



THE
JERE BEASLEY REPORT AUGUST 2008

Beasley Allen

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I. CAPITOL OBSERVATIONS

MERCK TO FUND VIOXX SETTLEMENT IN AUGUST

Merck announced on July 17th that it will fund the \$4.85 billion settlement designed to resolve tens of thousands of lawsuits related to its Vioxx painkiller. This announcement means Merck will have to honor the settlement agreement. Certain threshold levels had to be met in order to trigger the funding and all of them have been met. As a result, on August 4th the drug company will officially waive its right to walk away from the deal. Merck will then make total payments of \$4.85 billion into the settlement fund, with the first \$500 million payment scheduled for August 6th. Payments to claimants should begin before the end of this month.

Nearly 60,000 people have registered a claim that Vioxx caused a heart attack or stroke and there were approximately 50,000 lawsuits filed. Our firm's Mass Torts Section, led by Andy Birchfield, was instrumental in negotiating this settlement and the lawyers and staff have done a tremendous job in meeting all of the deadlines. It's an important day for users of Vioxx. Without a doubt, it's significant that more than 48,000 of the roughly 50,000 people who suffered injuries have agreed to participate in the settlement program. Those large numbers are a clear indication that the settlement is a good one for the Vioxx victims and their families. It has been a long, tough battle, but we can now see the end of the litigation for our clients.

UPDATE ON THE STATE'S MEDICAID FRAUD CASE

The following is an update on recent developments relating to the Medicaid

fraud lawsuit filed by the State of Alabama against 72 drug manufacturers. There have been a number of significant happenings including trials that were held against three of the companies.

STATE WINS ITS CASE AGAINST GSK & NOVARTIS

The State of Alabama has won its second Medicaid fraud lawsuit against two major drug manufacturers. The jury, after hearing two weeks of testimony, returned verdicts of \$80,989,559 against GlaxoSmithKline and \$83,257,694 against Novartis. This case was tried in the Circuit Court of Montgomery County. Each defendant was found by the jury to have committed fraud. The damages returned were all compensatory. The amount of damages awarded was exactly what the state had lost as a result of the fraudulent price reporting. Ed Sauls, a Montgomery-based CPA, was the state's damages expert. Many had stated that this trial would be a test case for the drug manufacturers.

STATE MEDICAID FRAUD LAWSUITS GET SUPPORT

In a most significant development, the AARP and Alabama Arise have thrown their full support behind the State of Alabama's Medicaid fraud lawsuit. Dr. Joan Carter, AARP's state director for Alabama, and J. Ray Warren, the group's state president, told the media last month at a news conference that national AARP was in full support of the state's efforts to recover damages from the 72 companies that have been sued. Jim Carnes, who is with Alabama Arise and deals with healthcare issues, said that his organization also backs the state and is throwing its full support behind the litigation.

These endorsements are

extremely important for a number of reasons: first, the two groups are knowledgeable about Medicaid; and second, they have a tremendous number of members in Alabama. For example, AARP has over 500,000 members in the state. In addition, AARP has offered the services of its legal staff to assist in brief writing when the cases go to the Alabama Supreme Court. These endorsements are huge for our cause and we appreciate the support very much.

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JUDGE ISSUES STRONG POST-VERDICT ORDER IN ASTRAZENECA CASE

Judge Charles Price, the judge assigned to the state's Medicaid fraud cases and who presided over the trial of the AstraZeneca case, has issued a very strong order on the post-verdict motions filed by the defendants in the State of Alabama's first Medicaid fraud case to go to trial. All of the liability-related motions were denied. However, the punitive damages award was reduced by Judge Price to \$120 Million in compliance with Alabama law. The compensatory damages were left at \$40 Million. The judge wrote in his order that the amount of damages was supported by the substantial evidence of fraud introduced at trial. It was most significant that the judge found the punitive damages award to be supported by substantial evidence, which is the standard for review for the awarding of punitive damages. He found that AstraZeneca had engaged in intentional fraud and that there was clear and convincing evidence in support of the jury's verdict. In his order, Judge Price stated further:

At trial, the State introduced evidence to establish that the Defendants (AstraZeneca) fraudulently diverted Medicaid funds intended to benefit the State's poor, elderly, and infirm citizens....The State also established that Defendants (AstraZeneca) wrongful acts constituted willful, intentional fraud and suppression....

We were completely satisfied with the judge's order, but AstraZeneca has appealed to the Alabama Supreme Court. The evidence of fraudulent conduct was very strong against AstraZeneca in

this case. It was obvious that the company intended to cheat the Medicaid program and thought it would never be caught. The company's strategy appeared to be—if caught—simply pay the money back to the state plus interest. That strategy was proved by the evidence at trial.

STATE OF ALABAMA OFFERS TO SETTLE THE MEDICAID DRUG CLAIMS

After being successful against three drug manufacturers in the trials held so far, I believe the time has come for all parties to reach a global settlement of the remaining cases. There are 69 drug companies with cases pending in the Circuit Court of Montgomery County involving false pricing in the Medicaid program. We have given each of these companies that were sued 30 days in which to start settlement negotiations. The defendants will have a 30-day window in which to make an acceptable settlement offer to the state. For those companies which make no offer, there will be no further settlement negotiations by the state.

Based on our investigation, all of the companies have collectively cheated the state Medicaid Agency out of approximately \$1 billion. This is money that could have been used to benefit the folks who qualify to be on the Medicaid program. Those beneficiaries include the elderly, the disabled, the poor and children. It's impossible to understand a corporate mentality that would put a scheme in place designed to cheat the folks who are beneficiaries of the Medicaid program. Our intention is to try the cases against those drug companies not willing to pay back to the state their ill-gotten gain. We will also seek punitive damages against those companies. Those companies

can't say they weren't given an opportunity to do the right thing and settle their cases.

NEXT TRIAL DATE SET

Judge Price has set October 27th as the date to start the next trial, which will be against Bristol-Myers Squibb Co. If there is no settlement, we will try this case as scheduled. We believe it to be one of the strongest of the remaining cases.

BRISTOL-MYERS SQUIBB SETTLES LAWSUIT WITH 44 STATES FOR \$515 MILLION

Under a settlement agreement, Bristol-Myers Squibb will pay state Medicaid programs a combined total of \$515 million to settle lawsuits against the company and its former wholly-owned subsidiary, Apothecon, Inc. The settlement involves lawsuits filed against the New York-based drug maker by 44 states and the District of Columbia over the company's marketing and pricing of prescription medications paid by the participating states' Medicaid programs. Like most other drug companies, BMS reported inflated prices for various prescription drugs. Those prices were used by states and federal health care programs to determine the prices paid for Squibb and Apothecon products.

The two companies were also accused of paying healthcare providers and pharmacies incentives to purchase Squibb and Apothecon products as well as promoting the sale and use of the antipsychotic drug Abilify for unapproved uses. In addition to settling state and federal claims, Bristol-Myers Squibb has entered into a Corporate Integrity Agreement with the Office of the Inspector General of the U.S. Department of Health and Human Services that requires the drug company to report its average sales prices and average manufacturers' prices in the future.

The states that elected to be a part of the national settlement began to receive their share of the settlement funds last month. However, Alabama elected not to participate in the national settlement and will try its case separately in Montgomery County Circuit Court. The Attorney General and all of the lawyers representing the state feel that Alabama's claim has more value in a separate lawsuit.

Source: *Legal Newsline*

TEXAS SUES FOUR DRUG COMPANIES FOR INFLATING DRUG PRICES

Attorney General Greg Abbott has filed another lawsuit on behalf of the State of Texas charging several generic drug manufacturers with reporting false, inflated drug prices to the Texas Medicaid program. The enforcement action names the following defendants: Watson/Schein Pharmaceuticals Inc. of California; Alpharma Inc. of New Jersey; Par Pharmaceutical Inc. of New Jersey; and Barr Pharmaceuticals Inc. of New York. This is just another case based on the companies reporting false prices to the state Medicaid programs.

The Texas Attorney General had previously taken successful action against numerous defendants for launching similar drug-pricing schemes. Among these are Schering-Plough/Warrick Pharmaceuticals in May 2004 (\$27 million); Dey Inc. in June 2003 (\$18.5 million); Boehringer Ingelheim/Roxane Laboratories in November 2005 (\$10 million); and Baxter Healthcare Corp. in June 2006 (\$8.5 million). The Attorney General's lawsuits against B Braun Medical Inc. of Pennsylvania and Abbott Laboratories Inc. of Illinois remain pending. Texas will also receive funds from the BMS settlement referred to above. That amount is believed to be \$17 million.

It's significant that Texas has a law on the books that gives that state's Attorney General a great deal of help in bringing corporate cheaters to justice.

With the passage of amendments to the Texas Medicaid Fraud Prevention Act in 1997, the Texas Legislature paved the way for whistleblower lawsuits involving industry insiders. The Alabama Legislature should pass similar legislation which would be a great benefit to Alabama taxpayers in combating fraud in the Medicaid program. To obtain more information about the Attorney General's efforts to fight Medicaid fraud in Texas, access the agency's Web site at www.texasattorneygeneral.gov.

Source: Texas Attorney General Press Release

ALABAMA MEDICAID CHIEF ELECTED TO NATIONAL POST

Alabama Medicaid Commissioner Carol H. Steckel has been elected chair of the executive committee of the National Association of State Medicaid Administrators. Carol was elected to the position by a panel that included Medicaid commissioners and directors from across the country. This is quite an honor for Carol and for the State of Alabama. The association, which includes representatives of state Medicaid agencies, provides an outlet for states to communicate with the federal government on Medicaid issues. As chair, Carol will represent the association in testimony before Congress and in dealings with other federal agencies. Carol, who had previously served in the same capacity, was appointed Medicaid Commissioner by Governor Bob Riley in 2003.

PUBLIC CITIZEN FIGHTS FOR ORDINARY CITIZENS

Public Citizen is a strong advocate for the rights of ordinary citizens and in my opinion it has no equal on the national level. It's good to know that Public Citizen is around to challenge corporate power and government abuses, and to represent the public interest in the halls of power in Washington. The following are items currently on Public Citizen's agenda:

- It will push for public funding of judicial, congressional, and presidential elections to limit the influence of special interests;
- It will challenge limits on corporate accountability and medical malpractice awards;
- The disclosure of ethics violations on Capitol Hill and the fight for lobbying reform are top priorities;
- It will advocate strong safety and health standards for motor vehicles, drugs, medical devices, consumer products and chemicals in the workplace;
- Promoting fair trade and challenging corporate globalization will be on its agenda;
- Key cases in federal courts will be argued throughout the country, which will include 55 cases before the U.S. Supreme Court; and
- It will lobby for funding for renewable energy and conservation and will oppose huge subsidies for the fossil fuel and nuclear power industries.

I encourage all of our readers to support Public Citizen in its fight for justice and equality. All Americans owe Joan Claybrook and her dedicated staff a tremendous vote of thanks for their great work. If you want to learn more about Public Citizen go to www.Citizen.org.

II. RECENT SETTLEMENTS BY FIRM

UNITED STATES SUPREME COURT REJECTS CONTINENTAL CARBON'S APPEAL

For more than six years, our firm has represented the City of Columbus, Georgia, local boat dealer John Tharpe,

and South Columbus resident Owen Ditchfield in a carbon black air pollution case against the Continental Carbon plant in Phenix City, Alabama, and its parent company, China Synthetic Rubber Corporation of Taiwan. At long last, I am pleased to report that on June 27th, the United States Supreme Court issued an order rejecting all further appeals of the \$20,709,000 pollution verdict entered in our clients' favor.

In August of 2004, a federal jury in Opelika, Alabama, awarded our clients \$1.9 million in compensatory damages and \$17.5 million in punitive damages for the carbon black pollution that the Continental Carbon plant repeatedly released onto the Plaintiffs' property. Over the course of that two-week trial, the jury received evidence that, according to the presiding United States District Judge Mark E. Fuller, demonstrated that the Defendants engaged in a "pattern of intentional misconduct...leading to repeated damage to the Plaintiffs' properties."

Following the trial, the defendant companies filed numerous appeals of the jury's verdict; all of them were rejected by the District Court and the Court of Appeals for the Eleventh Circuit. Then, in August of last year, the Defendants petitioned the United States Supreme Court, requesting that it hear one final attack on the jury's verdict. By rejecting that petition, the highest court in the land effectively ended Continental Carbon and China Synthetic's four-year effort to overturn the jury's decision.

Without question, the Court's ruling underscores what the City of Columbus, Action Marine, and Owen Ditchfield have said since the beginning of this case: these companies deserved to be punished for the carbon black pollution that their Phenix City plant released into South Columbus. More importantly, this decision sends a clear message that companies like Continental Carbon and China Synthetic Rubber Corporation cannot recklessly disre-

gard the rights and safety of their neighbors and expect to get away with it. Interestingly, the ratio of punitive damages awarded to the compensatory damages was about 9 to 1. This may be most significant since the decision followed the Court's opinion in the Exxon case.

I would like to personally commend the Mayor, the Columbus City Council, Owen Ditchfield and John Tharpe for taking a stand in this case and for supporting the rights of their fellow citizens in South Columbus. Despite the Defendants' efforts to conceal and downplay their misconduct in this matter, our clients never gave up and never stopped pursuing the justice to which they are entitled.

David Byrne and Rhon Jones from our firm were involved in this case from the very beginning and never gave up. Their hard work paid off. I would also like to thank our co-counsel, Jeff Friedman and Eddie Jackson, for all of their hard work on this case. Both are excellent lawyers and we look forward to working with them again in the future. We are pleased to have been able to get a very good result for our clients.

GM ROLLOVER CASE SETTLED IN HOUSTON COUNTY

Our firm recently settled a case against General Motors involving the rollover of a 2002 Chevrolet Trailblazer. We represented a family who lived in the Wiregrass area of Alabama in this case. The wife was driving a 2002 Chevrolet Trailblazer on U.S. Highway 84 when she made an evasive maneuver. The Trailblazer vehicle began to fishtail, ran off the road, and rolled over as it came back on the roadway. While the wife was properly belted at the time of the accident, she was partially ejected through the side window. As a result, she suffered a severe traumatic brain injury. She had no other serious or life-threatening injuries. The wife has

made great strides in her recovery process, but she still requires around-the-clock care. The husband and wife are some of the finest folks in this world. The husband has worked tirelessly to make sure that his wife receives the best possible care so that she will have the best chance of recovery from this life-changing injury. The couple's attitude throughout the entire case has been an inspiration to all of us.

Our primary claim was that the 2002 Trailblazer was defectively designed because it was not equipped with an electronic stability control ("ESC") system. GM developed its own ESC system, "StabiliTrak," in the mid-90's. GM chose not to incorporate StabiliTrak—or any other form of electronic stability control—on the 2002 Trailblazer, even though Stabilitrak had been used in **GM passenger cars** as early as 1997. At the time that the 2002 Trailblazer was built, GM knew that SUVs roll over at a much higher frequency than passenger cars. GM also had knowledge that when SUVs roll over, there is a high likelihood of serious injury or death. It was our contention that had the vehicle been equipped with an ESC system such as Stabilitrak, the accident would never have occurred. The ESC system would have corrected the vehicle dynamics and the wife would have been able to drive straight on down the road.

Additionally, the vehicle was defectively designed due to GM's failure to incorporate an appropriate "rollover protection system" into the vehicle. The Trailblazer should have been equipped with a roll-sensored, roof rail airbag. This type of airbag deploys from the roof-rail of the vehicle in the event of a rollover. Such an airbag would have prevented the wife's head from going outside the "survival space" of the vehicle. An unprotected, internal GM document indicated that as early as 1971, GM engineers discussed a "safety net" system which would protect against the exact type of injury that our

client sustained. But, GM chose to take no action to develop this safety feature until 2005. Even then, the car-maker only offered the roof-rail airbag system as an **option** on the 2005 Trailblazer.

This was a complicated case, involving highly technical engineering issues. GM took the position that, at the time the 2002 Trailblazer vehicle was manufactured, it was not technologically feasible to incorporate these two safety systems on the vehicle. Our response was simple—if GM had wanted to implement these features it could have done so as early as 1997. Our experts—both former automotive industry employees—testified that the technology was clearly available at that time. The timeline we developed in the case showed that once NHTSA started pressuring automobile manufacturers to prevent rollovers and protect occupants in the event they do occur, GM was able to implement these systems in a timely manner.

J.P. Sawyer and Cole Portis from our firm handled the case along with Steadman Shealy, an outstanding lawyer from Dothan, who served as co-counsel with our firm. Working together, we were able to help our clients reach a satisfactory settlement in their case. The amount of the settlement was confidential at GM's request. However, it's good to know that justice was done for a couple who were victims of corporate wrongdoing, and we were pleased to be able to help them.

SETTLEMENT OF WRONGFUL DEATH CASE

On August 18, 2006, a couple left their home early for a vacation to Pigeon Forge, Tennessee. As the couple drove their car north on Interstate 59 near Fort Payne, Alabama, they encountered a tractor-trailer rig traveling in the same direction. As the husband attempted to pass the tractor-trailer, it moved into the left lane and forced the couple's vehicle off the highway. While there was no actual contact between his car and the

truck, the husband lost control of his car. It barrel-rolled several times.

Due to the severity of the crash, the husband suffered a dislocation and fracture of his spine that resulted in paralysis from his shoulders to his toes. Fortunately, the wife only suffered a minor arm injury. The husband was taken to a Birmingham hospital where surgery was performed to stabilize his spinal injury. Thirteen days later, he suffered a heart attack and died.

When the wife came to our office and requested assistance, we knew a major challenge in a wrongful death claim would be the issue of medical causation. Could we establish that the spinal cord injury caused or contributed to the heart attack which ultimately took his life? We employed Dr. Jim Lauridson, a former deputy chief medical examiner for the State of Alabama, to assist us in this case. In his fifteen years as a medical examiner, Dr. Lauridson had determined the cause of death in over 4,000 cases. After reviewing the UAB Hospital records and medical records from other treating doctors, Dr. Lauridson's medical opinion was that the spinal cord injury caused both physical and mental stress which caused the husband's fatal heart attack.

Once we began reviewing the trucking company's records and the driver's personnel file and other records, it became quite clear there were discrepancies in the driver's logs. The driver of the tractor-trailer was from Kenya, Africa, and he had come to the United States seeking political asylum in 1995. He had been the director of veterinary medicine in Kenya, prior to coming to the United States. He had worked for PFG-Lester Broadline, Inc. for four years prior to a promotion which resulted in his being sent to truck driving school in 2000.

We were able, by way of discovery, to learn that the company's driver had received six speeding tickets between 1998 and 2006 and one ticket for improper passing. Based upon the company's own Policy and Procedure

Manual, the driver should not have been operating a truck on the date of the wreck. Further, during the discovery phase of the case, the driver admitted to copying his logbook from his prior week's driver logs. At the time of the wreck, the driver was assigned a route which took him from Nashville, Tennessee to Chattanooga—then to Gadsden—and then back to Nashville.

The driver admitted that he did not keep his driver's log contemporaneously as he drove each day even though that is required by the Federal Motor Carrier Safety Regulations. Under company policy, the driver was required to turn in his driver's logs weekly. The driver admitted that he would copy the log from the prior week before he would turn in his logs. He had followed this illegal practice for approximately one year before this wreck occurred.

Further, it became evident that this company did not have an auditing system in place to discover discrepancies in drivers' logs. The company's representatives testified that each route given to a driver would be such that the driver would not violate excessive hours driving pursuant to the Federal Motor Carrier Safety Regulations. However, the company's auditing program failed to monitor any violation other than excessive hours. This case was settled prior to trial during mediation for \$2.5 million. Mike Crow from our firm handled the case, which was filed in the United States District Court for the Middle District of Alabama, and did an outstanding job. We felt that Dr. Lauridson's very good work on the medical causation issue was extremely important in this case.

STATE OF NORTH CAROLINA SETTLES JAIL FIRE DEATH CLAIMS

Our firm recently resolved wrongful death claims for families that we represent related to the Mitchell County North Carolina jail fire of May 2002.

The Mitchell County Jail, located in Bakersville, burned, causing the deaths of seven inmates due to smoke inhalation. Several of the inmates, like our 21-year-old client Haley Thomas, were spending weekends in the jail for minor offenses. We have periodically mentioned the case as it moved through the appellate process. Our initial investigation into the fire revealed that the state had failed to properly inspect the jail facility. This resulted in numerous fire and building code violations which led to the inmates' deaths. Following our investigation, the North Carolina Department of Labor also investigated the fire. The Department determined that the state agency responsible for inspecting the jail for fire and building code violations had failed to adequately inspect the jail and to properly train its inspectors.

The Labor Department report determined that the area where the fire started should have been constructed of non-flammable materials or should have had a properly constructed fire wall within the building. Our expert established that if the jail had been properly constructed the fire would have quickly burned out without the loss of life. The state disputed the claims and argued that it was immune from suit under the Public Duty Doctrine. Under that Doctrine, an individual does not have a claim against the state for duties that are owed to the public at large.

The state initially filed a motion to dismiss before the Industrial Commission, the administrative body that hears claims against the State of North Carolina, and the motion was denied. The state appealed to the full Industrial Commission, which also denied the state's motion to dismiss. An appeal was then taken to the North Carolina Court of Appeals. In a 2 to 1 decision, the North Carolina Court of Appeals found that the state owed a special duty to inspect jail facilities for the benefit of inmates and that a breach of this duty

had occurred. In a last ditch effort, the state filed an appeal to the North Carolina Supreme Court. Following oral arguments, the Supreme Court ruled for our clients and held that the state did not have immunity from suit.

Following numerous months of discovery and disclosing experts, the state agreed to settle our clients' claims. It has been our privilege to represent our clients in this matter and to change North Carolina law to provide legal remedies for those who have been injured as a result of the state's failure to perform its statutory duties of inspection. Ben Baker from our firm handled this case and did an outstanding job for our clients. It was a long and hotly-contested case and fortunately the end result was a good one.

III. POLITICAL OBSERVATIONS

McCain's Chief Economic Advisor Speaks Out On The Economy

It didn't take long to figure out that John McCain is totally out-of-touch with reality on a number of fronts. This is especially true when it comes to the economic woes facing our nation. Senator McCain, who admits he knows little about the economic issue, has been depending on Dr. Phil Gramm, who was co-chair of the McCain campaign, to advise him on economic policy matters. Gramm has been setting economic policy for the campaign. Recently, this key advisor called the United States "a nation of whiners" who are in a "mental recession." While Gramm's remarks were just plain dumb, I fear this echoes what many top Republicans in Washington really believe about the American people. Many of them don't even know how to pump gas, much less how it feels to pay over \$4 a gallon for that gas. I doubt if

any of McCain's top advisors could even tell us what a gallon of milk or a loaf of bread costs in the stores. It's hard for them to understand what the American people are going through because of the failed economic policies of the Bush Administration.

So far all we have heard from McCain on the economy is a replay of what we have been hearing from the Bush Administration over the past seven years. As a result of the misguided economic policies of the Bush White House, the American economy is in great peril and our people are experiencing enormous economic challenges. We are in an economic recession and the fallout from Gramm's comments will just make things worse. Gramm, a former U.S. Senator from Texas and now a vice chairman of the Swiss bank UBS, made his remarks in an interview with *The Washington Times*. Gramm says he has a doctorate in economics, but I have to wonder if he made it to all of his classes. On the other hand, maybe he went to too many. In any event, what he said about the state of our nation's economy is either the most arrogant thing I have heard lately or the dumbest.

It's high time we had a President who doesn't deny our problems or blame the American people for them, but who will take responsibility and provide the leadership necessary to solve them. The economy is one of the two top issues for voters this year. In fact, it may be the most important issue in the presidential campaign. Interestingly, Gramm was in line for a top cabinet post in a McCain White House, but he now has been thrown under the bus by his close friend, John McCain. Karen Finney, the Democratic National Committee's communications director, had this to say:

What John McCain, George Bush, and Phil Gramm just don't understand is that the American people aren't whining about the state of the economy; they are suf-

fering under the weight of it—the weight of eight years of Bushonomics that John McCain and Phil Gramm have vowed to continue. How dare John McCain and his advisers so callously dismiss the challenges the American people face? No wonder voters feel John McCain is out of touch. He and his campaign don't even understand the everyday issues Americans are dealing with.

If Gramm was the only bad apple in the McCain barrel, the threat to our nation if the GOP nominee became President, wouldn't be as serious. But when you consider that Karl Rove, Grover Norquist and a host of powerful Washington lobbyists are running the show for McCain, it's downright scary. While Gramm has removed himself from the campaign—at least on paper—his influence on McCain remains, according to reliable sources in Washington.

THE BUSH HEALTHCARE RECORD

John McCain, whose campaign from the beginning has had no real sense of direction, is not tied closely to the key advisor for President Bush. In fact, this advisor, Karl Rove, has now had to come out of the closet in an attempt to breathe life into the campaign. Rove has been working actively for the GOP standard bearer. It's most interesting that Rove has been working hard in an effort to help McCain dodge the Bush record. Thus far those attempts have been unsuccessful and have fallen on deaf ears. One area where McCain is trying hard to avoid the taint of the Bush mantle involves health care. We have seen health care costs go out of sight during the Bush Administration and there are now 47 million Americans with no health insurance—a very bad combination—and there are no prospects for any relief during the

remaining months of the Bush presidency.

There is a definite need for universal access to health care in this country, and that is an important issue in the campaign. The following, which comes from remarks made by the President on the subject, pretty well sums up the Bush plan and his approach to making health care available to all citizens:

I mean, people have access to health care in America. After all, you just go to an emergency room.

*George W. Bush
July 10, 2007*

That tells us how this administration feels about a most serious problem facing all American citizens. The Bush-Cheney-Rove mentality is sort of like that of a certain French Queen from years past who also had no real feelings for the needs of ordinary folks. She told her subjects—who were also having to deal with a sinking economy, with lots of them literally begging for bread—that they could “eat cake.” While the President hasn't made that offer so far, he has come pretty close.

BLUE DOG DEMOCRATS ENDORSE BRIGHT FOR CONGRESS

In a significant development, the fiscally conservative Democratic Blue Dog Coalition has endorsed Montgomery Mayor Bobby Bright in his bid to be the next congressman for the 2nd Congressional District. Bobby has said he wants to be the next member of the coalition in the U.S. House of Representatives. Coalition members applauded Bobby for his commitment to fiscal responsibility and economic growth. U.S. Rep. Bud Cramer of Huntsville, who is not running for another term, believes that Bobby would be a good addition to the coalition which was formed in 1995.

Bobby won the June election to

become the Democratic nominee and will face Rep. Jay Love in the general election. Jay was the winner of a bitter run-off battle with state Senator Harri Ann Smith. Many believe the negative tone of the Republican race will help Bobby replace outgoing U.S. Rep. Terry Everett in Congress. Time will tell if that assessment is correct. Early polling indicates that Bobby is extremely strong in the northern counties in the district and is also strong in the Wiregrass. This will be a real interesting race to watch.

VICE-PRESIDENT CHENEY VISITS ALABAMA FOR GOP FUNDRAISING EVENT

By the time this issue is received Vice-President Dick Cheney will have appeared at a fundraiser in Birmingham for the Alabama Republican Party. According to Party Chairman Mike Hubbard, Cheney was to speak on August 1st at a luncheon at Shoal Creek Country Club. The visit was to raise money for the party's federal campaign fund. The money will be used primarily to help Republican candidates in congressional races. Invitations to the event said the tickets were \$500 and \$2,000 with the higher priced ticket getting a photo with the vice-president. Frankly, I was sort of surprised that the GOP would publicize the Cheney visit. I really don't believe any Republican candidate will hitch their campaign to Cheney's wagon. Since this issue went to the printer before the event, I don't know how it turned out. But, I got the impression that the GOP leadership wanted the Vice-President to slip into town, raise the money, and then get out of town.

Source: Associated Press

IV. LEGISLATIVE HAPPENINGS

It's VERY QUIET ON THE HOME FRONT

There is not much to report from the State House since Governor Riley hasn't called a special session so far. At least two sessions were expected this summer with the first one dealing with industrial development needs. However, losing the Volkswagen plant to Tennessee made that one unnecessary. The other session will likely be isolated to revisiting the laws relating to natural gas royalties. Most legislators I have talked with tell me that a session dealing with that issue will be a real test for the oil industry lobbyists. Those lobbyists will definitely have their work cut out on this issue. It will be interesting to see who will be the winner if the session is called—the lobbyists, or Governor Riley and the people of Alabama. If I were a betting man I wouldn't put my money on the lobbyists this time.

LOOKING AHEAD TO 2010

The state GOP is already making plans to take over the Alabama Legislature in the year 2010. According to reports, funds are being collected from the special interest groups with a war chest being set up to fund GOP candidates. It's my belief that Democratic candidates will be ready for the fight. However, I would like to see the leadership from both the Republican and Democratic parties spend their time working on campaign finance and lobbying reform rather than raising campaign funds for 2010 races. Nevertheless, the legislative races have already started and they should be most interesting and perhaps even entertaining.

V. COURT WATCH

DOCTORS WORRY ABOUT FEDERAL PREEMPTION

The threat of federal preemption has become a major issue in this country. A most interesting article appeared in the *New England Journal of Medicine* recently that addressed this issue. The authors focused on the Wyeth case which is before the U.S. Supreme Court. It was pointed out that if the drug manufacturer, Wyeth, prevails in the case "drug companies could effectively be immunized against state-level tort litigation if their products that have been approved by the Food and Drug Administration (FDA) are later found to be defective."

As we all know, a recent case decided by the Supreme Court involving a product liability claim against Medtronic was found to be preempted. Medtronic won its case in the Supreme Court because the 1976 law that grants the FDA authority to regulate medical devices contains a specific clause asserting that state requirements with regard to medical devices are preempted by federal requirements. Although the preemption clause is silent on common-law tort actions, the Supreme Court interpreted the clause broadly to include such actions. Many constitutional purists are questioning how the court reached its conclusion on preemption in that case.

Unlike the law governing medical devices, however, the Food, Drug, and Cosmetic Act, which provides the statutory framework for the regulation of drugs by the FDA, contains no such preemption clause. That should be a most significant distinction in the two cases. We have set out the facts in the Wyeth case in previous issues, but they are worth revisiting briefly. A patient lost her arm after an injection of Wyeth's antiemetic drug Phenergan. The High Court will decide whether

preemption of state tort litigation is implied by the law, even though it is not explicitly stated. Previous administrations and the FDA considered tort litigation to be an important part of an overall regulatory framework for drugs and devices.

It has been accepted over the years that product-liability litigation by consumers complements the FDA's regulatory actions and enhances patient safety. While persons who are harmed have a constitutional right to seek legal redress, federal preemption would take away that right. Due to pressure from the Bush Administration, and the drug and medical device manufacturers, the FDA has reversed its position. The FDA now says that common-law tort actions are preempted. It appears pretty basic that Congress, not unelected appointees of a federal agency, has the sole authority to decide whether preemption should apply. To this date, Congress has never said that a regulatory agency could usurp its authority and make laws relating to preemption and the common-law of the states.

Patient safety should be a top priority for the manufacturers of drugs and medical devices. It should be undisputed that product-liability litigation has helped to remove unsafe products from the market and has prevented others from entering it. Through the process of pretrial discovery, litigation may also uncover information about drug toxicity that would otherwise not be known. On the preemption issue, the NEJM article states:

Preemption will thus result in drugs and devices that are less safe and will thereby undermine a national effort to improve patient safety. Owing in part to a lack of resources, approval of a new drug by the FDA is not a guarantee of its safety. As the Institute of Medicine has reported, FDA approval is usually based on short-term efficacy studies, not long-term safety studies. Despite

the diligent attention of the FDA, serious safety issues often come to light only after a drug has entered the market. The FDA, which—unlike most other federal agencies—has no subpoena power, knows only what manufacturers reveal.

Based on conversations that I have had with friends in the medical community, I am convinced that most doctors don't understand preemption. It follows that they don't understand how preemption affects the health and safety of American citizens. The authors of the NEJM article discuss in detail why doctors should be concerned about preemption. The following is a good assessment of why federal preemption is bad for doctors and their patients:

In stripping patients of their right to seek redress through due process of law, preemption of common-law tort actions is not only unjust but will also result in the reduced safety of drugs and medical devices for the American people. Preemption will undermine the confidence that doctors and patients have in the safety of drugs and devices. If injured patients are unable to seek legal redress from manufacturers of defective products, they may instead turn elsewhere.

The authors, Gregory D. Curfman, M.D., Stephen Morrissey, Ph.D., and Jeffrey M. Drazen, M.D., testified at the congressional hearing on preemption held before the House Committee on Oversight and Government Reform. They wrote in the Journal concerning their testimony:

As we stated in our testimony to the committee, to ensure the safety of medical devices, we urge Congress to act quickly to reverse the Riegel decision. Congressman Waxman and Congressman

Frank Pallone, Jr. (D-NJ), are poised to introduce legislation that would unambiguously eliminate the possibility of preemption of common-law tort actions for medical devices. And if the Supreme Court rules for preemption in Wyeth v. Levine, which we hope it will not, Congress should consider similar legislation for drugs. Such legislation is in the best interest of the health and safety of the American public.

It's most significant that the article was written by top officials with the NEJM. They are concerned for the health and welfare of the American people when it comes to the safety of drugs and medical devices, and rightly so. If preemption is allowed to prevail, the American people will be the losers!

Source: *New England Journal of Medicine*

U.S. SUPREME COURT RULES IN EXXON VALDEZ CASE

In June the United States Supreme Court cut the amount of punitive damages awarded in the Exxon Valdez case. You will remember that the Valdez was the oil tanker wrecked off the coast of Alaska in 1989, causing 11 million gallons of oil to spill in the Prince William Sound. To date this is the worst oil spill in United States history. Exxon faced both criminal and civil actions as a result of the oil spill. Exxon appealed from the civil action, in which the jury awarded \$5 billion (later reduced to \$2.5 billion) in punitive damages against Exxon and for the Plaintiffs, commercial fishermen and native Alaskans whose livelihood was destroyed by the oil spill. The United States Supreme Court reduced the \$2.5 billion in punitives to \$507.5 million, the same amount as compensatory damages. The reduction in punitives was based on the Supreme Court's review and interpretation of maritime law regarding punitive damages.

The evidence that had been presented to the jury awarding the damages showed that the captain of the Exxon Valdez was intoxicated as he commanded the ship. Testimony at trial showed that the captain, Joseph Hazelwood, was an alcoholic in relapse who drank in bars, hotels, restaurants, various parking lots and ports, airports, airplanes, and on oil tankers, and that his alcoholism was known by members of Exxon management. Although Exxon had a policy prohibiting crew from serving on its ships within four hours of consuming alcohol, no action was taken to discipline Hazelwood or remove him as captain of the tanker. On the night of the accident, Hazelwood drank at least five double-vodkas before boarding the ship and his blood alcohol is estimated to have been about .241 at the time of the disaster.

Exxon posted a \$40.6 billion profit for 2007 and had the highest quarterly results for any corporation in United States history in February 2008. Considering the enormous wealth of this corporation, the amount of punitive damages remaining against Exxon will doubtless have little if any deterrent effect on Exxon's future conduct. In spite of its record earnings, Exxon has recently filed a request with the United States Supreme Court asking it to declare that it does not have to pay post-judgment interest on the reduced judgment. The victims are asking for interest which would amount to about \$500 million. I believe they are entitled to receive it.

The effect of this decision on punitive damages in other cases is being debated with no real answer at this point. It's my belief that the Exxon case will not have the effect that many in Corporate America hope it will have. Only time will tell if that assessment is correct.

NOTABLE CASES FROM THE RECENTLY COMPLETED TERM OF THE U.S. SUPREME COURT

There were a number of significant cases considered during the recently completed term of the U.S. Supreme Court. Clearly, the Court issued some interesting and noteworthy decisions. Among them were cases involving:

- Punitive Damages
- Second Amendment Dealing With Guns
- War Powers
- Federalism
- Crime and Punishment
- Capital Punishment for Child Rape
- Election Law Involving Photo Identification
- Campaign Finance
- Civil Procedure—Res Judicata: Virtual Representation
- Employment Law Involving A Denial of Benefits under the ADEA
- Conflict of Interest Review under ERISA
- Private Suits for Monetary Damages under ERISA
- Suits under the ADEA for Retaliation
- On the Business Front—Judicial Review of Arbitration Agreements
- The Federal Arbitration Act and the States
- Securities Law Litigation
- Energy

If you would like more information on these cases, let us know and we will send you a list of the cases with a summary of the decisions.

Source: *U.S. Supreme Court*

U.S. SUPREME COURT WON'T HEAR W.R. GRACE APPEALS

Since the U.S. Supreme Court decision has cleared the way for a trial date, W.R. Grace & Co. is headed to court in the company's criminal case. The Court rejected the appeals of W.R. Grace and six of its top executives, all of whom are charged with violating the Clean Air Act. As you know, asbestos-contaminated vermiculite was released from a mine in Libby, Montana causing tremendous problems. The appeals by Grace and its executives stems from a February 2005 indictment. It was alleged that the chemical company knowingly endangered the lives of mine workers and other Libby residents. As has been widely reported, asbestos-related disease has killed an estimated 300 to 400 Libby residents—miners at W.R. Grace's now-closed vermiculite mine, their families and others—while hundreds more suffer from fatal illnesses.

The High Court's decision sends the case back to U.S. District Judge Donald W. Molloy of Missoula, and effectively strips Grace of its final chance at winning the pretrial appeals and blunting the government's case. The Supreme Court's refusal to hear the case means there is nowhere else for Grace to go at the appellate level. The Defendants must now face the music. The Grace case is being called "one of the most significant cases ever brought under the federal environmental crimes program." In its appeal to the Supreme Court, Grace argued that the U.S. Environmental Protection Agency's definition of asbestos doesn't cover most of the fibers that contaminated the vermiculite in Libby. Judge Molloy agreed with Grace's lawyers in an August 2006 decision, but the U.S. Court of Appeals for the Ninth Circuit overturned that ruling and several others. In April, after exhausting their opportunity to appeal to the Ninth Circuit, lawyers for Grace asked the U.S. Supreme Court to review and reverse the rulings.

Government prosecutors successfully opposed those efforts, asking the High Court to deny W.R. Grace's request for a hearing, and clear the way for trial, which is now well into its second year of delays. Innocent folks were made sick and many have died as a result of the continuing exposure to the fibers. Judge Molloy's 2006 decisions had blocked the government's plans to bring charges of "knowing endangerment," a violation of the federal Clean Air Act carrying possible 15-year prison terms on each of the three counts. The trial judge ruled that those charges were time-barred.

Prosecutors appealed the decision, arguing that the "knowing endangerment" charges lie at the heart of allegations that top Grace executives intentionally concealed the dangers associated with the asbestos-contaminated vermiculite mined near Libby. The Ninth Circuit reversed Judge Molloy's decision last July, ruling that the government had acted quickly to fix the statute-of-limitations problem by submitting a superseding indictment spelling out Grace's overt criminal acts. Among other disputed rulings by Judge Molloy, reversed by the Ninth Circuit, was an order banning certain witnesses from testifying at trial, and another that prohibited the government's use of numerous documents, including three critical environmental health studies spelling out the hazards of asbestos.

In April, Grace agreed to pay \$3 billion to those sickened or killed because of its actions in Libby. W.R. Grace also agreed earlier this year to pay the U.S. government \$250 million to reimburse its investigation expenses and pay for cleanup of asbestos poisoning in Libby. The Grace story is a prime example of how some in Corporate America have no regard for the welfare of people. Hopefully, things will change after the November elections.

Source: *Missoulian*

RHODE ISLAND SUPREME COURT OVERTURNS LANDMARK LEAD PAINT RULING

Rhode Island's highest appellate court has overturned a landmark lower court ruling that three former manufacturers of lead paint were legally responsible for creating a public nuisance by covering up the health risks of lead paint. The three former lead paint makers—Sherwin-Williams Co., NL Industries Inc. and Millennium Holdings—had asked the Rhode Island Supreme Court to overturn a 2006 jury verdict that would have required them to pay billions of dollars to clean up contaminated paint around the state. The Rhode Island decision may have a negative impact in other states, counties and cities where lead-poisoning lawsuits are pending.

As you may recall, Rhode Island accused paint manufacturers of covering up the risk of lead paint. That state's lawsuit, filed in 1999, was the first in the nation to seek to hold paint makers responsible. Rhode Island authorities say more than 30,000 children were poisoned by lead paint in the state, with an estimated 200,000 to 300,000 homes contaminated by the paint. The cost of cleaning one home is estimated at up to \$15,000. The court's opinion reads:

However grave the problem of lead poisoning is in Rhode Island, public nuisance law simply does not provide a remedy for this harm. The state failed to establish that defendants interfered with a public right or that defendants were in control of the lead pigment they or their predecessors manufactured at the time it caused harm to Rhode Island children. We do not mean to minimize the severity of the harm that thousands of children in Rhode Island have suffered as a result of lead poisoning.

Lead paint was banned by the U.S. government in 1978 after studies

showed it caused health problems in children, including learning disabilities and permanent brain damage. But its presence remains widespread, especially in older homes. Rhode Island children routinely test above the national average for blood-lead levels. The paint companies denied that they were directly responsible, saying landlords, not paint makers, should be held accountable for conditions that expose children to lead. A Rhode Island court in 2006 denied punitive damage claims against the paint companies. The Supreme Court ruling has to be considered a major blow for children whose health has been damaged by lead in paint.

Source: *Insurance Journal*

A BAD RESULT IN THE WARDROBE MALFUNCTION CASE

A federal appeals court has thrown out the \$550,000 indecency fine against CBS Corp. for the 2004 Super Bowl halftime show that ended with Janet Jackson's breast-baring "wardrobe malfunction." The three-judge panel of the Court of Appeals for the Third Circuit ruled that the Federal Communications Commission "acted arbitrarily and capriciously" in issuing the fine for the fleeting image of nudity. The 90 million people watching the Super Bowl, many of them children, heard Justin Timberlake sing, "Gonna have you naked by the end of this song," and then he proceeded to partially undress Ms. Jackson.

The court found that the FCC deviated from its nearly 30-year practice of fining indecent broadcast programming only when it was so "pervasive as to amount to 'shock treatment' for the audience." I have difficulty with the court's decision and consider this a win for the broadcasting industry and a definite loss for the American people, who believe in morality and decency. Tim Winter of the watchdog organization, Parents Television Council, says

the court's decision "borders on judicial stupidity." In this regard, he observed:

If a striptease during the Super Bowl in front of 90 million people—including millions of children—doesn't fit the parameters of broadcast indecency, then what does?

The FCC had argued that Jackson's nudity, albeit fleeting, was graphic and explicit and CBS should have been forewarned. The FCC said Jackson and Timberlake were employees of CBS and that the network should have to pay for their "willful" actions, given its lack of oversight. The \$550,000 fine represented the maximum \$27,500 levied against each of the network's 20 owned-and-operated stations. I have to wonder when the American people will finally say the time has come for television programming, including the broadcast and cable channels, as well as satellite firms, to be cleaned up. I believe the time is now!

Source: *Associated Press*

VI. THE NATIONAL SCENE

POLITICIANS SHOULD LISTEN TO THIS WEALTHY OIL MAN

When I first saw a television ad a few weeks ago featuring T. Boone Pickens, the Texas billionaire, I wondered what he was up to. My interest intensified when I realized that what he was saying really made good sense. The fact that the U.S. is importing over 70% of its oil, with the numbers climbing every minute, should get everybody's attention. When you consider that we were only importing 24% of our oil in 1970, and now that percentage has just about tripled, it's evident the federal government hasn't done its job. The

current situation is a most serious matter. The television ads which began last month were run nationally. By now they should have gotten the attention of our political leaders in Washington.

Mr. Pickens is touting wind, solar and natural gas and that makes sense. I know a little about wind as a source of energy because of my friend Cecil Spear's company, Trinity Industries, which is a leader in that area. The wealthy oilman has a message for Americans and for the two presidential candidates and his message hits the nail squarely on the head: "Our dependence on imported oil is destroying the country." I totally agree with that assessment. No American president has done anything of significance to change things in over 40 years and time is running out. Mr. Pickens is dead serious about his mission. He's spending \$58 million and lots of his personal time in an attempt to get the word out about what our country's leaders need to do. He says in the first TV commercial: "I've been an oilman my entire life, but this is one emergency we can't drill our way out of." (Emphasis added)

The 60-second spot debuted on July 8th along with a deluge of paid and unpaid national and local media. The goal set out by Mr. Pickens is to make U.S. dependency on imported oil "the No. 1 political issue in America." It's quite obvious that the politically powerful oil industry has had a strong hand in setting our nation's energy policy for years, regardless of which political party was in power. The time has come to change that situation and put our nation's national interest on the drawing board for a change instead of the oil companies' bottom line.

Pickens' first commercial was designed to alert America to the threat we're facing. It was followed by three more commercials outlining his solution, which he believes could reduce U.S. dependency on foreign oil in 10 years. Elements include investing in U.S. renewable energy sources, starting with

wind and natural gas. What makes this unusual is that Pickens built his fortune on oil—and that makes his stand even more compelling. There can be no doubt that this man is dead serious about saving America from an almost total dependence on oil—both foreign and domestic—and it's a national problem that we can no longer ignore.

Radio spots and print ads featuring Pickens also began on July 8th, as did an extensive public relations effort that plugged him on *ABC's Good Morning America* and the *CBS Evening News*, *CNN* and *Fox News*. Pickens also met with the editorial boards of the *Chicago Tribune* and *Newsweek*. An insightful Op-Ed by Pickens was published in *The Wall Street Journal*. Pickens testified before a congressional committee on July 21st and "put the hay down where the goats could get it." He warned that unless action is taken, oil could cost \$300 a barrel in ten years. The campaign also has an in-depth social networking Web site that allows users to join, post a profile with photos, invite friends and share "ideas and tactics on how to make energy the most important issue in this election." When you consider that we are now spending \$700 billion each year to buy foreign oil, it's past time for our political leaders to wake up. Hopefully the American people will get involved and make sure the politicians are listening!

Source: *Forbes*

THE PRESCRIPTION DRUG WARS HEAT UP

The ongoing war over the high costs of prescription drugs has intensified over the past year. Hopefully, the recent settlement of a lawsuit that will return millions of dollars to cancer patients who were illegally overcharged for the drug Lupron signals a turning point in the battle for affordable prescription drugs. While the lawsuits brought by several states to challenge restrictions on importing lower-cost drugs from Canada have gotten most of the media

headlines, there is another litigation strategy that seems to be working. Drug industry practices that keep American prices high are now being challenged in lawsuits. Alex Sugerman-Brozan, director of the Boston-based Prescription Access Litigation Project, a nonprofit coalition of more than 100 consumer groups that helps litigate drug price issues, had this to say:

Importation is an easy political issue for elected officials, but we think we should focus our efforts on long-term reform of the drug-pricing system of the United States, so that we actually have affordable drugs here.

The Lupron case was a milestone in exposing fraud. That drug is used mainly to treat prostate cancer in men, but also is used for treating endometriosis in women and premature puberty in children. Lupron has long been covered by state Medicaid programs and also, as a doctor-administered drug, by Medicare. This is why it was federal authorities who originally brought a whistle-blower lawsuit against the manufacturer, TAP Pharmaceuticals. The company was accused of bribing doctors to prescribe Lupron over its competitors by offering them free samples and discounted prices and suggesting they could then charge Medicaid and Medicare the full reimbursement price and pocket the difference. That's referred to as "marketing the spread," a term we have become quite familiar with in our Medicaid fraud litigation.

In 2001, TAP entered a guilty plea and was required to pay \$885 million to settle criminal and civil charges. This was the largest drug fraud settlement in history. The case recovered money for the government, which pays 80% of Medicare's cost of inpatient drugs. But it ignored Medicare patients who had paid the remaining 20%, health insurers who had paid more and uninsured folks who had paid top dollar for the

drug. For your information, Lupron can cost more than \$1,000 a dose.

A class action suit was begun on behalf of consumers and private insurers. On November 30th, TAP Pharmaceuticals agreed to pay an additional \$150 million to settle that case before trial. From the settlement, \$40 million will go to individual patients who have incurred out-of-pocket costs for Lupron. However, the ramifications of the Lupron case go much deeper. Sugarman-Brozan made this assessment:

It really broke open a lot of the secrecy around [drug industry] practices. And it shone a spotlight on the manipulation of the average wholesale price (AWP) system.

As you may recall from previous reports, the AWP, a price provided by manufacturers for each of their own drugs, is called by some a benchmark for drug prices throughout the U.S. health system. It's used as a basis for reimbursements and is supposed to include all discounts, chargebacks, rebates and other price reductions. Lawsuits and federal investigations have uncovered so much drug makers' wrongdoing and health care providers involvement that the AWP system is now considered deeply flawed. As a result, Medicare has abandoned AWP as a benchmark for reimbursing doctor-administered drugs that are covered under Part B of the program.

Starting in July, Medicare switched to a new system based on average sales prices. That change is projected to save Medicare \$15 billion over the next ten years. But that change does not extend to outpatient drugs under the new Medicare drug benefit (Part D) that starts next year and will be run by private insurers that still mostly rely on AWP. Congress, at the insistence of the Bush Administration, has given the drug companies, the pharmacy benefit managers and the insurance industry the key to the federal vault.

Meanwhile, a more wide-reaching

AWP lawsuit is moving slowly through federal court in Massachusetts. Filed three years ago, it charges 28 major drug companies with creating "deliberately false and fictitious" AWP in an industrywide scheme to defraud consumers. As a result, it's estimated that patients were overcharged by more than \$800 million in the year 2000 alone. One part of that suit targets eight drug makers, all sponsors of the Together Rx card, which gives discounts to about one million low-income older Americans. The suit alleges that the companies increased their AWP by identical margins for more than 100 drugs covered by the card around the time it was created in 2002 to make the discounts pay for themselves.

More lawsuits, involving other aspects of drug pricing, are in the works. One, filed on behalf of a group of California pharmacists, accuses 14 leading drug companies of conspiring to keep U.S. drug prices artificially high by charging Americans more than people in other countries for the same drugs. The pharmacists are claiming damages of more than \$75 million for having paid too much. If that suit is successful, it may well pave the way for individual consumers to be able to sue for compensation. There is one thing for certain—the drug industry must clean up its act. All of the above are examples of how litigation helps to make incremental changes while calling attention to deeper problems that cry out for more fundamental action by Congress. The American people are definitely paying too much for prescription drugs and are entitled to relief.

Source: AARP Bulletin

THE VICE-PRESIDENT IS PUBLIC ENEMY NUMBER ONE ON ENVIRONMENTAL ISSUES

It's quite evident that Vice President Dick Cheney has fought all efforts in Washington to combat climate change

and global warming. Some say he is public enemy number one when it comes to environmental issues. Seeking to play down the effects of global warming, Cheney's office pushed to delete from congressional testimony references about the consequences of climate change on public health. A former senior EPA official, Jason K. Burnett, says the White House was concerned that the proposed testimony last October by the head of the Centers for Disease Control and Prevention might make it tougher to avoid regulating greenhouse gases emitted into the atmosphere.

Burnett's assertion, which he made in a July 6th letter to Senator Barbara Boxer (D-CA), chairperson of the Senate Environment and Public Works Committee, conflicts with the White House explanation at the time that the deletions reflected concerns by the White House Office of Science and Technology over the accuracy of the science. Burnett, until last month a senior advisor on climate change at the Environmental Protection Agency, wrote that Cheney's office was deeply involved in getting nearly half of the CDC's original draft testimony removed. He wrote in his letter to Senator Boxer:

The Council on Environmental Quality and the office of the vice president were seeking deletions to the CDC testimony (concerning)...any discussions of the human health consequences of climate change.

At a news conference, Senator Boxer maintained that the heavy editing of the testimony given by CDC Director Julie Gerberding last fall was the first part of "a master plan" aimed at "covering up the real dangers of global warming and hiding the facts from the public." Burnett resigned his post in June as associate deputy EPA administrator because of disagreements over the agency's response to climate change.

Burnett, an economist who had written a number of papers on government regulation while at the Center for Regulatory Study, a joint effort by the American Enterprise Institute and the Brookings Institution, first joined the EPA in 2004. He resigned two years later because of objections to an EPA rule on soot. He was asked to return in 2007 by EPA Administrator Stephen Johnson, who put him in charge of coordinating the agency's response to a Supreme Court ruling on whether to regulate carbon dioxide emissions.

In his letter, Burnett describes concerns at the White House, including those in Cheney's office, about linking climate change directly to public health or damage to the environment. The heavy editing of the CDC testimony in October is convincing evidence of how truly bad this Administration has been on critical environmental issues, including climate change. Burnett wrote in his letter that:

The White House, at the urging of Cheney's office, "requested that I work with CDC to remove from the testimony any discussion of the human health consequences of climate change. CEQ contacted me to argue that I could best keep options open for the (EPA) administrator (on regulating carbon dioxide) if I would convince CDC to delete particular sections of their testimony."

The Bush Administration—with Vice-President Cheney leading the charge—has fought all efforts to combat global warming brought about by climate change. The Vice-President has objected to the EPA officials testifying that greenhouse gas emissions harm the environment. The White House refused in December to accept a draft from EPA finding that carbon dioxide, the leading greenhouse gas, is endangering human health. That sort of thing is impossible to justify and tells us how truly bad this Administration has been.

Source: Associated Press

THERE HAVE BEEN 13 KBR-RELATED ELECTROCUTIONS IN IRAQ

According to General David Petraeus, the top U.S. commander in Iraq, 13 Americans have been electrocuted in Iraq since September 2003. Those who died include 11 soldiers, one marine and two private contractors. Two electrocutions occurred at different housing facilities and involved soldiers taking showers. An Army criminal probe blamed improper grounding of an electric pump that supplied water to a building where the soldiers were killed. KBR, the contractor, has been ordered to inspect the facilities it maintains there for electrical safety hazards.

A lawsuit has been filed by the family of one soldier against KBR, the Houston-based contractor, which is responsible for maintaining the barracks. Thus far KBR has been paid \$3.2 million for maintenance services under a contract. KBR has provided "only limited technical inspections" at the barracks and has performed no real safety inspections. The Pentagon has directed KBR to inspect all maintained facilities in Iraq where no prior inspection was performed and to "perform life, health and safety operations" on all other maintained buildings and make needed changes and repairs. How in the world could soldiers be allowed to use showers in facilities that were unsafe and hadn't even been inspected by KBR?

The Department of Defense Inspector General is investigating the deaths, as is the House Committee on Oversight and Government Reform, and that's good news. Congress should conduct a thorough investigation of all KBR and Halliburton contracts in Iraq. The Iraq war is costing American taxpayers hundreds of billions of dollars and there are lots of politically-connected contractors who are making a killing financially out of this ill-advised and highly political war.

It's being reported that shoddy electrical work by private contractors on

United States military bases in Iraq is widespread and dangerous, causing more deaths and injuries from fires and shocks than the Pentagon has acknowledged, according to internal Army documents. During just one six-month period—August 2006 through January 2007—at least 283 electrical fires destroyed or damaged American military facilities in Iraq, including the military's largest dining hall in the country. And while the Pentagon has previously reported, as indicated above, that 13 Americans have been electrocuted in Iraq, many more have been injured, some seriously, by electrical shocks. For example, a log compiled earlier this year at one building complex in Baghdad disclosed that soldiers complained of receiving electrical shocks in their living quarters on an almost daily basis.

War-profiteers should be held to a very high standard and should be held accountable for their wrongdoing. Any contractor doing business in Iraq must certainly be held to the highest standards when it comes to the safety and welfare of our troops. It appears that KBR has failed to meet even a bare minimum standard and needs to be taught a good lesson!

Source: New York Times

BLACKWATER IS LOOKING FOR MORE FEDERAL WORK

Blackwater Worldwide is planning to expand its military-training business in California. This outfit has made a financial killing in the Iraq war and it looks like it expects more business there. Virginia Senator James Webb is holding up the approval of four civilian defense officials until he gets more information from Defense Secretary Robert Gates about the Blackwater training facility in Otay Mesa, California. Senator Webb, a former Navy secretary, is potentially a formidable foe for companies like Blackwater. He has helped establish a commission that will investigate wartime contracting.

In May, San Diego city officials tried to halt Blackwater from opening a training facility because of permit issues and concerns about an indoor shooting range in an industrial area near the U.S.-Mexico border. Blackwater, which filed suit and opened the center anyway, claims it needs a West Coast foothold so it can teach U.S. sailors how to defend ships against terrorist attacks. The company also says it will provide other training for law enforcement and the U.S. military. I have to wonder how much the federal government has paid politically-connected Blackwater under no-bid contracts.

Source: *Wall Street Journal*

PARENTS TELEVISION COUNCIL SHOULD HAVE OUR SUPPORT

The Parents Television Council is a non-profit educational organization advocating responsibility in entertainment. The PTC is not affiliated with any political party or religious denomination. Since 1995, the PTC has been in the forefront of a national effort to restore responsibility and decency to the entertainment industry. Now more than one million members strong, the PTC has worldwide recognition as American's largest and most influential media watchdog organization. I am firmly in their corner and appreciate what they are doing.

More than fifty years worth of research and more than one thousand scientific studies have proven that children are strongly influenced by what they see on television, in the movies and in video games. While the PTC believes that parents have the greatest responsibility when it comes to monitoring the viewing habits of their children, the entertainment industry and the advertising community also must take responsibility for the vital role they play in shaping America's culture.

Through its research, publications and website (www.parentstv.org), by recruiting and mobilizing a grassroots

army of activists, and by educating the advertising community, Hollywood and public policy leaders, the PTC encourages the entertainment industry to develop wholesome quality entertainment that the whole family can enjoy. Finally, the PTC seeks to remind the American public of the need for television to return to its roots as a socially responsible medium—because our children are watching.

VII. THE CORPORATE WORLD

A BACKLOG OF FRAUD CASES

Currently, there is a serious backlog in the corporate fraud cases that are being evaluated by the U.S. Justice Department. More than 900 cases alleging that government contractors and drug makers have defrauded taxpayers out of billions of dollars are on the back burner. This backlog has built up over the past decade because the government's lawyers can't keep pace with the sharp increase in claims brought by whistle-blowers. The issue is drawing renewed interest among lawmakers and nonprofit groups because many of the cases involve the wars in Iraq and Afghanistan, rising health-care payouts, and privatization of government functions—all of which offer tremendous opportunities for some in Corporate America to swindle taxpayers.

Since 2001, almost 400 civil cases have been filed each year by employees charging that their companies defrauded the government. Cases in the backlog represent a lot of money being left on the table, according to Patrick Burns, who is with Taxpayers Against Fraud. This is a group that advocates for the Justice Department to receive more funding to support cases by whistle-blowers and their lawyers. As expected, there is strong opposition to providing

more funding coming from government contractors and the Bush Administration.

Whistleblower lawsuits have been good for taxpayers and bad for wrongdoers in Corporate America. In recent years, verdicts and settlements have returned nearly \$13 billion of ill-gotten gain to the U.S. government. At issue in most of the cases is whether companies knowingly sold defective products or overcharged federal agencies for items sold at home or offered to U.S. troops overseas. Under the False Claims Act, workers who file lawsuits alleging such schemes cannot discuss them or even disclose their existence until the Justice Department decides whether to step in. By its own account, the 75-lawyer unit in Washington that reviews the sensitive lawsuits is overloaded and understaffed. As a result, only about 100 cases a year are actually investigated by the legal team, working out of the commercial litigation branch of the Justice Department's civil division. As has been widely reported, there has been a massive amount of fraud by government contractors in Iraq and Afghanistan. Many of these contractors have close ties to the Bush Administration. That could explain why the administration has fought efforts to investigate and prosecute corporations that are cheating the government.

It's well documented that fraud has cost U.S. taxpayers tens of billions of dollars and that the False Claims Act is an important tool to bring the cheaters to justice. This Act must be utilized in order to recover the ill-gotten gain from the cheaters. Deputy Assistant Attorney General Michael Hertz told Congress recently that "the number and increased complexity of the fraud schemes presented to the department, combined with the volume of cases now under review, certainly present challenges." Among the largest recoveries in false-claims cases to date are:

- a \$650 million settlement earlier this year by drug maker Merck in connec-

tion with an alleged failure to repay Medicaid rebates;

- a \$515 million deal with Bristol-Myers Squibb to cover illegal drug pricing and marketing; and
- a \$98 million agreement with software maker Oracle over pricing.

The vast majority of the cases currently under review, more than 500 cases, involve the health-care and pharmaceutical industries and often involve Medicare and Medicaid funds. Our firm's involvement in the Medicaid fraud cases has convinced me that many in Corporate America actually believe cheating the government is acceptable. Their game plan is when they finally get caught, just pay the money back and then go about their merry way.

Source: *Washington Post*

UNITEDHEALTH SETTLES SUITS FOR \$912 MILLION

UnitedHealth Group Inc. has agreed to pay more than \$900 million to resolve shareholder option backdating lawsuits. The settlement, which is the largest settlement to emerge from an options-backdating case, comes nearly two years after revelations of stock-options backdating triggered the ouster of UnitedHealth's longtime chief executive, William McGuire. The settlement puts most of UnitedHealth's legal issues stemming from the scandal behind it. UnitedHealth's stock-options problems had remained a distraction, partly because a class-action lawsuit led by the California Public Employees' Retirement System grew more contentious and public in recent months.

Since 2006, dozens of companies have been found to have manipulated the dates on which stock options were awarded. In retrospectively picking dates when stock prices were at low points, they allowed executives the chance to reap outsize gains. The

scandal has led to more than 80 financial restatements, dozens of executive dismissals, and civil and criminal government investigations. In the second-largest backdating settlement to date, Brocade Communications Systems Inc. agreed a month ago to pay \$160 million to settle a shareholder class-action suit.

Source: *Wall Street Journal*

VIII. CAMPAIGN FINANCE REFORM

FEDERAL APPEALS COURT SAYS CAMPAIGN FINANCE RULES TOO WEAK

A federal appeals court has invalidated campaign finance rules that give wealthy donors broad latitude in underwriting expensive political ads. The U.S. Court of Appeals for the District of Columbia Circuit ruled that limits on coordinated campaign spending apply too narrowly to time frames just before elections and should be strengthened. Judge David Tatel noted in the ruling that interest groups often engage in early advertising, in some cases more than a year before an election.

The restrictions the Federal Election Commission imposed apply only to spending within 90 days of a congressional election and 120 days before a presidential primary. Judge Tatel said the FEC rule frustrates the purpose of the campaign finance reform law enacted in 2002. The law was designed to halt issue ads purportedly aimed at influencing voters' policy views, while in reality being directed at swaying the views of the candidates. The issue ads often are underwritten with six-figure political contributions referred to as soft money, which the law was aimed at getting rid of. The judge wrote in the decision:

By allowing soft money a continuing role in the form of coordi-

nated expenditures, the FEC's proposed rule would lead to the exact perception and possibility of corruption Congress sought to stamp out.

Under the FEC rule, issue ads outside the 90/120-day time frame mentioning candidates are allowed as long as the ads do not engage in "express advocacy." Clearly under the current law it's very easy to skirt the prohibition and influence elections. The appeals court called the express advocacy requirement a "functionally meaningless" standard. I agree with that assessment. The congressional goal of prohibiting soft money from being used in federal elections is quite obviously thwarted. The judge added that outside the 90/120-day windows, the regulation allows candidates to "almost completely" evade the soft money restrictions. The appeals court also rejected an FEC rule that permits federal officeholders and candidates to solicit soft money at state party fundraising events. The appeals court said the reform law "directly prohibits" such conduct.

Without a doubt, the FEC has done a poor job of carrying out its responsibilities relating to campaign finance reform. Rep. Christopher Shays (R-CT) brought the case challenging the FEC rules as being contrary to the reform law. Fred Wertheimer, president of the campaign finance reform group Democracy 21, called the decision "yet another sharp repudiation of the FEC's continued failure to properly implement" the Bipartisan Campaign Reform Act. There have been four court decisions against the FEC rules since 2002. Judge Tatel is an appointee of former President Clinton. The other judges on the case were Judge Merrick Garland, a Clinton appointee, and Judge Thomas Griffith, an appointee of President Bush. Hopefully, Congress will act promptly and pass legislation that will strengthen federal efforts to clean up the elections' process.

Source: *Associated Press*

IX. CONGRESSIONAL UPDATE

CONGRESS MUST RESTORE RIGHTS OF PATIENTS

Public Citizen has urged Congress to pass legislation without delay that would restore the rights of patients injured by defective or inadequately labeled medical devices to seek compensation for their injuries from the device manufacturers. The new legislation—the Medical Device Safety Act of 2008—would overrule the U.S. Supreme Court’s February decision in *Riegel v. Medtronic*, which held the 1976 federal law that gives the Food and Drug Administration authority to regulate medical devices also severely limits the right of injured patients to sue device manufacturers.

Reps. Henry Waxman and Frank Pallone sponsored the bill (HR 6381) introduced in the U.S. House of Representatives. Senators Ted Kennedy and Patrick Leahy are handling a similar bill in the Senate. The legislation would restore Congress’ intent in enacting the 1976 law—that traditional state common-law remedies for injuries and deaths caused by medical devices would work in tandem with federal medical device regulation to protect consumers. Public Citizen lawyer Allison Zieve, who argued on behalf of the Riegels in *Riegel v. Medtronic*, observed:

The possibility of being held liable for injuries their products cause creates an invaluable incentive for manufacturers to make their products as safe as they can, to revise labels as soon as they become aware that they are inadequate and to remove unsafe products from the market. By eliminating this possibility, the Supreme Court decision removed a significant layer of consumer protection, which makes passage

of the Medical Device Safety Act of 2008 so essential.

The Riegel case stemmed from a defective balloon catheter used during an angioplasty procedure. When the balloon burst during the operation, Charles Riegel was seriously injured. The victim and his wife sued Medtronic, the maker of the catheter, alleging that the company had violated state-law duties not to market unreasonably dangerous products and to provide adequate instructions and warnings of the risks associated with the product. Admittedly, federal regulation plays a crucial role in protecting patients from dangerous products, but, inevitably, some dangerous products will reach the market and some patients will be harmed.

Certain Medtronic defibrillators, Guidant defibrillators, St. Jude’s Silzone-coated heart valve, and Sulzer’s hip and knee prostheses are recent examples of devices that have caused great injury. The National Academy of Sciences’ Institute of Medicine, the Government Accountability Office and even the FDA itself, among others, have questioned the FDA’s ability to protect the public. No knowledgeable person can honestly say that the FDA does an acceptable job of protecting the American people from defective and unsafe drugs and medical devices. Public Citizen President Joan Claybrook made this observation:

Given the FDA’s failure to prevent numerous medical device tragedies in recent years, the continued availability of common-law remedies is essential.

Congress must protect the American people by passing this legislation. Now that ordinary citizens are catching on to what the Bush Administration is trying to do to them by way of federal preemption, they are demanding congressional action. If you agree that Congress must act in this area of concern, contact your members of the U.S. House and Senate.

Source: Public Citizen

THE DRUG INDUSTRY IS GREATLY INCREASING ITS LOBBYING

While the American people are hurting on two fronts when it comes to their dealings with the pharmaceutical industry, one being the price of drugs and the other involving safety issues, the drug companies are doing extremely well. The pharmaceutical industry’s spending on lobbying skyrocketed in 2007 according to a report by The Center for Public Integrity, a Washington watchdog group. Drug companies spent \$168 million on lobbying last year, up 32% from 2006. That lobbying is not designed to help consumers. Unfortunately for consumers, the industry’s efforts paid off on some important issues. For example consider that:

- The industry persuaded Congress to drop some proposed restrictions on direct-to-consumer advertising last year.
- The industry won renewal for two bills that speed approvals for new drugs and medical devices at the Food and Drug Administration and extend protection against generic competition for some brand-name medicines.

The biggest lobbying spender last year among pharmaceuticals was the industry’s trade organization, the Pharmaceutical Research and Manufacturers of America, which paid \$23 million, a 26% increase from a year earlier. The followings sets out the companies’ lobbying efforts with the amounts for each company:

- Amgen Inc. was first among drug firms at \$16.2 million;
- Pfizer Inc., the world’s largest pharmaceutical company by sales, was at \$13.8 million;
- Roche Holding AG spent \$9 million;
- Sanofi-Aventis SA spent \$8.4 million;
- GlaxoSmithKline PLC was at \$8.2 million; and

- Johnson & Johnson spent \$7.7 million.

Democrats in Congress have been traditionally less friendly to the drug companies. Since Democrats became the majority in the House and Senate the drug industry and its regulators at the FDA have been under much closer scrutiny. Interestingly, this scrutiny was spurred in part by a Republican, Sen. Chuck Grassley of Iowa, who has found new allies such as Rep. John Dingell (D-MI), the chairman of the House Energy and Commerce Committee. The Center's report said the pharmaceutical lobby's focus includes blocking the importation of inexpensive foreign drugs and protecting drug patents in the U.S. and overseas. I would add to that efforts to keep the FDA weak and ineffective.

The industry's support for limiting drug imports comes at a time when it's also coming under attack over safety issues for its foreign outsourcing of drug manufacturing as well as for its own imports from other countries such as China. The recent crisis involving contaminated heparin from China has prompted several congressional inquiries into the ability and determination of U.S. drug firms to ensure the safety of the drugs and drug ingredients they import. The federal government must control the power and influence of the powerful drug industry and the place to start is in Congress. Stronger laws relating to lobbyists and lobbying activities must be passed and then those laws must be enforced.

Source: *Wall Street Journal*

X. PRODUCT LIABILITY UPDATE

FEDERAL ROOF CRUSH RULE HAS BEEN DELAYED

Just prior to the deadline for issuing a new roof crush standard, the National

Highway Traffic Safety Administration went back to the drawing board as a result of pressure from Congress and consumer advocates. The final standard has been delayed until October 1st. As we have reported, NHTSA, which has not updated its rollover safety standards in over 35 years, was originally scheduled to send a new roof crush rule to Congress by July 1st. Under the proposed version, a roof would have been required to support 2.5 times the vehicle's weight, up from the current standard of 1.5 times the weight.

The delay comes in the wake of ongoing complaints from consumer advocates and members of Congress, who correctly contend that the proposal is not strong enough. A bi-partisan group of senators sent a letter to NHTSA in June, urging the agency to take additional time to develop a more stringent standard. Critics assert that most new cars already conform to a 2.5 standard and that the standard should be raised even higher, to 3.5.

The Bush Administration is responsible for putting a proposal in the standard that would preempt state law claims brought by individuals injured in rollover accidents. NHTSA's proposed roof crush rule puts the profit of car manufacturers first and the safety of consumers last. NHTSA must realize that it would be a tragic mistake not to do its duty when it comes to safety issues. It is abundantly clear that NHTSA should strengthen roof crush standards. A study released earlier this year by the Insurance Institute for Highway Safety found that the stronger the roof, the lower the risk of injury to occupants of a vehicle. That study is proof positive that weak roofs are the main cause of death and serious injuries in rollover accidents. Hopefully, NHTSA will do the right thing and promulgate a stronger roof-crush standard.

Source: *Lawyers Weekly USA*

REVAMPED VEHICLE RATING PROGRAM STILL HAS GLARING OMISSIONS

I am very thankful that Public Citizen is hard at work as a watchdog for American citizens on the activities of the federal government's regulatory agencies. Joan Claybrook and her staff have been watching one of them, NHTSA, very closely. Joan believes that improvements to the government's automobile crash test information program, announced last month, are good, but don't go far enough. The Department of Transportation officials spent three years working to strengthen the New Car Assessment Program (NCAP), but they failed to address any of the program's most glaring omissions. That—according to Joan—is a disappointment and I share her feelings. Starting with model year 2010, tests will include a new side pole test, which simulates a vehicle hitting a tree. In addition, the tests will use small female crash test dummies, rather than just men. All of that is good.

However, the program still doesn't include a dynamic (real-world) rollover crash test to determine a vehicle's safety in a rollover crash. This is extremely important since it's undisputed that rollover crashes are responsible for about one-third of all vehicle occupant fatalities each year. The program still lacks tests for vehicle performance in rear crashes and pedestrian crashes, and fails to test child safety restraints. Further, it lacks a compatibility rating, which would measure the disparity between the heights and aggression of vehicles on the road and is particularly important given all the tall, hulking SUVs on the roads.

Finally, the government is wrongly retaining its star rating system, which is more confusing to people than a basic A through F grading system. Joan Claybrook established the NCAP program in 1979 while she was head of NHTSA. Her concept at that time was not only to provide safety information to vehicle purchasers, but to push auto manufac-

urers to go beyond the basic safety standards when designing vehicles. The program started by Joan has worked. For example, in 1979, less than 30% of vehicles earned four or five stars; last year, 98% of vehicles got four or five stars. That is definite progress.

In 2005, a Government Accountability Office report concluded that the NCAP program was out of date and needed to be revamped. Other countries have programs that have far surpassed what NHTSA is doing in the U.S. For example, the programs in the European Union, Japan and Australia are more comprehensive than NCAP and still will be after the announced improvements by NHTSA are instituted. I totally agree with Joan and her co-workers at Public Citizen. By omitting so many valuable tests, NHTSA is missing a huge opportunity to quickly and easily boost safety. The next President and a Democratic-controlled Congress must see that NHTSA does its job and makes safety a real priority.

Source: Public Citizen

EARLY WARNING DATA IS SUBJECT TO FREEDOM OF INFORMATION ACT

A federal appeals court has ruled information that automobile and tire manufacturers submit to the government about crashes resulting in death, injury and property damage is subject to release to the public under the Freedom of Information Act (FOIA). The decision by the U.S. Court of Appeals for the District of Columbia Circuit came in a case filed by Public Citizen. The ruling vindicated the consumer advocacy group's efforts to promote public disclosure of the data and rejected the position of the Rubber Manufacturers Association (RMA) that it is exempt from FOIA's requirements.

Since 2003, manufacturers have been required to submit the information, referred to as "early warning data," under the Transportation Recall Enhancement, Accountability and Documentation

(TREAD) Act, but the U.S. Department of Transportation has been keeping the information secret because the RMA appealed a lower court ruling that FOIA applied to the data. This ruling should put an end to the association's efforts and pave the way for the agency to begin releasing early warning data in response to FOIA requests. The court of appeals based its ruling on what it called the "plain language of the TREAD Act," which "means what it says"—and it doesn't say that early warning data is exempt from FOIA. The court's ruling followed the analysis of the law set forth by Public Citizen in its legal briefs and in oral arguments in the case.

Public Citizen's president, Joan Claybrook, whose advocacy was instrumental in passing the TREAD Act, hailed the court's decision. Joan had this to say about the effect of the decision:

The TREAD Act was intended to prevent needless deaths and injuries, like those in the Ford/Firestone tire tragedy, by giving regulators and the public quick access to information manufacturers have about crashes involving their products. Public availability of information under FOIA is critical to achieving that goal.

In the court of appeals, the Transportation Department agreed with Public Citizen that the early warning data is not exempt from FOIA's requirements, but the existence of the case has had the practical effect of keeping the information from the public. In light of the court of appeals' opinion, it is expected that the Transportation Department will now comply with FOIA's requirements and begin processing requests for, and releasing, early warning data to the public unless it fits within a specific FOIA exemption.

Scott Nelson, the lawyer for Public Citizen who argued the case, did very good work. The government should now follow the law and comply with

its obligations under FOIA. Public Citizen is submitting a FOIA request for release of all the early warning information gathered by the Transportation Department to date.

Source: Public Citizen

THE PUBLIC MUST RECEIVE PROMPT WARNINGS ABOUT DANGEROUS PRODUCTS

Public Citizen has appealed a blanket rejection by the Consumer Product Safety Commission of a Freedom of Information Act request that sought information about how long the agency takes to warn the public about dangerous products after it learns about potential hazards. Public Citizen submitted the FOIA request in January, shortly after issuing a report revealing that the CPSC took an average of 210 days to warn the public about hazards for which the agency had levied fines over the previous six years. There appears to be a significant delay between the dates on which manufacturers and the CPSC became aware of hazards and the dates on which the CPSC informed the public about them. That is clearly wrong. The CPSC is much too slow to inform the public and that should change. After all, we are talking about the health, safety and welfare of consumers.

Source: Public Citizen

TENNESSEE SUPREME COURT UPHOLDS \$18.4 MILLION DAMAGE AWARD IN DAIMLERCHRYSLER CASE

In a lawsuit that generated a great deal of national attention, Tennessee's Supreme Court has upheld an award of \$18.4 million in damages against DaimlerChrysler Corp. The court ruled that a faulty seat design caused the death of a baby in Nashville in 2001. The ruling overturned a Tennessee Court of Appeals' decision that threw out an award of \$13.4 million in punitive damages for the parents of the eight-month-old baby. The appeals court

agreed with a \$5 million compensatory damage award by the lower court.

The infant died in a collision that occurred when the driver of a pickup truck, traveling at some 70 miles per hour—in a 35-mile-per-hour zone—rear-ended the 1998 Dodge Caravan in which the baby was riding in a car seat. The front passenger seat collapsed on top of the baby, who was fatally injured.

The parents claimed in their lawsuit that the car maker knew its seats tended to collapse backward in rear-end collisions, but did nothing to fix the problem. Paul Sheridan, a former chair of the Minivan Safety Leadership Team at Chrysler, testified that his group decided in 1993 to advocate changes in the seats because of the danger. Sheridan, who was fired in 1994, claimed the company's chief engineer ordered him to retrieve and destroy all copies of the committee's meetings. In November 2004, a jury in Davidson County Circuit Court found DaimlerChrysler and the pickup truck driver jointly liable for the baby's death. It imposed total damages of \$105 million, but the trial judge found that amount excessive and cut it to \$27.5 million.

The Supreme Court affirmed the appeals court on one element of damages. The court denied \$9.1 million in damages for emotional distress. But the court reinstated the punitive damages award. Writing for the majority, Justice Janice Holder said there was "a wealth of evidence supporting the jury's verdict." She cited testimony that DaimlerChrysler "had received notice of children injured by yielding seat-backs as early as the mid-1980s." Sheridan's testimony was also cited in her opinion. And she noted that accidents similar to the one that killed this baby had injured children on six other occasions. Judge Holder characterized the "proof of DCC's recklessness" as "powerful" in her opinion.

The Alliance of Automobile Manufacturers, the Chamber of Commerce of

the United States of America and the Product Liability Advisory Council each filed friend-of-the-court briefs in the case supporting DaimlerChrysler. This is a most significant decision and the punitive damages aspect should withstand an appeal to the U.S. Supreme Court.

Source: *Associated Press*

VERDICT IN FEDERAL COURT AGAINST GENERAL MOTORS

A jury in a Georgia federal court found General Motors negligent in a rollover crash that killed a 14-year-old boy and awarded \$3.5 million in damages to the parents, Garland and Bonnie Reynolds. The 2002 rollover accident claimed the life of their son, Matthew. The Reynolds sued GM in 2006, alleging that the design of the 1995 Chevrolet Blazer created stability issues that contributed to the fatal wreck. The jury deliberated for nearly three days after a two week trial in U.S. District Court in Gainesville, Georgia before finding GM at fault. The jury found that the Blazer is unsafe and it should not have been designed without proper stability.

On June 3, 2002, Bonnie Reynolds was driving a 1995 Chevy Blazer on the Interstate with her son in the front seat when the Blazer was struck by a drunk driver who lost control of his Pontiac Sunbird. The Blazer flipped several times and Matthew was ejected. He was taken to an area hospital where he died the following day. The driver who struck the Reynolds' car was later convicted of first-degree vehicular homicide.

Plaintiffs presented evidence at trial of other rollover accidents involving the Blazer. It was contended that the make and model of the Blazer was built with too high a center of gravity for the wheel base, and that the "track," or distance between the wheels, should have been widened to prevent stability problems. Blazers manufactured from 1995 through 2002 have similar design

flaws. As you may know, the Blazer was subsequently phased out in favor of the TrailBlazer, which has a wider wheel-base. Evidence presented at trial called for a recall. General Motors maintains that the vehicle is safe and an appeal is likely.

Source: *Associated Press*

DUKE UNIVERSITY HEALTH SYSTEM SETTLES CLAIMS BY PATIENTS

Duke University Health System has settled claims by patients who alleged they suffered health problems after being exposed to hydraulic fluid on surgical instruments at two Duke hospitals in 2004. According to media reports, the confidential settlement resolved claims against Duke by an unknown number of clients. There have been lawsuits filed by dozens of patients who were exposed to the hydraulic fluid at Durham Regional and Duke Raleigh hospitals. They have sued the companies that contracted with Duke to sterilize the equipment. The Plaintiffs were patients of the hospitals in late 2004, when more than 3,600 patients were operated on with instruments mistakenly cleaned with used hydraulic fluid. The fluid had been drained from an elevator and sent back to the hospitals for use as detergent. One would certainly never expect that something like this would happen, but apparently it did.

Source: *Associated Press* and *Raleigh News & Observer*

ALLERGAN FAILED TO WARN OF DANGEROUS BOTOX SIDE EFFECTS

A lawsuit was filed last month by a number of Botox users contending that the blockbuster product injured them or killed their relatives. The Plaintiffs allege that Allergan Inc., the manufacturer, failed to warn them of known dangers. The suit, filed in a California state court, links the toxin-based drug to three deaths, including one in March

of a 69-year-old Texas nurse who received injections for neck and shoulder pain. The second death was that of a 7-year-old girl with cerebral palsy, also from Texas, who died in 2004, allegedly after receiving injections to control limb spasticity. The third death occurred last month in Arizona. In that case, a 71-year-old woman allegedly got Botox injections for wrinkles around her mouth at a mall clinic a year ago. It was alleged in the suit that after the injections, she had trouble swallowing and breathing, was unable to speak and lost weight until she died. All three deaths involved uses of Botox that were not approved by federal regulators.

The suit also contends that Botox injections both for approved uses, such as smoothing frown lines, and unapproved uses, such as treating migraines, left 12 other persons with a range of disabilities, including blurred vision, numbness, allergic reactions, flu-like symptoms, muscle weakness and difficulty breathing. Botox was first approved nearly 20 years ago. As expected, Allergan contends that Botox is totally safe. Several of the Plaintiffs in the suit were hospitalized and suffer from chronic, life-altering conditions. The most-common side effect mentioned in the suit is a loss of the ability to swallow, which causes a slow death from starvation or asphyxiation.

Botox is derived from botulinum toxin Type A, a form of one of the deadliest known poisons. In its raw form, the toxin kills by interrupting the communication between nerves and muscles, causing them to relax and leaving the victim paralyzed and susceptible to suffocation. In February, the FDA warned that it was reviewing reports of at least one death and other serious reactions among patients to botulinum-based drugs, including Botox and competitor Myobloc. FDA officials said at the time that they were unaware of any deaths among cosmetic users. The most serious of the reported problems occurred in children with

cerebral palsy who were treated for arm and leg spasms with doses many times those recommended for cosmetic treatments.

The FDA warning followed Public Citizen's announcement in January that it found reports linking 16 deaths to the use of Botox or Myobloc from 1997 to 2006. The consumer group also found that 180 patients had developed life-threatening conditions after being injected, leading to 87 hospitalizations. This suit will be watched closely. Like many of the drugs that have had serious safety problems, Botox is not a life-saving drug. We will keep our readers informed as to any significant developments relating to this litigation.

Source: *Los Angeles Times*

A DEFECT ON TIRES HAS LINKS TO CHINA

Since there have been so many safety issues involving products imported from China, folks in our country are not surprised now to learn of more problems. The latest defective Chinese import involves tire-valve stems. These are the rubber shafts that allow motorists to fill their tires with air. Currently, there are at least 36 million imported valve stems on tires on American roads. Any of them could cause dangerous tire failures this summer. One U.S. importer issued a formal recall in June and another alerted the National Highway Traffic Safety Administration, which has begun an investigation. NHTSA issued an advisory in June to motorists to check their tires for wear, but interestingly, said nothing about the valve stems.

Most of the valves in question, which are said to crack prematurely, appear to be on tires sold between September 2006 and June 2007. But the full extent of the problem won't be known until NHTSA completes its investigation. But some independent safety experts believe that motorists should have been warned to inspect the tire-valve stems immediately. A technical bulletin was

issued by the company that imported most of the tires but nobody seems to know about it. Sean Kane, an auto-safety consultant with Safety Research & Strategies in Rehoboth, Mass., which issued its own public warning, believes "this is a real problem that potentially affects millions of vehicles."

A wrongful death lawsuit was filed in Florida after a fatal crash in November of last year. Dill Air Controls Products was sued by the widow of a man killed in a moving vehicle accident. The tire-valve stem was said to have caused the right rear tire of an SUV to fail, precipitating the vehicle's rollover. Shortly after the suit was filed, the Oxford, North Carolina, company approached NHTSA with a report of "a potential defect." NHTSA subsequently started an investigation of the valve stems the company distributes in the US. Some 30 million suspect valve stems were manufactured over a five-month period in 2006 for Dill by Topseal, a subsidiary of Shanghai Baolong Automotive Corp., based in Shanghai, according to NHTSA's preliminary summary of its investigation. In May, Dill issued a technical bulletin to its customers:

We have received a number of parts showing surface cracks on the outside of the rubber near the rim hole.... Out of an abundance of caution, we are recommending that when customers return to your stores for regular service, you inspect the valve stems on vehicles who received valve stems during the period September 2006-June 2007.

Mr. Kane, the auto-safety consultant, says the valves could deteriorate and crack in as few as six months. Dill's suspect valves were manufactured more than 1-1/2 years ago, from July through November 2006, according to the company. On June 2nd, another auto-parts importer, Tech International of Johnstown, Ohio, issued a formal recall notice for 6 million valve stems made

by a Chinese company with nearly the same name—Shanghai Baolong Industries Co., Ltd.—and the same address. Dates of manufacture of the defective product are also the same. In its recall notice, Tech International stated:

The defect is such that after the valve stem has been in service approximately six months or more, the rubber compound may undergo cracking resulting in loss of tire pressure.

It blamed the defect on improper mixing of the rubber compound in the manufacturer's facility.

Thus far NHTSA hasn't issued a national alert. Apparently the agency is waiting for the Dill investigation to be completed. However, there are lots of tires on the road that have the defective valve stems. Hopefully, there won't be any deaths or serious injuries while NHTSA is waiting to act.

Source: *Christian Science Monitor*

FIND OUT WHAT'S WRITTEN ON YOUR TIRES

With all of the information contained on a tire's sidewall, it's no wonder the average consumer has difficulty deciphering it all. In fact, most folks don't even know the information is on their tires. While some may know how to tell a tire's size and width, the manufacturer, and the maximum inflation pressure, the tire's DOT serial numbering system may not be so easy to understand. A tire's DOT number contains valuable information, especially when a tire was manufactured, but it was never meant to be very consumer friendly and was never meant to be decoded by the consumer. Having the means to tell when a tire was manufactured can mean the difference between safety and catastrophic results.

Some experts believe that tires have a shelf life and ignoring that could be fatal. Tires can sit on store shelves for years before they are sold; sometimes as long as twelve years and still be sold

as new tires. There is no expiration date on tires, but research and tests show as tires get older, even if they haven't even been driven a mile, they begin to dry out and the degradation process starts to take place. After six years of age, tires can become dangerous. Tires may look great on the outside, but how do you know what's going on inside the tire? After a time, tires begin to dry out and become less elastic even if they are not in use, making tread separation more likely even if they have plenty of tread depth and appear new. When a tire detreads at highway speeds, it becomes difficult if not impossible to retain control of a vehicle.

For decades, the tire industry has taught drivers to use the so-called "penny test" as a way to tell when a tire needed to be replaced. As late as last summer, they have recommended that the "penny test" is outdated, compromises safety, and should give way to the "quarter test." Why not arm consumers with the knowledge of determining when their tires were manufactured by decoding the DOT serial number and then recommending that they replace them at a certain age, no matter what the tread depth? Or better yet, why not imprint an expiration date on the tires?

The U.S. tire industry has fought efforts to require an expiration date on tires. The industry says, given the improvements in tire production, age is not a key factor in a tire's performance. However, the British Rubber Manufacturer's Association issued a forceful warning to its British consumers stating "BRMA members **strongly** recommend that unused tires should not be put into service if they are over six years old..." This is something that would come as news to most U.S. car owners, but seems to be known by everyone but the American consumer. In fact, the head of the U.S. Rubber Manufacturers Association has gone on record saying that there is no need for U.S. drivers to be given the same

warning that British car owners have received.

U. S. car manufacturers have been warning their customers for years about the problems with aging tires. In fact, Ford Motor Company has asked the federal government to impose a six year age limit or expiration date on tires. So just how do you tell when your tires were manufactured? Begin by locating the DOT number on the sidewall of your tire. Up until last year, the DOT number was molded on the inside of tires, making it extremely difficult to locate. To read it, the consumer either had to put their vehicle on a lift or crawl under it with a flashlight to find it.

Once you have located your DOT number, identify the 3 or 4 numbers at the very end of the serial number. If a tire has three numbers, it means that the tire was made prior to January 2000. If a tire has four numbers, it indicates that the tire was manufactured after January 1, 2000. The first two numbers in the date of manufacture indicate the week in which the tire was made. So, if your tire has 036 as the last three digits of your DOT number, it indicates that the tire was manufactured in the third week of 1996. If your tire has 4604 as the last four digits of your DOT number, it indicates the tire was manufactured in the 46th week of 2004. Motorists should check their tires' manufacturing date and replace the tires after six years of age regardless of the mileage. That should be a firm rule of thumb according to most safety experts.

XI. MASS TORTS UPDATE

PLAINTIFFS SEEK PAIN PUMP MULTI-DISTRICT PANEL

A number of lawsuits have been filed against several pain pump manufactur-

ers and drug makers that allegedly encouraged doctors to insert the devices directly into shoulder joints following arthroscopic surgery, even though the technique had not been approved by the Food and Drug Administration. The pumps were being inserted by the surgeons in the joint space and this was done on recommendations by the pump manufacturers.

An article published last October in the *American Journal of Sports Medicine* reported a strong link between the use of high-volume pain pumps following arthroscopic shoulder surgery and an otherwise inexplicable loss of shoulder cartilage. At press time, at least thirteen individual lawsuits had been filed in federal courts in Alabama, Florida, Indiana, Colorado and Oregon. One class action is pending in a Utah federal court. The first case scheduled for trial is in a state court in Portland, Oregon, and it should start on September 22nd. Our firm is assisting in the trial of this case.

Many of the injured persons are athletes in their teens to mid-30s who underwent shoulder replacements as a result of cartilage loss. A request was filed by Plaintiffs' lawyers with the Judicial Panel on Multidistrict Litigation to consolidate all of the federal claims in U.S. District Court in Portland, Oregon. Pain pump manufacturers named in the product liability suits are: Stryker Corp., of Kalamazoo, Michigan, I-Flow Corp. of Lake Forest, California, and DJO, of San Diego. These Defendants failed to adequately test the devices; failed to warn physicians about injuries that could occur from inserting the pain pump catheter into the shoulder joint, and marketed their pain pumps to the medical community for an "off-label" use not approved by the FDA. AstraZeneca, which sold anesthetics used in the pain pumps, has also been named in the suits for failing to adequately test the safety of its drugs in the pumps.

Source: *Lawyers Weekly*

WYETH SETTLES TWO CLAIMS BEFORE TRIAL

Wyeth has settled two women's claims that its hormone-replacement drugs Prempro and Premarin caused their breast cancer. The company agreed to pay an undisclosed amount to settle the claims which were pending in a Nevada court. It was alleged that Wyeth failed to adequately warn the women about the drugs' breast cancer risks. Wyeth is facing more than 10,000 lawsuits over the menopause drugs, which are still on the market, according to our best estimate. The company's sales of the drugs topped \$2 billion before a 2002 study found women using the medicines had a 24% higher risk of breast cancer. More than six million women took the pills to treat menopause symptoms such as hot flashes, night sweats and mood swings. Until 1996, some menopausal women used Premarin, which contains estrogen, together with Provera (made by Pharmacia Upjohn), which contains progesterin. During that year Wyeth combined the two substances in Prempro. Our friends, Zoe Littlepage and Raney Booth, two very good lawyers, represented the two women in this case and did an outstanding job. They will proceed to trial against Pharmacia Upjohn.

Source: *Bloomberg*

PARENTS FILE CLASS ACTION LAWSUIT OVER BABY BOTTLES

Four parents are suing baby bottle manufacturers whose bottles contain bisphenol A. As previously reported, the synthetic chemical, commonly known as BPA, has been linked to health problems in the brain and other areas and in behavior. BPA also is found in some spill-resistant cups and sports bottles. The lawsuit was filed in U.S. District Court against five manufacturers, alleging that the Defendants knew BPA was associated with health problems but

continued to use it in their products and did not disclose the risks. The parents sued Avent America of Bensenville, Illinois, Handi-Craft Co. of St. Louis (also known as Dr. Brown's), Evenflo Co. of Vandalia, Ohio, Gerber Products Co. of Parsippany, New Jersey, and Playtex Products of Westport, Connecticut, on behalf of themselves and others who bought the products. The class action lawsuit is one of numerous lawsuits filed throughout the country against baby bottle manufacturers.

Studies have found that BPA, which makes the bottle shatterproof, can leach out of the plastic and that heating the bottle or cup accelerates that process. There is a recent European study that may shed more light on the safety of products utilizing BPA. I hadn't had an opportunity to read that study before this issue went to the printer.

Source: *Columbus Dispatch*

PARENTS SHOULD BE CONCERNED OVER HPV VACCINE

There have been thousands of complaints linking a vaccine designed to prevent cervical cancer to a range of health problems. This has caused it to come under renewed scrutiny. Gardasil has been the subject of 7,802 "adverse event" reports from the time the Food and Drug Administration approved its use two years ago, according to the Centers for Disease Control and Prevention. Girls and women have blamed the vaccine for causing ailments from nausea to paralysis, and even death. While fifteen deaths were reported to the FDA, and ten were confirmed, the CDC says none of the ten were linked to the vaccine. The CDC says it continues to study the reports of illness.

Gardasil prevents the spread of human papillomavirus, known as HPV—a sexually transmitted virus that can cause cervical cancer in a relatively small number of girls and women. According to the vaccine's manufacturer, Merck & Co. Inc., there have been

more than 26 million Gardasil vaccines distributed worldwide, including nearly 16 million in the United States. Merck estimates that eight million girls and women have received the vaccine in the United States since June 2006.

Source: CNN

FDA SAYS SOME ANTIBIOTICS MAY CAUSE TENDON PROBLEMS

The U.S. Food and Drug Administration has ordered the makers of fluoroquinolone drugs—a class of antibiotics—to add a boxed warning to the drugs' prescription information cautioning patients that the drugs can cause tendon rupture and tendinitis. Fluoroquinolone drugs include Cipro, Levaquin, Avelox, Noroxin and Floxin. The FDA said in a statement:

Fluoroquinolones are associated with an increased risk of tendinitis and tendon rupture. This risk is further increased in those over age 60, in kidney, heart, and lung transplant recipients, and with use of concomitant steroid therapy.

These drugs can continue to be used, but folks using them should watch for problems. A black box warning is appropriate and is needed.

Source: CNN

FDA WANTS EPILEPSY-DRUG WARNINGS

The U.S. Food and Drug Administration will seek to include strong warnings about suicidal behavior on the labels of 11 epilepsy drugs, according to documents posted on the agency's Web site. The FDA will ask companies to update labels for the drugs, including Pfizer Inc.'s Lyrica, with black-box warnings, the most serious warnings the agency issues. Sales of the affected drugs, widely used for other problems such as chronic pain, were more than \$8 billion last year. A committee of outside medical experts discussed suicidal behavior associated with epilepsy

drugs at an FDA-sponsored meeting last month.

In June, the agency said it was finalizing plans to include language warning about suicidal behavior on the drugs' labels after saying studies show statistically significant differences in suicidal tendencies for patients who have taken the drugs. It was unclear at the time whether the agency would seek black-box warnings. An updated label warning about suicidal behavior would likely affect Pfizer more than any other company. Its epilepsy drug, Lyrica, is relatively new to the market and brought in \$1.8 billion in sales in 2007. Pfizer has disputed the FDA's data, saying its own information shows Lyrica isn't associated with a risk for suicidal behavior. Other drugs whose labels may be updated are Cephalon Inc.'s Gabitril and Novartis AG's Trileptal.

Source: Wall Street Journal

BLACK BOX WARNING FOR ENBREL

The FDA is now requiring a black box warning for etanercept (ENBREL), a drug for rheumatoid arthritis, manufactured by Immunex Corporation and marketed by Amgen and Wyeth pharmaceuticals. The black box warning will be added to the drug's label. Etanercept is the brand name with ENBREL being the generic name. However, the drug is not yet available in generic form. The warning concerns rare—but possible—tuberculosis infections. Etanercept is an effective disease-modifying anti-rheumatic drug with annual sales of \$875 million in 2007. The warning says that persons should undergo TB testing before starting the drug.

Source: Public Citizen

NEW YORK MAN CLAIMS DRUG CAUSED COMPULSIVE GAMBLING

A former Wall Street banker who said he lost \$3 million from compulsive gambling believes it was caused by a popular drug used to treat Parkinson's

disease. As a result, he is suing the companies involved with the drug for his losses. The lawsuit, filed in New York State Court, accuses the privately-held German drug maker Boehringer Ingelheim, Pfizer and Pharmacia & Upjohn of breach of warranty, negligence and negligent misrepresentation. The 55-year-old said that he took the drug, Mirapex, from 2002 to 2007 after being diagnosed with Parkinson's disease and suffering hand tremors.

A spokesperson for Pfizer says the company hasn't marketed Mirapex since 2005, when medical studies first linked the drug to compulsive behaviors, including gambling. Pfizer claims that it had "acted reasonably and appropriately during the entire time period it was involved with the drug." Mirapex is still sold in the U.S. market and is also prescribed for restless leg syndrome. The Plaintiff, a successful banker, said that he had been a recreational gambler before being prescribed the drug. But the Plaintiff said he quickly became reckless, spending entire nights gambling over the Internet and traveling to casinos. The Plaintiff alleged that he couldn't stop gambling without help. According to the complaint, the father of two joined a gamblers' support group and, within five weeks of getting off Mirapex, had stopped gambling.

Source: Reuters

OPS LITIGATION IN THE WORKS

Our firm is looking at cases involving a product known as oral sodium phosphate. OSP is a laxative that is commonly given to patients to cleanse the bowels prior to procedures, such as colonoscopies, endoscopic and radiologic examinations, and surgeries. The primary product being used is Fleet® Phospho-Soda®, which is manufactured by C.B. Fleet Company, Inc., and which has been associated with severe and potentially fatal cases of renal or kidney failure. In May 2006, the FDA required a

warning be placed on the product regarding the risk of kidney failure.

Most commonly, patients who have a toxic reaction to OSP suffer acute renal failure, which may lead to chronic and long-term dialysis or death. Those persons who are at the greatest risk are older people, those with decreased intravascular volume or preexisting kidney disease, and those using certain medications such as diuretics, angiotensin converting enzyme (ACE) inhibitors, angiotensin receptor blockers (ARBs), and some nonsteroidal anti-inflammatory drugs (NSAIDs). A kidney biopsy may be helpful in identifying the source of the patient's kidney failure. If you need additional information about these cases, please contact Ben Locklar in our Mass Tort Section at 800-898-2034.

OFF-LABEL MARKETING OF PHARMACEUTICAL DRUGS

Off-label marketing in the pharmaceutical drug industry has become more and more common. Drugs are typically approved by the Food and Drug Administration (FDA) for specific purposes or uses, which doctors and consumers can obtain from the product's label information. However, drug companies often market their drugs for purposes other than those that the FDA has approved, otherwise known as off-label marketing. Off-label marketing offers the drug companies the opportunity to sell their drugs to a wider audience of consumers who would not have used these drugs otherwise. The additional profits that drug companies can make from off-label marketing can be substantial.

One example of off-label marketing can be seen in several lawsuits filed against the makers of Lexapro and Celexa, which are in a class of antidepressants known as selective serotonin reuptake inhibitors (SSRIs). Specifically, Forest Laboratories is the Defendant in several SSRI related civil

lawsuits claiming that Lexapro and Celexa caused or contributed to persons committing or attempting suicide. Additionally, it has been reported that the U.S. Attorney's Office is investigating whether to bring criminal charges against Forest Labs for violations of the Federal Anti-Kickback laws with off-label marketing activities in the promotion of Lexapro and other products. To date, subpoenas have been issued to Forest Labs requesting documents relating to the company's marketing and promotional activities since 1997.

Forest Labs, along with other SSRI drug makers, allegedly has been marketing Lexapro for the off-label treatment of many different kinds of illnesses not approved by the FDA, by promoting the notion that every uncomfortable feeling is caused by a "chemical imbalance." In other words, the drug companies making these drugs have transformed everyday sadness, stress, and worry into mental disorders that only drugs can resolve. The major off-label marketing campaign of mental illness drugs have led many consumers to believe that drugs are needed for normal life-related distress. However, because many doctors are not trained on the side effects of SSRIs, consumers can have a wide range of reactions or behaviors that appear to be symptoms of another "disorder," and are then prescribed more drugs to counter the unrecognized adverse reactions to the first.

This example of off-label marketing and consumer use is all too common for other classes of drugs in the pharmaceutical industry as well. Therefore, consumers must be proactive when being prescribed new medications by their doctors. Consumers should discuss carefully with their doctors any new medication that is being prescribed.

ETHEX CORPORATION RECALLS MORPHINE SULFATE TABLETS

Recently Ethex Corporation, a Missouri company, announced the recall of morphine sulfate tablets due to reports that some may have been produced with double the thickness and double the active ingredient. The company, which initially identified 60 mg extended release tablets only, has now expanded the recall to include 30 mg morphine sulfate tablets. Distribution of this medication, described as a white or pink oval tablet with "60" or "30" on one side and "E" on the other, would have been in April of 2008, according to the company. This can be a very dangerous situation, as overdosing on morphine can be fatal. Serious side effects can also include respiratory problems, including low blood pressure, difficulty breathing, or the inability to breathe.

This marks the second recall in less than two months of tablets produced with twice the thickness and twice the active ingredient. In our June report, we wrote about Digitek tablets, manufactured by Actavis Totowa, which were recalled for the same reason. Digitek defective tablets can cause serious, life-threatening events and have been categorized by the FDA as a Class I recall, the most serious classification. Chad Cook is the lead lawyer at our firm investigating cases where patients have been seriously injured from either Ethex morphine sulfate tablets or Digitek tablets.

The maker of Digitek faces at least nine federal lawsuits in New Jersey, including one where a patient died, alleging the drug was dangerous and defective. The lawsuits are pending in U.S. District Court in Newark. On April 25th Actavis Totowa started a nationwide recall of all strengths of the Digitek pills, which are distributed by Mylan Pharmaceuticals Inc. and UDL Laboratories Inc. Similar lawsuits have been filed in Alabama, West Virginia and California. Ted Meadows from our firm is also eval-

uating Digitek cases for our firm. He can be contacted at 800-898-2034.

Source: *Associated Press*

XII. BUSINESS LITIGATION

MASTERCARD TO PAY \$1.8 BILLION TO SETTLE AMEX SUIT

MasterCard will pay about \$1.8 billion to American Express to settle an antitrust lawsuit. Under terms of the settlement, the credit card company will make 12 quarterly payments of \$150 million to its rival. MasterCard will take a \$1 billion charge related to the settlement in the current fiscal quarter. American Express accused MasterCard of illegally blocking American Express from the bank-issued card business. American Express is also warning that business is getting weaker in the United States, with things deteriorating more than it expected in June.

Source: *Associated Press*

OREGON JURY AWARDS MORE THAN \$14.5 MILLION IN PATENT DISPUTE

A federal jury has ordered a medical equipment manufacturer to pay more than \$14.5 million in a patent infringement dispute that involves a device invented by an Oregon physician. Dr. John O. Hayhurst and Smith & Nephew, a Massachusetts-based manufacturer, hold a patent for a device called an anchor. The device allows doctors to reattach tissue to bone and is primarily used in shoulder surgeries. A lawsuit filed in Portland, Oregon, in 2004 alleged that Florida-based Arthrex had been selling its own version of the device without paying the patent holders. If another company wants to make the patented device, it must pay royalties as required by law.

Because the jury determined that

Arthrex acted intentionally, the judge has the authority to triple the verdict and award attorney's fees. At press time, no date had been set for the judge to decide whether to do that. Arthrex claimed the device works differently than the one invented by Hayhurst. Smith & Nephew plans to seek an injunction prohibiting Arthrex from further manufacturing or selling the infringing devices in the United States. There will be an appeal in the case.

Source: *Insurance Journal*

COCA-COLA AGREES TO SETTLEMENT IN SHAREHOLDER LAWSUIT

Coca-Cola has agreed to pay \$137.5 million to settle a shareholder lawsuit that claimed the world's largest soft drink maker artificially inflated sales to boost its stock price, according to court documents. The lawsuit, filed in federal court in October 2000, claimed that in 1999 Coca-Cola forced some bottlers to purchase hundreds of millions of dollars of unnecessary beverage concentrate in an effort to make its sales seem higher. Bottlers use the beverage concentrate to make soft drinks. Institutional investors, led by Carpenters Health & Welfare Fund of Philadelphia & Vicinity, said the practice, known as "channel stuffing", artificially inflated Coca-Cola's results and gave investors a false picture of the company's health. The investors claimed that Coca-Cola had failed to disclose material facts about its business and these omissions and misrepresentations harmed investors. Coca-Cola agreed to the settlement on June 26th, and it submitted to the court on July 3rd. The settlement applies to anyone who acquired Coca-Cola common stock from October 21, 1999 through March 6, 2000, according to the settlement agreement.

In 2005, Coca-Cola settled a similar issue over the sale of excess beverage concentrate to bottlers in Japan between 1997 and 1999. "Coca-Cola

misled investors by failing to disclose end-of-period practices that impacted the company's likely future operating results," according to a statement issued by the U.S. Securities and Exchange Commission at the time. Coca-Cola didn't pay a fine in that settlement, but agreed to cease and desist from future securities violations and maintain tight internal controls on sales to bottlers and customers. The U.S. Department of Justice closed an investigation without filing charges against the company.

Source: *Reuters*

VERIZON TO PAY \$21 MILLION TO SETTLE SUIT OVER FEES

Verizon Wireless has agreed to pay \$21 million to settle a lawsuit filed by customers in California that involved the company's early termination fees. At press time, the details of the settlement had not been finalized. The settlement will have to be approved by the Alameda County Superior Court. Those customers who paid fees to end their contracts early will be entitled to payment from the settlement.

Telecommunications companies charge early termination fees that can range from \$150 to \$225 when customers cancel their service contracts before they expire. Wireless companies have said they must charge the fees so as to recover the cost of cellphones, which they subsidize when they sign up customers for long-term service contracts. Customers of six companies sued the carriers in 2006 in Alameda County Superior Court, saying that the fees violated California law.

Source: *Associated Press*

SHELL OIL ORDERED TO PAY \$66 MILLION TO ROYALTY OWNERS

An Oklahoma jury has ordered Shell Oil Co. to pay \$66 million to five royalty owners for their share of a lucrative oil well dug in the early 1970s. The payments will go to two

families that owned an interest in the land where Shell drilled for oil. Shell failed to inform the landowners when the company struck a huge reserve and built a well on the land in 1973. It took 20 years for the Plaintiffs to find out there was a well on the property in which they owned an interest. Once they finally filed a complaint in 1995, it's reported that Shell and then-lease owner Maynard Oil Co. did everything possible to delay the case coming to trial. As a result, it took a very long time for the Plaintiffs to finally get a trial date. I must admit that the delay was difficult to understand. Maynard Oil settled prior to trial for a confidential amount and the case was tried against Shell.

Source: *Lawyers Weekly*

XIII. INSURANCE AND FINANCE UPDATE

THE INSURANCE INDUSTRY PUTS PROFITS OVER POLICYHOLDERS' INTERESTS

According to a recent study, Allstate ranks as the worst insurer for consumers. At least that was the conclusion reached in a comprehensive investigation of thousands of legal documents and financial filings. The rankings show a distinct pattern of insurance industry greed amongst ten companies that frequently refuse to pay valid claims, employ hardball tactics against their policyholders, reward executives with extravagant salaries, and raise premiums while earning excessive profits. Many believe that Allstate sets the standard for insurance company greed and for placing profits over the interests of its policyholders. Thousands of court documents, materials uncovered from litigation and discovery, court testimony, complaints filed with state insurance departments as well as with the SEC, FBI records, and news accounts

were reviewed by the researchers to compile the rankings and statistics. The rankings from the study are as follows:

1. **Allstate**—this company has developed a system that is anti-policyholder when it comes to paying claims. The company plays hard ball on claims and makes it very difficult for claimants to settle valid claims. There has been a great deal written about Allstate's methods and tactics.
2. **Unum**—Unum's actions are even more shameful considering the type of insurance it sells: disability. Unum's behavior was epitomized when it denied the claim of a woman with multiple sclerosis for three years, stating her conditions were "self-reported," contrary to doctors' evaluations. In 2005, Unum agreed to a settlement with insurance commissioners from 48 states over their practices.
3. **AIG**—The world's biggest insurer, AIG's slogan was "we know money." AIG, described by commentators as "the new Enron," has engaged in massive corporate fraud and claims abuses. In 2006, the company paid \$1.6 billion to settle a host of charges.
4. **State Farm**—It was reported that State Farm is notorious for its deny and delay tactics. Like Allstate, State Farm hired McKinsey consultants. State Farm's true motives became apparent during Hurricane Katrina. In April 2007, State Farm agreed to re-evaluate more than 3,000 Hurricane Katrina claims.
5. **Conseco**—Conseco sells long-term care policies, typically to the elderly. Amongst its egregious behavior, the insurer "made it so hard to make a claim that people either died or gave up," according to a former Conseco-subsiidiary agent. Former Conseco executives were fined when they admitted to filing mis-

leading financial statements with regulators.

6. **WellPoint**—Health insurer Well-Point has a long history of putting profits ahead of policyholders. For instance, California fined a Well-Point subsidiary in March 2007 after an investigation revealed that the insurer routinely canceled policies of pregnant women and chronically ill patients.
7. **Farmers**—Swiss-owned Farmers Insurance Group consistently ranks at or near the bottom of homeowner satisfaction surveys.
8. **UnitedHealth**—The SEC opened an investigation into former United-Health CEO William McGuire for stock backdating, which ultimately led to his ouster in 2006 and returning \$620 million in stock gains and retirement compensation. Doctors have also reported that their reimbursements are so low and payments are delayed by the company to the extent that patient health is being compromised.
9. **Torchmark**—Torchmark has a history of preying on low-income citizens. For example, it has charged minority policyholders more than whites on burial policies. This company has changed a great deal over the years and not for the better.
10. **Liberty Mutual**—Like Allstate and State Farm, Liberty Mutual hired consulting giant McKinsey to help it adopt more aggressive claims tactics. Liberty Mutual's tactics were highlighted when a New York couple's insurance was "non-renewed" by Liberty, even though they lived 12 miles from the coast and never experienced weather-related flooding.

Financial documents reviewed revealed extravagant profits and executive compensation while policyholders' claims were routinely delayed and denied. For example, consider that:

- Over the last 10 years, the property / casualty and life / health insurance industries have each enjoyed annual profits exceeding \$30 billion.
- The insurance industry takes in over \$1 trillion in premiums every year. It has \$3.8 trillion in assets, more than the GDPs of all but two countries.
- The CEOs of the top ten property / casualty firms earned an average of \$8.9 million in 2007. The CEOs of the top ten life / health insurance earned an average of \$9.1 million.
- The median insurance CEO's cash compensation is \$1.6 million per year, leading all industries.

To get an idea on how consumers can hold the insurance industry accountable and view a full copy of the study, visit <http://www.justice.org/docs/TenWorstInsuranceCompanies.pdf>.

Source: www.justice.org

JURY VERDICTS AGAINST PAUL REVERE INSURANCE COMPANY & UNUMPROVIDENT CORPORATION

A federal court jury in Nevada returned verdicts last month against Paul Revere Life Insurance Company and UnumProvident Corporation (Unum Group). This was a partial retrial of a lawsuit originally tried to verdict in 2004. In the first trial, the jury awarded \$1.6 million in compensatory damages and \$10 million in punitive damages to G. Clinton Merrick in connection with the insurers' denial of his disability claim. The insurers appealed and the punitive award was ultimately sent back for retrial before a new jury. The jury ordered Paul Revere Life Insurance Co. to pay \$24 million and UnumProvident Corporation was ordered to pay \$36 million. Interestingly, the punitive award of \$60 million is six times the previous award that had been appealed by the insurers following the 2004 trial.

In the case, it was alleged that improper claims handling practices

begun at Provident were brought to Paul Revere and influenced its claim handling with respect to Mr. Merrick's claim both before the initial denial and afterward. These practices at the Unum Group of disability insurers have been the subject of media scrutiny as well as multiple governmental investigations. Rick Friedman, the lawyer who tried the case, had this to say about the verdicts:

The jury heard evidence of a fifteen year scheme to cheat disabled people. The money made off this scheme is in the hundreds of millions, if not billions of dollars. Jury after jury, and regulator after regulator has condemned their practices, but still they continue. The verdicts will keep coming until their practices change.

Rick did a very good job in this case and got an exceptionally good result. The fact that it was a retrial makes the result even better. An appeal of the verdicts is expected.

Source: *Associated Press*

AMERIGROUP SETTLES U.S. SUIT OVER PREGNANCY COVERAGE

Amerigroup Corp., a manager of government health plans, has agreed to pay \$225 million to the federal government and to the State of Illinois to settle a lawsuit alleging the company wrongfully denied coverage to pregnant women eligible for Medicaid. The company also will pay attorneys' fees and will enter into a corporate integrity agreement. A whistleblower, who was in charge of government relations for Amerigroup in Illinois, filed the complaint in 2002.

The company, which then operated in nine states and the District of Columbia, was accused of maximizing profits by keeping pregnant women and others with costly medical conditions off its rolls. A federal judge in Chicago fined Amerigroup \$190.4 million last year. There was also a \$144 million

verdict by a federal court jury in 2006. The latest suit was filed under the federal False Claims Act and a parallel state law.

Source: *Bloomberg*

GEORGIA BARS INSURANCE FIRM OVER VIOLATIONS

Regulators in Georgia have barred a California company from doing business in their state, saying it violated rules adopted in 2007 to prevent the sale of misleading or unsuitable life insurance policies to military personnel. Insurance Commissioner John W. Oxendine announced on July 2nd that he had barred Trans World Assurance, based in San Mateo, California, and imposed a \$214,000 fine. The Commissioner found that the company had committed nearly 200 infractions from September 2007 to last March. The company was also ordered to reimburse service members for the premiums they paid on policies it sold during that period.

The specific rules involved in the case were adopted as part of Georgia's response to military and Congressional concern over the sale of unsuitable financial products to young military consumers, described in articles in *The New York Times* in 2004. Insurance commissioners in many other states adopted similar laws, and began working more closely with military legal authorities to monitor insurance sales to service members. After a hearing in May, Commissioner Oxendine determined that the policy that Trans World had sold—which contains provisions for both a death benefit and a cash-accumulation fund—had features that did not comply with the new rules for that kind of policy.

These policy features included its method of computing interest and its imposition of penalties for withdrawals from the cash fund. Commissioner Oxendine also ruled that the company had sold the policies to military per-

sonnel without first determining whether the product was appropriate for service members covered under the low-cost life insurance provided through the military. At a May hearing, Trans World argued that its policy, called the Flexible Dollar Builder, was not subject to the military protection features in Georgia's law. Its lawyers argued that the savings fund was part of the policy's cash value, which made it exempt from rules governing "side funds" set up in tandem with insurance policies. They claimed that view was supported by the tax-free treatment of the cash that accumulates in the fund. Commissioner Oxendine rejected that reasoning, saying it was inconsistent with both Georgia court decisions and the insurer's own financial statements and sales materials. In one brochure, for example, the company distinguished a policy's "accumulation fund" from its "cash value." And in its financial filings, it described the money in the funds as "deposits."

Source: *New York Times*

EMPLOYERS USE ERISA LAW TO DENY BENEFITS TO EMPLOYEES

The federal Employee Retirement Income Security Act, designed to protect employee benefits, has been used by employers as a shield against lawsuits. Federal appeals courts, interpreting Supreme Court decisions dating to 1993, consistently have said companies that offer health, life and retirement benefits under ERISA are protected from most lawsuits. Employees can be sued only in a very limited fashion and the damages that can be recovered are minimal. The result is that a good number of employers use ERISA as a shield against lawsuits based on their bad conduct.

So far the U.S. Supreme Court has refused to clear up the confusion caused by the federal appeals court rulings. Congress, which could amend ERISA to make clear that valid lawsuits are allowed, also has taken no action.

The result, in the view of many ERISA experts, is that employees are using ERISA for a purpose never intended by Congress.

Senator Patrick Leahy, chairman of the Senate Judiciary Committee, pointed out at a recent hearing that before ERISA became law, employees clearly could sue for benefits in state courts. Court rulings, according to Senator Leahy, have left people "more vulnerable than they were before the law was passed." There is a definite need for either the U.S. Supreme Court or Congress to provide "some sort of meaningful remedy for employees when employees have a breach of fiduciary duty."

Source: *Associated Press*

CORPORATIONS PUT LABELS ON EMPLOYEES TO SAVE MONEY

As concerns about the slowing economy continue to grow, many businesses are seeking out ways to reduce overhead and increase slimming profit margins. Unfortunately, many of these corporations are doing so at the expense of the workforce by misclassifying employees as "independent contractors." While the term "independent contractor" may seem like just a title, the distinction is important; while "employees" are entitled to basic benefits such as overtime and workers comp insurance, independent contractors are not. Employers can pay a worker classified as an independent contractor less than a worker classified as an employee even though the person is doing the very same work. While some workers are true independent contractors, many corporations have misclassified their employees as independent contractors in order to avoid paying those required benefits. Recently, our firm has been handling a number of these employee misclassification cases, in order to stop big corporations from lining their pockets at the expense of hardworking Americans nationwide. Roman Shaul

and Dee Miles are the primary lawyers from the firm working on these cases.

Unfortunately, the problem is not isolated to any particular region or industry. In a hearing before the House Committee on Labor and Education, the Commissioner of the New Jersey Department of Labor and Workforce explained that "the primary reason that most employers choose to misclassify employees is a desire to avoid the employer costs of payroll taxes for Social Security, unemployment and disability insurance as well as other worker's compensation insurance premiums." The problem with these kinds of misclassifications is that they deprive workers of vital social services at the time they need them the most.

Independent contractors cannot claim unemployment or disability benefits, and are not paid the "time and a half" for overtime work that many workers need to make ends meet in this time of rapid inflation. Misclassification also hurts competition by creating an unlevel playing field for those businesses that properly classify employees. In addition, when dishonest corporations don't pay their fair share, state unemployment systems are forced to raise contribution rates in order to make up for the shortfalls. While these costs are first shouldered by the thousands of misclassified employees who don't receive their benefits, the American public also suffers because honest businesses that are forced to pay the higher rates will inevitably pass on that increase in cost to the consumer.

According to a Cornell University study, an average of over 700,000 workers per year in New York State alone were misclassified as independent contractors between 2002 and 2005, resulting in over \$4 billion per year in underreported taxable income. Nationwide, the IRS estimated that 15% of employees were misclassified as independent contractors, the last time it studied the problem in 1984. Unfortunately, unless action is taken, that

number will likely continue to grow as the number of workers classified as independent contractors increases. In 2005, the number of independent contractors nationwide had increased to over 10 million workers that do not receive overtime, unemployment insurance, or workers compensation—basic benefits that are even more important in periods of economic uncertainty. That number represents approximately 7.4% of the total workforce. As a result, it is more important now than ever for employees to know their rights. Our firm is doing its part to ensure that big corporations do not manipulate workers in the break room in order to increase shareholders dividends in the boardroom.

CONNECTICUT SUPREME COURT CERTIFIES CLASS ACTION AGAINST HARTFORD INSURANCE

The Connecticut Supreme Court has ruled that a lawsuit, filed by auto body repairers alleging that The Hartford Fire Insurance Company (Hartford) improperly steers customers to certain repair shops, can proceed as a class action. The Auto Body Association of Connecticut (ABAC), along with three Connecticut body shops, sued Hartford in July 2003 alleging that the insurance provider “engaged in a pattern of unfair practices” in violation of Connecticut state laws. According to the lawsuit, Hartford steered its customers to its preferred direct repair program shops rather than allowing its customers to freely use the repair shops of their own choosing.

In addition, Hartford is accused of concealing body shop labor rates by eliminating the use of independent appraisers. The suit alleges that Hartford relied exclusively on its own automobile service representatives to perform appraisals and, by doing so, Hartford was able to control the overall content of the report, including the amounts to be paid for labor. This tactic

resulted in customers not getting fair and independent appraisals of the damage done to their automobiles, according to the lawsuit.

In support of their claims, the repair shops presented evidence showing that when customers requested repairs, Hartford employees known as “customer care specialists” were instructed to refer the customer to a preferred shop in Hartford’s “customer care repair service program.” The suit also alleges that customers were pressured to abandon their choice of repair shop in favor of a Hartford preferred shop. Thomas Bovina, past president of ABAC, observed:

Insurance companies carjack customers by steering them to repair shops the companies prefer—shops that may install aftermarket or used parts. Using these parts may void a new car warranty—something insurance companies neglect to tell consumers. Consumers don’t see that company-preferred shops may cut corners on repairs, perhaps using inferior parts.

This case will be watched closely. Over the years, we have run into this sort of thing involving other insurance companies and repair shops. Many believe this is a common practice. If so, governmental regulators should put a stop to it.

Source: *Associated Press*

XIV. PREDATORY LENDING

AN OVERVIEW OF PROBLEMS INVOLVING THE PREDATORY LENDING INDUSTRY

There have been so many developments relating to the predatory lenders and the problems they have caused, especially in the housing market, that I have decided to wait until the next

issue to update the overall situation. Things are moving very fast—both in Congress and in the courts—and we should be able to get a better handle on things in a few weeks. I don’t believe anybody knew how bad things really were in this industry, but we are all finding out now. The bail-out that is currently making its way through Congress will cost taxpayers billions of dollars. While that bail-out is apparently needed, it’s clear that the whole system must also be fixed and any wrongdoers must be punished.

XV. PREMISES LIABILITY UPDATE

ANOTHER SETTLEMENT IN RHODE ISLAND NIGHTCLUB FIRE

A New Jersey packaging company, one of several defendants sued after a Rhode Island nightclub burned down five years ago, has agreed to pay \$25 million to survivors and relatives of the 100 people killed. The settlement with Sealed Air Corp. is the latest in a series stemming from the 2003 fire at The Station nightclub in West Warwick. As previously reported, the fire started when pyrotechnics used by the rock band Great White ignited flammable soundproofing on the club’s walls.

This settlement brings to nearly \$150 million the total amount of money offered to survivors and victims’ relatives. It also moves the case, which initially named dozens of people and companies as Defendants, closer to a resolution. Sealed Air made polyethylene foam that was installed in the club in 1996. The foam burned too easily and produced toxic gas. But Sealed Air took the position that the packaging material was misused as soundproofing, and that it was never determined the company even made the material in the club.

The foam at issue in this latest settlement is apparently different from the flammable polyurethane foam placed on the building's walls by the club owners, who took over the club in 2000. Other Defendants that have reached settlements include Clear Channel Broadcasting, whose rock radio station promoted the show, Anheuser-Busch Inc., The Home Depot Inc., and a pyrotechnics manufacturer. Several other foam companies agreed in May to pay \$30 million to settle. The settlements are all subject to court approval by a judge. The families must also agree. The Defendants that remain include the State of Rhode Island; the local fire inspector who failed to cite the club for foam, and American Foam Corp.

Source: *Insurance Journal*

MAKING POOLS SAFER MUST BE A TOP PRIORITY

In December of 2007, Congress passed the Virginia Graeme Baker Pool & Spa Safety Act to provide basic safety standards for the nation's public pools. That was good news, but now a recent survey by ABC News has found that the drains of almost 75% of the public pools throughout the country are still not safe. The new law requires all public pools to install the mandated safety devices by December 20th of this year or face fines up to \$1.3 million. The safety devices—safety drain covers and shut-off valves—are designed to prevent children from being trapped underwater by the powerful suction of pool filter systems.

These devices were available long before the new legislation was passed, but the industry didn't see fit to install them. In fact, the Association of Pool and Spa Professionals even fought the legislation in Congress. Since it appears from the survey that the industry isn't taking steps to implement the provisions of the Act, the safety problems will remain at a tremendous number of public pools and spas. Paul Pennington,

who is with the Pool Safety Consortium, says that many of the drain covers currently in use are "death traps." The CPSC should get involved and make sure the existing hazards are cured. Pool safety has to be a top priority for all concerned.

Source: *ABC News*

XVI. WORKPLACE HAZARDS

WAL-MART FACES MAJOR LABOR LAW TRIAL

A state court judge in Minnesota has ruled that Wal-Mart Stores Inc. repeatedly broke Minnesota labor laws. This was the third straight defeat in a wage class action trial for Wal-Mart. A jury may now order the giant retailer to pay as much as \$2 billion in damages. The company required hourly employees to work off-the-clock during training and denied full rest or meal breaks in violation of state wage and hour laws. The ruling by Judge Robert King, Jr. came following a non-jury trial. Judge King ruled Wal-Mart broke labor laws more than 2 million times and ordered the company to pay employees \$6.5 million in back-pay. The judge wrote in his ruling:

Wal-Mart's failure to compensate plaintiffs was willful. Wal-Mart was on notice from numerous sources of the wage and hour violations at issue and failed to correct the problem.

The Minnesota lawsuit is one of more than 70 cases, including class actions, in which Wal-Mart has been accused of wage-law violations. The giant retailer lost a \$78 million jury verdict in Pennsylvania in 2006 over rest breaks and unpaid work and a \$172 million verdict in California in 2005 over meal breaks. Both verdicts

have been appealed. It has been reported that Wal-Mart is involved in more litigation over alleged violations of wage and hour laws than any other company.

Judge King's decision means Wal-Mart will face a second trial in Minnesota state court, this time before a jury. Minnesota labor law allows a fine of up to \$1,000 per violation of wage and hour rules. With 2 million violations, that may total as much as \$2 billion. At the trial, which will start on October 20th, jurors will determine how much each violation is worth. They will also consider punitive damages. Wal-Mart will most likely appeal.

The lawsuit was filed by four women on behalf of about 56,000 Wal-Mart and Sam's Club employees. The workers claim that company managers denied breaks to keep down labor costs. The Minnesota suit was granted class-action status in 2003. The company also faces class-action suits in state courts in New Jersey, Washington and Missouri. Wal-Mart has fought off class certification in multiple states including New York, Illinois and Maryland. A federal court ruled on June 20th in Wal-Mart's favor, denying class status to workers in four states who claimed the company denied rest breaks and manipulated time cards to "shave" their pay. It will be most interesting to see how the Minnesota case comes out. Lots of folks are watching with anticipation.

Source: *Bloomberg*

JURY AWARDS \$46.6 MILLION TO BOSS WHO REFUSED TO FIRE WORKERS

An Ohio jury awarded the largest verdict in that state's history—\$46.6 million—to a man who was wrongfully fired last year. Ronald Luri accused Republic Services Inc. of retaliation and of forging documents critical of his job performance after he refused to fire three of his employees—all about 60 years old—on the grounds that such actions would constitute age discrimination.

The jury awarded Mr. Luri \$3.5

million as compensation for his lost wages as general manager of Republic's Cleveland division, and \$43.1 million in punitive damages as punishment for his treatment by the company. The jury also ordered Republic to pay Luri's attorneys' fees, to be determined by the trial judge. The jurors were especially disturbed by testimony of evidence-tampering and actions taken by Mr. Luri's superiors to prevent him from obtaining new employment in the Cleveland area after his firing. After the verdict was returned, the jury foreman made this statement:

We wanted to send a clear message that this was unjustly done and that they tried to ruin his career.

A key bit of evidence was an e-mail written by Mr. Luri's boss, Jim Bowen, Republic's Ohio-area president. A computer expert testified that Bowen had post-dated the memo and added two paragraphs critical of Mr. Luri's job performance two weeks after the lawsuit was filed. Republic is in the process of a merger that will make it the second largest waste-collection company in the country. It employs 13,000 workers in 21 states, and had \$3.2 billion in revenue last year. Maybe it learned a good lesson from this case. Shannon Polk and Richard Haber, who are from Cleveland, Ohio, represented Mr. Luri and did a very good job.

Source: *Plain Dealer*

A SUPREME COURT VICTORY FOR OLDER WORKERS

The U.S. Supreme Court ruled for older workers in a closely-watched age discrimination case, placing on employers the burden of proving that a layoff or other action that hurts older workers more than others was based not on age but on some other "reasonable factor." The 7-to-1 decision overturned a ruling by the federal appeals

court in New York, which said employees had the burden of disproving an employer's defense of reasonableness. The case was brought by 28 employees who lost their jobs during cutbacks at a federal research laboratory in upstate New York. All but one of the employees who were laid off were at least 40, the age at which protections begin under the federal Age Discrimination in Employment Act.

The issue in the case, while technical, is important for the litigation of age discrimination cases in which an employer's action or policy that appears neutral on its face has a disparate impact on older workers. David Certner, the chief legislative counsel for AARP, praised the decision, saying it would prove "vital to the creation and maintenance of a workplace that is fair and free of age bias."

In the case, (*Meacham v. Knolls Atomic Power Laboratory*), the employer was faced with laying off some employees after a voluntary buyout failed to produce the desired staff reduction. Managers were instructed to rate employees for how "flexible" and "retrainable" they were. Of the 31 who were eventually laid off, 30 were at least 40 years old. The age discrimination law provides that an employment action that would be "otherwise prohibited" is lawful if "the differentiation is based on reasonable factors other than age." The question in the case was what happens once an employer invokes this defense: does the employer have to prove, or do the Plaintiffs have to disprove, the existence of the reasonable non-age factors? The laid-off Knolls Atomic workers won their case before a jury, but the United States Court of Appeals for the Second Circuit overturned the verdict on the ground that the employees had not refuted the reasonableness of the laboratory's selection process.

Justice Souter indicated in his opinion that Congress—not the

Court—would have to give employers relief, and that's most interesting. Hopefully, that will be the justices' position in the federal preemption case now before the Court. Justice Antonin Scalia wrote a concurring opinion to say that the Court was properly adopting the position of the Equal Employment Opportunity Commission.

Source: *New York Times*

OSHA INVESTIGATES ACCIDENTS AT DALLAS COWBOYS' STADIUM

Federal officials have opened investigations into two recent accidents that occurred at the Dallas Cowboys' stadium in Arlington. One of the accidents resulted in the death of a worker. A crane was being used at the time a worker was electrocuted. The Occupational Safety and Health Administration has six months to complete its investigations. However, reports on the fatality and the crane incident, where three people were hospitalized, could be completed sooner.

There have been 175 incidents since work began on the \$1.1 billion stadium project in April 2006. Keith Cooper, construction manager with general contractor Manhattan Construction, says the company initiated new safety procedures in May after a sharp increase in these incidents. OSHA investigated two previous major accidents at the site. In January 2007, a worker fell through a hole, and the contractor, Capform, was fined \$10,000. Later that year, a man was hit in the back with a crane hook. OSHA found no violations, but issued a warning letter to Capform.

Source: *Star-Telegram*

XVII. TRANSPORTATION

NEGLIGENT ENTRUSTMENT

If all corporations that have company-owned vehicles on the road aren't aware of the claim of negligent entrustment under Alabama law, they should be. If a company, with knowledge, allows an incompetent driver to drive one of its vehicles, that company can be liable for the driver's negligence while operating the vehicle. This theory of liability also applies to individuals who allow others to drive their personal vehicles. If you are involved in a motor vehicle accident and you are injured, you may have a valid legal claim against the owner of the other vehicle involved in the accident if the owner negligently entrusted the vehicle to an "incompetent" driver. The term incompetent has a special meaning under Alabama law. You can learn about negligent entrustment by reading an Alabama Supreme Court case [*Edwards v. Valentine*, 926 So. 2d 315 (Ala. 2005)].

In the *Valentine* case, the Plaintiff was injured when his vehicle was hit by a vehicle owned by one person, but driven by another. That driver did not have a valid driver's license and was driving a vehicle owned by his brother-in-law. The Plaintiff sued the owner, claiming that the owner negligently entrusted the vehicle to the driver and that his injuries were caused by that entrustment. The Plaintiff won his case, which included damages for his injuries as well as damages for his wife's loss of consortium claim. The case was appealed by the owner and the Alabama Supreme Court affirmed the award. The court also set out the elements required for a negligent entrustment claim. In Alabama, for there to be a negligent entrustment, there must be:

- an entrustment of a vehicle;

- to an incompetent driver;
- with knowledge that the driver is incompetent;
- proximate cause; and
- damages.

The Alabama Supreme Court set out some useful guidelines in the *Valentine* case that help us know what the court considers to be important in these cases. If you are injured in a car wreck and the person driving the other vehicle doesn't own the car, it's important to find out who owned the vehicle, to look into the driver's driving history, and find out whether the driver had a history of drug or alcohol use, and to determine whether the owner negligently entrusted the vehicle to the driver under Alabama law.

When the owner is a corporation, especially a trucking company, there are all sorts of records that you can get to ascertain whether there is a potential negligent entrustment claim. Success in these cases depends on good investigation and pretrial discovery. I can tell you, however, that juries will not find a driver to be incompetent unless the evidence clearly justifies such a finding. But when adequate proof is there, and the case is tried properly, judges and jurors will respond favorably.

HIGH TECH DEVICES USED BY THE TRUCKING INDUSTRY ARE HELPFUL IN LITIGATION

As those of us who handle cases involving trucking accidents know all too well, litigation involving the trucking industry has become very specialized. Trucking companies are using a variety of high tech devices that are changing the face of trucking litigation. On-board computers, electronic logging, GPS systems and satellite and wireless tracking can provide a wealth of information about an accident and the history of the driver and vehicle. On-board recorders can track over 175

characteristics, such as vehicle speed, hard-braking incidents and vehicle maintenance. This information is most helpful in trucking litigation for obvious reasons. Both sides are using the data in trials and in investigations prior to filing suit.

In a highly-regulated industry, electronic devices are a new way for trucking companies to monitor a driver's route, how long a driver is on the road, how much time a driver spends at rest stops, and other information. Over time, the data recorders have become much more sophisticated. A primary source of information is the "black box," also known as an electronic control module or electronic data recorder, which records events like hard-braking, cruise control settings, when the truck traveled at various speeds, and sudden decelerations.

Newer electronic on-board recorders, known as EOBRs, monitor the speed of a truck as well as the number of driving hours, and can indicate every time a driver goes over the allowed number of hours or drives over the speed limit. Some carriers have replaced hand-written logbooks with GPS satellite and wireless devices that track a driver's schedule and route and beam the information back to the company. Other devices are now being introduced that use video cams and radar to track and warn of potential hazards, including blind spots or when a driver is drifting out of a lane. The data is then uploaded to the company computer in real time. The combined data that's available can help reconstruct an accident. We have found that in trucking cases driver fatigue or inattentiveness by drivers is very often a factor in causing accidents. We have seen where the company knew that its driver repeatedly exceeded the hours-of-service rules, yet didn't take the driver off the road. There have been a number of cases handled by our firm where a company failed to properly maintain a vehicle even though the on-board recorders indicated maintenance problems.

Under federal regulations, trucking companies are required to keep most records, such as daily driving logs, for only six months. Other types of documentation must be retained for one or two years, depending on the type, but there are no specific rules for electronic satellite data. Another factor is that some on-board recorders can be set to “on” or “off” by default. It’s advisable in a trucking case to send a “records preservation letter,” notifying the company of the information it must preserve. That should be a routine occurrence in all trucking accident cases. The requests should include all electronic data from the EOBR or any sort of GPS system or other on-board computers.

Source: *Lawyers Weekly USA*

ALABAMA LAUNCHED STATEWIDE CAMPAIGN ON ATV SAFETY

The Alabama Department of Public Health is to be commended for its recent actions relating to ATVs. The focus by the Department on the dangers of All Terrain Vehicles is certainly noteworthy. State officials launched a statewide educational campaign last month to warn citizens about the dangers of allowing anyone under age 16 to ride the vehicles. State Health Officer Dr. Don Williamson says in Alabama, ATV accidents over the past eight years have killed six children and severely injured another 211. Health officials say, based on reports from coroners and hospitals, that the ATV safety problem is getting worse. Alabama is among just three states that have no laws regulating the use of ATVs and that’s inexcusable. The Legislature should pass the necessary laws in the next regular session to remedy the situation.

Source: *Associated Press*

HUNDREDS OF TRUCKS TAKEN OFF GEORGIA ROADS FOR SAFETY VIOLATIONS

A 72-hour inspection effort resulted

in Georgia officials grounding 245 commercial trucks. The Motor Carrier Compliance Division of the Georgia Department of Public Safety conducted the inspections between June 3rd and June 5th. Officers inspected 1,466 commercial vehicles during the safety inspections, which are designed to locate trucks with safety defects and remove them from the highways before crashes occur. The inspections were part of Roadcheck 2008, a joint effort of commercial vehicle inspectors in the U.S., Canada and Mexico. The most common violation for 122 drivers cited was the hours of service they could be on the roads. The most common vehicle violations were with brake adjustments and the brake system. These inspections are extremely important from a safety perspective. Our experience in handling motor vehicle accidents involving large trucks tells us that driver fatigue and vehicle defects cause a significant number of the accidents in the cases we handle.

Source: *Insurance Journal*

HELICOPTER CRASH LAWSUIT SETTLED

A New Hampshire couple who went to Kaua’i to celebrate their 30th wedding anniversary, but instead suffered debilitating injuries in a tour helicopter crash that also killed one passenger last year, have settled their lawsuit for \$9.5 million. The suit was filed in Circuit Court on O’ahu late last year against the Boeing Co. (which merged with McDonnell Douglas in 1997), Aluminum Precision Products Inc. and Smoky Mountain Helicopters. The couple, Judy and Doug Barton, were among four passengers on an Inter-Island Helicopters air tour when it crashed on March 11, 2007, on Kaua’i’s north shore. The helicopter’s tail section blew apart in flight, causing it to crash. Witnesses said they saw at least two pieces of the helicopter fall into the ocean. The Bartons, on what was supposed to have been a 55-

minute tour, were about 1,000 feet up when the helicopter began to experience trouble. They were seated in the rear of the helicopter and suffered spine injuries when it crashed.

One passenger was killed and a fourth passenger suffered serious injuries. The helicopter pilot also was injured. It was the second fatal crash of a Kaua’i tour helicopter in three days and occurred just five miles from where a Heli USA Airways helicopter had crashed, killing the pilot and three of his passengers. Judy Barton, 52, who was left with no feeling below her waist and with no bowel or bladder functions, will require daily nursing help. Her husband, Doug, 61, suffered a similar spinal cord injury. He can walk, but not without experiencing severe pain. So far, the couple has incurred \$750,000 in medical bills.

The cause of the crash was determined to be a defective fitting that connected the tail rotor. The pilot attempted a procedure known as autorotation to slow the helicopter’s descent, but it wasn’t enough to prevent the crash. After the crash, the National Transportation Safety Board grounded all Hughes 500 series helicopters. Two that were in operation in New Zealand were found to have the same defect to fittings in the tail rotor. The crashed helicopter was built by McDonnell Douglas Helicopter Systems in 1987 and was owned by Smoky Mountain Helicopters Inc., doing business as Inter-Island Helicopters. The Bartons’ suit named Aluminum Precision Products Inc., the manufacturer of the defective fitting, and Smoky Mountain Helicopters as Defendants. The settlement was reached through mediation and because of full disclosure from McDonnell Douglas. Research showed that the same helicopter had 16 tail rotor failures, ten of which were due to tail rotor metal fatigue. Richard Fried, Jr., a Honolulu lawyer, represented the Bartons and did a very good job for them.

Source: *Honolulu Advertiser*

MEDICAL HELICOPTER CRASHES HAVE BECOME A CAUSE FOR CONCERN

The fatal collision on June 29th involving two medical helicopters in Arizona was the sixth crash involving emergency helicopters since May. This made the last two months one of the deadliest periods in the history of this fast-growing industry. Sixteen people have died this year in seven crashes, which involved eight helicopters, according to federal data. In fact, thirteen of the deaths have come since May, which has caused great concern. There has been tremendous growth in the use of medical helicopters in the U.S. About 750 medical helicopters are currently operating in this country, about twice the number that were flying a decade ago. Medical helicopters were once operated mostly by hospitals, but in recent years private companies, including some that are publicly traded, have come to dominate the industry.

According to Mark Rosenker, chairman of the National Transportation Safety Board, his agency is greatly concerned about the increase in crashes. The board began to investigate the industry after a rash of accidents in 2004 and 2005. In a report in 2006, the NTSB found that operators had failed to develop comprehensive flight risk programs, and that pilots often did not have adequate information about bad weather they might have encountered or equipment to alert them to dangerous terrain. The board called for stricter flight rules and improved accident-avoidance equipment, among other recommendations. While the Federal Aviation Administration accepted all of the board's recommendations, only a few of them have been implemented.

In the latest crash in Arizona, six people were killed and one was critically injured. The crash occurred as each helicopter was on its final approach to Flagstaff Medical Center. FAA says it's putting changes into effect that could include new weather requirements for flights and stricter

rules for pilot instrument competency. The Times reported that "some industry critics have questioned whether companies eager to profit from flights are sending helicopters to pick up patients who could have been transported more cheaply, and at less risk, by ground ambulance." It was noted that there may be pressure to fly "because most companies are owned by publicly owned entities."

This rash of crashes involving medical helicopters is a cause for great concern. In early June, four people were killed when a medical helicopter crashed near Huntsville, Texas. Three people were killed in May when a medical helicopter crashed near La Crosse, Wisconsin, and another three died in a crash in February of a medical helicopter off South Padre Island in Texas. In late May, maternity patients in Grand Rapids, Michigan, had to be evacuated after a medical helicopter crashed on a hospital's roof. A medical helicopter crashed 30 miles outside Prescott, Arizona, injuring the three crew members, one of them seriously. Hopefully, government regulators will take the necessary steps to make this growing industry put safety at the top of its priority list.

Source: New York Times

U.S. UNVEILS NEW RULE ON AIRPLANE FUEL TANKS

It appears that the federal government—after 12 years of delay—may finally be getting around to dealing with a serious safety problem. A device to prevent airplane fuel tanks from exploding must now be installed on certain passenger jets and cargo planes. This comes 12 years after such an explosion destroyed TWA Flight 800, killing all 230 people on board. The new safety requirement, announced by Transportation Secretary Mary Peters, applies to new passenger and cargo planes that have center wing fuel tanks like TWA 800, a

Boeing 747, which exploded over the Atlantic Ocean off Long Island on July 17, 1996, after takeoff from New York's Kennedy Airport.

The rule also requires airlines to retrofit 2,730 existing Airbus and Boeing passenger planes that have center wing fuel tanks with the changes over the next nine years. The retrofit schedule is based on the normal aircraft maintenance schedule. Manufacturers have two years in which to comply with the rule, although Boeing is already making some new planes with the changes. The change brings to a close a long and troubled chapter in federal aviation safety. The National Transportation Safety Board identified the cause of the explosion—the ignition of oxygen in a partially empty fuel tank that had been sitting for hours in the sun before takeoff—not long after the accident. But the FBI persisted for a time in investigating the accident as a possible bombing.

The Federal Aviation Administration proposed a rule to prevent future explosions in 2005, but the aviation industry balked, saying the cost was too high. The final rule requires aircraft manufacturers and passenger airlines to install devices that replace oxygen, which is highly explosive, with inert nitrogen in fuel tanks as they empty. The cost of installing the new technology will range from \$92,000 to \$311,000 per aircraft, depending upon its size. As I understand it, the rule doesn't require existing cargo planes to be retrofitted, apparently because of the cost.

Source: Associated Press

A \$24 MILLION VERDICT IN RAILROAD CROSSING INCIDENT

The families of four young people killed in a horrific train-car accident nearly five years ago have been awarded \$24 million by a jury in Anoka County, Minnesota. The jurors who heard the case rejected earlier state-

ments by the railroad that the victims had tried to beat a train to the crossing. Each of the four families was awarded \$6 million in damages. The railroad officials contended the victims' car drove around the crossing gates. During the trial, the families proved that the gates were not working properly when a westbound train traveling at 60 miles per hour hit the car at night back in 2003. The jury determined Burlington Northern Santa Fe was 90% responsible for the crash and the driver of the car was 10% responsible.

Although the railroad submitted evidence it contended showed the crossing gate was working at the time of the collision, the families responded by saying that the data provided by the railroad "wasn't authentic." The Plaintiffs presented evidence that questioned whether the information downloaded from the railroad's data recorders was actually from the crossing where the accident occurred. It was also questioned whether the data was from the same time as the accident. The jury obviously didn't believe the railroad's downloads because, if they had been accurate, the gates would have been down at the time of the incident.

The trial lasted six weeks and more than 300 exhibits were introduced in evidence. The freight train split the car in two in the collision. The only eyewitness was the train's engineer, who testified that he saw the car go around the lowered signal arm. The Plaintiffs said there was an intermittent malfunction and that the gates weren't functioning properly. The crossing was equipped with lights, arms and sound. A woman who had gone through the same crossing in the weeks before the crash testified that she was almost hit by a train when the lights didn't work and that she had notified the railroad. Plaintiffs offered evidence that nothing was done by the railroad to repair the crossing signal after the notification of a problem.

Interestingly, Burlington Northern

did not immediately provide information to investigators from the electronic event recorder kept in the crossing signal. As you may know, this is akin to a black box on an airplane. The recorder at the crossing contained data about the signal, but it was not encrypted. The railroad later said the laptop on which the data was stored had been "recycled." Now that the trial is over, the families plan to seek federal legislation changing how signal boxes record data. The data should be encrypted so that it can't be altered. The damages awarded by the jury were compensatory, based on the loss of comfort and companionship the young adults would have provided. The jury was not asked to award punitive damages. The plaintiffs were represented by Bob Potroff, a lawyer from Manhattan, Kansas, who did an outstanding job for the victims' families.

Source: *Star Tribune*

\$2.3 MILLION SETTLEMENT REACHED IN METROBUS CASE

Metro has agreed to pay \$2.3 million to settle a lawsuit filed by a man whose wife was struck and killed by a Metrobus in Washington last year. Martha Stringer Schoenborn and her friend and co-worker Sally Dean McGhee were killed in the accident. The women, who worked at the Federal Trade Commission, were struck by the bus while they were in a downtown crosswalk. The incident occurred just as the two women left work, and had a "walk" signal at the crosswalk. The driver who hit them failed to look while making a left turn from one street onto another.

These two victims were among five pedestrians killed in Metrobus accidents last year. Metro recently conducted a program in which about 3,000 bus drivers and supervisors gathered at busy intersections in the District to observe pedestrians, buses and other vehicles near the crosswalks.

Metro also installed amber flashing lights on 100 buses on a trial basis to alert pedestrians to their approach. The Metrobus driver pleaded guilty in September to two felony counts of negligent homicide and was sentenced to a year in jail. Mrs. McGhee's family has also filed a wrongful death lawsuit in federal court. That case is set for trial on October 17th. Peter C. Grenier, who is from Washington, D.C., was the Schoenborn's lawyer.

Source: *Washington Post*

TRUCKING COMPANY AGREES TO \$18 MILLION SETTLEMENT

A Michigan trucking company has agreed to pay \$18 million to the families of three victims killed in a tragic highway accident. The settlement came shortly after a federal court jury in Missouri returned a \$15 million verdict. Deliberations on punitives were underway when the trucking company agreed to settle the case. The case revealed a practice which has developed in the trucking industry. The different functions of one company are split up so the company can claim the assets of the entire enterprise are not at risk because of a fatality. Every department is divided into a separate company. For example, there may be one company that qualifies the drivers, a separate company that monitors their logs, a separate company that leases the tractors and trailers, and a separate company that leases the drivers. This has become a fairly common practice and makes handling claims against trucking companies much more challenging.

During the trial, it was proved in this case that half a dozen corporate Defendants named in the wrongful death suit were all subsidiaries or affiliates of CenTra, a Warren, Michigan holding company. The accident occurred on an interstate highway in Missouri in June 2006 when the truck driver fell asleep at the wheel. The tractor trailer he was driving slammed

into the rear of a car driven by Beverly Garrett, a local municipal union official. Ms. Garrett and three female relatives—all on their way to a wedding—were killed in the crash.

The three-week trial involved wrongful death claims filed by Garrett's children on behalf of Garrett, their grandmother and an aunt. A separate trial is expected to be held this fall on claims filed by the husband of Garrett's niece, who also died in the crash. The truck driver is facing four counts of second-degree involuntary manslaughter. In an unusual development, the judge in the civil trial entered a default judgment against one of CenTra's subsidiaries, called Central Transport. Also, an executive from another subsidiary, Pro Logistics, admitted liability during the trial.

The Plaintiffs' lawyers undertook aggressive discovery to unmask CenTra as the alter-ego of its various subsidiaries and affiliates. Over the course of a year, some 60 depositions were taken and four corporate headquarters were inspected. In addition, the Plaintiffs' lawyers conducted computer forensic examinations of dozens of company computers. Missing log books and a truck satellite tracking device compounded discovery challenges. The judge allowed the jury to receive spoliation instructions so it could consider the missing evidence, which suggested the driver lied about having slept for ten hours before getting behind the wheel prior to the accident.

The jurors heard testimony and saw documents from the very beginning on how these companies were interrelated, how they were set up, and the manner in which each operated. This truck driver, who had a very bad driving history, should never have been hired in the first place. The driver, who had a history of heart attack and stroke, had been rejected by one of CenTra's subsidiaries because of his health problems, but was hired by one of CenTra's other firms. He was on a variety of

medications, including Valium, at the time of the accident. It was proved at trial that CenTra failed to properly screen its drivers and ensure they received sufficient rest.

The jurors found CenTra and three subsidiaries liable for negligence and awarded \$15 million in compensatory damages. Two days later, the companies agreed to settle the case for \$18 million. Plaintiffs' lawyers, Kenneth B. McClain and Daniel A. Thomas of Humphrey, Farrington, McClain located in Independence, Missouri, did an outstanding job for their clients. This case is a great example of how important discovery is in preparing a case for trial.

Source: *Lawyers Weekly*

\$18 MILLION AWARDED IN CRASH THAT DISABLED COLORADO MAN

A Colorado jury awarded a husband and wife more than \$18 million recently for injuries the husband suffered when a tractor-trailer struck the car he was driving at the interchange of two interstate highways in 2006. The jury found Nebraska-based trucking company Werner Enterprises Inc. and Cheryl Neal—who was driving the tractor-trailer—at fault in causing the crash. Even though the Defendants contended that Peter D. Brophy, who was driving a 1993 BMW, was at fault, the jury found him to be blameless in the crash.

The jury awarded Mr. Brophy \$15,785,257 and his wife, Kate Brophy, \$2,284,000. Mr. Brophy suffered severe brain damage in the crash, uses a wheelchair and can barely speak. He will likely never work again. The crash occurred as Mr. Brophy merged from westbound Interstate 80 onto southbound Interstate 25. He was in the acceleration lane and the tractor-trailer attempted to exit southbound Interstate 25 onto Interstate 80. The right front wheel of the tractor-trailer intruded into the left rear wheel well of

the BMW, causing the car to spin across the interstate. Another tractor-trailer then crashed into the BMW.

Mr. Brophy, who has a life expectancy of 40 years, will continue to incur medical costs for the rest of his life. This means he will have these expenses for at least 40 additional years. His wife, Kate Brophy, suffered the loss of her husband's livelihood. Gary Ceriani, a Denver-based lawyer, represented the Plaintiffs and did a very good job for them.

Source: *Wyoming News*

THE CITY OF SAN FRANCISCO SETTLES A MUNI LAWSUIT FOR \$2 MILLION

The City of San Francisco has settled a personal injury lawsuit involving a Muni-train. The City will pay \$2 million to a woman who lost part of her leg after she was struck by a train in January. The settlement has been approved by the Municipal Transportation Agency Board. The woman was struck by a westbound train making a left turn as she crossed a busy city street on a green light. Doctors had to amputate the woman's right leg below the knee. She also suffered broken bones and other permanent injuries. It was alleged in the lawsuit that the City of San Francisco created a "dangerous, hazardous and defective condition" at the intersection of the two city streets. The intersection didn't have proper signs and failed to give pedestrians enough time to cross the street, according to the Plaintiff's lawyers.

Source: *San Francisco Chronicle*

FAMILIES OF DROWNING VICTIMS TO SHARE \$5.8 MILLION SETTLEMENT

The families of two women who drowned in 2004 when their car went off a street in Newark, New Jersey, and plunged into the Passaic River will share a \$5.8 million settlement. The estates of the two women will receive three payments, the last in January

2010. The city council has approved the settlement. The settlement came about through mediation. Three passengers in the Jeep Cherokee plunged off a 15-foot embankment and into the river on October 24, 2004. There were no guardrails or barriers to prevent cars from going into the river along that stretch of road. The families of two of the passengers sued the city.

In a deposition, an employee in the city's Division of Traffic and Engineering admitted the city knew the roadway was "challenging," had a speeding issue and that motorists might not see the one sign warning of an upcoming curve. City officials also knew of multiple accidents at the location where cars did not go into the river because they struck a tree or some other object.

There was evidence that the city didn't take any remedial action to avoid future problems. Officials failed to install guardrails at the deadly stretch of road despite a memo from the former police director requesting safety measures. Five months later, another woman lost control of her vehicle, then struck and killed a person before toppling into the river at almost the same spot. The woman also died and a lawsuit by her estate was filed and is still pending.

Source: *Star-Ledger*

SIGNS WERE A FACTOR IN ATLANTA BUS CRASH

Investigators for the National Transportation Safety Board say confusing highway signs, driver error and a lack of passenger safety features contributed to the deaths of the five college baseball players in the Atlanta bus crash last year. The findings on the crash, which also killed the bus driver and his wife, are in a report by the Board's investigators. According to the investigators, the bus driver thought he was getting on an HOV lane when he drove onto an elevated exit ramp,

running through a stop sign at highway speed and hurtling from an overpass onto the interstate below. The March 2nd crash killed five members of Ohio's Bluffton University baseball team and injured 28 others.

The NTSB investigator said Georgia officials changed the layout of the signs after having trouble with their mounting. The change deviated from federal guidance about placement of certain exit signs to make them more clear but the change did not amount to a violation of federal regulations, which allow for some exceptions. Nine accidents have occurred at the site between 1997 and 2007, including three fatal collisions. The drivers in all of the crashes were from outside the Atlanta area and therefore not familiar with the area. Anybody who has driven there knows that the interstates in the Atlanta area are extremely busy with a tremendous amount of traffic. NTSB Chairman Mark Rosenker observed:

This was an accident that didn't have to happen. Had the appropriate investigation been done at the state level we might not be here today.

Investigators also said the 65-year-old bus driver, who had a good driving record, was partly at fault. He had been driving for only an hour before the early-morning crash. But his medical certificate, which is required by law, had expired. The driver also had several risk factors for sleep apnea. Still, the investigators found no evidence that medical problems contributed to the crash. Instead, the driver "missed what route guidance was available," according to an investigator, who noted that 20 million drivers have successfully navigated the exit over ten years. The driver didn't decrease his speed as he came up the exit ramp, despite two signs notifying drivers of a stop ahead.

Parents of several of the crash victims have called for stronger regulations on bus safety, including a need for

more driver training, stronger roofs, shatterproof window glazing and mandatory seat belts. The NTSB has made similar recommendations dating back to 1968, but the recommendations have never made it into law. I can say from experience that all of the recommendations by the parents are needed.

Source: *Associated Press*

GOLF CARTS CAUSE A SIGNIFICANT NUMBER OF INJURIES

We wrote on the golf cart safety issue in the July issue. Now there is more to report on the subject. The number of people hurt in golf carts has more than doubled, researchers say. Part of the problem is that the carts are faster than they used to be. But they are also being used in ways they were not necessarily intended for and are carrying people—especially children—they should not, the study said. Writing in the July issue of *The American Journal of Preventive Medicine*, the researchers said that from 1990 to 2006, the injury rate had doubled. The lead author is Daniel S. Watson of Ohio State University.

Over the period studied, the researchers counted injuries in almost 150,000 people ages two months to 96 years. The study found that many of the injuries were caused by falls, which can occur at speeds as low as 11 miles per hour when the cart turns. It was pointed out that newer carts can hit 25 mph. They often lack safety equipment, according to a co-author of the study, Tracy J. Mehan, a researcher at Nationwide Children's Hospital. For example, the majority of the carts in use do not have seat belts. A lack of front brakes makes the vehicles prone to fishtail, the study said. In addition to being injured by falling out, riders are hurt when the carts turn over.

Source: *Insurance Journal*

XVIII. NURSING HOME UPDATE

NURSING HOMES BATTLE TO RETAIN MANDATORY ARBITRATION CLAUSES

U.S. nursing homes are fighting an effort in Congress to invalidate arbitration clauses in admissions contracts. Legislation has been introduced that would make it easier for residents to sue for shoddy care or wrongdoing. The legislation is needed to protect residents' rights to sue. Advocates say families and patients often do not notice fine print in standard contracts, which compels them to engage in binding arbitration instead of going to court to address claims of abuse or negligence. "Most are unaware they are signing away their right to go to court," according to Senator Herb Kohl, a Wisconsin Democrat co-sponsoring the bill to invalidate the clauses.

The AARP and the Alzheimer's Association back the legislation. However, the prospects for the legislation passing are unclear, which I have difficulty understanding. The entire U.S. House of Representatives and one-third of the Senate are up for election. About 1.5 million Americans currently live in long-term care facilities, with most of them in nursing homes. That number is expected to increase with the coming retirement of nearly 80 million baby boomers.

Many reports have documented shoddy care in the nation's approximately 16,000 nursing homes. The Government Accountability Office has repeatedly said sanctions for offenders are ineffective and that deficiencies and outright negligent care is common. The pending legislation would not ban arbitration, but remove clauses requiring it. It's my belief that no resident in a nursing home would choose arbitration if a dispute arose with the facility's owners or operators. Neither would a resident or his or her family agree to

submit any claim to arbitration before a dispute occurs. Requiring arbitration as a prerequisite to admission to a nursing home is wrong and can't be tolerated. Putting an arbitration clause in admission forms—without even discussing it with the resident or family members—is even worse. I am reasonably sure that routinely happens. In any event, arbitration in nursing home claims should never be allowed.

Source: *Insurance Journal*

SENIORS AT RISK IN NURSING HOMES

It appears that hundreds of thousands of senior citizens are at risk because they are living among registered sex offenders, parolees and residents with violent histories. This is according to a nursing home watchdog who studied residents at nursing homes, assisted living homes and long term care facilities. It was reported that there are 1,600 registered sex offenders living in facilities with seniors across the country. The watchdog, Wes Bledsoe, tracked the number of offenders living at these facilities over the past four years by matching addresses from sex offender registries with a database of care facilities from Medicare. Bledsoe testified last month at a congressional hearing on predators in these facilities. According to media reports, based on his testimony, there have been a number of rapes, murders, and assaults committed by criminal offenders in these facilities. This is something that definitely needs to be investigated by both the federal and state governments.

Source: *ABC News*

SUIT FILED BY ESTATE OF MAN FATALLY BEATEN IN NURSING HOME

The estate of a nursing home resident who was beaten to death by his roommate has filed a lawsuit against the facility. The estate sued All Faith Pavilion, a nursing home located on the

South Side of Chicago. The roommate, a resident, was charged with first-degree murder in connection with the death. The suit alleges the nursing home acted improperly by pairing the victim, who had Alzheimer's disease, with a roommate who had a history of mental illness. The alleged killer had been diagnosed with dementia.

Source: *Chicago Tribune*

XIX. HEALTHCARE ISSUES

FDA URGED TO TEST DIABETES DRUGS' HEART RISK

Dr. Steve Nissen, a noted cardiologist, wants the Food and Drug Administration to raise its standards for approving diabetes drugs. Dr. Nissen, who is with the Cleveland Clinic, says that new drugs need to prove they don't increase cardiovascular disease, the leading killer of diabetics. He believes the FDA should require companies to prove their drugs don't raise risks of cardiovascular disease before they are approved. Dr. Nissen, who believes there are more than enough diabetes drugs on the market that lower blood-glucose levels, says it's time for the FDA to raise its standards. In this regard, he observed:

Merely lowering blood-glucose levels in diabetes is too simplistic. We must reduce the complications of diabetes, including cardiovascular disease.

Dr. Nissen suggested that, in addition to requiring more preapproval studies, companies should have large, long-term studies in place when a drug is approved to monitor whether the drug increases the risk of cardiovascular disease. About 75% of all deaths in diabetes patients are a result of cardiovascular disease.

The FDA is weighing whether to

require that new and already-approved diabetes drugs have a positive impact on cardiovascular disease and life span, which are more difficult to measure than current benchmarks such as lower blood sugar. It's reported that no drug that regulates sugar levels has shown beneficial cardiac effects in Type 2 diabetics, who make up more than 90% of all diabetes patients. A shift away from current research benchmarks, known as surrogate endpoints, might change the entire framework of drug approval because research on most medicines—from anemia to cancer drugs—relies on such interim measures.

About one in 12 Americans has diabetes, according to the federal Centers for Disease Control and Prevention. The FDA is trying to decide what to do on the issue of diabetes-drug standards. This was the subject of a two-day meeting last month. The meeting was prompted in part by controversies about research on cholesterol-lowering drug Vytarin and Avandia, a diabetes drug.

Source: *Wall Street Journal*

14 PREEMIES GIVEN BLOOD THINNER OVERDOSE

It was reported last month that 14 babies in the neonatal intensive care unit at a Corpus Christi hospital received overdoses of the pediatric version of the blood thinner heparin. The error in the dosage of the medicine—used to flush intravenous lines to prevent blood clots from forming—was discovered by hospital nurses who noticed abnormalities in lab tests. The hospital discontinued using heparin immediately and gave newborns who needed it different medications. It is unclear how much over the recommended dose was given to the 14 babies. The hospital has a standard dose for newborns. The error is believed to have happened in the pharmacy when the medicine was mixed. Two of the babies have been released since the dis-

covery was made and the others are being monitored carefully. Hospital staff will report the incident to the Joint Commission on Accreditation of Healthcare Organizations, an independent, nonprofit agency that accredits and certifies more than 15,000 hospitals in the United States.

As you know, in November 2007, actor Dennis Quaid's newborn twins were at the center of a near-fatal drug mix-up in which they were administered 1,000 times the normal dose of heparin. Relating to his experience, Quaid told *60 Minutes*:

We all have this inherent thing that we trust doctors and nurses, that they know what they're doing. But this mistake occurred right under our noses, that the nurse didn't bother to look at the dosage on the bottle. It was ten units that our kids are supposed to get. They got 10,000. And what it did is, it basically turned their blood to the consistency of water, where they had a complete inability to clot. And they were basically bleeding out at that point.

The Quaid incident has gotten a great deal of media attention and has helped put in focus a most serious problem. The well-respected actor has testified before congressional committees and is working hard to bring the safety issue to the public's attention. The family's experience has totally changed Quaid's opinion on such things as the court system and federal preemption. He now sees the need to keep the state courts open for victims. Hopefully, Congress will take the necessary steps to make that a reality.

Source: *Associated Press*

COUNTRIES TO COORDINATE ASIA FACTORY DRUG INSPECTIONS

The United States is joining with Europe and Australia in coordinating inspections of factories in China and

India that produce raw materials for drugs. According to U.S. officials, this will allow regulators to cover a bigger territory. The pilot program will focus first on facilities in China and India. Contaminated heparin, made from Chinese ingredients, has been linked to dozens of deaths and hundreds of allergic reactions. The blood thinner drug has been recalled by Baxter International and the U.S. has blocked imports from the Chinese company. Health and Human Services Secretary Mike Leavitt now says there is a pressing need for new tools to deal with changes in the global market. I have to wonder why it took him so long to come to this conclusion. Surely, he has to know that China had been a serious importer of products to the U.S.

Source: *Associated Press*

FDA PREGNANCY AND LACTATION LABELING RULE

The FDA recently released a new system for labeling that would better alert women who are pregnant or breastfeeding that certain prescription drugs could be harmful. In the preamble to this rule, the agency also claims that this new system will preempt any claims brought by women who are injured by these products or who claim they were not adequately warned about the dangers of these products. It would be helpful to include examples of other instances where pregnant or lactating women sustained injuries caused by inadequate warnings on drugs, or examples where the FDA first said it was safe for pregnancy and later admitted that it was not.

JUSTICE DEPARTMENT SAYS RANBAXY LIED ABOUT QUALITY OF DRUGS

Federal prosecutors believe that Indian generic drug maker Ranbaxy Laboratories deliberately misled the U.S. government about the quality of its low-cost medicines. The Justice Depart-

ment is demanding that Ranbaxy turn over documents that it hopes will prove the company fabricated data to convince the government to approve its products. Ranbaxy is India's largest pharmaceutical company and claims to be the tenth largest generic drug maker in the world. The government has been investigating Ranbaxy since 2006, when the Food and Drug Administration issued a warning letter over manufacturing violations found at a company plant in India.

Last year, government officials seized paper and electronic documents from Ranbaxy's U.S. headquarters in New Jersey. In the filing earlier this month, Prosecutors say "reliable sources and supporting documents" show the company systematically lied about the makeup of its generic drugs, which include a cheaper version of Zocor, Merck's blockbuster cholesterol drug. The FDA approves generic drugs based on evidence that they are equivalent to the original medication. The government alleges Ranbaxy's equivalence data contained "false and fabricated information." Additionally, the government alleges Ranbaxy uses unapproved ingredients and diluted amounts of ingredients in its drugs.

Source: Associated Press

XX. ENVIRONMENTAL CONCERNS

INTERFERENCE BY BUSH ADMINISTRATION IN EPA'S GREENHOUSE GAS RULE IS UNCONSCIONABLE

Public Citizen believes that a notice issued by the Environmental Protection Agency about regulating greenhouse gases will do nothing to curb global warming. Instead of issuing a rule, the Bush Administration has chosen to delay the matter by seeking public comment, thereby ensuring the issue will not be dealt with until a new Administration

comes to town. Unfortunately, since our planet is heating up, with disastrous consequences, we don't have time to waste. The scientific consensus suggests that action should be swift, and even the U.S. Supreme Court, in a strongly-worded decision issued in April 2007, resolved the issue of whether the EPA had the authority to regulate greenhouse gases under the Clean Air Act. The EPA should have responded properly, but it hasn't seen fit to do so. You can thank the Bush Administration for the agency's failure to act.

The EPA's notice has been heavily edited in an interagency review and is accompanied by letters from representatives of the Office of Management and Budget, as well as the Secretaries of Transportation, Commerce, Agriculture and Energy. It's shocking that the letters express misgivings about regulating greenhouse gases under the Clean Air Act, erroneously saying that it is an ill-suited means of combating climate change. Only an Administration that considers itself above the law would allow the EPA to take such a position.

Public Citizen says it has repeatedly seen that leaving industry to regulate itself does not advance public health and safety. That's absolutely correct and the interference of the White House in this process is unconscionable. The President's decision to let the clock run out, rather than take action during his tenure in office, is a national disgrace. Unfortunately, that is exactly what the American people have become accustomed to during the Bush years.

Source: Public Citizen

EPA DOCUMENT TIES PUBLIC HEALTH PROBLEMS TO GLOBAL WARMING

Government scientists detailed a rising death toll from heat waves, wildfires, disease and smog caused by global warming in an analysis the White House buried so it could avoid regulating greenhouse gases. In a 149-page document released on July 14th, the

experts laid out for the first time the scientific case for the grave risks that global warming poses to people, and to the food, energy and water on which society depends. Scientists at the Environmental Protection Agency made this assessment:

Risk (to human health, society and the environment) increases with increases in both the rate and magnitude of climate change. Global warming is "unequivocal" and humans are to blame.

The EPA document suggests that extreme weather events and diseases carried by ticks and other organisms could kill more people as temperatures rise. Allergies could worsen because climate change could produce more pollen. Smog, a leading cause of respiratory illness and lung disease, could become more severe in many parts of the country. At the same time, global warming could mean fewer illnesses and deaths due to cold. Vickie Patton, deputy general counsel for the Environmental Defense Fund, observed:

This document inescapably, unmistakably shows that global warming pollution not only threatens human health and welfare, but it is adversely impacting human health and welfare today. What this document demonstrates is that the imperative for action is now.

While the science pointed to a link between public health and climate change, the Bush Administration has worked overtime to discourage such a connection. To acknowledge such a connection would compel the government to regulate greenhouse gases. The Bush Administration on July 11th dismissed the scientists' findings when it made clear that the Clean Air Act was the wrong tool to control global warming pollution. Instead, the Administration asked for public comment on a range of ways to reduce greenhouse

gases from cars, airplanes, trains and smokestacks under the 1970 law. A better solution, the EPA said, would have Congress writing a law aimed just at global warming.

In December, the White House refused to open an e-mail from the EPA that included the finding that climate change endangered public welfare. The determination was based on an earlier and similar version of the document recently released. At the time, the White House insisted on removing all references to the science, according to Jason K. Burnett, the former adviser on climate issues at the EPA.

Source: *Associated Press*

\$120 MILLION VERDICT REINSTATED AGAINST REFINERY

An Illinois appeals court has reinstated a \$120 million verdict against the former Clark Oil refinery. Specifically, the appeals court reversed a Cook County judge's atypical decision to dissolve the suit's status as a class action after a jury awarded the Plaintiffs a multimillion dollar verdict. The appellate court stated that the Cook County Judge's actions were unprecedented in Illinois.

Since 1993, residents surrounding the 170-acre oil refinery have been complaining of noxious fume emissions from the facility. Additionally, the refinery operations resulted in ash being deposited on Plaintiffs' property and explosions causing cracked foundations. In 2000, the suit against the former Clark Oil was granted class action status. In 2005, a jury awarded the Plaintiffs \$80 million in compensatory damages and \$40 million in punitive damages. However, in an extraordinary turn of events, Cook County Circuit Judge Cheryl Starks decertified the class action status of the case. Judge Starks explained that she reversed her earlier decision to certify the class because all 6,000 members of the class did not suffer the same degree of nuisance.

In a 2-1 decision the appellate court ruled that it was improper for Judge Starks to decertify the suit after the jury had entered a verdict. No other circuit court in Illinois had ever decertified a class after the jury reached a verdict and the trial court formally entered judgment. Under the ruling, the Defendant must pay the original \$120 million judgment as well as the estimated \$25 million interest that has accrued since 2005.

Source: *Chicago Tribune*

NYC RESIDENTS SUE OVER SMELLY SEWAGE PLANTS

Residents of a polluted neighborhood have filed suit against New York City and a waste recycling company, saying that putrid odors emanating from two nearby sewage facilities are ruining their lives. Residents in the Hunts Point neighborhood of the Bronx complain that the stench from the plants infiltrates homes and schools, keeping families from enjoying their yards or even hanging clothes out to dry. At a local school, students don't go out to play when the odor hits. The South Bronx is made up largely of working-class people. The lawsuit, filed in state Supreme Court, is focused on two plants in the neighborhood. One is a city-run sewage facility that takes in the waste of about 600,000 New Yorkers. The other is the privately run New York Organic Fertilizer Co., which transforms city sewage into fertilizer pellets.

The private plant is owned by Synagro Technologies Inc., of Houston, which operates in 33 states as America's largest recycler of organic waste. Synagro's parent company is the Carlyle Group, a global private equity firm. The Plaintiffs are demanding only that the facilities take the necessary steps to make upgrades to eliminate or reduce the odors. They are not seeking monetary damages.

Source: *Associated Press*

XXI. THE CONSUMER CORNER

PUBLIC CITIZEN SUES FDA IN EFFORT TO BAN PAINKILLER

Public Citizen has filed a lawsuit against the Food and Drug Administration in an attempt to get the agency to simply act on a petition filed by the consumer advocacy group. A prescription painkiller sold under names including Darvon and Darvocet is too risky to stay on the market, according to Public Citizen. This matter started when Public Citizen petitioned the agency two years ago seeking a ban on the drug, calling it no more effective than safer painkillers and citing the accidental deaths of more than 2,000 people since 1981. The FDA has taken no action on the petition.

Now, Public Citizen has filed suit in U.S. District Court in Washington, contending that the FDA has violated the law by not ruling on its petition within the required six months. At issue is a narcotic known chemically as propoxyphene, which is addictive. Even when used properly, the drug can cause slowed heartbeat and other serious cardiac side effects. It's difficult to understand how the FDA could sit on a petition involving a safety issue for more than two years without taking any action.

Source: Public Citizen

FLORIDA FILES COUNTRYWIDE LAWSUIT

The Florida Attorney General has filed a civil lawsuit against Countrywide Financial Corp. and its chief executive, Angelo Mozilo, alleging the company engaged in deceptive and unfair trade practices. The lawsuit, filed in state court in Broward County by Florida Attorney General Bill McCollum, alleges that Countrywide put borrowers into mortgages they couldn't

afford or loans with rates and penalties that were misleading. The suit seeks civil penalties and damages. Florida's action follows similar lawsuits filed in June by attorneys general in California and Illinois. Attorney General McColm said that Florida has had a continuing investigation of Countrywide and that he thought it was "important" for Florida to file suit without delay.

Source: *Wall Street Journal*

DEBT COLLECTORS CANNOT BLAME THEIR MISTAKES ON CREDITORS

In a ruling that could help consumers nationwide, a federal appeals court has ruled that debt collection agencies can't shirk responsibility for abuses by blaming the abuse on creditors. In an opinion written by Judge Mary Schroeder, the U.S. Court of Appeals for the Ninth Circuit ruled that the federal Fair Debt Collection Practices Act requires debt collectors to prove that they have used detailed procedures to ensure that they do not take actions that are prohibited by the act, such as harassing consumers, over-billing or making deceptive statements. The court added:

A debt collector is not entitled to just sit back and wait until a creditor makes a mistake and then institute procedures to prevent an occurrence.

The case involved an Arizona resident who was contacted by a debt collector about an outstanding bill from his old apartment complex. The debt collector, National Credit Systems Inc., had tacked on charges for "attorney's fees," but couldn't explain where the charges came from. The collection agency claimed that it had overlooked the error because the landlord-creditor had always provided accurate information in the past. The court rejected that defense, holding that debt collectors must show detailed preventive procedures to escape liability for their actions.

Deepak Gupta, a lawyer for Public Citizen who argued the case, says:

The court's ruling will compel debt collectors to police themselves more effectively. The ruling is very significant at a time in which increasing numbers of Americans are being contacted by debt collectors and abuses are on the rise.

This is another example of how Public Citizen works to protect ordinary citizens. This was a significant ruling by the court and Public Citizen is to be commended for filing the suit.

Source: Public Citizen

XXII. RECALLS UPDATE

NISSAN RECALLS SENTRAS DUE TO BRAKE PROBLEMS

Nissan Motor Co. is recalling nearly 170,000 Sentra sedans in the United States to address a brake cylinder that could leak fluid. The recall involves 2007-2008 Sentras. Nissan said in a letter to NHTSA that an irregularity in some of the cylinders could lead to a gap that could allow fluid to leak into the brake booster assembly. The leak could cause the brake warning light to turn on. Nissan said if the warning lamp is ignored, one of the brake circuits may not operate and could increase the risk of a crash. According to Nissan, there have been no crashes or injuries related to the issue. The Japanese automaker will replace the cylinder, which is made by auto supplier Robert Bosch GmbH, at no additional charge. This is obviously a safety defect and should be taken seriously by all concerned.

CAR TIRE STEMS RECALLED

An Ohio distributor has recalled about six million Chinese-made tire

valve stems after concluding that some of them were improperly made and could increase the risk of accidents. The distributor, Tech International, claims that just 8,600 of roughly 6 million of those valves are defective. The valve is a replacement snap-in tire valve—Model No. TR413—manufactured between July and November 2006. The valves were imported by Tech International from manufacturer Shanghai Baolong Industries Co. in Shanghai, China.

According to the recall, the rubber part of the valve may crack after being in use for about six months, causing a gradual loss of tire pressure. Continuing to drive on underinflated tires can cause them to burst, possibly leading to crashes. Tech International told the NHTSA that the company doesn't have records of the final purchasers of the valve stems. According to the company, the defect was identified after "a small number" of the valves were reported by customers and one distributor to have failed. The samples were shipped to China, and, in March, Baolong concluded that some valves could be defective. Tech International wrote in a letter to NHTSA that the cause of the defect is likely improper mixing of the rubber compound in the manufacturer's facility.

BUSH HOG OFF-ROAD UTILITY VEHICLES RECALLED

Bush Hog LLC, which is located in Selma, Alabama, has recalled about 4,000 Bush Hog Off-Road Utility Vehicles. The utility vehicle's throttle cable can freeze in freezing temperatures. This can cause the engine not to return to idle when the driver takes his or her foot off the accelerator pedal. Bush Hog has received 52 reports of incidents involving the utility vehicle, including one leg fracture injury. The recall includes the Bush Hog Models TH440 (Trail Hunter), TH4200 (Trail Hand) and TH4400 (Trail Hand) Off-Road Utility

Vehicles. "Bush Hog" is printed on the utility vehicle's cargo bed tail gate and on each side of the cargo bed. Model "TH440," "TH4200," or "TH4400" is printed on each side of the hood.

The hood color is red, green, or mossy oak. The utility vehicles were sold at Bush Hog dealerships nationwide from January 2004 through March 2008 for between \$8,000 and \$9,900. Consumers should immediately stop using the recalled off-road utility vehicles and contact a Bush Hog dealer to schedule a free inspection and repair. All registered owners have been notified about this recall by mail. For additional information, contact Bush Hog LLC toll-free at (877) 873-0143 or visit the firm's Web site at www.bushhog.com.

LAWN MOWERS RECALLED BY AMERICAN HONDA MOTOR CORP.

Honda Lawn Mowers is recalling about 20,500 mowers. The lawn mower's rear shield can break off allowing debris to be thrown toward the operator, which poses a laceration hazard to consumers. American Honda has received one report of a shield breaking off the lawn mower. No injuries have been reported. This recall involves HRX walk-behind lawn mowers with model numbers HRX 217(K)2HXA and HRX217(K)2HMA. The model and serial number are printed on a label located on the upper rear of the mower deck. Serial numbers included in the recall are MAGA-1500001 through 1520532. The recalled lawn mowers are red with "HONDA" written on the bag.

Consumers should immediately stop using the recalled lawn mowers and contact their local Honda Lawn and Garden dealer to schedule a free repair. Registered owners of the recalled lawn mowers have been contacted by direct mail notification. For additional information, contact Honda at (800) 426-7701 or visit Honda's Web site at www.hondapowerequipment.com.

ALL-TERRAIN VEHICLES RECALLED

American Honda Motor Co. Inc., has recalled Model Year 2007-2008 TRX 420 Rancher ATVs. If the ATV's rubber CV (constant velocity) boots get punctured or torn the joint will become contaminated and severe binding of the CV joints could occur, resulting in the sudden loss of steering control. This poses a risk of injury or death to riders. This recall involves Model Year 2007-08 Honda TRX420 ATVs, also known as the Honda FourTrax Rancher 4X4. These are adult-size ATVs designed for use by riders age 16 and older. The recalled ATVs are available in red, black, olive, and camouflage.

The Honda name and wing logo are printed on the fuel tank. The model year is printed on a label located on the frame behind the left front wheel. The model name "Rancher" is on a label at the left rear of the ATV. Consumers should immediately stop using these recalled ATVs and contact any Honda ATV dealer to make an appointment for a free repair. Registered owners of the recalled ATVs have been sent direct notices. For additional information, consumers can contact Honda toll-free at (866) 784-1870, or visit the firm's Web site at www.powersports.honda.com.

JARDINE CRIBS RECALLED

About 320,000 Jardine cribs sold by Toys "R" Us and Babies "R" Us stores have been recalled because four children became trapped. The wooden slats and spindles on the crib frames can break, allowing children to get trapped in the remaining gap. The Consumer Product Safety Commission reported 42 incidents of broken slats and spindles. This includes four instances of children getting trapped, two of whom suffered cuts and bruises. The recalled cribs were manufactured in China and Vietnam by Jardine Enterprises and sold by Toys "R" Us Inc. retailers: KidsWorld stores, Geof-

frey stores, Toys "R" Us and Babies "R" Us. KidsWorld and Geoffrey stores are no longer in operation, but sold the recalled cribs when they were open.

Earlier this year, Janine Nieman of East Stroudsburg, Pa. heard her son, Aiden, screaming first thing in the morning. She found him trapped with his body outside of the crib and his head stuck inside. One of the spindles had fallen out of the frame and he had slid through the gap up to his head. His parents were able to slide Aiden back into the crib. He came out of the ordeal shaken, but uninjured.

A Toys "R" Us spokesperson says the recall follows a comprehensive review by the company of all Jardine cribs. The company apparently removed all Jardine cribs from its selling floors several weeks ago, when it first became aware of multiple complaints about broken slats. The cribs were sold around the country from January 2002 through May 2008. For more information on the specific Jardine crib styles included in the recall, consumers can call 800-646-4106.

NORDSTROM RECALLS GIRLS' SANDALS

Nordstrom has recalled about 1,500 Cadence-Lea and Trio-Lea Girls' Sandals. The flower embellishments on the sandals can detach, posing a choking hazard to young children. No injuries have been reported. The recalled girls' sandals are leather with attached leather flowers and were sold under the "Cadence-Lea" and "Trio-Lea" names. "Cadence-Lea" sandals are white, light green or silver. "Trio-Lea" sandals are white or silver. They were sold in girls' sizes 5 through 12. Nordstrom is printed on the sandals. Consumers should take the recalled sandals away from children immediately and return the sandals to any Nordstrom store for a full refund. For additional information, contact Nordstrom at (800) 804-0806 anytime, or visit the firm's Web site at www.nordstrom.com.

DOLLAR TREE RECALLS GLUE GUNS

The Dollar Tree has recalled about 470,000 Crafters Square Hot Melt Mini Glue Guns. The recalled glue guns can short circuit, causing the gun to smoke. This poses a fire hazard to consumers. Dollar Tree is aware of four incidents in which these glue guns short circuited. No injuries have been reported. This recall involves the “Crafters Square Hot Melt Mini Glue Gun” with product number “939701.” The gun dispenses hot glue and is intended for craft projects. The glue gun is black with an orange trigger and measures approximately 4 1/2 inches from the back of the gun to the tip. It has a 44-inch electrical cord attached. “Crafters Square” and “939701” are located on the gun’s packaging. “DS-010 Glue Gun” is written in raised letters on the handle of the gun. Consumers should immediately stop using the recalled glue guns and return them to the store where purchased for a full refund. For additional information, contact Dollar Tree Stores at (800) 876-8077 or visit the firm’s Web site at www.dollartree.com.

KV TABLETS RECALLED IN CANADA OVER EXCESS MORPHINE

Morphine tablets from generic-drug maker KV Pharmaceutical Co. are being recalled in Canada after some were found to contain too much of the painkiller. Consumers shouldn’t use the tablets, ratio-Morphine SR, in 15 milligram, 30 milligram or 60 milligram doses, Health Canada said in a statement distributed by Market Wire. No reports of harm to patients had been received as of June 30th, the Ottawa-based agency said. An overdose of morphine, used to treat moderate or severe pain by modifying the senses, can cause slow breathing, fainting and loss of consciousness.

Health Canada (which is like the FDA in the U.S.) didn’t say how much extra morphine was in the recalled medicine.

Nilufer Guleyupoglu, a doctor at Beth Israel Medical Center’s pain medicine department in New York, observed:

It depends how many milligrams they’re off by and what kind of patients were exposed to it. If it’s double the amount of morphine, it can be toxic for patients who haven’t been exposed to opioids before.

The drug distributor Ratiopharm began the recall after KV, based in St. Louis, received two separate complaints, Health Canada said. The statement didn’t say where Ratiopharm is based or whether it’s connected with the German company by that name.

KROGER EXPANDS BEEF RECALL TO 20 STATES

On July 2nd, The Kroger Co. expanded its voluntary recall of some ground beef products to its stores in more than 20 states, saying the meat may be contaminated with E. coli. The nation’s largest traditional grocer also urged customers to check the ground beef in their refrigerators and freezers to determine whether it is covered by the recall. The warning came as federal investigators were trying to pinpoint the source of a separate salmonella outbreak linked to tomatoes that has sickened nearly 1000 people, raising more questions about the nation’s food safety system. Kroger’s recall stems from meat obtained from one of Kroger’s suppliers, Nebraska Beef Ltd., that has been linked to illnesses reported in Michigan and Ohio between May 31st and June 8th caused by E. coli bacteria. Nebraska Beef has recalled from wholesalers and other processing companies nearly 532,000 pounds of ground beef produced on five dates between May 16th and June 24th.

Symptoms of E. coli infection can include severe stomach cramps, diarrhea, vomiting and fever. It can potentially be deadly, but most people

recover within five to seven days. Health officials urge people to thoroughly cook hamburger and, if possible, use a digital thermometer to make sure meat has been heated to at least 160 degrees. They also recommend that people wash their hands with warm water and soap for at least 20 seconds before and after handling food.

BAYSIDE FURNISHINGS RECALLS YOUTH BED

Bayside Furnishings, a division of Whalen, of San Diego, California, is recalling about 8,350 LaJolla Boat Beds and Pirates of the Caribbean Twin Trundle Beds. The lid supports on the toy chests fail to prevent the lid from closing too quickly, posing an entrapment and strangulation hazard to young children. The CPSC has received one report of a death involving a 22-month-old boy from Roseville, California. The infant strangled when the lid of the toy chest fell on the back of his head and entrapped his neck on the edge of the chest of a LaJolla Boat Bed.

This recall involves two styles of Bayside youth beds: the LaJolla Boat Bed and the Pirates of the Caribbean Twin Trundle Bed. The preassembled toy chests are designed in the shape of a ship or boat’s “bow” and attached to the beds as a footboard. The LaJolla Boat Bed toy chest has a hardwood top and white wood base with a blue stripe. The Pirates Boat Bed toy chest has a hardwood top, wheel shape and brown wood base with decorative carvings.

The beds were sold at Costco and furniture retail stores nationwide and Costco.com from January 2006 through May 2008 for between \$700 and \$1,400. Consumers should immediately stop children from using the recalled toy chests and contact the firm for instructions on receiving a free repair kit with replacement lid supports. For additional information, contact Bayside at (877) 494-2536 anytime, or visit the firm’s Web site at

www.baysidefurnishings.com to register online for the free repair kit.

HEWLETT-PACKARD CO. RECALLS FAX MACHINES

Hewlett-Packard Co. is recalling the HP Fax 1010 and 1010xi Machines. An internal electrical component failure can cause overheating of the product, posing a risk of burn or fire. Hewlett-Packard has received three reports of overheating including two in the U.S. resulting in minor property damage. No injuries have been reported. This recall involves the HP Fax 1010 and HP Fax 1010xi models manufactured from November 2002 through September 2004. The HP logo and the model name and number are printed on the front of the fax machine. Consumers should immediately disconnect the recalled fax machine from the electrical power source and contact HP to receive a rebate. For additional information, contact HP toll-free at (888) 654-9296 or HP's Web site at www.hp.com/go/fax1010recall.

LIP GLOSS AND JEWELRY SETS RECALLED DUE TO RISK OF LEAD EXPOSURE

About 30,000 "Faded Glory" Lip Gloss, Locket, and Bracelet Sets have been recalled. The lobster claw clasp on the bracelet contains high levels of lead, which is toxic if ingested and can cause adverse health effects. The recalled three-piece sets contain a rectangle-shaped lip gloss container, a heart-shaped locket necklace, and a charm bracelet. "Faded Glory", the model number, and UPC are printed on the product's hangtag. Consumers should immediately take the bracelet away from children and return the set to any Wal-Mart store for a full refund. For additional information, contact F.A.F. Inc. at (800) 949-3311 or visit the firm's Web site at www.faf.com.

STUDIO RTA RECALLS TV STANDS

Studio RTA, of Pico Rivera, California, has recalled about 6,700 television stands manufactured by King Pao Enterprise Co. Ltd., of Guangdong, China. The stability of the stand does not meet industry standards to prevent TV tip-over, posing a risk of injury or death to consumers. This recall involves "Silhouette" TV stands with black or brushed silver and black frames and three glass shelves. Models included in the recall are 403650 (brushed silver and black) and 404191 (black). Model numbers are printed on the packaging and instruction sheet. Consumers should contact Studio RTA to receive a free repair kit. For additional information, contact Studio RTA at (888) 309-0299 or visit the firm's Web site at www.studiorta.com.

XXIII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

GRAHAM ESDALE

Graham Esdale, who joined the firm in the fall of 1996, specializes in the area of product liability and workplace injury litigation. He was also involved in the handling of tobacco litigation when the firm was handling those cases. Graham was the lead lawyer in a case resulting in a \$114.5 million verdict against a bucket truck manufacturer. Shortly thereafter, he was retained in the State of Delaware and was able to obtain a very good settlement for a client who had also been severely injured on a bucket truck. Graham also secured a \$3 million verdict for a client against Alabama Power Company in a case involving an electrical accident. Recently, Graham has settled several cases involving roof crush, defective door latches and tire treads. He is currently handling cases

in the states of Oklahoma, Tennessee, Iowa and South Carolina, as well as cases in Alabama.

Graham is married to the former Leigh Ann Hibbett of Florence, Alabama and they have two children, Whitney and Robert. The family attends the Episcopal Church of the Ascension. Graham is an outstanding lawyer who works hard and is totally dedicated to getting relief for his clients. His experience in products liability litigation has proved to be invaluable to the firm and our clients. We are most fortunate to have Graham with the firm.

CHRIS GLOVER

Chris Glover is the newest lawyer at Beasley Allen, having come with us on June 24, 2008. He is working in our Personal Injury section. Chris has dedicated his practice to protecting the rights of victims and survivors of catastrophic personal injury and wrongful death. He has represented injured individuals and their families in a wide range of serious injury and death claims, including those that were caused by defective products. Chris has also handled cases in motor vehicle accidents as well as workplace accidents. He has litigated numerous cases that have resulted in verdicts or settlements in excess of one million dollars. A frequent lecturer, Chris has spoken across the country on issues concerning defective products, trial skills and effective leadership for lawyers.

Chris, who graduated from Cumberland School of Law, practiced law in Birmingham, Alabama for a number of years prior to joining our firm. He has been elected as an officer in numerous professional associations. Chris has served as Chair of the American Association for Justice New Lawyer's Division; as Chair of the Emerging Leader's Division of the Alabama Association for Justice; and as an Officer of the Southern Trial Lawyer's Association. Chris is active in church, civic, and charitable organizations. His contributions to his profession and community were recently recog-

nized when he was honored in 2005 with the Jacksonville State University Young Alumni of the Year.

Chris is married to the former Erin Henley and they have two children, Kaitlyn and Andrew. Chris has served as a deacon and Sunday School teacher in his church for a number of years. Chris' grandfather, the late Jim Glover, is a legend in our state. Coach Glover was one of the most successful coaches ever in the annals of high school football. We are convinced that Chris will be a tremendous asset to the firm. It's good to be able to bring in a lawyer with his experience and abilities. Chris has hit the ground running and that's a good sign.

GRETA BEASLEY

Greta Beasley has worked at the firm for a total of 14 years. For the past ten years, she has been legal assistant to Clint Carter in the Consumer Fraud Division. During the past three years, she has exclusively worked on complex litigation including the Medicaid fraud lawsuits for the States of Alabama, Mississippi, Hawaii, South Carolina, Alaska and Utah. Greta's primary responsibilities are managing the voluminous document productions, coordination of discovery and helping in preparing the cases for trial.

Greta resides in Crenshaw County and has been married to Terry Beasley for twenty years. They have two children—Kayla, age 16, and Kyle, age 12, who attend Crenshaw Christian Academy. Greta enjoys running in her free time. She is a most valuable employee and we are blessed to have her with the firm.

DEBORAH SELLERS

Deborah Sellers, who has been with our firm almost 11 years, currently serves as Julia Beasley's legal assistant. In this position, Deborah, who is a valuable member of the litigation team in her section, assists with all phases of trial preparation. In her capacity as a legal assistant, she also participates in the trials. Deborah has been in the

legal field since graduating from high school. Deborah attended Huntington College and received a Paralegal Degree from Jones Law School. Deborah's son, Shawn Sellers, is an insurance adjuster with the State of Alabama and she is the proud grandmother of two grandsons, Ty, who is 3, and Rowdy, who is 1. We are fortunate to have Deborah, who does excellent work, with the firm.

XXIV. SPECIAL RECOGNITIONS

CITIZENSHIP CARRIES WITH IT DEFINITE RESPONSIBILITIES

We are blessed to live in the United States of America, and being a citizen of such a great nation carries with it tremendous responsibilities. Unfortunately, many of us don't take our citizenship as seriously as we should. For example, one of those responsibilities is to vote in national and local elections. This is one that all too many Americans simply don't take seriously. Another responsibility of citizenship is to serve as a juror when called in criminal and civil cases. Again, too many of our citizens try hard to avoid jury duty. The American jury system is critically important to the government and to all citizens. There are many other responsibilities, such as paying taxes and obeying the laws of the land, and the list goes on.

We are indeed blessed and most fortunate to live in a nation where the rights of individual citizens are respected and where all citizens have the right to be heard on critical issues—even those that are unpopular—facing our nation. Regardless of what we do for a living, or our social status, or the color of our skin, being a citizen of the United States of America is in and of itself most significant. Let's take a look at what a distinguished

member of the U.S. Supreme Court had to say about citizenship:

"The only title in our democracy superior to that of President is the title of Citizen."

Justice Louis Brandeis, 1937

That was a very strong statement in 1937 when Justice Brandeis spoke his words, and those words are still true today. Like the overwhelming majority of the people in this country, I am very proud to be a citizen of the United States of America!

SPEAKING OUT FOR JUSTICE AND FAIR PLAY

Over the past decade, there have been constant attacks on the civil justice system by groups that have a vested interest in shutting the courts to victims of corporate wrongdoing and abuse. Even some of our daily newspapers have bought the myth that our court system is broken. Toby Brown, a very good lawyer from Mobile, wrote a response to an editorial recently that all persons who believe in justice and fair play should read. For that reason, I am setting Toby's response out in its entirety for your edification. It's definitely worth reading and is squarely on target.

EDITORIAL ASSAULT UNJUSTIFIED

The Press-Register's June 24th editorial, "Alabama needs to flee 'tort purgatory,'" is a continuation of an unjustified and inaccurate assault on Alabama's civil justice system. The editorial concludes that Alabama's courts remain a "most inhospitable place for business" based on the U.S. Chamber of Commerce's so-called ranking of state liability systems. Here is what's wrong with the Chamber's bogus study:

- The U.S. Chamber of Commerce in Washington, D.C., is America's

biggest corporate lobbying organization. It is a front group funded by oil, drug, insurance and tobacco companies, among others.

- The U.S. Chamber is clearly distinguishable from local chambers of commerce, which are great resources for small businesses and for growing local economies.
- The U.S. Chamber's own pollster admitted that there is no way to measure the fairness of any state's legal system.
- The U.S. Chamber only surveys corporate defense lawyers employed by companies with \$100 million or more in annual revenues.

Yes, the U.S. Chamber's poll is based on responses from the same lawyers who work every day defending and protecting large corporations like Exxon and Enron, even after they have been caught breaking the law. No local attorneys, judges or members of the media are ever surveyed. It becomes still clearer just how meaningless the U.S. Chamber's state rankings are when one compares it with other state rankings. Some states that chronically rank at the bottom of the U.S. Chamber's poll are cited by other credible sources as great places to do business. These include Alabama, Texas, South Carolina and Florida—all named among the most desirable business climates in *Site Selection* magazine's ranking, which surveys corporate executives. Moreover, Alabama, South Carolina and Florida—all in the bottom 25% of the U.S. Chamber's poll—made the Pollina Corporate Top 10 Pro-Business States list. So what gives? The purpose of the U.S. Chamber's bogus study is to pressure state legislators to tilt the playing field even more radically toward the interest of big corporations.

Civil justice attorneys work to make sure any person who is injured by the misconduct and negligence of others can get justice in the courtroom, even when taking on the most powerful interests. This is more important now than ever because the drug, insurance and oil industries, along with other large corporations, dominate our political process and thus, people cannot depend on the political system to hold corporations accountable. When corporations and their CEOs act irresponsibly by producing products that are unsafe, by delaying or refusing to pay fair and just insurance claims, and by polluting our environment, the only resort for Americans to hold them accountable is in our courts. The fallacy in the June 24 editorial is its blind acceptance as truth a poll of corporate lawyers on their opinion of state justice systems. The U.S. Chamber's agenda is not surprising. What is surprising is that our local paper, through its editorials, continues to partner with such anti-consumer groups in the spreading of this deception.

Toby is to be commended for speaking out on an issue that affects all Alabamians. All of us who believe in fairness and justice in the judicial system must not sit back and allow shadow groups such as AVALA to mislead those in the media who can influence public opinion about Alabama's court system. The failure of knowledgeable folks to get involved over the years led to the myth of "tort reform."

XXV. SOME CLOSING OBSERVATIONS

FAVORITE BIBLE VERSES

Nancy L. Thompson, a very good a lawyer from Des Moines, Iowa, sent in her favorite Bible verse for consideration this month. Nancy, a staunch Democrat and faithful Christian, has the verse on her website. She seeks to make it the focus of her law practice and that is a very good thing. It would help all lawyers keep things in the proper perspective in the workplace.

Speak up for those who can't speak for themselves, for the rights of the destitute. Speak up and judge fairly; defend the rights of the poor and needy.

Proverbs 31:8-9

This verse is especially applicable to those of us representing persons who have been wronged and have a need for a lawyer to resolve a dispute. It's good to know that Nancy makes the verse a focus in her work as a lawyer who helps folks who need help.

The following verses come from Samuel B. Casey, who is Executive Director and CEO of the Christian Legal Society, and are quite appropriate for these times.

"The grass withers and the flowers fall, but the word of our God stands forever."

Isaiah 40:8 (New International Version)

Blessed is the nation whose God is the LORD; and the people whom he hath chosen for his own inheritance.

Psalms 33:12

My friend and "political buddy" from Montgomery, Joyce Spear, likes the following verse. This is certainly a comforting message for the perilous times

in which we live and I appreciate Joyce letting us pass it on.

When you pass through the waters, I will be with you; And through the rivers, they shall not overflow you. When you walk through the fire, you shall not be burned, Nor shall the flame scorch you.
Isaiah 43:2

Finally, I am going to add two more verses that came to my mind as I was winding up this part of the Report.

For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life.
John 3:16

So they said, "Believe in the Lord Jesus Christ, and you will be saved, you and your household."
Acts 16:31

I really appreciate folks sending in their favorite verses each month. It makes me realize how important it is to not only read the Bible, but to know that God's word is available and is actually at work in our daily activities. It is reassuring to know that we have a mighty God who speaks to us through His word!

XXVI. SOME PARTING WORDS

REFLECTIONS ON THE FOURTH OF JULY

I had intended to write on the Fourth of July last month, but because of my involvement in a multi-week trial, I decided to wait until this issue. Frankly, I'm glad I did because I received the following article, which was sent out by the Christian Legal Society to its members. This is a very good message

which explains the relationship between God and our national government. If we are at all concerned about the future of the United States of America and wonder what can be done to right things in this country, these writings will give us hope.

Regardless of what future legal decisions may hold, as Christians, we understand our national patriotism to be a penultimate allegiance under our ultimate allegiance to God. We are submitted to God's authority and are therefore submitted to every authority that He allows on earth. Romans 13:1-7.

As we think about God and our country this July 4th, I would like to take you to the very top of the Washington Monument for a moment and ask you to imagine yourself standing on the outside of the Monument at its highest pinnacle, looking around, in all directions, on a beautiful summer day. To the West is the Lincoln Memorial and everything it symbolizes; to the East the "Peoples House"—the Congress where our representatives contend for our national life together; to the North is the White House where the burdens of a nation and an entire world are daily considered and acted upon; and to the South the Tidal Basin, the Jefferson Memorial, the Pentagon still under reconstruction from the wounds of September 11, and finally Mount Vernon, the resting place of our First President upon whose national monument you are now standing.

Then you look down, and at your feet you notice for the first time an aluminum cap on which are etched in large letters two words: Laus Deo. [Lab-us Dee-o] No one can see these words. In fact, most

visitors to the monument are totally unaware they are even there and for that matter, probably couldn't care less. Once you know Laus Deo's history, you may want to share this with others you know just as a CLS member from Florida just shared it with me.

These words have been there for many years; they are 555 feet, 5.125 inches high, perched atop the monument, facing skyward to the Father of our nation, indeed the Father of every nation, overlooking the 69 square miles which comprise the District of Columbia, capital of the United States of America.

Laus Deo!

Two seemingly insignificant, unnoticed words—out of sight and, one might think, out of mind, but very meaningfully placed at the highest point over what is today the most powerful city in the most successful nation in the history of the world.

So, what do those two words, in Latin, comprised of just four syllables and only seven letters, possibly mean? Very simply, they say "Praise be to God!" [Laus is "Praise be" and Deo means "God"] Though construction of this giant obelisk began in 1848, when James Polk was President of the United States, it was not until 1888 (the year Benjamin Harrison defeated Grover Cleveland) that the monument was inaugurated and opened to the public. It took twenty five more years (when Theodore Roosevelt was President) to finally cap the memorial with a tribute to the One Washington himself thought to be the Source of any nation's Providence, particularly America.

Laus Deo...Praise be to God!

From atop this magnificent granite and marble structure, visitors may take in the beautiful panoramic view of the city with its division into four major segments. From that vantage point, one can also easily see the original plan of the designer, Pierre Charles L'Enfant...a perfect cross imposed upon the landscape, with the White House to the north. The Jefferson Memorial is to the south, the Capitol to the east and the Lincoln Memorial to the west.

A cross you ask? Why a cross? What about separation of church and state? Yes, a cross; with as much right to be in our public square as any of the other symbols that constitute and have contributed to our life together here in America.

Laus Deo...Praise be to God!

Within the monument itself are 898 steps and 50 landings. As one climbs the steps and pauses at the

landings the memorial stones share a message. On the 12th Landing is a prayer offered by the City of Baltimore; on the 20th is a memorial presented by some Chinese Christians; on the 24th a presentation made by Sunday School children from New York and Philadelphia quoting Proverbs 10:7, Luke 18:16 and Proverbs 22:6.

Praise be to God!

When the cornerstone of the Washington Monument was laid on July 4th, 1848 deposited within it were many items including the Holy Bible presented by the American Bible Society. Praise be to God! Such was the discipline, the moral direction, the spiritual mood given by the founder and first President of our unique democracy..."One Nation, Under God."

Samuel B. Casey
Executive Director and CEO of the
Christian Legal Society

These bold acknowledgements that God is sovereign, that He reigns and rules over our nation, and that He is deserving of all praise and honor are enormously encouraging. They have challenged me to pray for more leaders in our nation who would once again boldly and humbly call on the name of the Lord. When I initially received a copy of this message about two years ago, I confess that I had forgotten much of what it said. When it came again by email, I was also reminded that there is nothing in our public or private lives that is beyond God's sovereign control. Sometimes I forget that God is in charge of my life and all that I do. This article was not only a great reminder but a timely one. God is still on His throne and there can be no doubt about it. If you are like me, you need this reminder too!

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