Roche Ltd.:** after pleading guilty, paid a \$500 million fine in an antitrust case.
2. **Daiwa Bank Ltd.:** paid a criminal fine of \$340 million in a fraud case.
3. **BASF Aktiengesellschaft:** paid a criminal fine in an antitrust case.
4. **SGL Carbon Aktiengesellschaft (SGL AG):** paid a criminal fine in an antitrust case.
5. **Exxon Corporation and Exxon Shipping:** paid a \$125 million criminal fine in the Valdez case. Attorney General Dick Thornburgh called the fine

"the largest single environmental criminal recovery ever enacted." The companies pled guilty to misdemeanor violations of federal environmental laws.

6. **UCAR International, Inc.:** paid a criminal fine in an antitrust case.
7. **Archer Daniels Midland:** paid a criminal fine in an antitrust case.
8. **Banker's Trust:** paid a criminal fine of \$60 million in a financial fraud case.
9. **Sears Bankruptcy Recovery Management Services:** paid a criminal fine of \$60 million in a fraud case.
10. **Haarman & Reimer Corp.:** paid a criminal fine of \$50 million in an antitrust case.

We are simply reporting in this issue the results of the survey performed by the *Corporate Crime Reporter*. Even though guilty pleas entered by the 100 corporations are a matter of record, we are not taking any position on guilt or innocence of those corporations. Although the amounts of the fines might seem to be large, in reality the corporations' profits and benefits were much larger in each case, according to reports. While I wouldn't go so far as to label all of these corporations as "criminals," the documentation set out by the *Corporate Crime Reporter* in its report is pretty compelling. You can draw your own conclusions.

Source: *Corporate Crime Reporter*

WE MUST MAKE SURE WHISTLEBLOWERS ARE PROTECTED

Whistle-blowing employees are supposed to be protected under the Sarbanes-Oxley law when they expose corporations for violating the law and in the process cheating the government. But how well does the protection really work? When an employee dares to speak up at a large corporation and reports wrongful conduct, the federal whistle-blower protections are, at best, a flimsy shield against retaliation. There have been reports of whistle-blowers who believed they were doing the right thing in exposing corruption and fraud and then were demoted or punished in some manner by their employer. That shouldn't be allowed and the employees must be protected against such retaliation. Complaints, as allowed under Sarbanes-Oxley, that are filed by the employees with the Department of Labor haven't seemed to help very much. Employees are still finding themselves the victims of retaliation.

In writing the whistle-blower provisions of Sarbanes-Oxley, Congress simply didn't do enough. The law needs to remove whistle-blowers from the arbitration system most companies now require for resolving complaints. Arbitration is stacked against the employee, and the proceedings are usually conducted in private. Also, the amount of damages that can be recovered in whistleblower retaliation cases also should be increased. Currently, damages are limited to back pay and reinstatement, but back pay can be collected only after a whistle-blower leaves employment. Reinstatement, in reality, is not much of a remedy for an employee who has exposed wrongdoing of the employer. If the system is to work, there must be a way to make the corporations fear the consequences of punishing a whistle-blower. Hopefully, the Sarbanes-Oxley law will be amended so that employees won't have to fear retaliation if they expose the wrongdoing of their employers.

Source: *Houston Chronicle*

SETTLEMENT INVOLVING ARTIFICIAL HIP AND KNEE MAKERS REACHED

FA

Four of the nation's biggest makers of artificial hips and knees have agreed to pay a total of \$311 million in penalties to settle federal accusations that they used fake consulting agreements and other tactics to get surgeons to use their products. The four companies had been charged by the United States Attorney in Newark, New Jersey, with criminal conspiracy to violate anti-kickback laws. But they will not be prosecuted if they follow new compliance procedures under federal monitoring for the next 18 months. Christopher J. Christie, the United States Attorney in Newark, had this to say about the case:

This industry routinely violated anti-kickback statutes by paying physicians for the purpose of exclusively using their products. Prior to our investigation, many orthopedic surgeons in this country made decisions predicated on how much money they could make — choosing which device to implant by going to the highest bidder.

The device makers will pay financial penalties to settle potential civil charges against the companies and preserve their ability to receive federal Medicare reimbursements. A fifth big maker of orthopedic devices, Stryker Orthopedics, accepted federal supervision for the next 18 month. But this company was not subject to criminal charges because it was the first to cooperate in the investigation, according to the government. Stryker Orthopedics, a Mahwah, New Jersey-based unit of Stryker Inc. of Kalamazoo, Michigan, did not reach any settlement of potential civil charges, and it's not clear whether anything in connection with the investigation might lead to civil charges or any restriction on Medicare reimbursements.

The other four companies involved included Biomet, the DePuy Orthopaedics unit of Johnson & Johnson, and Zimmer Holdings, all based in Warsaw, Ind.; as well as Smith & Nephew, a British company whose orthopedics subsidiary has headquarters in Memphis, Tennessee. The government said that together the five companies represented 95% of the hip and knee implant market.

Similar dynamics exist in other segments of the medical devices business, as reflected by the agreement last year by Medtronic, the leader in spinal devices, to settle a separate government anti-kickback investigation by paying \$40 million. That settlement is currently on appeal by one of the whistle-blowers who brought the practices to the government's attention. Zimmer, the market leader, is paying \$169.5 million to settle the civil charges. DePuy, which is paying \$84.7 million, said in a news release that the company "supports this agreement and the government's efforts to further positive change throughout the industry." Additionally, Smith & Nephew is paying \$28.9 million and Biomet \$26.9 million. It should be extremely disturbing to all of us who pay taxes to the federal government to constantly hear about large corporations cheating the government, getting caught, paying a fine, and going forward with no real regret. It's time for a meaningful crackdown on corporate crime. Instead, the Bush White House is more interested in protecting wrongdoers and penalizing their victims!

Source: *New York Times*

THE SEC IS LOOKING AT STOCK SALES BY THE CEO AT COUNTRYWIDE

It's being reported that the federal Securities and Exchange Commission (SEC) is examining some questionable stock sales made by the chief executive of Countrywide Financial Corp., the nation's largest mortgage lender. The man, who nearly 40 years ago co-founded what is now the nation's largest mortgage lender, is being scrutinized by federal securities regulators. Sales of the struggling company's stock at critical times are the subject of inquiry. The Commission's informal inquiry involves Countrywide's Chief Executive, Angelo R. Mozilo. As reported previously, Countrywide is cutting thousands of jobs, and its shares have fallen more than 50% in value since January. Interestingly, on October 23rd, the company announced that it will restructure or refinance \$16 billion in adjustable-rate mortgages that have recently reset to higher rates or will reset by the end of next year, stretching some homeowners to the breaking point. Countrywide's plan comes as the mortgage industry tries to head off mounting political and public pressure. While the company says the program will "help" about 82,000 borrowers, mainly those with "subprime" credit, I suspect Countrywide's real motives are more to save its own corporate skin!

Source: *Associated Press*

***CAMPAIGN FINANCE REFORM

ALABAMA BEATS WYOMING IN NATIONAL CAMPAIGN DISCLOSURE STUDY

A nationwide study reveals what most of us already knew when it comes to weak campaign financing laws in Alabama. The study found that it's hard for any state to get worse than Alabama when it comes to informing voters about where politicians get their campaign donations. The study, grading states on their campaign finance disclosure programs, gave Alabama a failing grade and ranked the state 49th out of the 50 states. Only Wyoming fell below Alabama. Kim Alexander, president of the California Voter Foundation and an author of "Grading State Disclosure 2007, observed:

There are significant weaknesses in Alabama's campaign finance laws. Other states have been making improvements and Alabama hasn't. You need a strong disclosure law to make sure the data available to the public is timely and meaningful.

The foundation and other groups have been doing the studies since 2003, and Alabama had ranked 47th in the previous reports. The study, funded by the Pew Charitable Trusts, was also done by the Center for Governmental Studies and the UCLA law school as part of the Campaign Disclosure Project. The national campaign finance study ranked Washington first, followed by California and Oregon. Florida and Hawaii tied for fourth. The rankings are done to encourage states to make improvements that will give voters more information about who is financing campaigns. The study found that Alabama is out of step with other states because:

- Alabama does not require candidates to disclose a donor's occupation or employer. Thirty-one other states require this information, which lets voters know the type of contributors a candidate has.
- Candidates in Alabama file their reports on paper rather than electronically. This prevents the state from providing a searchable database that allows voters to see whether a donor is giving to multiple candidates. Thirty states have electronic filing for statewide candidates, and 23 states have it for legislative candidates.
- Alabama does not require donations made within the last five days before an election to be reported before the election. Thirty-six other states require candidates to disclose last-minute donations.

- Without the disclosure of last-minute contributions, a candidate can wait to take a controversial donation until just before an election and then not report it until after the election has already been decided, Alexander said.

The report noted that efforts to rewrite Alabama's campaign laws failed in the last session of the Legislature. That included bills to require electronic filing by candidates and to ban the transfer of money between political action committees to disguise its source. Hopefully, the public will demand that the legislators deal with more than just banning PAC-to-PAC transfers. In my opinion, there is much more wrong with our system that needs immediate legislative attention. This new report could inspire a bipartisan majority in the Legislature to finally pass the reform that is so badly needed, but it will take pressure from the public to make it happen. I am convinced that the only way to control the special interests' power and control of politics in Alabama is to limit the amounts of money that can be donated and spent and to ban contributions from the "shadow groups" that are set up as a conduit to funnel money through without any disclosure requirements. In the next session starting February 5th, campaign finance reform should be made the top priority. Everybody says they want reform – now, let's see who is really serious about making it happen.

Source: *Associated Press*

*****CONGRESSIONAL UPDATE**

BUSINESS AS USUAL IN WASHINGTON

Alabama citizens have been getting lots of news about potential conflicts of interest involving state lawmakers. Now it appears that one of our U.S. Senators may have a potential problem of a similar nature in Washington. Our junior Senator Jeff Sessions pushed an amendment to a Senate bill that would allow banks to avoid paying billions of dollars in royalties for electronic check images. This legislative tactic was used by Jeff even though the Senator and his wife hold an ownership interest in two banks that would benefit directly from the Sessions' amendment. The *Wall Street Journal* ran a story on this legislation and the amendment in its October 4th issue.

The shares owned by Jeff are in Birmingham's Compass Bancshares, which were recently valued at as much as \$300,000, according to media reports. His wife owns stock in Citigroup Inc. valued at as much as \$50,000. Although lawmakers voting on legislation that affects them financially, directly or indirectly, may be common and legal, pushing a specific amendment through the process that affects a lawmaker financially may well be a horse of another color. Jeff reportedly said that his holdings had "nothing to do" with the amendment he got

tacked onto the bill. Even if that may be the absolute truth, it does have the appearance at least of a potential conflict of interest. Reports that the stock is now being sold is rather interesting. It's sort of like shutting the barn door after the horses get out.

The royalties are being claimed by Data Treasury Corp. of Plano, Texas, which holds several patents on the process for converting paper checks into electronic images, according to media reports. I suspect we will hear more on this sensitive matter in the coming months. If this sort of thing occurs on a regular basis in the Senate, it should be stopped across the board. If there are only isolated incidents, however, those can be dealt with on a case-by-case basis. Surely the Senate has rules or standards that govern this sort of conduct. If not, they certainly should put them into effect and enforce them so that conflicts of interest, real or perceived, can be appropriately dealt with.

Source: *Birmingham News*

*****PRODUCT LIABILITY UPDATE**

MY OPINIONS ON THE OSPREY HAVEN'T CHANGED

The Marine Corps tilt-rotor aircraft known as the "Osprey" may finally see battle in Iraq. The official name of the Osprey is the V-22, and the bird has been 25 years in development. During its history, crashes of Ospreys have claimed the lives of 30 men, and the plane has yet to see combat. The cost to the taxpayers has been over \$20 Billion, and 458 planes will be delivered to the Marines, Navy and Air Force. That's about \$119 Million per Osprey. The saga of the Osprey is a classic example of the political influence of the military-industrial complex at work. Even Dick Cheney believed the Osprey to be a mistake and tried to block production on a number of occasions.

The crashes involving the Osprey resulted in the plane being grounded in 2000 for 18 months. Our firm learned in litigation we handled that the V-2 had serious design problems. Hopefully, those problems have been remedied. We were shocked to find out that the government had cut corners in the testing program, which was inexcusable. My belief is that this plane is not safe and will put flight crews at risk. It should be noted that the V-22 will be carrying up to 26 Marines into combat in Iraq with no ejection seats and no parachutes. Our prayers are for the safety of all who will be flying in the Ospreys in Iraq. I sincerely hope that my concerns over the safety of the V-2 will prove to be wrong. Fortunately, the family of the Marine our firm represented was able to settle their wrongful death case. During the preparation of that case we learned a great deal about the Osprey and much that we found out caused me great

concern over the safety of the aircraft. I was convinced that the V-2 was not safe, and I have seen nothing since that time to change my mind.

LAWSUIT FILED AGAINST CRIB MANUFACTURERS

A class action lawsuit seeking damages for the owners of cribs has been filed in Minneapolis against Simplicity Inc., Target Corp., and Graco Children's Products Inc. Graco is the company that licensed its name to Simplicity for some of the cribs that were recalled. This lawsuit comes on the heels of the largest recall of full-sized cribs ever in the U.S. The federal Consumer Product Safety Commission, prompted by an investigation by the *Chicago Tribune*, issued a recall of 1 million Simplicity cribs. The recall included the Aspen 4 in 1 that was sold from 1998 until May of this year. As previously reported, three children died, seven were trapped, and there were 55 other incidents—all related to a design flaw and hardware failure involving the separation of the cribs' drop rail from their frame.

The lawsuit was filed by Charles Kelly, the same lawyer who had represented a California family in the death of a 9-month-old boy who died in April 2005 in a Simplicity crib. In filing the suit, he observed:

The recall is grossly inadequate and irresponsible. Simplicity should be required to tell consumers to dismantle their crib, and return it for a full refund. A retrofit kit only invites disaster. Only one retrofit kit needs to be used incorrectly and we could have another death. It was improper assembly ... that caused the three deaths in the first instance.

The lawsuit alleges that Simplicity should have warned consumers about the dangers of the cribs or should have stopped the selling them. It is contended that the companies certainly should have done something after learning of the injuries and particularly after learning of a death involving the cribs. A request has been made for a congressional hearing on this matter. Why did it take two years after the first death for the Consumer Product Safety Commission to issue a recall? That is a question that demands an answer.

Source: *Chicago Tribune*

JURY VERDICT UPHELD IN HYDRAULIC TRUCK TRAGEDY

Legal Headlines

A state appeals court has upheld a jury verdict against a maker of hydraulic dump-beds used on trucks. In May, a jury in Stark County, Ohio awarded \$6 million to the widow of Robert Ronske, who was killed in 2002 when

the elevated bed of his truck silently lowered and pinned him against the frame. Mr. Ronske had been doing maintenance when his body triggered a control valve on the outside of his 1978 Ford truck, causing the bed to lower in four seconds. Heil Co. was accused of making a defective product because the dump-bed kit didn't include a safety device, one that cost less than \$7. Heil also failed to warn distributors and consumers about the defect. The safety device had been in use since the 1940s, but Heil did not use it in the design.

Heil argued Mr. Ronske failed to follow proper safety protocol while doing maintenance by not bracing the bed. The company appealed to the 5th District Court of Appeals, saying the evidence didn't support the verdict. The defendant also said the conduct of plaintiff's lawyers prevented a fair trial. A three-judge panel upheld the judgment and said the trial judge conducted the trial with impartiality and professionalism. As for alleged misconduct by the lawyers, the panel noted that lawyers representing the Heil Co. didn't object during the trial to many of the incidents they are now raising for the first time on appeal. That appears to be one such incident. In any event, Heil Co. still can appeal to the Ohio Supreme Court. Hopefully, the verdict will stand.

Source: Cantanrep.com

THE NUTS AND BOLTS OF ACCIDENT RECONSTRUCTION

JLB

A key aspect of any personal injury or product liability case involving a vehicular accident is the reconstruction of that accident. Accident reconstruction is the ability to determine the path the vehicles traveled, the angle of the impact, the speeds involved, and the rotations of the vehicles. It is exactly what it sounds like – the ability to reconstruct what exactly happened in an accident. It is the foundation upon which most cases are built. It is especially important in a product liability case because the exact details of how the accident happened is what experts, such as an occupant kinematics expert and a defect expert, rely upon in forming their opinions. For example, in order to determine how a passenger in a vehicle moved during an accident, the occupant kinematics expert must first know how the vehicles were impacted and how the vehicle moved, all of which come from the accident reconstructionist.

For the most part, accident reconstruction requires the retention of an expert. But, there are some basic steps anyone can take in looking at an accident that will give an individual a general idea about how the accident happened. First and foremost is to get a copy of the accident report as soon as possible. The accident report contains vital information that can lay the foundation for a determination as to whether a case exists. Although all accident reports differ in each state (some states' reports are more thorough than others), most reports will contain speed estimates, information about the occupants'

seatbelt usage, a narrative from the investigating police officer as to how he believes the accident happened, and a conclusion regarding who was at fault. The report will also contain eyewitness information and whether any accident scene photographs were taken. The accident report is the engine that drives the initial investigation into a case.

The next step to take is to **secure** the vehicle involved in the accident. The vehicle is the **most critical piece of evidence** in reconstructing an accident. By inspecting the vehicle, you can get an idea of the angle of impact, an estimate of the speeds involved, and determine if there is any evidence on the seatbelt to suggest the occupant was using it at the time of the accident. These are just a few of the many pieces of evidence the vehicle holds. Thus, it is vitally important to secure the vehicle. Typically, the accident report has information on where the vehicle is being stored and the insurance company involved. I suggest sending a preservation letter to both the storage location and the insurance company. The preservation letter should explain that you are investigating the accident and that the vehicle is a key piece of evidence that should not be altered, amended, or destroyed in any way. It should also contain instructions for them to call upon receipt of your letter.

Another reason to preserve the vehicle as quickly as possible is that the vehicle probably contains an event data recorder, more commonly referred to as the black box. These black boxes were introduced in automobiles as a by-product of airbags. A variety of sensors collect information that is processed by the black box. The box ultimately decides whether to deploy the airbag in an accident. The black box is designed to retain portions of the data from the accident. Afterwards, the data can be downloaded. The type of information stored by these black boxes depends upon the vehicle module and the nature of the accident. Certain boxes store information on engine speed, vehicle speed, brake status, throttle position, and seatbelt usage. The equipment to download the data from the black box is commercially available for certain model vehicles, including some General Motors and Ford vehicles. The black box data contain valuable information that can be useful to the reconstruction of the accident.

The next step is get to the accident scene as soon as possible and photograph it. The accident scene may contain skid marks, yaw marks, gouges, divots, vehicle tracks, and the like, which are vital tools necessary for any reconstruction. Unfortunately, a lot of these pieces of evidence are lost over time. If the police did not take scene photographs, it is especially critical to document the accident scene as soon as possible after the accident, before vital physical evidence is lost. Of course, if the police did take photographs at the scene, it may not be as important to document the scene yourself. The great thing about the police photos is that the vehicles are typically shown in their final resting position and, for the most part, the photos attempt to document the path of travel of the vehicle. Experts really like police photographs. It is amazing the technology that is available to experts. For example, using technology known as

photogrammetry, the experts can measure objects from photographs. It's most important feature is the fact that objects can be measured without being touched. The technique is extremely useful to experts in situations where all the physical marks on the roadway are gone. The police photographs can be used, along with photogrammetry, to reconstruct the accident.

Finally, it is crucial to talk with the investigating police officer, as well as any eyewitnesses to the accident. The problem with eyewitness testimony is its reliability. There have been times when three witnesses will give three different versions of how a single accident occurred. Some witnesses try to be too helpful. They will tell you what they think they saw, not what actually happened. Or, they will hear a noise, look up, and see cars spinning around, then quickly theorize what must have happened. Then there is that time-lapse memory thing when, two years after the accident, they simply have forgotten the details of the accident. Yet, you cannot overlook the importance of getting either recorded or written statements from eyewitnesses as soon as possible after the accident. Although you do not want to completely rely upon the eyewitnesses, it certainly helps a case when, as you are putting the pieces back together, some of the things the witnesses told you now make sense in the context of the accident reconstruction.

In conclusion, the above pieces of evidence form the foundation of any accident reconstruction. The information should be gathered as soon as possible after an accident occurs. Information is much more reliable the closer in time to the accident. These items are the nuts and bolts of the field of accident reconstruction. I appreciate very much Dana Taunton, who is in our Personal Injury Section, providing this information for our readers. Hopefully, it will prove to be both educational and helpful.

THE STORY OF WEAK ROOFS AND ROLLOVERS — A DEADLY COMBINATION – AS TOLD BY PAULA LAWLOR

A critical component of the vehicle that has been overlooked for the past 34 years by both the American auto manufacturers and the National Highway Traffic Safety Administration (NHTSA) is the roof structure. The purpose of a vehicle's roof is not merely to keep out the rain and bad weather. Accident studies show that real-world rollover accidents frequently involve extreme local stresses on the vehicle roof structure. It is the weakness of the roof structures, i.e., the lack of resistance to stresses inherent in rollovers, that allows the roof to intrude into the passenger cabin. In 2006 alone there were 10,698 people killed and approximately 24,000 people seriously injured in rollover accidents in the United States. "Roofs in most contemporary vehicles crush extensively in a majority of rollovers where there are serious to fatal injuries. While it is clear that an occupant is safer in a rollover with a safety belt than without, public policy that

increases belt use without addressing the problem of roof crush would be irresponsible.”

In 1966, Congress passed the National Traffic and Motor Vehicle Safety Act in an effort to protect the motoring public from rising injuries in automobile accidents. The legislation provided for the promulgation of minimum safety standards in the design and manufacture of all passenger vehicles sold in the United States. Pursuant to legislation, on January 6, 1971 the government proposed a minimum roof strength standard, Federal Motor Vehicle Safety Standard 216 (FMVSS 216). The intent of the roof strength safety standard was to prevent injury to vehicle occupants in rollover accidents by preventing the intrusion of the roof into the passenger compartment.

FMVSS 216 required the roof structure of the vehicle to withstand forces comparable to those experienced in a rollover. As originally proposed by the government, the test called for a hydraulic load of up to 1.5 times the vehicle’s weight to be first applied to the roof structure in the area of the windshield pillar on one side of the vehicle followed by application of the same force to the same area on the other side of the vehicle. The application of the test force to both sides of the roof structure would simulate the sequential nature of impacts in a real-world rollover. This two-sided test, as proposed, used a 12" x 12" test device oriented at 10 degrees horizontally (pitch angle) and 25 degrees laterally wherein the static load was applied at the upper surface of the A-pillar until reaching a force of 1.5 times the empty weight of the vehicle. FMVSS 216 was not approved as originally proposed. The test was modified, prior to final approval, to provide for testing of only one side. The load could be applied to either side; and both sides must be able to withstand application of the load. However, the load was not applied sequentially to both sides in the same test. The problem is that the application of the force to one side may weaken the roof structure. If the roof structure is compromised with the first application, the other side will lose strength and not be able to withstand the same amount of force, leading to the collapse of the roof structure. To verify that a roof structure is sufficiently strong enough to withstand sequential impacts as are experienced in a real-world rollover, the vehicle must be tested with sequential loads. FMVSS 216 is a static test in that the vehicle does not move during the testing. Prior to the development of the static test, the automakers used dynamic tests to verify roof strength. One such dynamic test was the inverted drop test, in which a vehicle was suspended upside down and dropped onto its roof from 6 inches to 2 feet. It is important to note that in the late 1960s, many of the vehicles being manufactured showed serious roof collapse in inverted drop tests. The same vehicles also failed the government’s proposed two-sided static test. Their vehicles, however, could pass a standard that tested only one side with the pitch angle reduced to 5 degrees. Internal and public records show that GM, Ford and Chrysler lobbied to eliminate the sequential testing to the second side of the roof and reduce the pitch angle for a roof strength safety standard their vehicles could pass. This test became our government standard in 1973 and it is the same standard we have today.

FMVSS 216 was first implemented in 1973 as a temporary standard to be revoked in 1977 and replaced with a rollover test rather than a static test. The rollover test proposed by the government in 1970 required that no portion of the test dummy be ejected during the rollover phase. Knowing how pitifully their vehicles were performing in dynamic roof integrity tests based on the failed drop tests, GM, Ford and Chrysler filed unanimous opposition to the government's proposal that would have required dynamic rollover testing as part of the restraint system evaluation under FMVSS 208.

In this same time frame, GM, Ford and Chrysler designed and tested Experimental Safety Vehicles (ESV) and Research Safety Vehicles (RSV) and examined structural integrity, occupant performance and ejection characteristics in non-collision rollover accidents. These vehicles had strengthened roofs equipped with a rollbar and/or reinforced A, B and C-pillars. The result of the GM ESV in a 2-foot drop test was:

- The windshield remained in place but sheared loose along the top edge
- The right front door could be opened by hand after the test
- The maximum measured passenger compartment intrusion was 3.9 inches

The result of the GM ESV in a 30 mph lateral rollover test where the vehicle rolled 2 1/4 rolls was:

- The windshield was completely retained along all edges
- All doors could be opened by hand after impact
- The maximum measured passenger compartment intrusion was 3.8 inches
- None of the occupants extended beyond the passenger compartment

In June 1977, Chrysler concluded in Engineering Safety Committee Meeting Minutes that "the 400 additional lives saved in an RSV (Research Safety Vehicle) is the result of reduced roof intrusion." Despite knowledge gained from the ESV and RSV programs, that a strong roof would provide occupant survival space in a rollover, GM Ford and Chrysler continued to oppose the rollover test in FMVSS 208. The temporary static test standard which required a minimum of 1.5 strength to weight ratio (SWR) was totally inadequate and the Industry knew that it would not provide occupant survival space in the event of a rollover. In fact, in 1959 the Automotive Crash Injury Research (ACIR) department at Cornell University concluded that in rollover accidents "crushing of the top structure is

also a serious problem as this effectively destroys the package compartment, leaving no room for the occupant.” The ACIR concluded that “an auxiliary roof, supporting structure, might be added to the normal roof shell ... such that the roof should support approximately 3.5 times the weight of the car without exceeding the yield point.” When ACIR made its recommendations, GM, Ford and Chrysler were each financially supporting Cornell and continued to do so for years. Vehicle roofs designed to this bare minimum standard are designed to collapse and crush in and do not provide occupant survival space in the event of a rollover - thus 34 years of ever increasing deaths and catastrophic injuries due to the crushing of the roof into the occupant’s survival space in a rollover.

On October 22, 2001 NHTSA requested public comment to assist in upgrading FMVSS 216. On August 19, 2005 NHTSA announced its proposed rule:

- Force up to 2.5 times a vehicle’s weight is applied to a steel plate on one corner of the vehicle’s roof
- All roof components are prohibited from contacting a seated 50th percentile male dummy
- Vehicles up to 10,000 pounds are required to meet this standard
- PREEMPTION - If the automobile manufacturer meets this minimum standard and a person is killed or catastrophically injured by the roof in a rollover accident, the manufacturer cannot be sued

NHTSA also announced that the benefits of this proposed rule will be a savings of only 13-44 of the 10,000+ that die annually in rollover related accidents. There has been strong criticism of the proposed rule by safety advocates who are lobbying for a dynamic test, such as a drop test or a rollover test, rather than a static test and also believe the roof of the vehicle should withstand 3.5 times the vehicle’s weight, as is the case with the Volvo XC90 manufactured by Volvo who is owned by Ford. The added cost per vehicle to achieve a similar SWR would be somewhere between \$25 and \$100.

Earlier this year NHTSA decided that the next stage should be a Supplemental Notice of Proposed Rulemaking (SNPRM). An SNPRM is a notice and request for comment when an agency has made significant substantive changes to a rule between the Notice of Proposed Rulemaking (NPRM) and the final rule. The SNPRM allows the public to comment on the changes. At an October 18, 2007 Department of Transportation oversight hearing in the Senate, Senator Mark Pryor asked if the SNPRM requires manufacturers to test both sides of the vehicle and Transportation Secretary Mary Peters said she believes it does. The SNPRM has now been presented to the Office of Management and Budget (OMB) and is expected to clear OMB on January 15, 2008 and to be

published on January 30, 2008. The comment period will end March 28, 2008. The legal deadline for the final rule is July 1, 2008.

In 2006 the American College of Surgeons (ACS) deleted Rollover as Triage Criterion. According to NHTSA figures, the 2006 comprehensive cost of the 10,698 fatalities, 23,793 serious injuries and 183,207 minor and moderate injuries is conservatively \$46 billion. With this number of deaths and serious injuries occurring it is certain that in many of the rollover accidents every minute counts. How is it then that the American College of Surgeons has abandoned these victims of rollover in their system of sorting patients according to need for treatment? The bigger question is, "Who is taking care of the people?"

The proposed FMVSS 216 is not a dynamic test and ignores most factors that are important in a real-world rollover. The FMVSS 216 static test is run to an inadequate load level, and inadequate load angle and to an insufficient crush level. This static test relies on the glass for roof strength, does not record injury levels, does not evaluate occupant survival space, does not evaluate the restraint system and does not subject the vehicle to real-world forces and crush levels.

The new roof strength standard **MUST SAVE THOUSANDS OF LIVES ANNUALLY**. Accident analyses show real-life rollover accidents frequently involve extreme local structural stresses on parts of the vehicle structure, therefore Mercedes-Benz conducts rollover and roof-drop tests on its vehicles. The new standard should include a dynamic test such as a drop test or a rollover test utilizing a test dummy(s). The inverted drop test does not rely on the glass for roof strength, considers occupants (test is run with a test dummy), can record injury levels, evaluates occupant survival space, evaluates the restraint system and subjects the vehicle to real-world forces and crush levels. An inverted drop test is easy to conduct, it is very repeatable and it produces a vast amount of meaningful information that relates to vehicle performance in real-world rollover accidents. The inverted drop test has been used by auto manufacturers since the 1960's. NHTSA has stated that the inverted drop test is noted to produce deformation patterns similar to what is observed in rollover tests and real-world rollover collisions. NHTSA concluded that the inverted drop test has merit in its usage, realism and repeatability in evaluating roof crush. Most European manufacturers already use inverted drop testing to evaluate the rollover performance of their vehicles. They design their vehicles to withstand the forces of an inverted drop test and as a result, European vehicles such as the Volvo XC90, the Mercedes M Class and others provide superior occupant protection during rollovers. Mercedes even goes so far as to call the inverted drop test one of its most important crash tests.

Two-sided static testing - each test should be conducted to the full 5 inch depth and maintain the SWR Pitch angle - An examination of details of the same 273 National Accident Sampling System (NASS) rollover crashes from accident years 1997-2000 that NHTSA used to develop and support an amended FMVSS

216 revealed, “virtually all had major damage over an A pillar and a substantial majority had front fender damage indicating that forward pitch in at least one impact was roughly 10 degrees.” It was concluded that “A realistic test of roof crush resistance, whether quasi-static or dynamic, must be conducted at a pitch angle of at least 10 degrees.” Angle of platen - If the SNPRM does include a two-sided static test, that is two sequential tests on the same car body, it is important to note that the lateral and vertical component of the load angle is significant as it influences the collapse of the roof into the survival space. In 1983 General Motors’ engineer Ivars Arums designed static tests to simulate real world rollovers for the purpose of reducing roof deformation in order to keep the glazing intact which would in turn prevent ejections. These tests were performed at lateral angles of 49 - 55 degrees on the roof as opposed to the 216 angle of 25 degrees (a more vertical force) on the roof, chosen specifically by Arums after he analyzed real world accidents and realized that roof to ground contact occurred at lateral angles of close to 52 degrees. And Arums tested the same vehicle statically on both sides of the roof at an angle of 45 degrees. Arums’ lateral roof crush tests results demonstrated a 33% reduction in roof strength as compared to the results of the same vehicle when tested according to FMVSS 216.

Load level - The two-sided static test must also have a sufficient loads in each of the tests in terms of multiples of the gross vehicle weight to be able to replicate the deformations occurring in real-world rollover accidents. It is important that the roof of the vehicle withstand a load level of 3.5 times the vehicle’s weight on each side of the vehicle roof (driver’s side as well as passenger side of same vehicle) to be sufficient to provide occupant survival space. It is critical that the tests are run to the full 5 inch depth. Stopping the test on the first side when it reaches the designated SWR (at a depth of 3 inches or so) would have no effect on the other side. Yet in real-world rollover accidents, roof contact with the ground on one side effects the geometry of the other side of the roof. Misconception that partial and full-ejection in rollovers is not related to roof crush Roof deformation can not only lead to roof collapse and “crush” over the occupant’s survival space but it is also the leading cause of full and partial ejection. Roof failure affects the geometry of the safety belt system and can result in the side impact air bags not providing effective protection. The loss of structural integrity can result in the deforming roof directly exposing the occupant to contact with outside hazards and is also the principal cause of glass breakage which then allows partial and total ejections through the vehicle’s now glassless openings. These critical issues have been totally and purposefully ignored by both NHTSA and the auto industry in all their reports and analysis of the lives lost and therefore the potential lives saved by an adequate roof strength standard.

ESC - electronic stability control. NHTSA has recently mandated ESC as standard equipment in all SUV’s in the near future. ESC will only be partially effective in preventing SUV rollover accidents. There will continue to be many thousands of rollover accidents annually which will continue to produce

thousands of deaths and catastrophic injuries annually if a strong roof strength standard is not immediately implemented.

In May 2003 the United Nations Ambassador of Oman, Fuad Al-Hinai, introduced a resolution on the global road safety crisis. He addressed the United Nations General Assembly stating that road accidents caused 1.2 million deaths and injured 10 to 15 million people each year. By 2020, road traffic deaths would account for 3.3 million deaths globally, with more than 90% occurring in low and middle-income countries. According to World Health Organization he said, road traffic accidents caused 2.8% of all global deaths. The annual cost of road traffic deaths was a staggering \$518 billion. And Ambassador Al-Hinai made the point that the thousands of deaths caused by road accidents per year did not receive the media attention of a single aircraft crash.

On April 14, 2004, for the first time ever, the U.N. General Assembly devoted a session to the global road safety crisis. U.S. Transportation Secretary Norman Mineta addressed the U.N. General Assembly, "We need not accept morbidity as the price of mobility anywhere in the world." Mineta said the annual deaths a year in the U.S. (Which in 2004 was 42,636) was unacceptable. Mineta told the U.N. General Assembly, "President George Bush's Administration has established a goal to further reduce the traffic death rate by a third by the year 2008." At the time the annual mileage death rate in the U.S. was 1.5 deaths for every 100 million vehicle miles traveled. By 2006 the annual mileage death rate in the U.S. was 1.42 deaths for every 100 million vehicle miles traveled and the annual road deaths increased to 42,642. What plan of action is in place for the annual mileage death rate to plummet to 1 by 2008? Wishing isn't good enough, there must be a concrete plan.

On October 27, 2005 the United Nations designated the third Sunday in November as a day of remembrance for those that die and are injured due to road crashes and called on nations globally to improve road safety. On June 20, 2007 Senator Christopher Dodd [D-CT] introduced a bill at the 110th Congress: S. Con. Res. 39: A concurrent resolution supporting the goals and ideals of a world day of remembrance for road crash victims. Co-sponsors of the bill were: Senator Thad Cochran [R-MS], Senator Frank Lautenberg [D-NJ], Senator Carl Levin [D-MI], Senator Richard Lugar [R-IN] and Senator Robert Menendez [D-NJ]. This bill was passed in the Senate on October 4, 2007 encouraging the people of the United States to commemorate a world day of remembrance for road crash victims with appropriate ceremonies, programs, and other activities. The bill now goes to the House. The designated day this year falls on November 18th.

Senator Mark Pryor [D-AR] is Chairman of the U.S. Senate Commerce Committee Subcommittee on Automobile Safety and Senator Daniel Inouye [D-HI] is Chairman of the U.S. Senate Committee on Commerce, Science & Transportation. Both are responsible for providing guidance and oversight to the

National Highway Traffic Safety Administration so that it can meet its mission to save lives, prevent injuries and reduce economic costs due to road traffic crashes and can meet its vision to be a global leader in motor vehicle and highway safety. Either of these Senators is in a position to call a congressional hearing for the purpose of enacting legislation for strong vehicle roofs. There is no other issue in our country that involves as many deaths annually as the number of deaths in rollovers. I encourage you to write to your Senators and Congressmen requesting they communicate with Senators Pryor and Inouye their desire for a congressional hearing to enact legislation for strong vehicle roofs that does not include preemption. I have personally found that most of the politicians in Washington, DC are uninformed on this issue of roof crush in rollovers. The question once again, "Who is taking care of the people?" And the answer is, the people – people like you and me that see a problem and take the time to take action with letters and petitions and phone calls and personal meetings addressed to the key people in power to correct it.

Authored By:
Paula Lawlor
People Safe in Rollover Foundation
October 21, 2007

*****MASS TORTS UPDATE**

PLAINTIFFS WIN HORMONE THERAPY LAWSUIT FA

In the trial of the latest Nevada state court hormone therapy case, the jury found against Wyeth on all of plaintiffs' claims and returned a verdict ordering Wyeth to pay a total of \$35 million in compensatory damages and \$99 million in punitive damages. The jury found that Wyeth was negligent, Premarin and Prempro were defective, Wyeth concealed material facts about these products, and Wyeth acted with malice or fraud. The punitive damages award came in the second phase of the trial. The jury had found Wyeth's conduct to be "reprehensible," which led to the second phase of the trial and the awarding of punitive damages.

The three women alleged that the use of Premarin and Prempro had contributed to the development of their breast cancer, Wyeth had failed to properly warn about and concealed the risks of the drugs and Wyeth had sold a defective product. During the trial, Wyeth argued that each of the women had other risk factors that contributed to the development of their cancer and that it provided adequate warnings. Wyeth also contended the company clearly warned users that there was a slightly increased risk of breast cancer from taking Prempro, which was first marketed in 1995.

This is the seventh hormone therapy case to go to a jury. There are still about 5,300 similar lawsuits around the country in state and federal courts. The verdict is the largest award to date against the Madison, New Jersey-based company. All of the pending cases involve the drugs Premarin, an estrogen replacement, and Prempro, a combination of estrogen and progestin. As you know, these drugs are prescribed to women to ease symptoms of menopause. There is no telling how many women were hurt by Wyeth's conduct in this matter. Putting corporate profits over the health and welfare of these women is bad by any standard and can't be tolerated.

Sources: *Wall Street Journal*; *New York Times*

DRUG COMPANY SETTLES DRUG MARKETING AND PRICING CASE

Bristol-Myers Squibb Co. and a subsidiary have agreed to pay more than \$515 million to settle federal and state investigations into their drug marketing and pricing practices. Government investigators alleged that Bristol-Myers Squibb paid illegal remuneration from 2000 to 2003 in the form of consulting fees to induce doctors and other health care providers to buy the company's drugs. Investigators also claimed that from 2002 to 2005, the New York-based drug maker promoted the sale of Abilify, an anti-psychotic drug, used to treat bipolar disorder and schizophrenia, for pediatric use and to treat dementia-related psychoses. As previously reported, neither of these uses is approved by the Food and Drug Administration (FDA).

In the second quarter, the company reported \$412 million in sales of Abilify, a 27% increase from a year earlier. Bristol-Myers announced in December that it had tentatively agreed with the U.S. Attorney's Office in Boston to settle an investigation into its marketing activities. At that time, the company did not disclose which drugs were involved. Besides Abilify, Bristol-Myers Squibb makes Plavix, a blood thinner that is the company's top-selling drug, and Pravachol, a cholesterol-lowering drug.

The settlement with Bristol-Myers Squibb is the latest in a series of settlements the Justice Department has reached with pharmaceutical companies over illegal marketing of their drugs. As we have reported, the U.S. Attorney's office in Boston has been particularly aggressive in prosecuting health care fraud cases. Earlier this year, Schering Sales Corp. and its parent company, Schering-Plough Corp., agreed to pay \$435 million to settle allegations it lied to the government about drug prices and illegal promoted the drugs Temodar and Intron A for the treatment of cancers for which they were not approved by the FDA. In 2004, Pfizer Inc. paid \$430 million in fines to settle allegations it marketed the epilepsy drug Neurontin for pain and psychiatric illnesses. In 2001,

TAP Pharmaceutical Products paid \$875 million to settle allegations it inflated prices and bribed doctors to prescribe its prostate cancer drug Lupron.

Source: Bostonchannel.com

THE VIOXX LITIGATION IS STILL ON TRACK

Although the pace of the Vioxx litigation has slowed somewhat, more trials in lawsuits against Merck & Co. are far from over. Three years have passed since the giant drug company pulled Vioxx from the market because increased heart attack and stroke risk. There is still a massive amount of litigation pending in federal and state courts. As you will recall, Vioxx was pulled from the market on September 30, 2004. Realistically, it may take several years before Merck's problems relating to Vioxx, a dangerous drug that the FDA should never have approved, come to an end. But, the concern should not be for Merck, but for the thousands of Vioxx victims and their families, and that's the reason our firm is totally committed to seeing this fight through to the end.

There are still at least 45,200 product liability cases pending, with another 14,450 on hold with the statute of limitations suspended under tolling agreements. There are also 266 potential class action lawsuits alleging patient injuries or stockholders' economic losses in the U.S. and one class-action, that has been certified in Canada. Meanwhile, New York and six other states are suing to recoup what they paid for Vioxx through Medicaid. So Merck is far from out-of-the woods, and that's a fact.

It should be noted that a new round of trials has started. Judge Fallon will start hearing stroke trials next year. These trials will involve Vioxx users who suffered strokes. Our firm's next trial will be in Bullock County, Alabama, and is scheduled to start on January 7, 2008. It will involve a heart attack and resulting death. New Jersey Superior Court Judge Carole Higbee plans to use other judges to simultaneously run four heart attack trials with a few plaintiffs each. This move – combined with the federal trials – will put the Vioxx litigation on the fast track. It will be a busy time for all concerned.

MASSIVE CLASS ACTION LAWSUIT FILED AGAINST PURDUE PHARMA

The Attorney General of the Commonwealth of Kentucky announced the filing of a lawsuit last month against Purdue Pharma, the manufacturer of

OxyContin. Attorney General Greg Stumbo was joined in the suit by numerous county officials in Kentucky affected by the abuse and distribution of OxyContin. Additional county officials are also expected to join as parties in the case. One of the officials who are presently involved in this litigation had this to say:

This is an important event not just for the residents of Pike County, but for all Kentuckians whose lives have been torn apart from the effects of this powerful and highly addictive narcotic. This company has to be held responsible for their wrongdoing. This suit is not about money, but rather the people who have been affected and seen first-hand the Kentucky counties, have worked hard to combat the effects associated with this drug. But, even when we think there is nothing more we can do, we still have our legal system to provide a way to bring this issue to light and provide relief to the people of Pike and other counties whose lives have been destroyed by OxyContin.

Pike County, one of the plaintiffs in the suit, will be acting as representative of a class of Kentucky counties and cities that have been affected by the over-prescribing of OxyContin. This was alleged to be the result of fraudulent misrepresentation by Purdue about the risks associated with OxyContin, especially the highly addictive potential of the drug. It was reported that the counties involved are facing a prescription drug abuse epidemic that has been partly caused by the illegal action of the pharmaceutical company Purdue Pharma. The object of the lawsuit is to force Purdue Pharma to reimburse taxpayers' money that has been spent treating and fighting the effects of OxyContin.

On May 10, 2007, Purdue pled guilty to federal charges of misbranding a drug with the intent to defraud or mislead. Three corporate executives of Purdue also pled guilty to misleading the public about the risks of addiction associated with OxyContin. Pike County retained the law offices of Gary C. Johnson, a lawyer from Pikeville, Kentucky, to represent the county in the suit. The judicial system is the only place these counties could go to get their grievance heard and to seek redress for the harms done to them. Our system of law and justice has always provided a means to redress harm caused by others

Source: News Release From Attorney General's Office

PAIN PUMPS CAN CAUSE CARTILAGE DAMAGE

Dr. Charles Beck, a well-respected orthopedic surgeon, recently issued a warning that a commonly used device designed to reduce pain after surgery is potentially dangerous when used in the shoulder joint space. The devices,

manufactured by Stryker Corporation, I-Flow Inc. and other companies, deliver high concentrations of pain medication directly to a surgical site. According to the recently published article co-authored by Dr. Beck, they can cause permanent and debilitating damage to the shoulder. In discussing the matter, Dr. Beck stated:

These devices have been used on thousands of patients nationwide, and based on our findings, hundreds appear to be at risk for this complication which results in severe pain, debilitating stiffness and eventual joint replacement surgery for many of those affected. We sent the results of our study to the manufacturers more than two years ago, but their response has so far been minimal to non-existent. It is time to get the word out and stop these devices from ruining any more lives.

Dr. Beck's warning comes at an appropriate time now that football season is in full swing. Manufacturers report that the number of orthopedic surgeries rise in the fourth quarter of each year tied to increased sports activity, particularly football and skiing. It appears that patients may tend to defer elective surgeries until the fourth quarter after annual insurance deductibles are satisfied.

The article, published in the October 2007 issue of *The American Journal of Sports Medicine*, demonstrates a strong association between the intra-articular (inside the joint space) use of high volume pain pumps following arthroscopic shoulder surgery and an otherwise unexplainable loss of hyaline cartilage in the shoulder joint. Dr. Brent Hansen, an orthopedic surgeon, was the senior author of the study. The complication discussed in the article, known as Postarthroscopic Glenohumeral Chondrolysis (PAGCL), is permanent and can lead to extreme pain and lifelong suffering in 63% of the patients that use the pain pumps. It is suggested that the complications may occur following open surgery as well.

Numerous lawsuits are pending against the companies that manufacture, market, or distribute the pain pumps, including Stryker, DJO Inc., I-Flow Inc., BREG Inc. and others. Included among the many claims in the lawsuits are the allegations that the manufacturers failed to instruct or warn the U.S. medical community that the safety of using the pain pumps in the shoulder joint space had not been established or that the continuous injections of commonly used anesthetics may cause permanent injury.

Our firm is looking into a number of claims from people across the country whose lives have been devastated by these pain pumps. These are supposed to be routine outpatient procedures, but the patients often endure several more surgeries, and most will eventually need complete shoulder replacement. We expect hundreds of individuals across the country to come forward with their own stories of ongoing pain and suffering they have experienced after using one of

these devices. Ted Meadows, who is in our Mass Torts Section, is heading up a team that is investigating cases that include the use of pain pumps, not only in the shoulder, but in the knee, ankle and hip. If you need additional information relating to this matter, you can contact Ted Meadows at (334) 269-2343.

Source: *Associated Press*

STUDY SHOWS DRUG TRIALS GO UNWATCHED

Clinical trials that enroll millions of patients in tests of experimental drugs and medical devices get scant government oversight. This was the conclusion reached in a report released in late September. Over a six-year period, the federal Food and Drug Administration inspected just one of every 100 trial sites, raising questions about the agency's ability to ensure the safety of study participants, according to the report by Health and Human Services Department Inspector General. It was reported that the FDA – simply put – is not getting the job done. Hampered by the lack of a comprehensive catalog of clinical trials, the FDA is unable to even identify all trials, the estimated 350,000 study sites, and the institutional review boards that oversee each study to ensure they meet scientific, ethical and legal obligations, according to the report.

Those limitations hinder the FDA's ability to ensure that participants are protected from unreasonable risks. Most folks would be shocked if they knew the FDA relies on just 200 inspectors to police human studies of drugs and devices. The investigation found that the inspections performed focus more on ensuring the accuracy of trial data than on verifying the measures put in place to protect the study participants. Even when inspectors do turn up serious problems, their findings are frequently downgraded by senior officials and almost never followed by inspections to see whether the issues have been resolved, according to the report.

In the case of the FDA's drug office, 68% of inspector recommendations that the agency take regulatory action, typically in the form of a warning letter, were downgraded. The FDA found serious problems at test sites 348 times between 2000 and 2005. But only 26 investigators were disqualified from conducting further clinical trials, and data were disqualified just twice, according to the report. Rep. Edward Markey (D-MA), co-author of a provision in an FDA bill recently signed into law, observed:

The report makes clear without a tough cop on the beat to enforce the rules, unscrupulous researchers can take advantage of trial participants and potentially expose them to harm

The new law creates a mandatory clinical trial registry. The FDA told the inspector general that inspections make up only one part of its efforts to ensure

human subjects are protected. The agency sees its review of study protocols before they get under way as the most important step in protecting participants. The FDA oversees the safety of companies' drug or medical device trials, while the Office for Human Research Protections does the same for federally financed tests. There is no federal monitoring of privately financed, noncommercial trials. This is a problem that must be addressed and corrected.

Source: *New York Times* and *Associated Press*

JURY RETURNS A \$7 MILLION VERDICT AGAINST ROCHE IN ACCUTANE CASE

A jury in Florida returned a verdict against Roche Holding AG recently in a case involving the use of Accutane. The drug company must pay \$7 million to a Pensacola man who blamed the company's acne drug for his inflammatory bowel disease. This was the company's second defeat in Accutane cases in as many trials. The jury found that Roche failed to adequately warn of Accutane's risks and helped cause Crohn's disease in the plaintiff. The trial took place in a state court in Pensacola. The plaintiff, who took the drug for nine years until his diagnosis in 2000, suffers from diarrhea, fatigue, and depression. He hasn't been able to work full-time in five years.

Roche faces 400 lawsuits blaming Accutane for causing inflammatory bowel disease. A New Jersey jury in May awarded \$2.62 million to an Alabama man in the first such case to reach trial. Roche lawyers claimed the disease's cause is unknown and the company's drug-label warnings were adequate. The Pensacola jury's award to the Florida man, whose Crohn's disease is a form of inflammatory bowel disease, includes \$5,146,500 for future pain and suffering, \$766,500 for past pain and suffering, \$617,599 for lost earning capacity, \$387,561 for future medical expenses, and \$110,134 for lost earnings. The company says it will appeal. The plaintiff in the Florida case was represented by Michael Hook, with the firm of Hook, Bolton, Kirkland & McGhee, located in Pensacola, Florida.

Source: *Bloomberg News*

HEART PATIENTS SUE MEDTRONIC OVER DEVICE

A man who claims he received 47 unneeded jolts from his implanted defibrillator has filed suit against Medtronic over the broken wires the company is recalling. The suit will seek class-action status in a federal court in Minneapolis to represent people who were hurt in some manner. The lawsuit's allegations include emotional distress and negligence. It also seeks restitution, disgorgement of profits, and punitive damages. Medtronic Inc., maker of

pacemakers and other heart devices, has acknowledged that wires connecting its implantable defibrillators to patient hearts break more often than it expected. It said five deaths may be linked to the broken wires.

According to Medtronic, some 235,000 people have the Sprint Fidelis lead wires. While the bad wires can be removed and replaced, removing the wires can be dangerous because it may tear at scar tissue. Medtronic says it made the decision to recall based on its "concern for patient safety," and a "commitment to patient well-being." You may recall that a 2005 Medtronic recall over defibrillator battery failures, which was less severe than the new problem, resulted in more than 1,000 personal injury lawsuits being filed. Given that the bad wire problem is much more serious, I expect there will be many more claims filed. Our firm has been contacted by a number of persons who have potential claims. If you need additional information, contact Ted Meadows at (334) 269-2343.

Source: *Associated Press*

AVANDIA MDL ASSIGNED TO JUDGE RIFE IN EASTERN DISTRICT OF PENNSYLVANIA

Our firm is handling a number of claims for persons who have had a bad experience with Avandia, the drug is manufactured by GlaxoSmithKline and is prescribed to help improve blood sugar control. Recently, an Avandia multidistrict litigation docket was created and assigned to U.S. Judge Cynthia M. Rife of the Eastern District of Pennsylvania. We are considering at this point whether our clients' claims should go to the MDL. My concern is why in the world does the FDA allow a drug that causes cardiovascular risks to be prescribed to a population at such a high CV risk already when older medications don't have this adverse side effect? The FDA has finally required a black box warning for Avandia. This is most significant, but sort of late in coming.

We have been contacted by persons who are diabetics and who have suffered heart attacks while taking this drug. We are continuing to investigate many of these potential claims. We have established strict criteria to be utilized to determine which type of claims we believe should be litigated. If you have a need for information concerning Avandia contact Frank Woodson, who is coordinating these claims for the firm, at 334-269-2343.

*****BUSINESS LITIGATION**

VONAGE SETTLES PATENT SUIT WITH SPRINT

Shares of Vonage Holdings Corp. more than doubled in value shortly after the Internet phone company settled the patent suit that had been filed by Sprint Nextel Corp. As reported last month, a jury in the U.S. District Court in Kansas City, Kansas, found that Vonage infringed on six Sprint patents, and ordered Vonage to pay \$69.5 million in damages. The settlement reached on October 8th resolves all claims in that suit for \$80 million. Sprint also agreed to license Vonage its portfolio of more than 100 patents on connecting calls between a regular telephone network and a packet-switched network such as the Internet.

However, the settlement does not resolve all of Vonage's legal troubles. In March, another jury awarded Verizon Communications Inc. \$58 million in damages and an additional 5.5% royalties on future revenues after finding that Vonage violated three Verizon patents. Vonage denies infringement and says it has deployed workarounds for two of the patented technologies. Questions are being raised about the future of standalone Internet telephone companies. Their subscribers use adapters to connect their phones to their broadband Internet connections, and pay around \$25 a month for unlimited domestic calling. Vonage was a pioneer in this market and was until last year the biggest player. But the company has seen a slowdown in subscriber growth, leaving it with 2.3 million subscribers at the end of the second quarter.

Source: *Associated Press*

SUPREME COURT ALLOWS LAWSUIT AGAINST HEWLETT-PACKARD TO PROCEED

The Supreme Court has allowed a class action lawsuit to proceed against Hewlett-Packard Co. that alleges Compaq, now a part of HP, sold defective computers. The court's action lets stand a 2005 ruling by an Oklahoma state court. The case involves a lawsuit by two Oklahoma residents, who allege that Compaq Computer Corp. sold them a defective computer and didn't repair or replace it as called for in the company's warranty. They filed suit in June 2003 and their lawyers asked the state court to certify a class of 1.7 million people who had bought similar computers. That request was granted in 2005. Compaq was purchased by Hewlett-Packard in 2002.

Source: *Associated Press*

*****INSURANCE AND FINANCE UPDATE**

AXA EQUITABLE LIFE CASE MOVES FORWARD

Firm Ann.

I reported previously that our firm, along with the New York law firm of Hanly, Conroy, had filed a case against AXA Equitable Life Insurance Company in Federal Court in the Southern District of New York for charging life insurance

rates based on a “smoker” status to policies that insured children. AXA Equitable claimed that they had done nothing wrong in charging children premiums based on a smoker rate. The Federal Court was asked to dismiss our complaint. Recently, the Court ruled on a number of legal issues, but ultimately ruled that AXA Equitable was not entitled to have the complaint filed against it dismissed. As a result, we can now move forward with the case. The plaintiffs’ claim that AXA Equitable breached the contract of insurance with all the insureds who paid an inflated premium based on insurance rates charged to children under a “smoker status” will now move forward. United States District Judge Paul A. Crotty wrote in his order:

The policies state that the cost of insurance will be ‘based on sex, attained age, and rating class of the insured person’ and that the application is part of the contract.” The contract therefore clearly requires that the rating class on which the cost of insurance is based be consistent with the answers Plaintiff provided on the application. If the Defendant maintains ‘smoker’ and ‘non-smoker’ rating classes, it may not apply a ‘smoker’ classification to Plaintiff’s children for purposes of determining the cost and benefits under the policies when the application indicates that they are non-smokers.

We will now go forward with case preparation and will prove that the practice of charging children an inflated premium by assigning a “smoker rate” to their policy is a breach of contract and just plain wrong. We will do everything in our power to put a stop to this shameful practice and return to the policyholders the inflated premiums that AXA Equitable has charged on policies of insurance issued on the lives of children. A nation wide class action status will be sought for all policyholders who fall into this category. Our goal is for AXA Equitable to return all of the money and other benefits derived from the improperly charged premiums on policyholders as a result of this breach of the insurance agreement.

Dee Miles, Jay Aughtman and I will be involved from our firm along with Andrea Bierstein from the Hanly, Conroy firm in the handling of this case. We will continue to update you on significant developments as they occur.

INSURANCE COMPANIES FIGHT TO KILL A BADLY NEEDED LAW

Lots of folks are watching a referendum in the state of Washington that could change how insurers are required to treat their customers on claims. Insurance giants like Allstate, State Farm, Safeco, and Farmers have spent close to \$10 million in the referendum battle and they have a well-defined mission. Their goal is to convince voters to reject a law passed earlier this year that could force an insurance company to pay up to triple damages and lawyers’ fees if the company fails to pay a legitimate claim and then loses in court. A "yes" vote on

the referendum allows the law to go into effect, while a "no" vote strikes the law down.

The new law forces insurance companies to pay legitimate claims in a timely and fair fashion and frees the courts from relatively minor cases that clog the system for months and even years. This surely seems like a good piece of legislation. The law came about as the result of Washington state lawmakers getting so many complaints from policy holders who believed insurers weren't treating them fairly. The lawmakers passed the law, aptly called "The Fair Conduct Act." As soon as the governor signed the bill into law, however, a coalition, funded primarily by insurance companies, moved in to stop the law from going into effect by filing petitions for a voter referendum on the law. Under Washington law that is allowed.

The state Insurance Commissioner, Mike Kreidler, strongly supports the new law. He should be in a position to know whether it's good or bad. He says that if insurance companies act responsibly, they have nothing to fear under the law. I agree with his assessment. The Commissioner told CNN in a recent interview:

If companies act in good faith, [they are] not going to have a problem. It's not going to cost any more money. There's not going to be any legal action. There's going to be no treble damages, because if companies deal with their customers in good faith there's no penalty.

The insurance industry-backed group has been running television commercials claiming that the law will lead to frivolous lawsuits and higher insurance rates. Where have we heard that line before? As we all know, that is not a new tactic by the insurance companies and it's wearing thin. Frankly, I don't believe the insurance industry will win this fight because "right" isn't on their side.

Earlier this year, *CNN* exposed a controversial insurance industry strategy that began in the mid-1990s. Former insiders from the industry admitted that insurance companies began limiting or denying legitimate claims in minor injury cases and as a result, reaped billions in profits. Judges told *CNN* that the strategy has tied up courts across the country with minor claims. The method of operation used by a number of insurance companies consisted of three elements: an initial delay in adjusting a claim; then after the period of delay, a denial of the claim; and ultimately defending the claim that was first delayed and then denied. Our firm has seen a tremendous number of instances in our practice in which an insurance company went to great lengths to avoid paying legitimate claims. I recall one case that we handled several years back when a well-known insurance company actually delayed paying a legitimate health insurance claim that would have saved a young man's life. We filed suit and

were able to prove an intentional scheme to avoid paying the claim. The company actually was buying time, hoping the teenager would die from his illness. The case was ultimately settled after several days of trial in federal court.

The new law in Washington will help make insurance companies pay valid claims promptly. Instead of causing more lawsuits, the law will actually reduce drastically the number of lawsuits. Hopefully, the people will win this fight against the insurance industry and its millions of dollars. If so, it will be a major accomplishment – sort of like the epic battle involving David and Goliath and that means the “good guys” win!

Source: *CNN*

THE ELDERLY MUST BE PROTECTED

I wasn't surprised to read where long-term care insurance companies were asked to explain “troubling data” regarding how policyholders' claims are handled and paid. Senator Charles E. Grassley (R-IA), in a letter to 11 of the companies, referred to data collected by the National Association of Insurance Commissioners, which indicated that nationwide complaints about long-term care insurance rose 92% from 2001 to 2006. The data also indicated that complaints involving claim denials resulted, in a majority of cases, in reversals that favored consumers. It's disturbing that the association found that these data revealed “a pattern of error not typically found in other lines of health-related insurance.”

Senator Grassley has asked the largest long-term care insurers, including Genworth Financial, Consec, and Penn Treaty American Corporation, to provide detailed information on how policyholder claims, inquiries, and denials are handled and whether employees receive rewards for denying claims. In March, *The New York Times* reported that some long-term care insurers had established procedures that made it difficult, if not impossible, for some policyholders to be paid. That article, which focused on Consec and Penn Treaty, was mentioned by Senator Grassley in his letters to insurers and by the House Committee on Energy and Commerce when it started a similar investigation back in May.

Nursing home care is another area of concern. Senator Grassley has also asked the Government Accountability Office to examine how private equity ownership has affected the quality of care in nursing homes. In particular, the senator, who is the top-ranking Republican on the powerful Senate Finance Committee, asked the agency to examine how many nursing homes had been bought by private investment groups and how conditions had changed after those homes were acquired. He also wanted the GAO to examine the number of health and safety deficiencies cited by regulators at those homes. A September report in the *Times* said that private equity firms had bought thousands of nursing

homes and then often cut expenses and staff, sometimes below minimum legal requirements, to increase profits. That is obviously unacceptable and can't be tolerated.

There will likely be a great deal of litigation over abuses in the long-term care insurance industry. In June, Conseco announced that it was setting aside \$250 million to pay a settlement in a class-action lawsuit brought by long-term policyholders. That same month, a subsidiary of Penn Treaty was suspended from operating in Florida after regulators said the company failed to file audited financial results. The company has appealed that ruling. It has been reported that many of the insurers are increasing their rates. Because raising rates and not paying claims can't be allowed, our governmental regulatory agencies have lots of work to do in order to protect the elderly in our population.

Source: *New York Times*

MINNESOTA SETTLES ANNUITY LAWSUIT WITH ALLIANZ LIFE

The State of Minnesota has settled a lawsuit with Allianz Life Insurance Co. involving annuities. Some seniors who might have died before they could get their annuity money back from the insurance company now can apply for refunds and interest under the settlement. Minnesota Attorney General Lori Swanson accused Allianz of selling annuities that weren't appropriate for older retirees. Many of them claimed they had been told they could get their money out, only to be forced to choose between onerous penalties or leaving their money in the annuity for years. Allianz, which also agreed to pay \$500,000 in fines and expenses, is the nation's largest seller of these types of annuities. The settlement has already been approved by a state court judge.

Folks who are over 65 and who bought Allianz deferred annuities after January 1, 2001, can apply for a full refund without penalties. More than 7,000 annuity holders with \$325 million worth of annuities are expected to get letters outlining the refund process. Annuity holders will have four months to apply for refunds. Allianz and the attorney general's office will decide jointly whether to grant the refund, but the settlement calls for them to "liberally construe" the facts in favor of the consumer. They will look for evidence that the annuity "was unsuitable on the date of application or that Allianz or its agent misrepresented the terms or conditions" of the annuity. A third party will settle disputes over who should get refunds. The Attorney General's office is also investigating other companies over similar practices. Golden Valley, Minnesota-based Allianz Life is a subsidiary of German insurer Allianz SE.

Allianz agreed to give closer scrutiny to annuities being sold to people over age 65. Annuity applicants who will be left with less than \$75,000 in liquid assets after they buy the annuity, or those with annual incomes of less than

\$20,000, will get extra scrutiny before they are allowed to buy the annuity. The new procedures are expected to result in Allianz rejecting "substantially more policies" than it does now. In discussing the lawsuit, the Attorney General observed:

These financial instruments are incredibly complicated. We have lawyers in the office who struggled to understand them. They're written in small print. They're extraordinarily complex. I believe they're intentionally designed to be complex. And that can lead to abuse, as well.

It's real good to see the Attorney General in Minnesota taking action to protect consumers in her state. In my opinion, that is the responsibility of any Attorney General. Unfortunately, some are hesitant to take legal action against large and powerful corporations that are politically active and are potential sources of large campaign donations. That reality is another good argument for why we badly need campaign finance reform.

Source: *Insurance Journal*

MORE RITA-RELATED LAWSUITS FILED IN SOUTHEAST TEXAS

The second anniversary of Hurricane Rita has brought a flood of lawsuits in southeast Texas. About 300 property-insurance lawsuits were filed related to the storm over a two week period. Most cases involve policyholders who claim their insurers have shortchanged them on storm damage. Many property owners also allege their insurance company used deceptive trade practices or violated the state insurance code. At the same time, a dispute has emerged over the deadline for filing the lawsuits.

Texas state law provides a four-year statute of limitations for filing contract disputes, but most homeowner policies give property owners two years and a day to file a lawsuit. Whether the two-year time period began at the date of the storm, or when policyholders began negotiating with their insurance company, has developed as a point of contention. Rita hit on September 24, 2005, packing 120 mph winds. At least nine were killed after the storm roared ashore and thousands of homes were destroyed.

The Texas Department of Insurance interprets the deadline as "two years and a day from the cause of action. The question is when does the "cause of action" begin. The insurance department says it's when the insurance company either "made a denial or chose not to act or made a settlement that was lower than what the person was hoping to get." But Allstate Insurance Co., which quit writing windstorm coverage in Texas coastal counties last year, says the deadline starts on the date of the storm.

Source: *Insurance Journal*

ANOTHER INSURANCE COMPANY SETTLES A KATRINA LAWSUIT

A federal trial in Mississippi involving Hurricane Katrina damage ended with a settlement between the insurance company and the Mississippi couple whose property was damaged by the storm. A jury had decided that the damage was caused by the storm's wind and should have been covered by the couple's policy. Terms of the settlement between USAA Casualty Insurance Co. and Kevin and Sherry Webster are confidential.

The jury had concluded that all of the damage to the couple's beachfront house in Bay St. Louis, Mississippi, was caused by Katrina's wind, wind-blown debris, or wind-driven rain - perils that are covered by the insurer's policies. USAA had argued that nearly all of the damage to the two-story home was caused by Katrina's flood waters and wasn't covered by the Websters' policy. The jury disagreed and found for the homeowner. USAA and other insurers claim their homeowner policies cover damage from a hurricane's wind, but not its rising water, including storm surge. The Websters didn't have a separate flood insurance policy. The couple contended that wind caused the house to collapse before the storm surge even reached it. The Websters' policy had limits of \$811,000 for the house, \$81,000 for a barn on their property, \$162,200 for living expenses and \$760,480 for the home's contents. USAA paid \$10,944 for wind damage to the house and \$42,929 for the barn.

The Websters had been seeking punitive damages for the company's alleged bad faith, plus lawyer's fees and expenses. All of the claims are now settled and that ends the case. The couple is among thousands of Mississippi and Louisiana property owners who have sued their insurers after Katrina devastated the Gulf Coast in August 2005. Several federal trials for Katrina insurance cases already have been held in Gulfport, Mississippi, with mixed results for policyholders. In August 2006, U.S. District Judge L.T. Senter Jr. ruled that Nationwide Mutual Insurance Co. wasn't obligated to pay a Pascagoula couple for damage from Katrina's rising water. A federal appeals court in New Orleans later upheld that ruling. But, in January a jury awarded \$2.5 million in punitive damages to a Biloxi couple who sued State Farm Fire and Casualty Co. for denying their claim. Judge Senter also heard that case and reduced the jury award to \$1 million. But, the judge found that State Farm had acted in a "grossly negligent way."

Source: *Insurance Journal*

FLORIDA COUPLE SETTLE KATRINA LAWSUIT AGAINST STATE FARM

Another Katrina-related lawsuit in a Mississippi state court was settled last month. The case over Hurricane Katrina damage ended with a settlement between the insurance company and a Florida couple. It was the first Katrina-related insurance trial to take place in a state court. Others have been tried in federal court. Florida residents Ray and Marie Van Meerten were seeking \$144,000 in coverage and the loss of rental of a Bay Saint Louis rental home that they claimed Katrina rendered uninhabitable on their property. They also sought punitive damages. A circuit judge had not yet ruled on whether punitive damages, which as you know are designed to punish bad corporate behavior, would be allowed in the case. Terms of the settlement between State Farm Fire and Casualty Company and the Van Meertens are confidential. Testimony indicated the Van Meertens' property was subjected to a storm surge of about 21 feet.

Source: *Associated Press*

STATE FARM AGREES TO LOWER RATES IN FLORIDA

Florida Governor Charlie Crist is working hard for citizens in his state and is making insurance companies toe the line. There have been lots of problems with insurance companies in Florida dropping policyholders and increasing rates. A \$47.5 million settlement with State Farm Florida and State Farm Mutual was announced recently by Attorney General Bill McCollum and Insurance Commissioner Kevin McCarty. This settlement softens but does not wipe out the insurer's premium increases or halt its cancellation notices. Commenting on the prospects for Floridians relating to long-term changes, Governor Crist observed:

I want long-term changes for State Farm, too, in the market in Florida. I want them to reduce their rates more. And I believe before we're done, they will.

Under the settlement mentioned above, the insurer agrees to lower its premiums an additional 2% - bringing the total cut since June to an average 9% - to comply with new laws passed in January. But those discounts will appear on bills that also carry a 52.7% increase approved last November. The decrease is also less than the overall 12% reduction State Farm's lobbyists in January told the governor's office to expect if lawmakers expanded hurricane protection for the industry. State Farm also agreed to discontinue practices regulators said were illegal - basing renewal decisions on whether a homeowner bought other insurance from the company, and giving discounts to those who agreed to give their hurricane risk to the state.

Other companies are under investigation for similar practices, according to Florida insurance regulators. Also as part of the settlement with State Farm, the

insurer must return \$23 million in overcharges to consumers over the next three months. The company was over-billing customers for their share of statewide hurricane assessments. In addition, the insurer agreed to notify 35,000 customers of State Farm Fire that, by virtue of their safe driving records, they are eligible for cheaper auto insurance from State Farm Mutual.

Along with assessing \$1.5 million in fees, the settlement ends multiple investigations, halts a state rate challenge, and cancels pending public hearings on State Farm's business practices in Florida. Apparently, State Farm still intends to continue its announced plan to drop some 50,000 Florida customers. Although State Farm remains Florida's largest private home insurer, its greatest interest in the state is its auto line - more than 2.5 million policies worth \$1.3 billion in premiums the first half of this year.

A separate state investigation continues into whether Florida insurers conspired to keep home insurance rates high. State Farm, Cincinnati, and Auto-Owners have been subpoenaed to turn over material regarding conversations with trade groups, rating agencies, and catastrophe modeling firms. Concerning this investigation, Governor Crist had this to say:

I think there's probable cause that other companies that are dealing in the state of Florida may be agreeing with each other to try to keep their rates high, but the jury is out on that because we're waiting to get these subpoenas back.

Governor Crist says his office is exploring what action to take against insurers that are using rate cuts ordered by the Legislature to seek increases instead. Three dozen insurers, led by Allstate, USAA, and Florida Farm Bureau, have filed for large increases. The governor believes these companies are "probably in violation of Florida law," and says that his office is "very interested in pursuing that action." In my opinion, the Florida governor is doing a very good job and should be commended for putting the interests of Florida first and foremost.

Source: *Tallahassee.com*

TRUSTEE OF BANKRUPT WEST VIRGINIA STEELMAKER SUES ZURICH

The trustee of the former Weirton Steel Corp. has filed suit against Zurich Specialties London Ltd., claiming the insurance company refused to pay a legitimate claim and now owes the bankrupt steelmaker's creditors \$39 million. The complaint, filed in U.S. District Court in Wheeling, West Virginia, accuses Zurich of breach of contract on a policy that covered Weirton following its May 2003 Chapter 11 bankruptcy filing. It's alleged that the steelmaker incurred unforeseen losses after an August 2003 fire at West Virginia's Pinnacle Mine

halted the delivery of coke. The mine, owned by U.S. Steel Corp. of Pittsburgh, supplied about 80% of the coke Weirton needed to produce raw steel. Koppers Inc. supplied the other 20%, but it told Weirton that it would not continue that supply beyond December 31, 2003.

The company filed a claim with Zurich in February 2004, specifying its losses in detail, but Zurich never paid the claim. Although Weirton Steel losses exceeded \$44 million, the company had a \$5 million deductible, making it a \$39 million claim. The bankruptcy settlement approved by a judge in 2004 provided only \$30 million to Weirton Steel's creditors, which include a trust set up to benefit employees. If the trustee wins the lawsuit or is able to reach a financial settlement with Zurich, the creditors would share the proceeds. The failure of the insurance company to pay Weirton's claim obviously had a very bad effect on the company's financial situation.

Source: *Insurance Journal*

SOME SCHOOLS ARE BEING SUED FOR VIOLATING THE FALSE CLAIMS ACT

Colleges and universities that obtain federal aid using fraudulent methods could face whistle-blower lawsuits if the number of False Claims Act cases that have been filed recently are any predictor of coming events. Whistle-blowers alleged that the University of Phoenix fraudulently obtained billions of dollars in student-aid money by paying recruiters incentives for boosting enrollment. That is a violation of a 1992 federal law banning such activities. In July 2007, Oakland City University, based in Oakland City, Indiana, agreed to pay \$5.3 million to settle a false claims active case. That university was also accused of paying incentives to recruiters. Additionally, a trial begins this month in a whistleblower case against Orange County, California-based Chapman University. The school is accused of making false statements about classroom hours in order to get more federal dollars for the school.

Universities that apply for federally funded student loan programs must follow the law. Schools should not be immune in any respect and must be held accountable when they cross the line. There are set rules and standards for getting government money and they must be followed. I predict that we will see more lawsuits brought under the False Claims Act involving colleges and universities. Schools that abide by the law, however, have nothing to fear. If you want additional information relating to whistle blower claims feel free to contact Larry Golston at 334-269-2343.

Source: *Associated Press*

*****PREDATORY LENDING**

CITIGROUP BUYS MORTGAGE ASSETS AND SERVICING UNIT FROM ACC CAPITAL

Ameriquest Mortgage Co., once the nation's largest subprime lender, has stopped doing business. Its parent company, ACC Capital Holdings, has sold its remaining mortgage assets and service business to Citigroup Inc. Citigroup agreed to buy the company's wholesale mortgage origination and servicing assets. It should be noted that ACC's only other holding was Ameriquest, which has been shut down, and for good reason. The acquisition includes servicing rights for \$45 billion worth of loans. Citigroup, the nation's largest financial institution, had agreed in February to provide working capital to Orange, California-based ACC Capital.

As part of that deal, Citigroup had an option to acquire the assets and become the company's primary warehouse lender. ACC Capital has been caught by a wave of delinquencies and defaults that have swept through the subprime mortgage market. In my opinion, however, the problems at ACC Capital were a direct result of Ameriquest's fraudulent lending practices. Over the past year, the company shut down a number of Ameriquest mortgage branch offices. It also consolidated call centers and cut thousands of jobs in the process.

In 2006, ACC agreed to pay \$325 million in a multistate settlement over claims of deceptive lending practices. As a part of the settlement, the lender agreed to provide borrowers with full disclosures on the terms of loans, stop giving its lending agents financial incentives to include higher fees or other penalties on loans, and change how it handles appraisals. Interestingly, many Ameriquest customers have refused to accept the attorneys general's settlement.

Our firm is proud to be a leading firm in helping borrowers who found the settlement to be inadequate with their claims. Ameriquest was a bad company that hurt lots of folks and that sort of thing simply can't be tolerated. Fortunately, the courts are still open to afford a remedy for wrongdoing by corporations like ACC Capital and Ameriquest. If you want more information relating to this matter, contact John Tomlinson or Bill Robertson, who are in our Consumer Fraud Section, at (334) 269-2343.

Source: *Associated Press*

ALABAMA PAY DAY LENDERS CREATE A LOBBY FORCE

According to media reports, a number of payday loan and title loan stores in Alabama have formed a "trade organization," allegedly created to boost the image of their businesses. The association, named the Council for Fair Lending,

reportedly is launching a \$50,000 advertising campaign called "Borrow Smart Alabama." It was stated that 200 of the 2000 payday lenders operating in Alabama have joined the new association.

Payday lenders are making a financial killing and are not subject to any real regulation in our state. Interest in Alabama for these predatory lenders is capped at roughly 456%, which is impossible to justify, and that may explain why they all are making so much money. The payday lending industry rakes in more than \$4 billion annually in fees. The Alabama Legislature should amend the very weak law passed a few sessions back so as to make the regulation of payday lenders meaningful. The current statute protects the lenders and does very little for their borrowing customers. I would prefer that the practice of payday lending be banned, but realistically, I know that won't happen now that they have an organized lobby group working for the industry.

Source: *Associated Press*

*****PREMISES LIABILITY UPDATE**

WISCONSIN JURY RULES FOR QUAD/GRAPHICS AND ITS INSURER

A Wisconsin jury has found that Quad/Graphics and its insurer are entitled to \$63 million in damages arising out of the 2002 collapse of a shelving system that ignited a fire at the publishing giant's Lomira plant in Lomira, Wisconsin. The jury divided fault among three manufacturers: HK Systems of New Berlin, (deemed 51% responsible); Rack Structures Inc. of Livonia, Michigan (found 39% responsible); and Leavitt Tube Co. of Chicago (held 10% responsible). The trial judge determined the overall damage amount, although how that amount will be divided among the manufacturers hasn't been determined. Some manufacturers or their insurers already paid some of the damages, while other defendants settled with Quad/Graphics for undisclosed sums before the trial began.

At issue was the July 2002 collapse of an automated shelving system in a two-month-old storage building. A number of welds in the shelving supports had been found to be defective, but the company was told during a meeting that the building could still be used. The defendants claimed that Quad/Graphics bore some responsibility for the accident because the company was aware of the problems. Obviously, the jury didn't buy that contention.

The shelf collapse ignited a fire that burned for three weeks, destroying the building, in which an estimated 108 million pounds of paper were stored. All Quad/Graphics employees evacuated safely, but a contractor died when his car was crushed by debris. Leavitt made the 100-foot tubes that ran from the floor

to the ceiling HK designed the system, and Rack Structures built the shelves. Sussex, Wisconsin-based Quad/Graphics is the world's largest privately held printing operation, with 12,000 employees worldwide.

Source: Insurance Journal

JURY RETURNS A \$50 MILLION VERDICT IN FATAL BLAST IN BALDWIN COUNTY LH

A Baldwin County jury has returned a \$50 million verdict in favor of the family of a Daphne man killed when the water heater in his home exploded. The trial lasted for over 2 weeks and the issue of fault was hotly contested. The 55-year-old husband and father had gone to check on the natural gas-fueled water heater in his family's garage on July 1, 2005. It was alleged and proved that the heater exploded because of a faulty valve. Milwaukee-based A.O. Smith, which built the heater, blamed the blast on a natural gas leak in the garage. The jury obviously didn't buy that argument.

The family had moved into the single-story brick home only a few months before the explosion occurred. Over a period of time, the family encountered a series of troubles with the water heater. In fact, there had been a call for service on the heater just days before the explosion. A repairman had come out and tried to fix a valve. It was proved at trial that a "used, old worn-out valve" had caused a clog, creating the potential for an explosion

On the day the trial began, a plumbing company that had worked on the heater, and the contractor that built the house, settled with the family for \$1 million each. Two of the five original defendants – an A.O. Smith representative and his worker – also settled for \$1,000 each after the trial had gone for several days. These were pro tanto settlements and I believe the remaining defendants elected to let the jury know about them.

My good friend Buddy Brown, a tremendously talented lawyer from Mobile, along with Skip Finkbohner, David Wirtes, George Dent, and David Cain from his firm, represented the family. These lawyers did an outstanding job in developing and trying this case. The outcome was a tremendous result for a family who had suffered a great loss. It's good to see justice done in the case!

Source: *Mobile Press Register*

TRAIN DERAILMENT SETTLEMENT APPROVED

A federal judge has given final approval to a \$7 million settlement in a class action lawsuit arising from a January 2002 derailment and chemical spill on the edge of Minot. The settlement is expected to provide money for thousands of people affected by the Canadian Pacific Railway wreck, which sent a deadly cloud of anhydrous ammonia over the area. One man died trying to escape the fumes. Distribution of settlement funds is expected to start in November. The settlement approved by U.S. District Judge Dan Hovland does not affect people who have filed individual lawsuits against the **Canadian Pacific**. The final number of persons who will benefit from the settlement won't be known until November 8th, the deadline to submit claims.

Source: *Forbes News*

***WORKPLACE HAZARDS

JUDGE INCREASES AWARD TO WAL-MART WORKERS TO \$141 MILLION

A Pennsylvania judge has ruled that Wal-Mart workers in Pennsylvania, who previously won a \$78.5 million class-action award for working off the clock, will receive an additional \$62.3 million in damages. About 125,000 people will receive an additional \$500 because of a delay in compensation. Philadelphia Common Pleas Judge Mark Bernstein wrote in his order:

The law in its majesty applies equally to highly paid executives and minimum wage clerks. Just as highly paid executives' promised equity interests or put options or percentage of sale proceeds are protected fringe benefits and wage supplements, so too the monetary equivalents of "paid break" time cashiers and other employees were prohibited from taking are protected fringe benefits and wage supplements.

This part of the court's order certainly makes sense. When you look at the large compensation packages of corporate officers, with all sorts of fringe benefits, it's refreshing to see working folks getting a break. A Philadelphia jury awarded the workers the exact amount they had sought last year, rejecting Wal-Mart's claim that some people chose to work through breaks or that the few minutes of occasional extra work were insignificant. The latest damages to be awarded are authorized by a Pennsylvania law that says a company can be penalized when it withholds pay for more than 30 days without cause. The judge wrote further in his opinion:

By this statute the Legislature created significant financial incentives for employers to pay workers all the money they've earned by their hard work.

Similar suits charging that Wal-Mart violated state wage laws are pending across the country. In one case, a California trial ended with a \$172 million verdict that Wal-Mart is appealing. The Bentonville, Arkansas-based company also settled a Colorado suit for \$50 million. A trial in Minnesota started recently and suits are pending in New Jersey and several other states. The Pennsylvania class-action suit involves current and former employees who worked at Wal-Mart and Sam's Clubs from March 1998 through May 2006. Having dealt with Wal-Mart in several lawsuits, I am not a big fan of the way the giant retailer treats its employees.

Source: *Associated Press*

JURY AWARDS \$11.6 MILLION IN SEXUAL HARASSMENT CASE

A federal jury in New York found against Madison Square Garden (MSG) and its chairman in a sexual harassment lawsuit. These defendants must pay \$11.6 million in damages to former New York Knicks executive Anucha Browne Sanders in her sexual harassment claims. The jury also found Knicks coach Isiah Thomas subjected Ms. Sanders, a mother of 3, to unwanted advances and a barrage of verbal insults. However, the jurors said Thomas did not have to pay punitive damages. The jury found MSG owes \$6 million for allowing a hostile work environment to exist and \$2.6 million for retaliation; MSG chairman James Dolan owes \$3 million. MSG is owned by Cablevision Systems Corp., based in Bethpage, New York, and Dolan is Cablevision's CEO. This verdict is seen as a significant victory for women in the workplace and perhaps one that is long overdue.

Source: *Associated Press*

JURY FINDS FOR VICTIM IN STRIP-SEARCH LAWSUIT

A circuit court jury in Kentucky awarded \$6.1 million – including \$5 million in punitive damages – to Louise Ogborn in her strip-search hoax lawsuit against her employer, the McDonald's Corp. Ms. Ogborn, who is 21-years-old, worked as a \$6.35-an-hour crew member at a McDonald's store. On April 9, 2004, she was detained, stripped, and sexually assaulted at the store. The incident occurred when a person called the store, pretending to be a police officer, and accused Ms. Ogborn of stealing a customer's purse. While the events that occurred are quite unbelievable, this was not the first time such a thing had happened at a McDonald's store. Incidentally, McDonald's claimed it had no

responsibility for any of the incidents, including this victim's ordeal. However, it was proved at trial there had been other victims of strip-search hoaxes at 40 of McDonald's other restaurants. Ann Oldfather, the lawyer who represented Ms. Ogborn, made this statement concerning the verdict:

We think this is a great day for employee safety in Kentucky. When McDonald's has to choose between its brand image and employee safety, they had better choose employee safety.

The jury attached a note with its verdict encouraging McDonald's to offer more training to its employees on sexual harassment and hoax calls. The manager had failed to question the caller's demands and actually brought in her then-fiancé to watch Ms. Ogborn. At the hoax caller's direction, this man proceeded to sexually humiliate the employee. Ms. Ogborn was one of dozens of victims of a hoax caller who over more than a decade duped managers at as many as 160 fast-food restaurants and other stores into strip-searching and sexually abusing employees. While many of those workers have sued their employers, the Ogborn case was the first to go to trial.

The jurors found McDonald's to be guilty of negligence, false imprisonment, premises liability, and sexual harassment. The jury awarded Ms. Ogborn \$1 million in compensatory damages for pain and suffering, lost enjoyment of life, and embarrassment, and an additional \$111,312 for future medical and psychiatric care. The jury also awarded \$5 million in punitive damages to punish McDonald's for "reprehensible" conduct and to deter the company and others from doing the same thing. McDonald's is expected to appeal the verdict.

The facts of this case were most unusual. McDonald's, despite knowing about the hoax caller and how he operated, failed to tell anybody at the store where Ms. Ogborn worked about him or about the other incidents. Apparently, neither were employees at other stores warned in any respect about these calls. While McDonald's adopted a policy in 2001 barring strip searches, it never instructed or trained any managers or other employees on the policy. Actually, the policy was hidden in a 1,000-page manual that was simply placed on an office shelf. McDonald's should learn a lesson from this jury verdict. It must not only have a policy relating to protecting employees, but the company must make sure all management employees know about it. McDonald's – as well as other corporations in the fast food business – must train their employees and conduct follow-up checks to make sure policies are both understood and followed. It is impossible to justify McDonald's conduct in this case. I hope McDonald's learned the lesson and remedial action will follow.

Source: *The Courier Journal*

LONGSHOREMAN SETTLES HIS LAWSUIT FOR \$13.2 MILLION

A longshoreman who was nearly crushed when a steel shipping container fell on his vehicle has settled his personal injury lawsuit for \$13.2 million. The settlement was reached by Michael Clarkin and his family in the lawsuit in a South Carolina state court. Mr. Clarkin was injured in his vehicle in November 2004 when a shipping container broke loose and dropped 50 feet onto his parked Ford Explorer. As many of you likely know, shipping containers are 20-foot-long steel boxes that can be lifted from ships onto trucks. Mr. Clarkin suffered injuries to his legs, back, and nervous system. His wife testified that he also is prone to angry outbursts and that the accident has affected his mental state.

Mr. Clarkin, a clerk who tracked the movement of shipping containers, was injured at the State Ports Authority's North Charleston Terminal. The machine that was lifting the containers malfunctioned and the container dropped. The failure was blamed on a design defect that was corrected after the accident. The settlement was reached with Kalmar Industries, which made the lifter; Gregory Poole Equipment Co., the distributor; and the Ports Authority. The total settlement is believed to be the largest ever in a personal injury case in South Carolina.

Source: *The Associated Press*

OSHA FINES ROOFING COMPANY

Kiker Roofing & Sheet Metal Contractors, located in Mobile, Alabama, has been fined by the federal government and required to pay workers' compensation benefits following the March death of one of its employees. The employee was helping replace the roof of a building on Bishop State Community College's main campus when he fell from a hole in the roof to the gymnasium floor below. The employee died from injuries sustained in the fall.

The Occupational Safety and Health Administration (OSHA), which investigated Kiker after the accident, found the company had committed two "serious" violations related to the use of guard rails or harnesses to prevent workers from falling. But the agency assessed the contractor only \$4,800 in fines.

In addition to the fine, OSHA could conduct follow-up inspections of Kiker work sites, according to a spokesman for the agency. The agency will "go back to ensure that safety is first and foremost," according to the spokesman. Stephen Moore, a Mobile lawyer, who is representing the family, is "at a loss to understand why Kiker wasn't fined more money."

This appears to have been a preventable death, and for that reason the fine doesn't appear to reflect the gravity of the conduct involved. The company has agreed to pay workers' compensation benefit to the family in an amount yet

to be determined. There will likely be a civil wrongful death lawsuit filed by the family. The roof should have been properly inspected by Kiker before workers were placed on it. Had this been done, this hazard and dangerous condition would likely have been identified and a life spared.

Source: *Mobile Press Register*

WRONGFUL DEATH LAWSUIT FILED OVER DEATH IN CRANE COLLAPSE

The parents of a Maryland man killed last year when a construction tower crane crushed his downtown apartment are suing the companies involved in the construction project. The victim was in his apartment next to the project on November 16th when the 217-foot-high crane suddenly collapsed on his building. The victim, a patent lawyer for Microsoft Corp., was the sole fatality. Investigators with the state Department of Labor and Industries fined the general contractor, Lease Crutcher Lewis, \$9,200 for failing to ensure that the crane was inspected and used properly, as well as for other problems.

Magnusson Klemencic Associates, the engineering firm that designed the crane's foundation, also was fined \$5,600 because the base did not meet manufacturer's requirements. Both firms are the defendants in a lawsuit filed recently in a New York state court. It was stated by the victim's father that residents around the construction project had "the right to expect that the companies responsible for the crane would make sure it was safe." The lawsuit was filed, according to the victim's mother, because the companies have refused to "acknowledge their responsibility" for the disaster that killed her only child.

According to a Lease Crutcher Lewis officer, the company has been working with others involved in the project "to determine who shares the blame for the collapse" and that "the companies involved in the crane event acknowledge that one or more of them are responsible and are analyzing the failure to determine which companies are." The company says it will continue to work toward a prompt resolution of all claims.

Source: *Philadelphia Inquirer Reporter*

*****TRANSPORTATION**

CELL PHONE USE BY DRIVERS IS DANGEROUS

Cellular telephones, which have now become commonplace, are quite often factors in causing traffic accidents. David Strayer, a University of Utah psychiatry professor, authored a study that showed drivers talking on cell phones perform as poorly as those who drive under the influence of alcohol. Dr. Strayer observed that "people become pretty bad drivers when they are talking on the phone." His study referred to "inattention blindness," and that's an apt description of what occurs when drivers get preoccupied while talking on a cell phone.

Drivers talking on cell phones are four times more likely to be in an accident. Unlike European countries, which have mostly outlawed cell phone usage while driving, the United States has failed to prohibit cell phone use by drivers. Only four states and the District of Columbia ban it. A number of states restrict phone use among drivers under 18 or require that users employ hands-free devices.

Once thought of as the cure for driver distraction, headsets or other hands-free devices saw their value placed into serious question by a major 2005 study done by the Virginia Tech Transportation Institute. The study concluded that the conversation itself, not the device, was distracting, and that headsets provide only "an illusion of greater safety." Scientists who probe the human brain have figured out why: That portion of the brain that is responsible for an engaged conversation overwhelms the part that controls visual acuity. Put simply, the more we talk, the less we see. Researchers at Johns Hopkins University have proved it with experiments involving people whose brains are being scanned with magnetic resonance imaging machines. Because of advances in cell phone technology, motorists can now send text messages and check their e-mail, while driving a vehicle. Lisa Lewis, founder of the Partnership for Safe Driving, had this to say relating to cell phone use:

It's a major factor in crashes. We don't need any more studies to tell us that. We've got plenty of victims to tell us that.

The wireless phone industry's trade association claims that it usually takes no position on measures before state legislatures, which is hard to believe. As widely reported, the industry has been successful in keeping legislative bodies from passing bills to either ban or restrict cell phone use. Their lobbyists carry a lot of weight and have beaten back the attempts to pass legislation in almost every instance. Personally, I believe that cell phone usage by drivers is very dangerous and should be banned. Few people – if any – can safely drive in traffic while carrying on a conversation on a cell phone. It's a real safety hazard that puts motorists on our highways at great risk.

Source: *Houston Chronicle*

AIR AMBULANCE SERVICE PLANE CRASHES

Several issues back, we wrote on the history of crashes associated with air ambulances or medical transport planes. Recently, a Birmingham man was among three people killed in the crash of a medical plane owned by Eagle Air Med that slammed into a southern Colorado mountain. The pilot, who was killed in the crash, was an experienced pilot with 22 years of flying. Also killed in the crash were a flight nurse and a flight paramedic. The wreckage was found on October 5th and the National Transportation Safety Board is currently investigating the accident. Thus far it's not clear what caused the crash. The crew had left Chinle, Arizona, in the twin-engine Beech King Air C-90A to pick up a patient in Alamosa, Colorado, but never arrived. According to Eagle Air Med, the pilot made no distress calls to the company's communications center. Apparently, the pilot had a good flying record.

Source: *Associated Press*

LAWSUIT IN DEADLY 2004 TRUCK CRASH SETTLED

Relatives of some of the 10 people killed and two others injured when a tractor-trailer slammed into oncoming traffic in 2004 have settled their civil suit against the driver and owners of the 18-wheeler. Although the amount of the settlement is confidential, it ends all civil litigation arising out of the crash, which involved the 18-wheeler crashing into a pickup truck and a sports utility vehicle. Five people in the truck were killed. The five victims in the SUV who were killed included a mother, her three young children, and their grandmother.

The settlement was reached as jury selection was scheduled to begin last month in a U.S. District Court in Texas. The original lawsuit was filed on behalf of the family of Manuel Esparza, who was among seven roofers in the pickup truck that was one of the vehicles struck by the 18-wheeler. The impact was so severe that the pickup was nearly torn in half. The driver of the 18-wheeler was sentenced to 10 years in prison last year after pleading guilty to 10 counts of manslaughter. Dean Gresham, a lawyer from Dallas, Texas, was the lead lawyer for the plaintiffs in this litigation.

Source: *Associated Press*

ALABAMA'S GUEST STATUTE SHOULD BE REPEALED OR HELD UNCONSTITUTIONAL

When you hear the term "guest statute," you probably think that it has something to do with a visit at somebody's home or staying overnight at a hotel. Well, think again. In Alabama, the term actually has to do with the status of a person riding as a passenger in a motor vehicle. Back in the late 1920s and early 1930s, nearly all states passed laws classifying passengers in motor vehicles.

Their relationship with the driver was the key to the classification. This was done for the legal protection of drivers of motor vehicles. An occupant was either a “guest” or a “passenger.” This classification was determined by whether the passenger conferred a benefit (usually money) on the driver. If the driver was merely giving an occupant a gratuitous ride, the occupant was labeled as a “guest,” and that changed the duty owed by the driver in his operation of the vehicle to the passenger.

Why would this classification be important to the driver of a motor vehicle? A guest statute would determine whether the driver of a vehicle had any legal responsibility to passengers in the vehicle. Many states passed laws called “guest statutes” over 75 years ago. Since then many courts have declared these types of statutes to be unconstitutional. In 1935 the Alabama Legislature passed what has become known as the “Alabama Guest Statute,” which was quite similar to laws passed by other state legislatures. The Alabama law reads as follows:

the owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment thereof, in and upon said motor vehicle, resulting from the operation thereof, unless the injuries or death were caused by the willful or wanton conduct of the operator, owner or person responsible for operation of the motor vehicle.

§32-1-2 Code of Alabama

Under the Alabama law, the passenger must prove either wanton or willful conduct on the part of the driver in order to receive damages. That is a rather harsh burden to put on a person who has been badly hurt in a motor vehicle accident. When examining the history and background of why the Alabama Legislature and other legislative bodies across the country enacted guest statutes, you will find it was to protect drivers who could be sued for simple negligence by occupants in their vehicle in case of an accident. Even though the reasons why these statutes were enacted may have been valid 75 years ago, those reasons are no longer valid. Interestingly, no state has enacted a law of this sort since 1939.

Beginning in the early 1970s, many of these statutes began to be challenged on constitutional grounds, involving both state and federal equal protection arguments. Under an “equal protection” argument, the challenge was to show whether the legislative classification, which excluded a certain class of persons, was rationally related to the object of the statute. The Alabama “Guest Statute” was challenged in 1975, but was upheld as being constitutional. In that opinion, one Justice commented that it was up to the legislature to amend or repeal the current statute. It has been 30 years since that case was decided. During that time, the Alabama legislature has failed to either repeal or amend the

current law. There have been a couple of other unsuccessful constitutional challenges to the “Guest Statute.” Interestingly, the Alabama Supreme Court has never determined the Act in question to be rationally related to a legitimate state interest. It’s time for the Act to be found unconstitutional either on federal or state equal protection grounds. That is what has happened in nearly every state. Alabama is one of only three states that still have a “Guest Statute” in place. This is a law that no longer has any application to modern times. Mike Crow, who handles claims arising out of motor vehicle crashes for our firm, contributed to this part of the Report. Mike is convinced that the existing Alabama law should be either repealed or held unconstitutional by the courts, and I totally agree with him.

*****ARBITRATION UPDATE**

MAJOR ARBITRATION FIRM RULES AGAINST CONSUMERS

Consumers who expect justice in disputes with their credit card companies shouldn't expect to find it in binding mandatory arbitration, according to a new Public Citizen report. I wasn't surprised to learn that in cases decided in California by a major arbitration firm over a four-year period, consumers lost 95% of the time. Further, virtually all were collection cases filed against consumers by credit card companies or by firms that buy debts from these companies. This indicates why credit card companies are using arbitration as a means to collect debts. The report, "The Arbitration Trap: How Credit Card Companies Ensnare Consumers," was released at a news conference on September 28th. Several lawmakers who have introduced legislation to protect consumers from arbitration, and a real victim of unfair arbitration proceedings, appeared at the news conference, along with representatives from Public Citizen.

Public Citizen reveals the close and dangerous relationship that exists between credit card companies and the private arbitration firms that decide their mandatory, binding arbitration cases. The result of an eight-month investigation provides, for the first time, a comprehensive analysis of data on nearly 34,000 arbitration cases, and in-depth stories of credit cardholders and their struggles in what is described as a “nightmarish system.”

The report focuses on the National Arbitration Forum (NAF), referred to as the “go-to” arbitration forum for the credit card industry, which is a major player in the California arbitration business. Between January 1, 2003, and March 31, 2007, arbitrators working for Minneapolis-based NAF ruled for businesses in 95% of the California cases examined. In fact, 90% of the NAF cases were handled by only 28 arbitrators, who awarded \$185 million to businesses. One arbitrator actually handled 68 cases in a single day – which indicates what sort of trial a consumer gets in arbitration – and ruled consistently against the consumers.

That is an average of one every seven minutes, assuming an eight-hour day. It's not surprising that this arbitrator ruled for the business in every case, awarding 100% of the money requested. It may be significant that this arbitrator is a lawyer with his own practice representing business and corporate clients. Public Citizen President Joan Claybrook had this to say concerning the unsavory use of arbitration:

People shouldn't have to give up their legal rights just to get a credit card. This is a system that is unfair to consumers, many of whom are struggling financially, and a huge gift to big business. We need to ban mandatory arbitration clauses in consumer contracts now.

Senator Russ Feingold (D-WI), who, along with Rep. Hank Johnson (D-GA), has introduced the Arbitration Fairness Act of 2007 (S. 1782 and H.R. 3010), made this statement concerning Public Citizen's report:

Public Citizen's excellent report provides solid evidence of the abuses that take place when consumers are forced into binding mandatory arbitration agreements. It's time to restore choice to consumers and employees, and restore the effectiveness of the laws Congress has passed to protect them.

The Arbitration Fairness Act of 2007, if passed, would ensure that citizens have a real choice between arbitration and the traditional civil court system by requiring that agreements to arbitrate employment, consumer, franchise and civil rights disputes may be made only after a dispute has arisen. The act would prevent a corporation with greater bargaining power from forcing individuals into arbitration through a contract. As we all know now, buried in the fine print of millions of customer-service agreements for everything from credit cards to cell phones, as well as employment contracts, binding mandatory arbitration clauses require customers to agree to settle any grievances through arbitration. This results in folks being forced to forgo their to a trial by jury.

Arbitration is being required before any dispute occurs, which can never be justified in a consumer transaction for obvious reasons. If arbitration is good for both individual consumers and corporations, why not just allow agreements to arbitrate only after a dispute arises? Instead, we are seeing it either forced on consumers or hidden away in the small print of a document – long before any dispute arises.

Most people don't realize, that by accepting a credit card, they are giving up their right to go to court if they ever have a dispute with the company. In fact, folks are being forced into a system in which the company holds all the cards. Not only do the companies hire the arbitrators and funnel millions of dollars of business to arbitration firms - giving arbitrators a financial incentive to rule for the company - but proceedings are also very costly to consumers. Pretrial discovery

and document exchange is rarely a part of arbitration. Also, the proceedings and the results are generally kept secret. Consumers who want due process in arbitration must pay, and the costs are substantial. The costs are in the thousands in many cases. In fact, the award doesn't even cover the expenses incurred by consumers in many cases that go to arbitration.

Public Citizen focused on California data for a good reason – California is the only state that requires arbitration providers to disclose any information about arbitration results. In all other states, there is no oversight or accountability and no disclosures required. Public Citizen's investigation revealed “customers left in the shadows of arbitration, often spending years fighting off collection agencies; cleaning up identity theft messes; untangling themselves from administrative bungling and trying to bounce back from credit rating hits.”

As the American public has learned – to their detriment – mandatory arbitration clauses that are binding are found in just about all consumer contracts for goods and services, including things such as credit cards, cell phones, auto insurance, mortgages, car purchases, car loans, and even nursing home admissions. Customers who sign such contracts are often unaware that they are agreeing to give up their rights to sue in court when they have a dispute with the company. Laura MacCleery, director of Public Citizen's Congress Watch division, had this to say:

Binding mandatory arbitration is a systematic, privately funded denial of justice for consumers. It is a get-out-of-jail-free card for corporate hucksters.

The only way for consumers to ever get any real relief from the evils of arbitration is for Congress to act. That's why it's so important that folks back home contact their U.S. Representatives and Senators and ask them to support and vote for the bill referred to above. The courts can help, but that approach hasn't proved to work to any great extent. That leaves the issue in the lap of Congress. The full report by Public Citizen is available at http://www.citizen.org/documents/Final_wcover.pdf. If you would like to have a case-specific account of how bad the arbitration trap for consumers who are caught in it, let Shanna Malone know at (334) 269-2343. She will send you the tragic story of how **Troy Cormock** was caught in the trap, how he fought for years to get out and how much it cost, him to finally escape. We will also make the Cormock story available on our Web site, www.BeasleyAllen.com.

*****HEALTHCARE ISSUES**

MEDICARE AUDITS REVEAL SERIOUS PROBLEMS IN PRIVATE PLANS

It appears that tens of thousands of Medicare recipients have been victims of deceptive sales tactics and had claims improperly denied by private insurers. These private insurers run the system's huge new drug benefit program and offer the other private insurance options encouraged and supported by the Bush Administration. A review of scores of federal audits has found this to be factual. The problems, described in 91 audit reports reviewed by *The New York Times*, include the improper termination of coverage, huge backlogs of claims and complaints, and a failure to answer telephone calls from consumers, doctors and drugstores. Medicare officials have required insurance companies of all sizes to fix the violations by adopting "corrective action plans."

Since March, Medicare has imposed fines of more than \$770,000 on 11 companies for marketing violations and failure to provide timely notice to beneficiaries about changes in costs and benefits. The companies include three of the largest participants in the Medicare market, UnitedHealth, Humana, and WellPoint. My brother Billy, who owns two drug stores, tells me that dealing with the insurance companies and plan benefit managers has been a major problem.

The audits document widespread violations of patients' rights and consumer protection standards. Some violations could directly affect the health of patients. Of the audits conducted by the Department of Health and Human Services, 39 focused on drug benefits, 44 focused on managed care plans, and 8 examined other types of private plans. According to Medicare officials, compliance problems occurred most often in two areas: marketing and the handling of appeals and grievances related to the quality of care. Many of the marketing abuses occurred in sales of the fastest-growing type of Medicare Advantage product, known as private fee-for-service plans. In June, the government announced that seven of the leading companies in this market, including UnitedHealth, Humana, and Coventry, had agreed to suspend marketing of these plans. Medicare recently allowed them to resume marketing after they took steps to monitor their sales agents more closely.

Each Medicare plan has a list of preferred drugs, known as a formulary. Under federal law, patients can request coverage of other drugs that may be medically necessary. But many insurers can't respond to these requests because they do not have procedures to handle them. The findings set out below were typical of the deficiencies described in Medicare audit reports:

- **UnitedHealth**, which serves more than six million Medicare beneficiaries, did not have an "effective program" to supervise its marketing representatives, agents and brokers. In some cases, United improperly denied claims without giving any explanation to beneficiaries.
- **WellPoint**, one of the nation's largest insurers, had "a backlog of approximately 354,000 claims" at certain Medicare plans offered through

its UniCare subsidiary. The company's call center took an average of 27 minutes to answer phone calls from its members and 16 minutes to answer calls from health care providers. More than half the callers hung up before speaking to a company representative.

- In March, **Sierra Health Services** ended drug coverage for more than 2,300 Medicare beneficiaries with H.I.V./AIDS, saying they had not paid their premiums. In many cases, the premiums had been paid, and beneficiaries had canceled checks to prove it. Sierra initially refused to reinstate them, but eventually agreed to do so after repeated requests from federal officials.
- **Humana**, which covers more than 4.5 million people on Medicare, promised to investigate every complaint about its marketing practices, but it received so many complaints that it could not keep up. Many beneficiaries said they had received incorrect information from Humana agents. Medicare officials said some agents had not been adequately trained or supervised.
- **Humana** did not always tell beneficiaries about changes in its list of covered drugs. In some cases, Humana did not explain its reasons for denying claims and did not inform beneficiaries of their appeal rights.
- **The Sterling Life Insurance Company**, a subsidiary of the Aon Corporation, did not pay claims correctly or handle appeals in a timely way. The company has "a demonstrated pattern of failure" to meet Medicare performance standards. Problems were compounded by a rapid growth in enrollment.
- Two sponsors of popular Medicare drug plans, **MemberHealth** and **Bravo Health**, did not act on requests for coverage of specific drugs within 72 hours, as required by the government. Bravo did not comply with federal rules requiring doctors to review all claims denied for a "lack of medical necessity."

Deceptive sales practices by insurance agents who prey upon the elderly and disabled to sell them expensive and inappropriate private Medicare plans simply can't be tolerated. Kathleen Healey, a lawyer with the Alabama Department of Senior Services, described how some of the fraud occurs:

Despite the prohibition of door-to-door marketing, agents arrive on residents' doorsteps stating that the president sent them, or that they represent Medicare. Some telemarketers insist they are calling from Medicare, and they tell beneficiaries that they will lose their Medicare if they do not sign up for the telemarketer's plan.

As soon as the new law went into effect, the insurance companies sent agents door-to-door in Alabama. Many of these agents took advantage of folks. The companies sold plans that turned out to be bad for the enrollees, and this has caused serious problems. It should be noted that every enrollee in a private Medicare plan is a potential source of substantial profits to the companies. So far the pharmaceutical companies, the insurance companies, and the plan benefit managers have been the real winners under the Prescription Drug Act. Folks who are supposed to benefit under the Act found themselves victims of fraud and abuse on too many occasions. The taxpayers have to be considered as big time losers because of the tremendous costs of the program, which now run in the trillions!

Source: *New York Times*

LAB MIX-UP RESULTS IN MASTECTOMY

It is being reported that medical laboratories are experiencing an increased number of mistakes. Clearly, lab errors can cause significant problems when they occur. Even though all of the consequences aren't always bad, some are very bad and those cause great harm. A recent incident illustrates the adverse effects of a bad lab error. When she heard the diagnosis of invasive lobular carcinoma, Darrie Eason had but one thought: "Please don't let me die." Four months and a double mastectomy later, her doctors told Ms. Eason that her tissue sample had been mislabeled, and that she never had cancer. Ms. Eason, a 35-year-old single mother from Long Beach, New York, described her ordeal:

They told me I had cancer, and now they're telling me I didn't. I didn't know if the next day they were going to call me and say, "Sorry, we made a mistake, you really do have cancer."

According to a New York state health department report, Ms. Eason was the victim of a mix-up at the CBLPath medical lab in Rye Brook, New York. After getting the truth, she sued CBLPath in a state Supreme Court seeking damages. The state report, issued in August 2006 to CBLPath, refers to a company report that blamed the mix-up on a technician who admitted cutting corners while labeling tissue specimens. Even though her case may be settled, the lab involved has a duty to correct the problems that caused Ms. Eason harm. Other labs should also take all necessary steps to avoid errors of this sort.

While the state report found "no systemic problems" at CBLPath, Ms. Eason believes the lab must be held accountable. If a lab diagnoses a person as having cancer, that person will believe they have cancer. Folks are entitled to have faith and trust in systems that are supposed to be reliable. Ms. Eason's doctors weren't sued because they were working with flawed information

provided to them by CBLPath. Hopefully, mistakes of this magnitude are rare, but we have learned they do happen. Jim Conway, a senior fellow at the Institute for Health Care Improvement, a not-for-profit health research organization in Cambridge, Massachusetts, says labs must create systems that prevent human errors from going unchecked. He says systems must be put in place that will “mitigate chances of a human being making a mistake.” That surely doesn’t seem too much to ask of the owners of labs across the U.S.

Source: *Newsday*

ACCIDENTS AT HIGH-RISK BIOLABS INCREASING

I was shocked to learn that laboratories in the U.S. handling the world's deadliest germs and toxins have experienced more than 100 accidents and missing shipments since 2003. To be told that the number is increasing steadily is even more disturbing. It's fortunate that thus far no one has died. At least, there are no deaths reported. Regulators claim the public was never at risk during these incidents. But the documented cases reflect poorly on procedures and oversight at high-security labs. It's significant, and of great concern, that some of the labs work with organisms and poisons so dangerous that illnesses they cause have no cure. In some cases, labs have failed to report accidents as required by law. All of this makes the risk extremely dangerous.

The mishaps include workers bitten or scratched by infected animals, skin cuts, needle sticks, and more, according to a review by the *Associated Press* of confidential reports submitted to federal regulators. These reports describe accidents involving anthrax, bird flu virus, monkeypox, and plague-causing bacteria at 44 labs in 24 states. More than two-dozen incidents are still under investigation. It appears that the number of accidents has risen steadily. Through August, the most recent period covered in the reports obtained by the *Associated Press*, labs reported 36 accidents and lost shipments during 2007 — nearly double the number reported during all of 2004.

Clearly, research labs are extremely important because they work to find cures and treatments for diseases. But, the expansion of the lab network has been dramatic under the Bush Administration. The National Institute of Allergy and Infectious Diseases funds much of the lab research and construction. The Institute spent about \$41 million on bio-defense labs in 2001. By last year, the spending had risen to \$1.6 billion. The number of labs approved by the government to handle the deadliest substances has nearly doubled to 409 since 2004. You may be shocked to learn — as I was — that the labs are routinely inspected by federal regulators just once every three years. I pray the U.S. won't experience a public health incident with potentially catastrophic consequences as a result of what appears to be a real problem.

Rep. Bart Stupak (D-MI), chairman of the House Energy and Commerce investigations subcommittee, is conducting an investigation of the lab incidents. The first hearing was held last month. The reports referred to above were so sensitive the Bush Administration refused to release them under the Freedom of Information Act, citing an anti-bioterrorism law aimed at preventing terrorists from locating stockpiles of poisons and learning who handles them. Because of the seriousness of the matter, I will set out some of the previously undisclosed accidents:

- In Rockville, Maryland, ferret No. 992, inoculated with bird flu virus, bit a technician at Bioqual Inc. on the right thumb in July. The worker was placed on home quarantine for five days and directed to wear a mask to protect others.
- An Oklahoma State University lab in Stillwater in December 2006 could not account for a dead mouse inoculated with bacteria that causes joint pain, weakness, lymph node swelling, and pneumonia. The rodent — one of 30 to be incinerated — was never found, but the lab said an employee "must have forgotten to remove the dead mouse from the cage" before the cage was sterilized.
- In Albuquerque, New Mexico, an employee at the Lovelace Respiratory Research Institute was bitten on the left hand by an infected monkey in September 2006. The animal was ill from an infection of bacteria that causes plague. "When the gloves were removed, the skin appeared to be broken in 2 or 3 places," the report said. The worker was referred to a doctor, but nothing more was disclosed.
- In Fort Collins, Colorado, in January 2004, a worker at a federal Centers for Disease Control and Prevention (CDC) facility found three broken vials of Russian spring-summer encephalitis virus. Wearing only a laboratory coat and gloves, he used tweezers to remove broken glass and moved the materials to a special container. The virus, a potential bio-warfare agent, could cause brain inflammation and is supposed to be handled in a lab requiring pressure suits that resemble space suits. The report did not say whether the worker became ill.
- There have been leaks of contaminated waste, dropped containers with cultures of bacteria and viruses, and defective seals on airtight containers. Shipments had gone missing or been lost, including plague bacteria that was supposed to be delivered to the Armed Forces Institute of Pathology in 2003. A wayward shipment was discovered eventually in Belgium and apparently was incinerated safely.
- Texas A&M's laboratory failed to report, until this year, one case of a lab worker's infection from Brucella bacteria last year and three others

workers' previous infection with Q fever. The illnesses are characterized by high fevers and flu-like symptoms that sometimes cause more serious complications.

- A worker at the Army's biological facility in Fort Detrick, Maryland, was grazed by a needle in February 2004 and exposed to the deadly Ebola virus after a mouse kicked a syringe. She was placed in an isolation ward called "The Slammer," but the Army said she did not become ill.
- In Decatur, Georgia, a worker at the Georgia Public Health Laboratory handled a Brucella culture in April 2004 without high-level precautions. She became feverish months later and tested positive for exposure at a hospital emergency room in July. The worker eventually returned to work.
- In April this year at the Loveless facility in Albuquerque, an African green monkey infected intentionally with plague-causing bacteria reached with its free hand and scratched at a Velcro restraining strap, cutting into the gloved hand of a lab worker. The injured worker at the Lovelace Respiratory Research Institute received medical treatment, including an antibiotic.
- The National Animal Disease Center in Ames, Iowa, reported leaks of contaminated waste three times in November and December 2006. While one worker was preparing a pipe for repairs, he cut his middle finger, possibly exposing him to Brucella, according to the confidential reports.
- A researcher at the CDC's lab in Fort Collins, Colorado, dropped two containers on the floor last November, including one with plague bacteria.
- A worker at Walter Reed Army Institute of Research-Naval Medical Research Center in Silver Spring, Maryland, sliced through two pair of gloves while handling a rat carcass infected with plague bacteria. The May 2005 report said the worker was sent to an emergency room.

Whenever a lab suffers a theft, loss, or release of any of 72 substances known as "select agents" — a government list of germs and toxins that represent the horror stories of the world's worst medical tragedies for humans and animals — a report must be submitted to regulators. We must make sure that U.S. labs are safe and that all incidents like those mentioned above are promptly disclosed to the government. If a killer agent is ever set loose in the general population, the potential for a disaster is obviously very great.

Source: *Associated Press*

SIPPY CUP CHEMICAL CAUSES CONCERN

With all the recent recalls involving children's toys, many parents are taking extra steps to protect their children. Unfortunately, there are lots of folks who don't always get recall information. However, the vast amount of media attention that's been given to the lead problem in toys for children in the U.S. has most likely been received by most adults who have small children. Another area of concern has developed since it's been reported that some children's sippy cups may have a harmful chemical in them. A report authored by Dr. Frederick Vom Saal, a biologist at the University of Missouri, warns that a chemical, Bisphenol-A or BPA, used to make a wide variety of plastic goods, including most baby bottles, may not be safe. This is something that most parents wouldn't normally know.

The National Toxicology Program recently held a meeting with 12 independent scientists to evaluate BPA. After three days, the group found that exposure to BPA presents some risk to human development and reproduction. Scientists do say, however, that it will take more research to confirm what those risks are, including how much of the chemical that is contained in the products actually gets ingested by people. Nevertheless, parents should be made aware of the potential for harm and take whatever appropriate action they deem necessary. The federal Food and Drug Administration should actually take the lead in this matter and determine what course of action should be taken. The agency has an obligation to investigate and determine if BPA does present significant risks.

Source: *NBC News*

JURY AWARDS \$6 MILLION IN WRONGFUL DEATH AGAINST WALGREENS

A jury has returned a verdict in favor of the family of a high school wrestling coach who died of a toxic drug interaction in December of 2002. The \$6 million award is believed to be the highest amount awarded by a jury in the history of Coconino County, Arizona. On December 22, 2002, Eric Warren, a coach at a local high school, was found dead in his home. The autopsy report later determined that he had died from a toxic interaction between two pain medications -- Tramadol and Methadone. The coach had been suffering from a variety of pains that were being managed with medication prescribed by his family doctor.

In October 2004, the family filed a wrongful death suit in state court, alleging among other things that the pharmacy that dispensed the medication, Walgreen Arizona Drug Company, was at fault and caused the death. It was contended that Walgreen's staff had been given a computer warning on the drugs' toxic interaction and was duty-bound to warn its customers and his doctor of the danger. Testimony at trial revealed that no such warnings were given.

Walgreen's responded by saying that their customer was himself negligent, causing his own death, or that the doctor was negligent in prescribing the medication, which caused the death. The jury concluded that Coach Warren was 1% responsible for his death with the doctor being 2% responsible. They found Walgreen's to be 97% responsible for the death. The jury awarded \$2 million each to the decedent's two children, and \$1 million each to his parents. The Flagstaff doctor who prescribed the pain medications has reached a separate settlement of an undisclosed amount with the Warren family.

Source: *Associated Press*

WALGREEN & CO. IS SUED OVER MISFILL ERROR

LH

A wrongful death lawsuit has been filed in a Missouri federal court by a couple over the death of their unborn child. A suburban St. Louis woman miscarried after she learned the pills that she thought were prenatal vitamins were actually a potent chemotherapy drug. It was alleged that the unborn child died as a result of the mother taking this drug over a period of time. The lawsuit, filed against Walgreen Co., whose pharmacy is said to have dispensed the wrong medicine, contends that the company failed to properly supervise pharmacy personnel who dispensed the medicine, failed to verify the prescription with the woman's doctor, and failed to follow appropriate protocol. It's alleged that Walgreen instead of dispensing a prescription for Materna, a prenatal vitamin, gave the customer Matulane, a chemotherapy drug for treatment of Hodgkin's disease. The drug is actually designed to interfere with cell growth and DNA development. It's difficult to see how in the world an error of the magnitude described could have happened. This case will be watched closely as it develops.

Source: *Insurance Journal*

FDA PANEL URGES BAN ON MEDICINE FOR CHILD COLDS

LH

A Food and Drug Administration advisory panel voted last month to ban popular over-the-counter cold products intended for children under the age of 6. The panel found there was no proof that the medicines eased cold symptoms in children, while there are rare reports that they have caused serious harm. If put into practice, the ban will have a drastic effect on the way parents cope with the most common illness in young children. These products are now available without a medical doctor or pharmacist being involved in any manner. The vote came a week after major manufacturers agreed to withdraw more than a dozen cold products labeled for use in infants and babies. But, never doubt that manufacturers won't fight the new recommendations. If the agency decides to adopt the committee's recommendation, it must undertake a rule-making process

that can “take anywhere from one to many years,” according to Dr. Jenkins, director of the office of new drugs at the FDA.

The products under review include such common brand names as PediaCare, Robitussin and Triaminic, which are made, respectively by Johnson & Johnson, Wyeth and Novartis. It’s significant that some of these products are directly marketed for infants and other children under 6. There are currently about 800 pediatric cold products sold in the United States that use one or more of 39 different drugs. Parents spend around \$500 million every year buying nearly 95 million boxes containing 3.8 billion doses of medicine. The panel voted by a 15 to 7 vote to allow the continued marketing of medicines intended for children 6 and older. It voted unanimously to require standard measuring devices with products to cut down on accidental overdoses. The panel also voted that no product should be allowed to market itself as “doctor recommended,” a common marketing ploy now being used that many panelists felt is misleading. I am confident that this matter won’t be resolved any time soon.

Source: *New York Times*

*****ENVIRONMENTAL CONCERNS**

KENTUCKY UTILITY PAYS \$11.4 MILLION TO EPA

East Kentucky Power Cooperative recently agreed to pay \$11.4 million for the alleged release of more than 19,000 tons of contaminants. The multi-million dollar settlement marks the highest penalty ever assessed under the federal Clean Air Act’s Acid Rain Program. According to government officials, the Co-op’s Dale, Kentucky, power plant not only operated two generators without participating in the federal Acid Rain Program, but also failed to enlist in the state ground-level ozone program. As a result, the Co-op unlawfully emitted thousands of tons of pollutants that contribute significantly to acid rain and smog.

Under the agreement, East Kentucky Power will pay \$1.9 million annually for six years to the federal government. Additionally, the Co-op must install \$2 million worth of pollution controls at the Dale power plant. The new technology, which must be installed by October 31, 2007, will prevent large emissions of sulfur dioxide and nitrogen oxide. Finally, East Kentucky is obligated to apply for an acid rain permit and partake in state and federal greenhouse gas reduction programs.

As part of the Clean Air Act, the Acid Rain Program utilizes an innovative, market-based approach to reduce emissions of harmful greenhouse gases. The program allows each utility to emit a fixed number of tons of pollutants annually. If a plant exceeds the limit, they are required to buy additional credits to compensate for their pollution. On the other hand, the program offers financial

incentives to those utilities that emit less than their limit by allowing them to sell their greenhouse gas credits.

Source: *Lexington Herald-Leader*

AN UPDATE ON THE DUPONT CASE IN WEST VIRGINIA

We wrote about the ongoing lawsuit against DuPont Co. in the last issue. Since that time a great deal of activity in this most important case has occurred. The suit, filed by 10 Harrison County residents in 2004, contended that routine health screenings were needed because residents had inhaled and ingested arsenic, cadmium, and lead around a 112-acre site at a former zinc- smelting plant in the small town of Spelter, West Virginia. DuPont was found guilty of wanton, willful and reckless conduct on October 19th and ordered to pay \$196.2 million in punitive damages for its actions at the former zinc-smelting plant. As previously reported, residents claimed the chemical giant had lied to them for decades about health threats from pollution. When combined with previous verdicts in earlier phases of this trial, the Harrison County jury awards against DuPont now total nearly \$400 million.

Ten residents of the small community of Spelter sued the chemical giant in a four-part trial involving property damage claims, long-term health screenings and corporate accountability. Mike Papantonio, a very good lawyer from Pensacola, Florida, who represents the plaintiffs, says:

The verdict should tell state environmental regulators and executives of DuPont, it's not acceptable to put profits ahead of the health and safety and the environment of West Virginia. I think this is a pretty clear message to corporations — not all corporations, but renegade corporations — that believe it's business as usual because it's not.

The plaintiffs won the first phase of their case on October 1st, when jurors found DuPont liable for and negligent in creating the waste site. They also found DuPont had created a public and private nuisance and that its pollution trespassed onto private property. In the second phase, the jury required DuPont to provide medical monitoring for 40 years to people who were exposed to arsenic, cadmium and lead. Judge Thomas Bedell will determine how the plan, estimated to cost more than \$100 million — will be administered. Judge Bedell will also determine how the punitive damages are divided. Jurors had decided that DuPont should pay about \$55.5 million to clean up private properties.

Interestingly, after the trial had ended, DuPont filed 351 documents with the court, according to the plaintiffs' lawyer, would have been "relevant and extremely valuable" evidence in the case. Although DuPont claimed it recently

discovered the documents, it sure does seem sort of weird that important documents showed up all of a sudden after the trial concluded. Judge Bedell will be asked to issue sanctions against the Dupont. We will keep you posted on future developments in this most important case.

Source: *Associated Press and USA Today*

SETTLEMENT REACHED IN ACID RAIN CASE LH

American Electric Power Co. (AEP), a major power generator, has agreed to spend \$4.6 billion to reduce chemical emissions blamed for spreading acid rain across the Northeast. The utility company, based in Columbus, Ohio, also will be required to reduce the emissions by at least 69% over the next 10 years and pay an additional \$15 million in civil penalties and \$60 million in cleanup and mitigation costs to help heal polluted parkland and waterways. The settlement was filed with a federal court just before a six-week trial in federal court in Columbus, Ohio, was scheduled to begin.

This settlement includes one of the largest government fines in an environmental case. The EPA, a dozen environmental groups and eight states - Connecticut, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont - brought the lawsuit against AEP in 1999. The energy company was accused of rebuilding coal-fired power plants without installing pollution controls as required under the Clean Air Act. Environmentalists blame acid rain caused by coal-fired power plants for plaguing the Northeast over the last quarter-century, including damage that has eaten away at the Statue of Liberty and the Adirondack Mountains range in upstate New York. Smog and acid rain have been linked to sulfates and nitrates that are products of coal-fired plants.

AEP, which has more than 5 million customers in 11 states, has agreed to clean up 46 coal-fired operations in 16 of the plants in its eastern system - a group likely to include at least nine plants in Ohio, Indiana, Virginia, and West Virginia. AEP has maintained that the work in at least some of its plants was routine maintenance that didn't fall under federal requirements for pollution controls. The terms of settlement require AEP to:

- Spend \$4.6 billion on so-called scrubbers and other pollution controls to reduce emissions of nitrogen oxide and sulfur dioxide, which cause acid rain and smog.
- Cut nitrogen oxide emissions by 69% by 2016, and reduce sulfur dioxide emissions by 79% by 2018.

- Pay civil fines of \$15 million.
- Pay \$60 million in mitigation measures. The money includes \$21 million to reduce emissions from barges and trucks in the Ohio River Valley; \$24 million for projects to conserve energy and produce alternative energy; and \$3 million for the Chesapeake Bay, \$2 million for Shenandoah National Park and \$10 million to acquire ecologically sensitive lands in Appalachia.

This appears to be a good settlement. The EPA and the states involved should be commended for taking the action that resulted in the settlement. It took over seven years to get a resolution, but it appears that the result was well worth it.

Source: *Associated Press*

MAJOR ASBESTOS BILL PASSES IN U.S. SENATE

LH

The Asbestos Disease Awareness Organization (ADAO), an organization dedicated to serving as the voice of asbestos victims, has praised the passage of a bill sponsored by Senator Patty Murray (D-WA). The Ban Asbestos in America Act of 2007 was passed by the U.S. Senate. The Act is an effort to ban all production and use of asbestos in America, launch public education campaigns to raise awareness about its dangers, and expand research and treatment of diseases caused by asbestos. The Senate should be commended for passing this monumental act. Hopefully the House will follow suit and pass the legislation, which will require a full ban on asbestos.

The occurrence of asbestos-related diseases, including mesothelioma, lung cancer, and asbestosis, is growing out of control. Studies estimate that during the next decade, 100,000 victims in the United States will die of an asbestos related disease - equaling 30 deaths per day. Asbestos Disease Awareness Organization (ADAO) was founded by asbestos victims and their families in 2004. ADAO seeks to give asbestos victims a united voice to help ensure that their rights are fairly represented and protected, and raise public awareness about the dangers of asbestos exposure and the often-deadly asbestos related diseases. ADAO is funded through voluntary contributions and staffed by volunteers. For more information visit www.asbestosdiseaseawareness.org. Our firm is currently handling a number of mesothelioma cases. Mike Andrews, who is the lead lawyer on those cases, can be contacted at (334) 269-2343. You can also go to our Web site, www.beasleyallen.com for more information relating to these claims.

Source: ADOA News Release

THREE CHILDREN WILL RECEIVE \$2.5 MILLION UNDER LEAD POISONING SETTLEMENT

Three children in Albany, New York, who were poisoned by lead in the apartment buildings in which where they had lived previously, will receive \$2.5 million from a settlement reached recently with landlords. The children were exposed to lead-based paint in several apartments owned by two different landlords in the 1990s. The children, who are now in their teens, have learning disabilities believed to be caused by lead dust from peeling paint in the apartment. The payments under the settlement will be made by insurance companies from policies issued to the two sets of landlords.

Source: *Associated Press*

*****TOBACCO LITIGATION UPDATE**

THE U.S. SUPREME COURT RULES AGAINST TOBACCO COMPANIES

Altria Group Inc.'s Philip Morris USA and other cigarette makers have lost their cases before the U.S. Supreme Court. Their bid to prevent smokers in potentially thousands of Florida lawsuits from taking advantage of jury findings against the industry was rejected. The justices, without comment, left intact the Florida Supreme Court's conclusion that the 1999 jury verdict would apply to future lawsuits. The jury had found that cigarette makers withheld information about smoking risks and put unreasonably dangerous products on the market.

The appeal arose from a case that at one point threatened the tobacco industry with a \$145 billion punitive damage award. The Florida Supreme Court ruled that a state appeals court was correct to overturn the award and that the case couldn't go forward as a class action on behalf of 700,000 people. But, in that case, the state court said many of the jury findings would apply to individual cases. At the Supreme Court, the cigarette makers argued those findings were so "generalized" that their use in future cases would violate the U.S. Constitution's due process clause.

Philip Morris and R.J. Reynolds Tobacco will now face dozens of Florida lawsuits that seek to use the jury verdict as a starting point. Smokers and their family members will have until January to file additional lawsuits. The cigarette makers contended in the request for review to the High Court that the lower court ruling "promises to serve as a catalyst" for those lawsuits. The tobacco companies didn't contest the application of two of the jury's findings, namely, that

cigarettes are addictive and cause 23 diseases. The companies also contended in the petition that the Florida court cleared the way for smoker claims that are barred under a federal cigarette- labeling law.

Philip Morris, R.J. Reynolds, Brown & Williamson Holdings Inc., Loews Corp.'s Lorillard Tobacco Co. and Vector Group Ltd.'s Liggett Group LLC. took the request for review to the High Court. The U.S. Chamber of Commerce and the business-backed Product Liability Advisory Council, which is a tort reform group, supported the tobacco companies in the request. But, the request was rejected, and that's good news for Floridians who have been tobacco victims.

Source: *Bloomberg News*

*****THE CONSUMER CORNER**

ASC WARNS ALABAMIANS ABOUT FRAUDULENT SCHEMES

The Alabama Securities Commission (ASC) has warned citizens to be alert to the dangers posed by three schemes/scams currently circulating throughout the state. Joe Borg, Director of the ASC, says it's best to: "Investigate before you invest. The three scams will be discussed in some detail below so that our readers can not only be warned, but can warn others.

Recently, the ASC received reports from citizens concerning a "Financial Planning Survey," purportedly sponsored by a reputable financial/investment firm. Although those contacted may not be interested in investing or purchasing a financial plan, they are approached and pressured to gather their personal financial documents and supply them to an individual who is identified by the company as a "financial planning associate," or similar title. The enticement is that the individual may receive \$1,000 or more for participating in the survey, with the possibility of receiving \$250 per year thereafter. This may be a ploy to obtain personal financial information or an illicit method to get the unsuspecting person to purchase investment instruments that may not be in their best interest from a high-pressure salesperson.

In another scheme, scam perpetrators, based in foreign countries, use the telephone and direct mail to entice American citizens, including many Alabamians, to buy chances in high-stakes foreign lotteries. These solicitations violate U.S. law, which prohibits the cross-border sale or purchase of lottery tickets by phone or mail. This scam, which targets peoples' greed, is prevalent all across the country, and unfortunately citizens are falling for it. The unsuspecting victim might receive a check for \$1,500 or more to cover "taxes and fees," accompanied by a professionally printed letter and explanation that they have won a large sum of money from a foreign lottery. The letter instructs the victim to cash the check and forward the amount, and possibly more, to begin

“processing” their exorbitant but fictitious lottery winnings. Shortly after the victim cashes the check and after mailing the money for processing fees to the lottery, the check bounces and is not honored by their bank, making them responsible for the amount. Sometimes, victims are deceived into sending their financial account numbers, ostensibly to be used to deposit winnings into their account. The scammers then have easy access to remove money from their account.

Another problem area concerns a “Phishing” scam, a form of Internet fraud used to trick victims into providing sensitive personal and/or financial information to illicit sources. Like most Phishing scams, the IRS Refund scam targets citizens by way of email or regular mail. The senders portray themselves as officials of state or federal agencies that, “due to administrative oversight, are withholding tax refunds that belong to the victim.” The sender presents the victim with a document that gives the appearance of a genuine IRS form and asks for Social Security numbers, credit card numbers, or other personal information. Although it is not uncommon for state and federal agencies to hold unclaimed tax dollars, neither the IRS nor the State of Alabama initiates contact with taxpayers by email to advise them of refunds or to request financial information such as PIN numbers, passwords, or similar secret access information for their credit cards, bank, or other financial accounts.

If you want more information or need to check out a suspected scam, call the Alabama Securities Commission, 1-800-222-1253, or the Alabama Attorney General’s Office of Consumer Affairs, 1-800-392-5658. It’s better to check any potential investment out if the person or entity contacting you is unknown or the investment seems “too good to be true.” It’s always better to be “safe than sorry!”

JUDGE ALLOWS CLASS ACTION AGAINST TARGET WEBSITE

A federal judge in California has certified a class action lawsuit against Target Corp brought by plaintiffs claiming the discount retailer's website is inaccessible to the blind. On October 2nd, the judge also rejected Target's motion for summary judgment in the case. According to the court’s ruling, the plaintiffs – including the National Federation of the Blind – were claiming that Target.com violates federal and state laws prohibiting discrimination against the disabled. In a statement Marc Maurer, president of the National Federation for the Blind, made this statement concerning the lawsuit:

This is a tremendous step forward for blind people throughout the country who for too long have been denied equal access to the Internet economy. All e-commerce businesses should take note of this decision and immediately take steps to open their doors to the blind.

This is a most significant lawsuit and its progress will be monitored closely. If the suit is successful, it will have a tremendous effect nationwide. I'm not aware of any other action that has addressed this specific issue as it relates to the blind.

Source: *Reuters*

FDA TO EXAMINE CLAIM THAT LIPSTICK LEAD LEVELS ARE UNSAFE

The U.S. Food and Drug Administration (FDA) said last month it would look into claims from an advocacy group that certain lipsticks contain potentially dangerous levels of lead. But, the agency says similar past claims have not been confirmed. According to the Campaign for Safe Cosmetics, one-third of the 33 red lipsticks examined by an independent lab contained a level of lead exceeding 0.1 parts per million (ppm), the FDA's limit for lead in candy. But none listed lead as an ingredient. Thirty-nine percent of the lipsticks tested had no detectable levels of lead. Interestingly, the FDA does not set a limit for lead in lipstick. The FDA said concerns about lead in lipstick have been raised occasionally in the print media and on the Internet. An FDA spokeswoman Stephanie Kwisnek, had this to say about the problem:

These concerns have not generally been supported by FDA's own analysis of products on the market. In the present case, we are looking into the specific details of the issues raised.

The Campaign for Safe Cosmetics describes itself as a coalition of women's, public health, labor, environmental health, and consumer rights groups whose goal is to pressure companies to remove toxic chemicals from their products and replace them with safer alternatives. The lead tests were conducted by the Bodycote Testing Group on lipsticks bought in Boston, San Francisco, Minneapolis, and Hartford, Connecticut. Bodycote Testing Group, of Sante Fe Springs, California, operates nearly 300 facilities around the world. Among the top brands testing positive for lead were:

- L'Oréal Colour Riche "True Red": 0.65 ppm
- L'Oréal Colour Riche "Classic Wine": 0.58 ppm
- Cover Girl Incredifull Lipcolor "Maximum Red": 0.56 ppm
- Dior Addict "Positive Red": 0.21 ppm

L'Oréal challenged that its products contain harmful ingredients, saying in an e-mail that its products have been thoroughly reviewed and tested by the company's toxicologists, clinicians, pharmacists, and physicians, and are in

compliance with federal regulations. The trade association representing the cosmetic industry acknowledged "negligible" levels of lead in some lipsticks but said it is not intentionally added. John Bailey, an executive vice president at the Cosmetic, Toiletry and Fragrance Association, observed:

Consumers are exposed daily to lead when they eat, drink water and breathe. The average amount of lead a woman would be exposed to when using cosmetics is 1,000 times less than the amount she would get from eating, breathing and drinking water that meets Environmental Protection Agency drinking-water standards.

Obviously, the FDA should look at this health issue immediately and determine whether there is a serious problem. If so, the agency should take appropriate action. At the very least, a standard should be promulgated.

Source: *Associated Press*

*****RECALLS UPDATE**

JOHNSON & JOHNSON RECALLS CHILDREN'S COUGH MEDICINES

Johnson & Johnson has recalled certain infant cough and cold products, citing "rare" instances of misuse leading to overdoses. The products being recalled include: Infants' Tylenol Drops Plus Cold; Concentrated Infants' Tylenol Drops Plus Cold & Cough; Pediacare Infant Drops Decongestant; Pediacare Infant Drops Decongestant & Cough; Pediacare Infant Dropper Decongestant; Pediacare Infant Dropper Long-Acting Cough; and Pediacare Infant Dropper Decongestant & Cough (PE) products. Cough and cold products for children age two and over and single-ingredient pain reliever and fever reducers expressly labeled for infants are not included in the recall.

The recall came two months after the Food and Drug Administration issued a public health advisory warning parents not to give cough and cold medications to children under 2 years of age without a doctor's direction. As mentioned in the Consumer Section of this issue, the FDA's Nonprescription Drugs Advisory Committee met last month to discuss the use of cough and cold drugs by children. Public Citizen believes that children under 6 years of age should never be given these medications. There has apparently been no real testing of the cold medications for use by children at any age. It will be most interesting to see what the FDA does concerning this most important health and safety issue.

WINNIE THE POOH TOY RECALL

The Consumer Product Safety Commission says that more than 90,000 children's toys have been recalled for containing dangerous levels of lead. J.C. Penney is now recalling more than 70,000 toys, including Chinese-made Winnie the Pooh play sets, and art kits made in Taiwan and Vietnam. The company says an independent laboratory began the process of performing additional tests on its painted toys in August. This round of toy recalls appears to be the direct result of the commitment that was made earlier this summer to rid all store shelves of contaminated products. Hopefully, the number of toys that are in violation will all be removed for the store shelves. However, consumers who have bought any of the products must still be made aware of all recalled items. If you have any questions, I suggest that you contact the CPSC Web site, www.cpsc.gov for additional information.

Source: *Associated Press*

LAN ENTERPRISES RECALLS DOLL STROLLERS

About 21,000 Mini Zooper Doll Strollers have been recalled. A child's finger can become caught in the rectangular metal clip or the black plastic side hinge, which can sever a child's fingertip. The strollers also pose an entrapment hazard. Pottery Barn Kids has received three reports of serious lacerations, including one partial finger severing on a 2 year old boy. The Mini Zooper Doll Stroller has a silver metal frame with a bright pink cotton canvas seat cover. "Pottery Barn Kids" is printed on a label on the canvas seat cover. The strollers were sold exclusively at Pottery Barn Kids retail stores nationwide, through the company's catalog and on its Web site from October 2005 through June 2007 for about \$50. For additional information, call Pottery Barn Kids at (888) 367-0144 or visit the firm's Web site at <http://www.potterybarnkids.com/>.

RECALL OF ESTES-COX MODEL ROCKETS

About 80,000 X-15 Flying Model Rockets have been recalled because the model rocket's side or engine retainer ring can separate and cause the rocket to fall without the nose cone separating and the parachute deploying, posing a risk of an impact injury to nearby consumers. Estes-Cox has received seven reports of the side or engine retainer ring separating and the nose and parachute failing to release. There were also 25 reports of the retainer ring being lost during flight, including one report that a consumer was struck in the arm, requiring surgery.

This recall involves the X-15 flying model rocket, a 1:44 scale version of the North American Aviation hypersonic rocket plane. The model rockets are about 13.5-inches long and have a wingspan of about 5 inches. The rockets are

black and yellow, and have the number 66670 on the tail. The rockets were sold individually (item #1890) and as part of a starter kit (item #1412). The item number is printed on the product's instruction sheet and above the bar code on the product's packaging. They were sold at hobby stores and other retailers nationwide from June 2005 through July 2007 for between \$16 and \$36. For additional information, contact Estes-Cox at (800) 576-5811 or visit the firm's Web site at <http://www.estesrockets.com/>.

CUB SCOUT BADGES RECALLED OVER LEAD

A plastic badge awarded to Cub Scouts has been recalled by the Boy Scouts of America (BSA) because it may contain excessive levels of lead paint. The recalled badge — made in China — is the "Immediate Recognition Kit," which has been distributed to an estimated 1.7 million Cub Scouts nationwide. The BSA apologized "for any concerns" and said they are doing everything they can to "ensure the health and safety" of everyone who participates in their programs." The announcement came on the same day that more than a half-million other Chinese-made products, including *Pirates of the Caribbean* toys, were recalled because they contain dangerous levels of lead. The Consumer Product Safety Commission announced those recalls.

The supplier of the badges was Georgia-based Kahoot Products Inc. The badges have been sold for "seven to eight years," and about 20,000 recognition kits are sold annually to Cub Scout den leaders. The badges being recalled are for the Cubs who are 7 and 8 years old. The badge has a yellow-and-blue border, includes a picture of a bear and wolf, and reads "Progress Toward Ranks." Kahoot notified the national Scout organization about its concerns that the totem badges may contain lead levels in excess of U.S. Consumer Product Safety Commission standards in the paint. All questionable badges are being removed from all Scout shops and from the shelves of retailers who sell Scout products. In addition to publicizing the recall on Scouting Web sites, the Boy Scouts is publishing notice about the recall in Boys' Life and Scouting magazines.

CAMPBELL RECALLS 72,000 CANS OF CHUNKY SOUP

Campbell Soup Company is recalling more than 72,000 cans of a variety of its Chunky soup. The recall involves 18.8-ounce cans of Campbell's Chunky Baked Potato with Cheddar and Bacon Bits. They may contain pieces of hard plastic that present a choking hazard and could cause injury if swallowed. Campbell says three consumers have reported minor injuries in and around their mouths. It says no other products are affected by the recall. The recalled soups

were shipped to 24 states, including Alabama. Consumers who purchased Campbell's Chunky Baked Potato with Cheddar and Bacon Bits with the can code "JUL 08 2009 07097" are being advised to return the product to the store where it was purchased for an exchange or refund.

CONAGRA RECALLS POT PIES IN SALMONELLA SCARE

ConAgra Foods -- which had to recall its peanut butter earlier this year -- is in the middle of another recall. This time it involves Banquet pot pies. ConAgra has stopped production at the Missouri plant that makes the Banquet pot pies after health officials said the pies may be linked to 139 cases of salmonella in 30 states. ConAgra maintains that its chicken and turkey pies are safe if they're cooked properly. But the U.S. Department of Agriculture issued a health alert on October 9th to warn consumers about the link between the company's product and the salmonella cases.

The federal Centers for Disease Control and Prevention (CDC) has been tracking reports of the salmonella cases for the past seven days. A CDC spokeswoman says the largest numbers of salmonella cases had been reported in Georgia, Wisconsin, Pennsylvania and Missouri. As you will recall, earlier this year, ConAgra had to recall all of its peanut butter manufactured at a south Georgia plant because it was linked to a different salmonella outbreak.

SAM'S CLUB BURGERS LINKED TO E. COLI

The Sam's Club warehouse chain has pulled a brand of ground beef patties from its shelves nationwide after four children who ate the food, produced by Cargill Inc., developed E. coli-related illness. Customers are asked to return any remaining patties purchased after August 26th to the store or destroy them. The children became ill in September after eating ground beef patties that were bought frozen under the name American Chef's Selection Angus Beef Patties from three Sam's Club stores in the Twin Cities (Minneapolis and St. Paul, Minnesota) area.

Sam's Club removed the product from its stores nationwide after the illnesses were reported. Cargill, based in Wayzata, Minnesota, is one of the nation's largest privately held companies. It makes food ingredients, moves commodities around the world, and runs financial commodities trading businesses. The patties were produced by Cargill and had an expiration date of Feb. 12, 2008. They were coded UPC 0002874907056 Item #700141. The company has been cooperating with the state Department of Health and the U.S. Department of Agriculture (USDA) to determine the scope of the issue.

The Minnesota Department of Agriculture is working with the USDA to determine the source of the contamination. Cargill learned of the issue when a USDA compliance officer from the federal Agriculture Department visited the company's ground beef facility in Butler, Wisconsin. Officials had traced the patties to that plant. Two of the children were hospitalized. Symptoms of E. coli illness include stomach cramps and diarrhea. People typically are ill for two to five days but can develop complications including kidney failure. Anybody who has developed such symptoms should contact their personal doctor. As you probably know, Sam's Club warehouse is owned by Wal-Mart Stores Inc., the world's largest retailer, based in Bentonville, Arkansas.

MEAT PLANT REDUCED INSPECTIONS PRIOR TO RECALL

In the months before issuing a massive recall of its frozen hamburgers, Topps Meat Co. curtailed testing of ground beef and skipped other safeguards aimed at preventing contaminated meat from reaching consumers, according to a report published last month. It was reported that three batches of frozen patties tainted with a potentially fatal bacteria left the company's plant. To date, 40 people in eight states were sickened with E. coli infections linked to the Topps burgers.

Topps recalled 21.7 million pounds of its patties in late September, which was the second-largest U.S. beef recall, and then closed its business. The recall represented a year's worth of production for the company, which considered itself the nation's largest producer of frozen hamburgers. The Topps recall, and a subsequent recall of 840,000 pounds of frozen patties produced by Cargill Inc. at a plant in Butler, Wisconsin, were linked to illnesses. All of this brought more questions about the U.S. Agriculture Department's regulation system, which leaves many safety decisions to producers. It should be noted that Topps was not a slaughterhouse; it took in cut beef and ground it. Many meatpackers like Topps test their finished product, such as frozen or raw hamburger, but that apparently is not required. Slaughterhouses are not required to test carcasses for pathogens, and if they do, they are not required to hold onto the meat until they get results, which must be changed.

The recent outbreaks reversed a steady decline of E. coli in ground beef that began in 2000, but the government and industry are not certain whether that signals a trend or was due to random events. The O157:H7 strain of E. coli bacteria, which can be fatal to humans, is harbored in the intestines of cattle and can also get on their hides. Improper butchering and processing can cause the E. coli to get onto meat. It's important to remember that thorough cooking, to at least 160 degrees internal temperature, can destroy the bacteria.

Source: *Insurance Journal*

*****SPECIAL RECOGNITIONS**

JUDGE U.W. CLEMON IS HONORED IN BIRMINGHAM

The official portrait of U.S. District Judge U.W. Clemon, the state's first black federal judge, was unveiled in a ceremony on October 15th in Birmingham. The event drew an overflow crowd, including members of his family, former law clerks, and a host of friends. Judge Clemon, appointed to the bench by President Jimmy Carter in 1980, is the longest-serving active U.S. District Judge in Alabama, Georgia, and Florida. The portrait of the judge, in his black robe, was done by Simmie Knox, an Alabama native who also painted portraits of the late Supreme Court Justice Thurgood Marshall and former President Bill Clinton. .

Once the portrait was unveiled by his wife, Barbara, and daughter, Michelle, the judge shared a story about how 29 years ago, while he and Barbara were about to board a plane in Los Angeles, a page was received from the FBI that alerted him that he was one of three people on the Ku Klux Klan's hit list. Judge Clemon learned he was supposed to have been assassinated the preceding night. The judge felt secure in returning home because of his strong faith and he did so without hesitation. He joked, however, that it never crossed his mind that the day would come when he would actually "rejoice at his own hanging." Looking at his portrait, he observed: "Well that day is here," in a jovial manner. Judge Clemon's portrait will permanently hang in the Hugo Black Federal Courthouse.

The ceremony was held in the Robert S. Vance Federal Building, where Judge Clemon was honored and celebrated for his legal genius, his longevity on the bench, and being a man of many firsts. As many have forgotten, the Jefferson County native became one of the first two black state senators in the State of Alabama, having been elected in 1974. Then-Senator Clemon served as chairman of the powerful Rules Committee and later as Judiciary Chairman during his two terms in the Senate. He was the federal district court's chief judge until November, when U.S. Judge Sharon Lovelace Blackburn, who presided over the occasion, assumed that responsibility. Every seven years, a new chief judge is named based on seniority. It goes without saying that Judge U.W. Clemon has made his mark in history for his many accomplishments over the years. I was honored to have been selected as one of the speakers at the ceremony. It was a grand occasion and one that I will never forget.

JERRY REMY IS ELECTED PRESIDENT

An election took place recently that was most unusual and quite unique for a number of reasons. For starters, it had neither big campaign donors nor dirty

tricks by any of the candidates. In fact, all of the candidates ran very “clean campaigns,” and spent very little money. This election dealt with the presidency of the “Red Sox Nation.” I have been a Boston Red Sox fan since I was about 12 years old, and this election to pick a President of the Red Sox Nation was great. Red Sox Hall of Fame second baseman and TV analyst Jerry Remy won a convincing victory in his first bid as a candidate in the election. He is now officially President of Red Sox Nation. More than 70,000 votes were cast with fans voting on line at redsox.com, via text messaging, and by postcard.

Remy, who starred for the Red Sox during his 10-year major league career, threw out the ceremonial first pitch before the first game between the Red Sox and the Angels in the 2007 American League Division Series. This election created a great deal of interest all across the U.S., with 1,200 people seeking this high office. The Red Sox won the American League President and the first game in the World Series was scheduled for the day we went to the printer with this issue. My three “children,” Jere Jr., Julia and Bee, who are avid members of Red Sox Nation traveled to Boston for the first game. Hopefully, I can say next month the Sox are world champs! Even if that doesn’t happen, President Remy will still give a voice to all Red Sox fans across the country and around the world. Hail to the chief!

DAVID BRONNER HAS BEEN GREAT FOR ALABAMA

When Dr. David Bronner came to the University of Alabama to get his law degree in 1971, few people realized at that time what an impact he would wind up having on our state. Without a doubt, David has been great for Alabama and will go down in history as one of the brightest and most innovative of all public figures in our state’s history. In 1973, David accepted the position of Chief Executive Officer (CEO) with the Retirement Systems of Alabama. Today he remains CEO at RSA and hasn’t slowed down a bit. It’s his responsibility to invest the funds of that organization and he has done an outstanding job. Under his direction, these funds have increased from over \$500 million to well over \$30 billion, making the RSA the largest financial organization in Alabama. David’s expertise in the field of finance is widely recognized throughout the country.

David has been featured in almost every business periodical in the U.S., including *The Wall Street Journal*, Institutional Investor, The Money Manager, Business Week, Forbes Magazine, and Pension and Investment Age. RSA funds have been utilized in areas that reflect favorably on the economy of the state. Importantly, these funds have established resort attractions in the state that have brought out-of-state people to visit and spend time and money in Alabama. David has certainly made his mark on the Capital City. A good number of impressive buildings carry the RSA brand, with more on the drawing board. The Robert Trent Jones Golf Trail has been a tremendous success and has paid great dividends to the economic well-being of our state. It’s been a super tool for the

recruitment of industry. Incidentally, I warned David while this project was in the planning stages that it would never work – was I ever wrong!

Although Dr. Bronner's schedule is quite heavy, he has not hesitated to accept requests for speaking engagements, to write articles for papers and magazines within Alabama, and to tell about the good and the bad that exists in our state. The thing that I really like and admire about David Bronner is that he is not afraid to stand up for what is right and fight for his beliefs. He is truly a great asset to our state and its citizens and will go down in history as a man who has had a tremendous influence for good in our state. A number of persons have told me that they would like to see David be the person to follow Bob Riley as governor in 2011. I believe that a Bronner Administration would be a truly outstanding one if his prior accomplishments are any indication of how he would govern if given that opportunity.

THE WILLS FOR HERO'S PROGRAM IS A GOOD ONE

This past September 11, 2007, marked the sixth anniversary of the terrorist attack on our country. Part of the country's healing process has included contributions by Americans from all walks of life. The Alabama State Bar joined those ranks when it launched its "Wills for Heroes" pro bono program. The program provides free simple wills, advance healthcare directives, and powers of attorney to law enforcement personnel, firefighters, and emergency medical personnel.

The "Wills for Heroes" program was the brainchild of Anthony Hayes, a lawyer from South Carolina, who wanted to contribute to the country's healing process following the attacks of 9/11. Alabama became the fourth state, following Arizona, South Carolina, and Virginia, to adopt this program. Alabama's program kicked off in the Capital City at the Montgomery Police Department. Volunteer lawyers from around the state, whether or not they have experience in estate planning, will assist the public servants in preparing the probate documents. The organizing committee raised money from law firms to purchase laptop computers and a software program that allows the completion of a will in about one hour.

Lawyers working in the program prepared free wills in Montgomery through September. The program moved to Mobile in October and then on to Birmingham this month. Clinics will be scheduled for Huntsville and Dothan in 2008. Any lawyer who is interested in participating in this program should contact the Alabama State Bar for more information. State Bar President Sam Crosby was instrumental in bringing this program to Alabama. He, along with numerous dedicated lawyers and non-lawyers, worked tirelessly to organize the program and the clinics. Any lawyer looking to fulfill the obligation for pro bono work should seriously consider participating in the program. The Alabama State

Bar is to be commended for taking this action. This is a classic example of folks helping folks!

WE SHOULD SUPPORT THE JAG SCHOOL FOUNDATION

The Judge Advocate General's School provides basic instruction in military legal practice to new judge advocates and paralegals. The staff at the school is selected based on past superior performance. The School also provides continuing legal education in specialized and advanced topics to active duty, Reserve, National Guard, and civilian lawyers and paralegals, from all military departments and many federal agencies. The School instructs on legal matters at all Air University schools and several Department of Defense institutions, and teaches foreign military officers and civilians at the Air University and in host countries throughout the world. It also assists in the management of the USAF preventive law program and publishes several legal periodicals. The School serves as the Air Force liaison with civilian and military professional legal organizations and manages the continuing legal education reporting program for USAF lawyers.

The School, which is located in Montgomery, is in session 50 weeks of the year, teaching more than 30 separate formal courses for thousands of students annually. It also hosts several workshops, symposia, and other special events every year. The JAG school faculty is expected to double over the next few years for obvious reasons. Troop deployments in various environments create specific and highly specialized needs and our military's current involvement in the Middle East has put even greater demands on the JAG school. Funds are badly needed to assist the school in carrying out its mission.

There is a way for all of us to help out and make sure the JAG School is able to carry out its mission. The JAG School Foundation, a not-for-profit organization contributed to by active duty and retired judge advocates, provides substantial financial support for a number of the events that assist the school. Since 1993, the School has been located in a new, state-of-the-art facility, the William L. Dickinson Law Center. Students are primarily housed in an adjacent lodging facility. There is a great deal of support required for special events of all kinds that assist the JAG School. The Foundation needs donations to continue support for the many activities it is involved with. I encourage our readers to consider making a contribution to the Foundation. If you want more information, you can contact Shanna Malone at our firm at 334-269-2343, or you can visit the Foundation's Web site: www.jagschoolfoundation.org. This is a good way for interested persons to support our military efforts.

ALABAMA APPLESEED OPENS NEW OFFICE

Alabama Appleseed has recently opened up its new office in Montgomery. It is now located at 309 N. Hull Street in the Old Alabama Town area. Alabama Appleseed is a non-profit organization that has been doing great work in Alabama for several years. Being non-partisan, the group seeks to identify root causes of injustice and inequality in our state. The organization is trying to make a difference in the lives of all Alabamians by working with various leaders and seeking to craft practical and lasting solutions through education, legal advocacy, community involvement, and policy expertise. This association was started in 1999 by Governor Albert P. Brewer, former Chief Justice Bo Tolbert, former Supreme Court Justice Janie L. Shores, Dean Ken C. Randall of the University of Alabama School of Law, and J. Mason Davis, a noted Birmingham lawyer.

Alabama Appleseed has a diverse and distinguished Board of Directors from around the state, representing the legal, business, academic, and non-profit communities. A.H. "Nick" Gaede, Jr., formally a senior partner with the law firm of Bradley, Arant, Rose & White, LLC, and now with BE&K, Inc. has been the Chairman of the Board since 2001. One of our own lawyers, Roman A. Shaul, serves on the Board of Directors. John A. Pickens is the executive director and has worked tirelessly to grow this organization in both size and focus. The group's success has recently paid off in the need for new office space. Recently, an open house was held that was well attended by many leaders in the business, legal, and public interest communities. This is a significant organization that deserves support. I am sure they would be delighted to see you at their new office the next time you are in the Capital City. You can call them at 334-263-0086 if you have any questions or comments about the projects on which they are working.

WILD LAW PERFORMS A VALUABLE SERVICE

Conserving and restoring our natural resources affects every Alabama citizen and will certainly be beneficial to future generations. Protecting the environment is the responsibility of all of us and, unfortunately, sometimes we fail to do our job. The urgent need to pass additional laws is something that must be addressed by legislative bodies to make sure that our natural resources are managed in the right way and that environmental concerns are met. It's also important to see that offenders are appropriately dealt with.

A law firm – WildLaw – has been working for the past 10 years in this most important area. The firm has offices in Montgomery, Alabama, Tallahassee, Florida, and Asheville, North Carolina. The mission of WildLaw is to defend the environmental integrity of human and natural communities through education, administrative actions, capacity building and litigation. Since its inception, WildLaw has maintained a commitment to providing all people, regardless of race, color, ethnicity or socioeconomic status, a clean and healthy environment. WildLaw performs a most valuable service in my opinion. Ray Vaughn, who was

with our firm a few years back, is the Executive Director of WildLaw. If you want to support the work of WildLaw or simply want more information concerning their work you can call Ray at (334) 396-4729 or go to the Web site, www.wildlaw.org.

*****FIRM ACTIVITIES**

EMPLOYEE SPOTLIGHTS

Ben Baker

Ben Baker, who graduated from the Cumberland School of Law in 1993, works in our Personal Injury/Product Liability Section. Ben's focus has always been on products liability and crashworthiness cases. He practiced in Birmingham for several years before coming with us. Ben's secondary focus is in the area of personal injury and construction site cases. Ben obtained a record \$12 million verdict for his client in Lamar County, Alabama, in a crashworthiness case involving a heavy truck crash. He has also settled many crashworthiness cases that have resulted in multimillion-dollar recoveries for his clients. This year Ben was part of the trial team that obtained a \$4 million verdict against Wal-Mart in Montgomery County related to a defective tire. The other three defendants in that case settled on a pro tanto basis prior to the trial.

Ben is currently a member of the Executive Committee for the Alabama Association for Justice. He previously served on the Executive Committee for the Young Lawyers Section of the Birmingham Bar Association, an elected position. Ben is also on the board of the Landmarks Foundation of Montgomery, a non-profit organization committed to preserving historic structures. Ben was raised in Ozark, Alabama. He is married to the former Kimberly Strag of Alexander City, and they have one daughter, Isabella, and one son, Benjamin. Ben and his wife are members of Christ Church, an Anglican Parish. Ben is an outstanding lawyer who is totally dedicated to helping his clients receive justice.

Willa Carpenter

Willa Carpenter, who has been with the firm for almost 15 years, serves as the Human Resources Liaison for our firm. Without dispute, Willa is the firm's spiritual leader. Willa, who really is more like a Chaplain for the firm, provides guidance and support to the firm's employees by listening, counseling, and praying with them whenever they are in need. She also is available to help with small and practical matters. She sees to it that flowers are sent to our employees or their close family members when accident or sickness occurs, and on many occasions will go by the hospital to visit an employee or one of their family members.

Willa oversees the firm's weekly devotions and says these are a wonderful testament to the spirit of Christian fellowship that exists at the firm. She also sees them as an acknowledgement of our need for God's blessings on our firm and all of our lawyers and employees. Her duties also include coordinating other

social activities for the firm, such as the annual night out with the Montgomery Biscuits, Thanksgiving breakfasts, and Christmas parties. Willa also has regularly scheduled prayer meetings with several of the male lawyers' spouses. She would also do the same for the spouses of female lawyers, I suspect, if they would come.

Willa and Sam, who have been married for 53 years, have three children and six grandchildren. They serve as elders at Christian Life Church in Montgomery. The Carpenters enjoy entertaining and regularly hold pray meetings and other gatherings in their home. Sam and Willa believe that family and friends are their greatest asset. Willa does an outstanding job for the firm, and we are blessed by her presence on a daily basis.

Sloan Downes

Sloan Downes, who has been with the firm 11 years, currently works as Section Head Administrator for the Personal Injury/Products Liability Section. In this position, she assists the Section Head, Cole Portis, in the overall operations of that section. Sloan also serves as Cole's Legal Assistant, where she plays an active role in many of the personal injury/products Liability cases. She grew up in Mobile, Alabama and graduated from the University of South Alabama. Sloan and her husband, Dan, have three active boys, Trey, Nathan, and Jacob Thomas. Sloan spends her spare time playing football and baseball with her boys and supporting Forest Avenue Academic Magnet School and St. Bede Catholic Church. Sloan also enjoys swimming, cooking, gardening and reading. Sloan is a dedicated employee who does outstanding work for the firm. We are fortunate to have her with us.

Holly Stroh

Holly Stroh, who has been with the firm over seven years, works as a Legal Secretary to Lance Gould in the Consumer Fraud Section. Holly has two children: Taylor, age 8, and Drew, age 6, each of whom attends Montgomery Catholic Preparatory School. Her mother, Sandra Walters, also works for the firm. Sandra has been with us for 15 years and serves as Section Head Administrator for the Toxic Torts Section. Holly enjoys spending time with her children and being around her family and friends. She is a very good employee and we are mighty glad she is with the firm.

*****SOME CLOSING OBSERVATIONS**

THE JOY AND BLESSING OF LABOR

I have been blessed to work for a law firm that has good lawyers, good employees, and a very good work environment. Even so, there are times when work is not always pleasant and is often stressful. I have always been able to deal with whatever problems might come up. That's because I learned to keep my focus and dependence on my God. I am told that there are lots of folks don't like to come to work and I believe in many instances it's simply because they don't like their jobs or don't like the folks they work with. Jay Wolf, who is the Senior Pastor at First Baptist Church in Montgomery, made some interesting observations recently relating to work and how to cope with the stress and strain that we all have to deal with in the workplace. Here's what Jay had to say about the workplace:

Surveys reveal that 65% of American workers are dissatisfied with their jobs. Many of them go to work simply because they have no other choice – “I owe, I owe, so it's off to work I go.”

Many people resent the routine and feel they are trapped on a meaningless merry-go-round with no real purpose in life. There is a better way! You possess the capacity to see your work as God's gift and transform your labor into an exciting opportunity to serve the Lord as you serve others. The first step comes with refusing to divide your life into the secular and the sacred. See everything you do “in word or deed” as an offering back to the Lord. Do not limit worship to a Sunday service but adopt a lifestyle of worship.

The second step includes your choice to select an attitude of gratitude. Bring into clear focus the fact that not everyone is able to work. Humbly thank God for your health, your abilities, and the availability of your job. The third step is the critical discipline of learning to see the Lord in your workplace. Infuse the daily with the divine by looking for the Lord in your co-workers, customers, successes, and challenges. Then actively seek to discover divine appointments for sharing encouragement, instruction, and a witness for Christ. The result will be the transformation of your work into a ministry opportunity that produces not only a paycheck but joy, fulfillment and eternal fruit!

Whatever you do, in word or deed, do it all in the name of the Lord Jesus, giving thanks to God the Father through Him.

Colossians 3:17

I sincerely believe that making God our primary focus in all that we do – including in our jobs and in the workplace – is the key to enjoying our work. We

must learn to trust God's promise and depend on Him at all times. When God is in control, the result for us is better performance, more productive effort, and pure enjoyment in what we do in the workplace. Both joy and blessings result when we learn to really trust God and work to please Him in all that we do. Jay gives us the formula for success and happiness in the workplace when he gives us the simple but powerful message found in Colossians.

*****MY PARTING WORDS**

BIBLE SCRIPTURE OF THE MONTH

A member of our church, Jonah Dawson, sent me a card recently that included his favorite scripture from the Bible. I decided to include the scripture he selected in this issue mainly because of the subject matter. With all of the bad stuff going on around us, it's an appropriate time for us to examine relationships and try to figure out what is causing all of the bad and unexplained events to occur. Many of the problems result from relationships that have gotten off track in some manner. In fact, a favorite scripture from the Bible will be included each month in future issues. The following is Jonah's contribution to this issue and you can determine how it relates to you. I know that it certainly made me do some serious self-analysis.

Love suffers long and is kind; love does not envy; love does not parade itself, is not puffed up; does not behave rudely, does not seek its own, is not provoked, thinks no evil; does not rejoice in iniquity, but rejoices in the truth; bears all things, believes all things, hopes all things, endures all things. Love never fails. But whether there are prophecies, they will fail; whether there are tongues, they will cease; whether there is knowledge, it will vanish away.

1 Corinthians 13:4-8

The Bible teaches us that of all of the spiritual gifts given to us, the greatest of all is the gift of love. The term is often used without truly understanding what love is really all about. Many males – and even some females – have great difficulty dealing with the concept and true meaning of love, and that can cause problems in our relationships with family and friends. I appreciate very much Jonah's bringing this timely message to all of us. I would like to have our readers send in their favorite scriptures each month and we will select one for inclusion in the next month's issue.

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