



THE  
**JERE BEASLEY REPORT** SEPTEMBER 2008

# Beasley Allen

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# I. CAPITOL OBSERVATIONS

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## **ALABAMA IS STILL GOOD FOR BUSINESS**

Alabama has again been recognized as a very good place for business. A business magazine honored Alabama's economic development activity which really shouldn't come as a surprise. The *Southern Business and Development* magazine named Alabama its "State of the Year" for the fifth time in the last six years. The magazine covers economic development in 17 states and uses a point system to determine its award. Alabama has been the "State of the Year" in 2002, 2003, 2004, 2005 and now for 2007. Governor Bob Riley and the state's chief industrial recruiter, Neal Wade, celebrated the honor last month by visiting companies in Huntsville, Birmingham and Montgomery. Alabama announced 473 new and expanding industries in 2007. Those projects will produce at least 24,000 new jobs.

It's good to see our state recognized as a leader in industrial development. Alabama is a good place to locate an industrial plant and also a very good place for existing facilities to expand. On a personal note, I helped create the state's industrial training program when I was in government way back in the early 1970's. Anybody who is familiar with industrial development efforts is well aware of the Alabama program which is recognized as having been a major factor in our state's success in attracting new industry over the years.

## **ALABAMA MEDICAID COMMISSIONER ISSUES NATIONAL ALERT**

Alabama Medicaid Commissioner Carol Steckel, chair of the Executive Committee of the National Association of State Medicaid Directors, has issued a "national alert" memo to all state Medicaid agencies on the drug-pricing fraud cases filed in Alabama by Attor-

ney General Troy King. Commissioner Steckel is urging all of her fellow Medicaid directors to follow the Alabama cases for their nationwide impact on prescription drug prices. The Commissioner has asked her peers to serve on a Task Force on Drug-Pricing Fraud Prevention. This would give the state Medicaid heads an opportunity to coordinate their efforts. Commissioner Steckel believes it's vitally important that Congress and all state legislatures understand the various issues Alabama is facing when it comes to pharmaceutical prices.

Thus far, Alabama's Medicaid agency has been awarded \$274 million in fraud damages by juries in three cases against drug manufacturers in Montgomery County Circuit Court. Our fourth trial is scheduled for October 27<sup>th</sup>. Sixty-eight additional cases are pending. We are currently negotiating with over 25 drug companies and hopefully all of those cases will settle. Commissioner Steckel told her fellow commissioners that our Alabama cases have the strong active support of the national AARP and its 514,000 Alabama members. In my opinion, their support will prove to be invaluable to our just cause.

## **SOUTHERN GOVERNORS TO DEVELOP ENERGY PLAN**

Southern governors are working on a comprehensive plan to reduce the South's carbon footprint and create jobs. It has been reported that many of the region's universities are eager to assist with research. This presents a real opportunity for the region. Southern states are already working individually to reduce energy use and develop better technology, but a unified voice is needed to help shape the national debate. Governor Riley and other governors discussed the initiative last month during the Southern Governors Association meeting in West Virginia.

Source: *Associated Press*

## **STATE PROGRAM WILL COMBAT DRUNK DRIVING IN ALABAMA**

Governor Bob Riley has awarded \$1.4 million to finance a statewide DUI task force, which includes nine stepvans equipped for breath tests for alcohol. Approximately 40% of all traffic deaths in Alabama are alcohol-related. It's apparent that drunk drivers pose a danger to persons who travel on Alabama highways. The "bat mobiles" are a key component of "Task Force Zero," a state trooper campaign to stop drunk driving. They will allow for road-

## IN THIS ISSUE

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I.	Capitol Observations . . . . .	2
II.	Political Observations . . . . .	3
III.	Legislative Happenings . . . . .	5
IV.	Court Watch . . . . .	5
V.	The National Scene . . . . .	8
VI.	The Corporate World . . . . .	12
VII.	Campaign Finance Reform . . . . .	14
VIII.	Congressional Update . . . . .	14
IX.	Product Liability Update . . . . .	17
X.	Mass Torts Update . . . . .	21
XI.	Business Litigation . . . . .	25
XII.	Insurance and Finance Update . . . . .	28
XIII.	Predatory Lending . . . . .	29
XIV.	Premises Liability Update . . . . .	30
XV.	Workplace Hazards . . . . .	32
XVI.	Transportation . . . . .	34
XVII.	Arbitration Update . . . . .	37
XVIII.	Healthcare Issues . . . . .	38
XIX.	Environmental Concerns . . . . .	39
XX.	The Consumer Corner . . . . .	41
XXI.	Recalls Update . . . . .	43
XXII.	Firm Activities . . . . .	46
XXIII.	Special Recognitions . . . . .	47
XXIV.	Some Closing Observations . . . . .	50
XXV.	Some Parting Words . . . . .	51

side testing, which will be a real boost to law enforcement. Alabama Department of Public Safety Director Col. Chris Murphy believes this will have a positive effect on combating drinking and driving on Alabama highways.

Source: *Birmingham News*

### **FORMER SEC BOSS JOINS ALABAMA PROBE**

Alabama is bringing in help in its battle against financial crime. Harvey Pitt, former chairman of the U.S. Securities and Exchange Commission, has been appointed as a deputy attorney general for Alabama. This allows him to assist the state in its investigation of a controversial investment tactic known as naked short selling. Joe Borg, chairman of the Alabama Securities Commission, wanted Pitt and calls him “the best around” for the job.

Attorney General Troy King appointed Pitt to focus on a case involving Montgomery-based Colonial BancGroup, which has seen its shares plummet under pressure from investors who profit when stock prices fall. These investors profit through a practice known as “short selling,” which is discussed in another part of this issue. Borg’s office is investigating whether some of those investors spread lies and malicious rumors in order to manipulate the stock price—a scheme often employed by “naked” short sellers, who illegally trade shares they do not own. Pitt is known to be one of the most knowledgeable people available when it comes to securities law. And he has a particular expertise on naked short selling, which is now a major target of the SEC, according to Borg. Colonial has been stung by mortgage losses across its network of 340 branches in Alabama, Florida, Georgia, Nevada and Texas.

Source: *Associated Press and Mobile Press Register*

## **II. POLITICAL OBSERVATIONS**

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### **A LOOK AT THE PRESIDENTIAL RACE**

#### **The Race Heats Up**

The Presidential race has really heated up over the past several weeks. The McCain campaign has gone totally negative much earlier than anticipated. While McCain is still leading in the polls in Alabama, the margin is narrowing. I predict this race will get much closer in the coming weeks. It’s my belief that the more folks see and hear the real John McCain the less they will feel comfortable voting for him. One thing that has to concern most Americans is the kind of folks running the McCain campaign.

McCain has quit trying to hide the fact that Washington’s special interest lobbyists have been running his campaign and raising his money. The Arizona Senator has claimed in years past to be a “straight-talker” who labeled himself a “maverick.” But if McCain really is the feared reformer of business-as-usual government in our Nation’s Capitol, why does his presidential campaign look like the back alley of “K-Street?” Rather than put the high-priced and powerful special interest lobbyists in the back rooms, McCain has put them in total control of his campaign.

When you combine the likes of Karl Rove, Steve Schmidt (one of Rove’s attack dogs), Charlie Black, Rick Davis, Dr. Phil Gramm, and a cadre of other powerful lobbyists in the running of the campaign, it’s a certainty that if McCain prevails in November ordinary citizens will be shut out from the White House once again and our government will continue to be run by powerful special interest groups.

#### **Top McCain Adviser Got Money From Several Foreign Countries**

Randy Scheunemann, John McCain’s chief foreign policy adviser, is a prime example of the kind of folks running the McCain campaign. The Arizona Senator and his staff were lobbied on 49 occasions in a three-year span by this man while he was being paid hundreds of thousands of dollars by the government of the former Soviet republic of Georgia. The payments raise ethical questions because of Randy Scheunemann’s personal financial interests at a time when he is advising McCain on foreign policy. As we have seen, the GOP candidate quickly seized on Russian aggression in Georgia, which might just be a coincidence, as a campaign issue. On April 17<sup>th</sup>, a month and a half after Scheunemann stopped working for Georgia, his business partner signed a \$200,000 agreement with the Georgian government. The deal added to an arrangement that brought in more than \$800,000 to the two-man firm from 2004 to mid-2007. New York University law professor Stephen Gillers sees a problem and made this comment to the *Associated Press*:

*Scheunemann’s work as a lobbyist poses valid questions about McCain’s judgment in choosing someone who—and whose firm—are paid to promote the interests of other nations. So one must ask whether McCain is getting disinterested advice, at least when the issues concern those nations. If McCain wants advice from someone whose private interests as a once and future lobbyist may affect the objectivity of the advice, that’s his choice to make.*

Interestingly, Georgia isn’t the only foreign government hiring Scheunemann. He has been a big time lobbyist with an array of clients including a number of foreign countries. For example, his firm lobbied McCain’s office on four bills and resolutions regarding Georgia, with McCain as a co-sponsor or supporter of all of them. In

addition to the 49 contacts with McCain or his staff regarding Georgia, the Associated Press says Scheunemann's firm lobbied the senator or his aides on at least 47 occasions since 2001 on behalf of the governments of Taiwan and Macedonia, which each paid Scheunemann and his partner Mike Mitchell over half a million dollars; Romania, which paid over \$400,000; and Latvia, which paid nearly \$250,000. This is typical of the kind of folks running the show for the campaign.

It should be noted that Scheunemann is part of the community of neo-conservatives who pushed Bush into the war in Iraq. In the months before the war began, Scheunemann ran the Committee for the Liberation of Iraq, which was set up in November 2002 when the public found out that we had no business in Iraq. Before that, he was on board with the Project for the New American Century, whose letter to Bush nine days after the September 11th attacks pointed to Iraq as a possible link to the terrorists. The letter said American forces must be prepared to support "by all means necessary" the U.S. government's commitment to opponents of Saddam Hussein. Scheunemann was among the letter's 37 signers. Of course, there were no links between Iraq and the terrorists at that time. Instead of taking care of business in Afghanistan, we have spent over seven years in Iraq fighting a war that was poorly planned and poorly carried out. Now the folks who put us there are firmly entrenched in the McCain campaign leadership.

Source: Associated Press

### **KEY FIGURE IN ABRAMOFF SCANDAL RAISES MONEY FOR MCCAIN**

When you think the worst is over relating to folks running the McCain campaign, another unsavory name pops up. I was shocked to learn that Ralph Reed, a political strategist and lobbyist tied to the Jack Abramoff lobbying scandal, is now one of John McCain's key fundraisers. Reed was the former

director of the so-called Christian Coalition, which was used for political and monetary purposes by Reed and others. Now Reed touts himself as a member of McCain's "Victory 2008 Team." Reed's connections with Abramoff are well documented. Why anybody running for President would want Reed involved in his campaign is beyond me.

Source: Associated Press

### **RECENT POLLING SHOWS THAT ALABAMA VOTERS ARE UNHAPPY WITH WASHINGTON**

Alabamians are just like the citizens of other states when it comes to how they feel about what has been happening in our nation's Capitol over the past seven and a half years. To put it mildly, Alabama citizens are very unhappy over how our federal government has been run and with the mess the Bush Administration is leaving for the next President. The poll numbers in Alabama are not good for President Bush and his Administration. How this will affect the presidential race in Alabama is yet to be determined.

### **OTHER RACES OF INTEREST FOR THE GENERAL ELECTION**

#### **The Supreme Court Race In Alabama**

There is one seat up for election on the Alabama Supreme Court this year. Judge Deborah Bell Paseur is the Democratic nominee and she will face Judge Greg Shaw who is running on the GOP ticket. Hopefully, this race will be run on real issues and will stay away from the negative campaigning that has become all too prevalent in judicial races in our state. If the election were held today Judge Paseur would win rather easily according to all of the polls that have been run. Of course, the GOP candidate will be heavily financed by the special interests which will result in the race becoming closer.

### **Both Bright And Love Expect To Be Appointed To Key Committees If Elected**

Both candidates in the Second District Congressional race want to serve on the agriculture and armed services committees if they are elected. Bobby Bright and Jay Love square off as their party's representatives in the general election showdown. Obviously those assignments will be important to the Second Congressional District. They are seeking to replace retiring Rep. Terry Everett, a Republican from Rehobeth who presently serves on the agriculture and armed services committees.

The two committees are considered key for the Second District because of the presence of agriculture and military bases, including Fort Rucker and Maxwell-Gunter Air Force Base. Democratic leadership has already committed to appoint Bright to those committees if he is elected. The Republican minority leader made the same commitment to Love.

Of course, the party in power will play a huge role in this matter. The Democratic Party is expected by most pollsters to maintain its majority in the House. It sure seems like it would be of more benefit to the folks in the Second District to be working from the majority side. We saw how important it was to have friends in Congress when jobs at Maxwell-Gunter and Fort Rucker were at risk. Occasionally, there will be members of Congress in one party who can work well with members of the opposite party. A prime example has been Senator Richard Shelby, who has been able to work with Democratic Senators, and has been most effective in getting things done in the Senate. We all know how important Senator Shelby has been to the people of Alabama. Clearly, we need a Congressman in the Second District who can work with Democrats and Republicans alike on issues critically important to our state and nation.

Source: Montgomery Advertiser

## **THE OTHER CONGRESSIONAL RACES**

The races in the Third and Fifth Congressional Districts have attracted a great deal of interest. From early polling it appears that State Senator Parker Griffith will win his race in the Fifth District. Newcomer Josh Segall has made quite an impression in the Third District and is waging a highly-organized and most efficient campaign. The gap between Segall and the incumbent Mike Rogers has narrowed to the point that this race is now much closer and may soon be considered a toss-up.

## **U. S. SENATE SEATS UP FOR GRABS**

Even Senator John Ensign, the top Republican in charge of the GOP's Senate campaigns, has conceded in an interview with Associated Press that his party will lose seats in the General Election. There are a number of factors that have created this situation with the main one being the unpopularity of the sitting President and all of the problems that his Administration has created in our country. All of the polls—including those run by Republicans—show that voters nationally are moving toward the Democratic Party in almost every state. That is bad news for the GOP and good news for the American people who are ready for change with new leadership at the national level. When you consider that there aren't too many Republican Senate candidates who are tying their political wagons to John McCain's "straight-talk express," that pretty well tells the story. As I have said before, it's my opinion the Republicans can't win this year, but history tells us that the Democrats can lose.

## **III. LEGISLATIVE HAPPENINGS**

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### **PROSPECTS FOR 2009**

I was glad to see that my friend Senator Wendell Mitchell is taking the lead in an attempt to bring harmony to the state Senate. If Wendell can do this, it will indeed be a feather in his cap. The last session was one that most members—both Democrats and Republicans—would like to forget. There are too many problems facing our state for partisan politics to tie up the Senate as was the case in the 2008 regular session. Hopefully, Wendell's efforts to bring about harmony will be successful.

### **SPECIAL SESSION**

So far, there hasn't been any word from the Governor's office on a special session. However, I am reasonably sure there will be at least one and perhaps two sessions called by Governor Riley within the next few months. There are a number of issues that warrant calling the legislators back to town. I understand the powerful lobby groups are working hard to avoid having to face the music on some issues important to the state.

### **JOINT LEGISLATIVE PANEL CALLS FOR NUCLEAR PLANT IN NORTH ALABAMA**

The Permanent Joint Legislative Committee on Energy Policy met last month to consider an energy plan for the State of Alabama. The committee voted in favor of a nuclear plant to be built next to the Tennessee Valley Authority's unfinished Bellefonte nuclear plant in northeast Alabama. A resolution was unanimously adopted urging the Nuclear Regulatory Commission and TVA to go forward with the two-reactor project in Jackson County. Sponsored by Huntsville Senator Parker

Griffith, the resolution says there have been no nuclear generation plants constructed for over two decades and that nuclear power is critical to overall state and national energy plans. It's good to see the legislators paying attention to the energy problems facing our state.

Source: Associated Press

## **IV. COURT WATCH**

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### **DOCTORS SAY LAWSUITS HELP GUARANTEE DRUG SAFETY**

We have written a great deal over the past several months about the evils of federal preemption. I predicted that when folks finally find out what this movement is all about, they would oppose it universally. It appears that is now coming to fruition. Top doctors at the helm of the nation's most influential medical journal have given the Supreme Court some very good legal advice on this issue. The editors of the New England Journal of Medicine said in a friend-of-the-court brief which was filed with the High Court:

*The Food and Drug Administration is in no position to guarantee drug safety. Lawsuits can serve as a vital deterrent and protect consumers if drug companies don't disclose risks.*

The preemption issue is in *Wyeth v. Levine*, a case to be heard this fall, that could have far-reaching implications for litigation over dangerous drugs, such as the painkiller Vioxx. Wyeth brought the case to the High Court, claiming it was protected from lawsuits. The drug company argued that the FDA's judgment could not, in effect, be rejected by a state court. The executive branch and specifically the FDA itself have consistently rejected this position in past years. Now during the last days of the Bush Administration the ugly head of federal preemption is being raised.

It is most significant that the Journal

editors urged the Justices to be skeptical about the FDA. In the brief the doctors said:

*The FDA alone simply lacks the ability to serve as the sole guarantor of drug safety. Without the discoveries dredged up by plaintiffs' lawyers through liability litigation, the FDA would be stripped of an essential source of information that the agency has consistently relied on when making its regulatory decisions, and the American public would be deprived of a vital deterrent against pharmaceutical company misconduct.*

The medical editors joined 47 state attorneys general and two former FDA commissioners—David Kessler and Donald Kennedy—in supporting the Plaintiff's position on appeal. The case is being closely watched because earlier this year the Supreme Court ruled that manufacturers of FDA-approved medical devices were shielded from litigation in state courts. However, that case is quite different because Congress had spoken to the pre-emption issue with respect to medical devices. That's not the case in *Wyeth v. Levine*.

The statute that applies to medical devices is different from the law that governs medications. The law in the medical devices case had a pre-emption provision. Congress has never put a pre-emption provision in the Food and Drug Act. Dr. Jeffrey M. Drazen, the Journal editor, said in an interview with the Associated Press that he hoped arguments over legal distinctions would not obscure the reality that the FDA is overwhelmed trying to keep up with drug safety problems, which can range from rare but serious side effects, to shortcomings in manufacturing plants as far away as China. In this regard, Dr. Drazen aptly stated:

*Even if the FDA is doing the best it can, it simply can't see the future clearly enough to pre-empt*

*manufacturers from litigation. The (court) system represents one of the key defense mechanisms that individuals have if a manufacturer has not made the risks of a product clear to the public.*

In my opinion, these doctors represent the views of most Americans who are knowledgeable about federal pre-emption and how it will affect people. If the Court rules for the drug company on this anti-consumer issue, it will be the worst possible thing for the health and welfare of the public. Without an open court system, the drug companies will have no fear of putting a product known to be dangerous and unsafe on the market.

Source: Associated Press

#### **CANDIDATE FOR THE ALABAMA SUPREME COURT CALLS FOR APPOINTED JUDICIARY**

Deborah Bell Paseur, the Democratic candidate for the Alabama Supreme Court, favors appointing judges and letting voters decide if they should be retained. The Florence judge told the Birmingham chapter of The Federalist Society that the current system of partisan politics has led to judicial races that are too nasty and expensive. That, she said, has contributed to the public perception that "justice is for sale." The suggested change would allow appellate judges to be chosen based on their qualifications. Of course, Alabamians would not lose their right to vote because they would decide each term whether the judge should keep the job, she said.

Judge Paseur, the first woman to practice law and to become a judge in Lauderdale County, said she would bring to the Supreme Court the same work ethic and judicial philosophy she showed in her 27 years on the bench. According to Judge Paseur, her court, which handled both criminal and civil cases, had one of the state's largest caseloads and highest disposition rates. Judge Paseur was re-elected four times without opposition which shows her

reputation as a judge who fairly applied the law to the facts of cases and did not follow any agendas. That's good to hear and I believe that the people of Alabama will agree.

Source: Birmingham News

#### **SECRET SETTLEMENTS OF LAWSUITS SHOULD BE PROHIBITED EXCEPT IN EXCEPTIONAL CASES**

As I have written in prior issues of the Report, I am against the confidential settlements of lawsuits. Unfortunately, in all too many cases, victims of corporate wrongdoing have to agree to confidentiality when they settle their cases. That is because victims badly need the settlement funds in most every instance and have to accept the condition of confidentiality that is attached to settlement offers by defendants. In most states, settlements in state and federal courts are allowed to be kept secret quite often. Corporate defendants seek and get confidentiality, gag orders and sealed records when they settle cases. But in South Carolina, thanks to federal Judge Joe Anderson and State Supreme Court Chief Justice Jean Toal—who are advocates for court openness—settlement records in cases involving public safety issues have been open for several years. South Carolina has been a leader for openness and that's good. Hopefully, the rest of the nation will soon follow its lead.

A bill is pending in the U.S. House of Representatives that would prohibit federal courts from sealing settlements in matters of public interest. Judge Anderson went to Washington last month to testify before a House subcommittee on the virtues of openness. The bill that has been introduced would require federal courts in all states to be as open as those in South Carolina. Judge Anderson told the subcommittee:

*I knew of a judge who restricted access to case information where a child died while riding an allegedly defective go-kart. The set-*

*tlement was \$1.4 million, and the judge imposed a strict obligation of secrecy on the parties. I later learned that the model go-kart which the child had been riding was still being sold and marketed.*

Clients have the final say-so on whether to agree to confidentiality when offers of settlement have that condition attached to it. Lawyers—whose first obligation is to see that their clients get fair settlements—have to agree to keep the amount of the settlement secret if their client agrees so that their case can be settled. In such cases, clients and their lawyers agree never to reveal how much they received in the settlement. In addition, the defendants attempt to get total confidentiality, involving matters other than amounts to be paid, in many cases. When that happens the public's right to know just how dangerous a product might be is hidden and kept secret. In South Carolina, judges have stepped in to protect the public's right to know. A bill similar to the House bill is in the Senate Judiciary Committee and is co-sponsored by Senator Lindsey Graham. Both bills, called "Sunshine in Litigation" acts, would prohibit federal courts from sealing settlements in matters of public interest.

Since it's late in Congress' session, neither the House bill nor the Senate bill is expected to pass this year. Hopefully, the bills will be a top priority when a new President and Congress are elected in November and take office next year. The public has the right to know when a product is defective and is still on the market. People also have a right to know when a corporation has committed fraudulent acts in the past with the conduct continuing.

Source: *The State.com*

#### **JUDGE CORRECTLY UNSEALS EXXON OPINION**

A federal trial court judge in Washington, D.C. has unsealed a previous ruling

in a civil lawsuit against Exxon Mobil Oil Indonesia. In the suit, 11 Indonesian villagers alleged that the oil giant continued to arm soldiers guarding their facilities even though it knew that the soldiers tortured and killed villagers in 2000. Exxon had previously moved to dismiss the suit for lack of personal jurisdiction. When that motion was denied, Judge Louis F. Oberdorfer gave the parties the opportunity to move to seal the memorandum accompanying that order. Exxon argued that portions of the memorandum that referenced documents already under seal should have been edited out of the document.

Judge Oberdorfer, applying a six-part balancing test, found that Exxon could not overcome the "strong presumption in favor of public access" to judicial records and documents. The judge noted that references in the memorandum did not concern the specific risks that led him to seal the documents in the first place and did not concern the types of information usually subject to seal such as trade secrets, the privacy and reputation of victims of crimes, or risks to national security interests. This was a very good ruling and hopefully it's a sign of more of the same to come from the courts in the future.

Source: *Associated Press*

#### **THE BATTLE OVER THE RIGHT TO SUE RAILROADS CONTINUES**

A long-running battle between Canadian Pacific Railway Ltd. and the victims of a major toxic train derailment in North Dakota turned in favor of the victims recently when a federal appellate court upheld the constitutionality of Congress' effort to allow the suits by victims to proceed in state courts. The railroad now wants the court to rehear the decision. The appeals court ruled that "there is no federal-question jurisdiction" and that "the statute is constitutional." This means the case is sent back to state courts.

The litigation involves a 2002 derailment of 31 cars of a Canadian Pacific freight train. The derailment, so violent

that one car flew the length of a football field, released more than 220,000 gallons of anhydrous ammonia into the air. This exposed the area's population to a cloud of toxic gas. As a result, one person died, 11 people sustained serious injuries and 322 people sustained major injuries. Victims filed a class action in federal court as well as individual suits in state courts. Many of the state court lawsuits were removed to federal court by the railroad. The federal district court, and then the Eighth Circuit on the first appeal, held that the Federal Railroad Safety Act (FRSA) preempted the state suits. Had those rulings stood, the plaintiffs would have been left without a remedy since the Act didn't create a federal cause of action.

In 2007, while a second appeal was pending, Congress amended the FRSA to clarify that it did not preempt state law actions when a railroad has failed to comply with federal or state standards. The amendment was retroactive to the date of the North Dakota derailment. On the second appeal, Canadian Pacific challenged the amendment's constitutionality, arguing that it violated separation of powers, due process, equal protection and the *ex post facto* clause. The United States intervened to defend the law, and 13 states filed an amicus brief supporting the law and the victims. A three-judge panel of the Eighth Circuit, voting 2-1, rejected all of the railroad's arguments. The court's majority opinion reads:

*Contrary to CP's claim that the amendment seeks 'to impose unlimited liability [upon CP] for' the Minot derailment case, the amendment merely gives injured parties the chance to seek recovery against railroads. Victims of railroad accidents must still prove their cases in court.*

Before the amendment, Judge Kermit E. Bye, who wrote the opinion, said the Act had been interpreted to deny injured persons "the mere chance" to hold a railroad accountable when its negligence violated state and federal

laws and regulations intended to further railroad safety. "It was rational for Congress to 'clarify' this result was not an intended purpose" of the Act, Judge Bye wrote for the majority. Canadian Pacific has settled many of the claims, but there are more than 100 claimants with pending lawsuits. The FRSA's stated purpose is railroad safety and the Eighth Circuit was correct in its ruling upholding the law. This was a major victory for victims and for railroad safety.

Source: *National Law Journal*

### **A WORKERS' COMPENSATION CASE THAT CAME OUT RIGHT**

Unless they are familiar with the system, few people realize that Alabama's Workers' Compensation laws are tilted toward the employer and are considered to be very much pro-business and very much anti-worker. Cases for injured workers can be very difficult for the lawyers who handle these cases. My hat is off to those lawyers for their willingness to help workers at a time when they really need help. It's a highly specialized field and lawyers who do that type work must be highly skilled and willing to face some tough laws when representing their clients.

One such case involved an employee named Thomas Singleton. On a date in 2003, Thomas Singleton called in sick to work. He told his supervisor that he hurt his back the day before while emptying the trash can. One of his job duties at work was to empty a fifty-five gallon trash can at the end of his shift. The employee was unable to return to work because of his back injury, so he filed for workers' compensation benefits. The trial court awarded full permanent total disability benefits. His employer, Kiva Dunes, appealed the award. Kiva Dunes claimed that the phone call did not provide adequate notice that the injury was work-related. Under Alabama law, an injured employee has ninety days to inform his or her employer of a work-related injury. If the employee fails to do so,

coverage can be denied. The Court of Civil Appeals sided with Kiva Dunes and reversed the trial court's ruling.

Mr. Singleton then filed a petition to the Supreme Court of Alabama. That Court sided with the trial court and reversed the court of appeals' decision. The Court held that Mr. Singleton's statement during the November 10, 2003 telephone call to his supervisor that he had injured his back "while emptying the trash can" was adequate notice for a reasonable person to know that his injury was work-related. His employer knew that Mr. Singleton emptied the fifty-five gallon trash can at the end of the day as one of his job requirements. Common sense would tell a reasonable person that this statement satisfies the ninety day notice requirement. It's good to see the Court doing the right thing in a worker's case. Thankfully, the Justices ruled in favor of the injured worker instead of protecting an insurance carrier. That's a very good sign!

## **V. THE NATIONAL SCENE**

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### **SOME DISTURBING NUMBERS FROM THE WHITE HOUSE**

The budget deficit forecast from the Bush White House—almost a half trillion dollars for next year—has set a new record and that is most disturbing. We have seen an economy go from healthy surpluses to record deficits under President Bush's reign. The U. S. dollar is at a record low as a result of this administration's fiscal irresponsibility. As we approach the fall of the year, we find our country in a recession which is growing worse week-to-week. For some reason the projected deficit by the White House doesn't include the spending on the wars in Iraq and Afghanistan which are costing more than \$5 billion per week.

It's sad to say, but we are becoming a

nation that is getting deeper and deeper in debt with our creditors including foreign countries such as China. Our national debt—which has doubled during the Bush years—is now almost \$6 trillion. This means we are paying over \$250 billion a year in interest on this debt. George Bush will go down in history as the worst President for the nation's economy since Hoover and that indeed is a sad legacy.

### **OIL COMPANIES ESCAPE BILLIONS IN ROYALTY PAYMENTS TO AMERICANS**

What is being labeled a "bureaucratic oversight" has allowed 24 oil companies to avoid more than \$1.3 billion in royalties for the privilege of extracting oil and natural gas from U.S. territory in the Gulf of Mexico—with foreign companies responsible for 55% of that total. But this \$1.3 billion in forgone royalties pales in comparison to the \$60 billion that Americans stand to lose in royalty revenue over the life of these leases. And if Congress repeals the moratorium on Outer Continental Shelf (OCS) drilling that has existed since 1982, these freeloading oil companies will be eligible to bid on new leases, providing them with more record profits while American families are left holding the bag. These 24 companies have posted a combined \$365 billion in profits since 2006. More will be said on that later.

The list of the specific companies comes from a February 2008 U.S. Department of Interior memo recently obtained by Public Citizen. Four of the 24 companies (BP, Marathon, Shell and Walter Oil & Gas) signed voluntary agreements to pay royalties going forward, but they will not be required to pay the more than \$200 million taxpayers have been denied on production that already has occurred.

The U.S. Senate is currently considering amendments to the Stop Excessive Energy Speculation Act of 2008 (S. 3268) that would repeal the Congressional ban on offshore drilling. The U.S. House of Representatives is also considering measures in the Deep Ocean

Energy Resources Act of 2008 (H.R. 6108) that would open up the OCS to new drilling. However, it's conceded that allowing new drilling in these areas will not significantly lower gasoline prices. According to a U.S. Department of Energy report, opening all areas off the coasts of the Atlantic, Pacific and the Gulf of Mexico to new drilling "would not have a significant impact on domestic crude oil and natural gas production or prices before 2030."

New areas were opened for drilling in December 2006, when Congress passed the Gulf of Mexico Energy Security Act (Public Law 109-432), which authorized leasing 8.3 million acres in the Gulf of Mexico, 70% of which had been previously protected under Congressional moratoria. It should also be noted that any oil or gas that is produced is a commodity that will go to the highest bidder and that could well be China or some other foreign country. There is certainly no guarantee it will stay in the U.S.

It is irresponsible to allow companies that escaped the payment of potentially more than \$60 billion in royalties because of a loophole to get access to more leases. There is legislative precedent to force companies to pay their fair share. The House passed a measure in January 2007 that would forbid oil companies from being awarded any new leases unless they renegotiate non-royalty leases from 1998 and 1999. President Bush opposed this part of the legislation, and the Senate has yet to adopt it. Of U.C.-produced oil, 31% of that production comes from land owned by the federal government.

It should not come as a surprise that much of the impetus for opening the OCS comes from an expensive advertising campaign financed by Former House Speaker Newt Gingrich's American Solutions for Winning the Future. When Gingrich was Speaker, Congress passed the Deep Water Royalty Relief Act of 1995. It turned out to be an even bigger favor than Congress had intended. Because of a bureaucratic oversight by the Department of Inte-

rior during the implementation of the Act, oil companies that secured leases in 1998 and 1999 were exempted from royalties, regardless of the prevailing market price of oil. This stands in stark contrast to other, similar leases, which require the payment of royalties if the price of oil exceeds a certain threshold. The day the bill was signed in November 1995, West Texas Intermediate oil was trading at \$18.28/barrel. With oil now trading nearly 600% higher, these companies have been and will be extracting very valuable energy from public land without paying any royalties to American taxpayers.

In addition, there is widespread mismanagement of the royalty program that allows oil companies to underpay royalties, resulting in Americans being cheated out of hundreds of millions of dollars. Unless that is fixed, expansion of OCS development will also unfairly enrich oil companies, most of which are foreign. A former top auditor at the Department of Interior testified under oath in March 2007 that his superiors limited his ability to collect royalties from oil companies that were owed to the American people. In 2007, a jury in a case filed under the False Claims Act found that Kerr-McGee (now Anadarko), one of the holders of the no-royalty leases from 1998 and 1999, deliberately underpaid more than \$7.5 million in royalties.

There are 24 companies that have already been extracting oil and natural gas from the Gulf of Mexico royalty-free and have thereby underpaid \$1.3 billion in royalties. Some well known names are included on that list. Additionally, there are 25 other companies that have yet to produce on these 1998 and 1999 leases but will produce royalty-free energy in the future. One of those companies is none other than ExxonMobil.

*Source: Public Citizen*

#### **CERTAIN JUSTICE DEPARTMENT OFFICIALS VIOLATED THE LAW**

An internal investigation by the Justice Department has found that

former Department officials broke the law by letting Bush Administration politics dictate the hiring of prosecutors, immigration judges and other career government lawyers. The Justice Department's report found that for nearly two years, top advisers to then-Attorney General Alberto Gonzales discriminated against applicants for career jobs who weren't Republican or conservative loyalists. At times, their search for GOP activists delayed filling judgeships and threatened to clog immigration courts, according to the report. The federal government makes a distinction between "career" and "political" appointees, and it's a violation of civil service laws and Justice Department policy to hire career employees on the basis of political affiliation or allegiance.

Yet Monica Goodling, who served as Gonzales' counselor and White House liaison, routinely asked career job applicants about politics, the report concluded. Questions like "What is it about George W. Bush that makes you want to serve him?" were asked. The Justice Department's Office of Inspector General and Office of Professional Responsibility did the investigation. A number of other political questions were asked of the candidates. "It appeared that these topics were discussed as a result of the question seeking information about how the applicant would characterize the type of conservative they were," the report concluded. Attorney General Michael Mukasey, who succeeded Gonzales, says he was "disturbed" by the findings. He took no action against the wrongdoers. However, the investigation was one of several examining accusations that White House political meddling drove prosecution, policy and employment decisions within the once independent Justice Department. Those charges were spurred initially by the firings of nine U.S. attorneys in 2006 and culminated with Gonzales' resignation under fire as Attorney General last September. The 140-page report does not indicate whether Goodling or others involved

could face any charges.

None of those involved in the discriminatory hiring still work at the Justice Department, meaning they will avoid any departmental penalties. Even though crimes were committed, nobody will be charged and that's unfortunate. Goodling, a former Republican National Committee researcher with little experience as a prosecutor, admitted in House Judiciary Committee testimony last year that she "crossed the lines" while hiring Justice Department career employees. She received immunity for her testimony, meaning she can't be prosecuted unless it can be proved that she lied while under oath. Nevertheless, this sad episode is apparently typical of how the Justice Department operated during the Bush-Cheney-Rove years. The current Attorney General has already announced that nothing further will be done by the Justice Department and that there will be no prosecutions. That really isn't too surprising considering who appointed him.

Source: *Associated Press*

### **U.S. SETTLES WITH LIBYA ON TERROR-RELATED LAWSUITS**

Libya and the United States have settled all outstanding lawsuits by American victims of terrorism, clearing the way for the full restoration of diplomatic relations between the two countries. There were 26 pending lawsuits filed by American citizens against Libya for the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, and other attacks. There were also three outstanding lawsuits filed by Libyan citizens for U.S. airstrikes on Tripoli and Benghazi in 1986 that Libyans say killed 41 people, including leader Moammar Gadhafi's adopted daughter.

The settlement reached last month completes a nearly five-year effort to rebuild ties between the two countries. The agreement will be followed by a U.S. upgrading of relations with Libya including the opening of an embassy in Tripoli, the confirmation of a U.S.

ambassador and a visit by Secretary of State Condoleezza Rice before the end of the year. It will also allow direct U.S. aid to the country. The settlement also gives immunity to the Libyan government from any further terror-related lawsuits, which is quite interesting.

The U.S. had no diplomatic relations with Libya from 1980 until late 2003, when Gadhafi pledged to abandon his weapons of mass destruction programs, stop exporting terrorism and compensate the families of victims of the Lockerbie bombing and other attacks. After that, the nation was given a reprieve from U.N., U.S. and European sanctions, removed from the State Department's list of state sponsors of terrorism and allowed a seat on the U.N. Security Council. It sure looks like the Bush Administration has turned over a new leaf when it comes to nations that once were called "evil" and sponsored terrorism.

The last hurdle was over compensation for Americans harmed in Libyan-sponsored attacks, including the Lockerbie attack and the 1986 bombing of La Belle discotheque in Berlin, which killed two American soldiers. As you may recall, the disco attack prompted former President Reagan to order the 1986 airstrikes on Libya, which did cause civilian deaths. Libya paid the 268 families involved in the Pan Am settlement \$8 million each, but was withholding an additional \$2 million it owed each of them because of a dispute over U.S. obligations in return. The main Libyan lawsuit was filed by 45 families of those killed in the 1986 airstrikes. There are two other cases pending related to other incidents. International institutions and foreign companies operating in Libya—including some American firms—will contribute to a fund to compensate the American and Libyan claimants.

The top U.S. diplomat for the Middle East, David Welch, signed the agreement with Ahmed al-Fatouri, head of American affairs in Libya's Foreign Ministry, in a ceremony before reporters and members of both delegations.

Welch labeled the settlement a "historic agreement" and delivered a letter from President Bush to Gadhafi. It's good to get this matter resolved so that all of the victims' families can be compensated. It's been a long wait!

Source: *Associated Press*

### **LEAKING UNDERGROUND FEMA FUEL TANKS**

The *Associated Press* says the government owns hundreds of underground fuel tanks that need to be inspected for leaks of hazardous substances that could make local water undrinkable. Many of the tanks were designed for emergencies back in the days of the Cold War. Eileen Sullivan of the *Associated Press* reported recently that the Federal Emergency Management Agency has known since at least the 1990s that tanks under its supervision around the country could be leaking fuel into soil and groundwater.

FEMA has admitted that it knows of at least 150 underground tanks that must be inspected for leaks. The agency also is trying to determine whether an additional 124 tanks are underground or above ground and whether they are leaking. According to FEMA, there has been no documentation of reported leaks or harm to communities from the tanks. Former agency officials and Congressional testimony, however, suggest that the federal tanks have long been considered a safety and health problem. Many of these tanks were built to store 5,000 gallons of diesel fuel and placed around the country at the height of the Cold War in the 1960s to fuel electric generators that could sustain emergency broadcasts by radio stations in case of a nuclear attack or other catastrophe. Made of steel, the tanks inevitably rust over time and allow fuel to escape. Steel tanks left in the ground for decades rot and that's a well known fact. Surely, government officials involved knew that at the time the tanks were buried underground.

More than 500,000 leaking storage tanks—most of which are filled with fuel and oil—are buried across the

country, according to Environmental Data Resources, based in Milford, Connecticut. The consulting company says that's about half of all the underground tanks in the country. Those tanks are owned privately or by local, state and federal agencies. Because they're underground, leaking tanks can go undetected for years. If diesel leaks into drinking water, affected people could be at a higher risk of cancer, kidney damage and nervous system disorders. A gallon of fuel can contaminate 1 million gallons of water.

FEMA will determine what to do with the defunct tanks—such as remove them or fill them with sand—on a case-by-case basis, because of varying state laws. It appears that FEMA hasn't let all of the states know about leaking tanks within their borders. A 2005 law required all federal agencies to submit an inventory to Congress and the EPA of all the tanks they owned or operated, and whether the tanks were in compliance with the law. In the late 1980s and early 1990s, the government insisted on better-made tanks. The underground tanks of today must have safety measures including leak detection and an extra shell made with material resistant to gasoline, diesel and ethanol.

Source: *Associated Press*

### **JUDGE RULES NATIVE AMERICANS OWED \$455 MILLION**

A federal judge ruled last month that Native Americans suing the U.S. government over mismanaged royalties collected from gas and oil companies that drilled on their lands are entitled to \$455 million. The ruling is the latest in a case that has been in the court for 12 years. The ruling focused on how much royalty money was withheld from trust accounts managed by the Department of Interior on behalf of 500,000 Native Americans and their heirs over the past 121 years.

The Native Americans' lawyers said that the government had badly mismanaged the trusts and that there was a shortfall of nearly \$4 billion. At a June

bench trial, the lawyers said the Native Americans were owed \$47 billion, a figure that represented the "benefit" the government received from improperly using the missing money. The government's lawyers had argued that only several hundred million dollars was in dispute.

The Blackfeet tribe, located in northwest Montana, filed the class-action lawsuit in 1996, seeking to force the Interior Department to account for billions of dollars in royalties from Indian lands held in trust by the government. The origins of the suit date to 1887, when the government divided up millions of acres of Indian reservation land and parceled it out to individual Native Americans, then put the lots into trusts controlled by the Department of the Interior. On behalf of the Native Americans, the government then leased the land to oil, gas and other companies. The government has run into trouble trying to account for the money. Many records are missing or have been destroyed. Both sides are considering an appeal.

Source: *Washington Post*

### **IT'S PAST TIME TO CLEAN UP TELEVISION PROGRAMMING**

It has been reported that children between the ages of 13 and 17 spend an average of 33.35 days a year in front of a television or movie screen. These numbers come from a study by IMMI data research organization. For this reason, it's extremely important to control what is being shown on television screens. For the last several years, TV's broadcast networks have been engaged in a slow and subtle campaign against laws requiring decency on the public airwaves. First, they went to court claiming the "right" to air profanity—even the "f-word"—any time they want, without restriction. Then they claimed that a program showing a naked woman getting into a shower in front of a child wasn't "indecent." And then they said that Janet Jackson's breast-baring striptease during the

2004 Super Bowl wasn't indecent.

Bit by bit, sort of like the Chinese water torture, the networks have been using lawsuits and the courts to erode laws against indecency on the public airwaves. But now, the networks have shown their true colors at last. In a news release, the networks declared that they are totally opposed to all laws against indecency! The networks that make billions of dollars every year by using the airwaves owned by the public—and use them free of charge—are now saying that there should be **absolutely no decency laws whatsoever!** The networks believe that they should have the "freedom" to air any profanity, any amount of nudity, as much explicit sex, and all the graphic and gratuitous violence they want, without any restrictions.

In their release, the networks criticized the Supreme Court's *Pacifica* and *Red Lion* rulings—rulings which are the cornerstone of indecency law—as being old and outmoded. The broadcast networks claim that, because of cable and satellite TV, broadcast TV is no longer "uniquely pervasive," and that the GOVERNMENT should be forced to prove that it has a "right" to regulate them.

It's apparent that the multi-billionaire bosses who run the broadcast networks believe they are above the law, that they don't have to care what millions of Americans want. Contact your Senators and Representatives in Congress and urge them to support S. 1780—the Protecting Children from Indecent Programming bill. This law would give the FCC the power to enforce decency regulations—and would force the networks to obey the law like everyone else.

Source: Parent's Television Council

## VI. THE CORPORATE WORLD

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### **EXXON POSTS RECORD \$11.68 BILLION PROFIT**

At a time when most Americans are really struggling to make ends meet, ExxonMobil has once again reported the largest quarterly profit in U.S. history. The oil giant posted net income of \$11.68 billion on revenue of \$138 billion in the second quarter. That works out to \$1,485.55 a second. You probably recall that Exxon held the previous corporate record which was set by the company in the fourth quarter of 2007. This politically powerful corporation is taking advantage of the American people and apparently has no intention of sharing their pain.

Several bills have been introduced in Congress to enact a “windfall” profits tax on oil companies’ earnings, or at the very least to eliminate the manufacturing tax exemption these companies now enjoy. So far these efforts have been blocked—mainly by Republicans—who say raising taxes on oil companies will only discourage investments in finding new oil and raise the price of crude. That is the company line—but it won’t sell to folks paying \$4 a gallon for gasoline. ExxonMobil owns the record for at least the top six most-profitable quarters for a U.S. company, as well as the largest annual profit. Lots of folks tell me that they have quit stopping at Exxon stations to buy gas. That seems like a good idea to me!

Source: CNN

### **PRESIDENT BUSH SIGNS THE HOUSING BILL**

It was most interesting that President Bush quietly signed the housing bill into law with absolutely no fanfare. In fact, it was done in a private setting with nobody there. Economists, consumer advocates and other analysts said the package of programs for struggling homeowners and shaken mort-

gage lenders is unlikely to relieve the foreclosure crisis that is driving the nation toward a deeper recession. I am not sure what short or long term effect this legislation will actually have on our nation’s economy. Hopefully, it isn’t just another governmental blunder when it comes to helping ordinary folks who are in real turmoil. It’s evident that the housing market is in real trouble and that our economy is being badly hurt as a result. Jared Bernstein, a senior economist at the Economic Policy Institute, observed:

*This is not the end of the housing crunch. Housing prices have already fallen 15% and they need to fall 10% more. This bill isn’t going to change that equation.*

The bill signed by the President seeks to halt the steepest slide in house prices in a generation, rescue hundreds of thousands of families from foreclosure and restore confidence in the nation’s largest mortgage-finance firms. During Senate debate, Senator Chris Dodd, chairman of the Senate Banking Committee and one of the bill’s lead sponsors, cited a long list of grim statistics relating to the mortgage crisis. He pointed out that an estimated 8,500 families a day at that time were falling into foreclosure and that one in every eight homes was projected to enter foreclosure over the next five years. Senator Dodd told his colleagues:

*This legislation will not perform miracles. I want the American people to have realistic expectations about what we’re about to do. But as others have said, it is a step, and an important step, towards putting our nation on the road to economic recovery.*

Some say the bill contains provisions that are bailouts for “irresponsible borrowers and risk-addicted financial institutions” that could wind up costing taxpayers hundreds of billions of dollars. Hopefully, those predictions will miss the mark. Clearly, the members of Congress had to respond

to a crisis that has pushed more than 1.5 million families into foreclosure. Even though what they did has obvious political risks, it was evident that something had to be done. Most all analysts believe lawmakers had little choice but to act.

The measure grants Treasury Secretary Henry Paulson authority to extend an unlimited line of credit to Fannie Mae and Freddie Mac, a move aimed at reassuring global markets that the firms, which back nearly half of all outstanding mortgages in the United States, will not be allowed to fail. The package also contains a strong new regulator for Fannie Mae and Freddie Mac and an overhaul of the Federal Housing Administration, the nation’s largest provider of mortgage insurance. More will be said about these two entities in another section of this issue.

Although Congressional budget analysts have concluded that Fannie Mae and Freddie Mac are sound and unlikely to need any government help, they said there is an outside chance the companies could call upon Treasury for more than \$100 billion. The centerpiece of the legislation is a plan to prevent as many as 400,000 foreclosures by authorizing the FHA to help people who, because of falling prices, owe the banks more than their homes are worth. If lenders agree to forgive a portion of the debt and write new loans worth no more than 90% of the home’s current, lower value, the FHA will insure the new loans and agree to pay off the lenders if borrowers default.

Homeowners also would get an immediate equity stake in their properties, which they would have to share with the government if they sell or refinance. Perhaps with good reason, consumer advocates have their doubts about this legislation. While more than a year has passed since the mortgage crisis began, banks are still foreclosing on far more loans than they modify. In May, as a coalition of lenders known as the Hope Now Alliance modified 70,000 loans, RealtyTrac reported 261,000 foreclosure filings. An April

report by the State Foreclosure Prevention Working Group found that 70% of seriously delinquent borrowers were not receiving help. Alys Cohen, a staff attorney at the National Consumer Law Center, observed:

*How effective can the FHA refinancing program be in light of how slow and ineffective mortgage servicers have been so far? We're encouraged that steps are being taken. But we're worried.*

Only time will tell if this legislation will prove to be a good thing for the American people. Many believe that the federal government had to have known the massive problem existed and should have acted much sooner. Instead, they waited until the cows were out of the barn before shutting the barn door. The regulators, Congress, and President Bush have to share the blame for that. The American taxpayers and those citizens who have already faced foreclosure or will in the near future have every right to be "mad as the dickens" with those responsible for this mess.

Source: *Washington Post*

#### **FORMER ENRON EXECUTIVE PAYS SEC \$31.5 MILLION TO SETTLE CASE**

We all know the tragic story of the collapsed Enron Corp. that not only hurt lots of folks, but also caused the federal government to finally start looking at what some other corporations were doing. A former top executive of Enron is paying \$31.5 million to settle charges in a civil action alleging that he used inside information to illegally profit from sales of thousands of shares of company stock in 2001. According to the Securities and Exchange Commission, the settlement with Lou L. Pai—who was chairman and chief executive of the fallen company's retail energy division Enron Energy Services—is one of the largest ever with an individual for illegal insider trading.

The settlement includes a \$1.5

million civil fine and \$30 million in restitution plus interest. The SEC gave Pai credit for \$6 million due him under his insurance policy as a company officer that he previously forfeited as a payment to Enron shareholders in a class-action lawsuit. He agreed to pay the remaining \$25.5 million into a fund administered by the SEC for injured Enron shareholders.

Pai sold nearly \$300 million in Enron stock before he quit the Houston-based company in mid-2001. The massive accounting fraud at Enron, once the nation's seventh-largest company, and its collapse into bankruptcy in December 2001 was a classic example of corporate corruption. In its suit, the SEC said that between May 18<sup>th</sup> and June 7, 2001, Pai sold 338,897 shares of Enron stock and exercised Enron stock options that put another 572,818 shares on the open market. Pai made the sales after receiving confidential information from Enron Energy Services management regarding financial and operating problems at the division, according to the SEC. Pai avoided millions in losses from the stock sales when Enron's stock price plummeted in the fall of 2001. Pai's shares averaged \$53.78 a share at the time of his sales and closed at 40 cents on December 3, 2001—the day after Enron filed for bankruptcy protection.

Source: *ABC News*

#### **CITIGROUP MAY HAVE TO PAY BILLIONS IN BUYBACKS**

It has been reported that Citigroup Inc. has been negotiating with state and federal regulators in an effort to resolve allegations of wrongdoing in the auction-rate-securities market. This could result in Citigroup buying back several billion dollars of the illiquid securities from investors and paying a sizable fine. In early August, New York Attorney General Andrew Cuomo threatened to sue Citigroup for alleged fraud in the marketing and sales of auction-rate securities. The Attorney General's office says the firm wrongly

told customers the securities were safe, liquid and cash-equivalent. Additionally, Citigroup failed to tell investors that, from August 2007 until earlier this year, the market was kept afloat primarily because the bank placed bids in auctions for the securities.

Citigroup is said to have been in talks with representatives from the Attorney General's office, other state securities regulators and the Securities and Exchange Commission. If Citigroup reaches an agreement with regulators, which may or may not happen, the firm could be forced to spend more than \$5 billion to buy out individuals, charities and other investors whose cash is tied up in the frozen auction-rate-securities market. Reportedly, the agreement also could include a fine of as much as \$100 million. In describing how the scheme works, the *Wall Street Journal* wrote:

*Investors currently hold more than \$200 billion in auction-rate securities that can't easily be sold. Auction-rate securities, typically issued by municipalities, student-loan companies and charities, are long-term securities with short-term features. The interest rates reset at weekly or monthly auctions run by Wall Street firms. The market, which once topped \$330 billion, began to struggle last year as the credit crisis spread. Wall Street firms worked for several months to support the market. Then in February, they stopped supporting the auctions and the market froze, leaving investors with largely illiquid securities.*

The more we learn about how many in Corporate America have operated, the worse it seems. Citigroup is just one of the "Bad Guys" and unfortunately there are many more.

Source: *Wall Street Journal*

#### **MORGAN STANLEY AND JPMORGAN SETTLE AUCTION-RATE CASE**

Morgan Stanley and JPMorgan Chase & Co. have agreed to pay fines and buy

back auction-rate securities that state and federal regulators said were fraudulently sold to investors. The New York-based banks, among the largest underwriters of the securities, will pay fines totaling \$60 million and redeem at face value auction-rate debt sold to clients, under a settlement with New York State Attorney General Andrew Cuomo and a group of other state regulators. The settlement was announced on August 14<sup>th</sup>.

The agreements are the latest arising from a nationwide investigation of how auction-rate securities were marketed before the \$330 billion market collapsed in February. Investors purchased the debt on the advice of bankers who pitched it as a cash equivalent, regulators said, only to find they couldn't sell the bonds as demand dried up. UBS AG and Citigroup Inc. agreed earlier in the month to buy about \$26 billion of the debt and pay fines of a combined \$250 million. Merrill Lynch & Co. also voluntarily offered to repurchase about \$10 billion of the securities, a type of long-term debt whose interest costs are set through auctions run by dealers every week or month.

Source: *Bloomberg*

#### **WACHOVIA SETTLES AUCTION-RATE SECURITIES PROBE**

Another bank, Wachovia Corp., will buy back nearly \$9 billion in auction-rate debt to settle complaints that it misled investors. In the settlement, Wachovia, the fourth-largest U.S. bank, agreed to repurchase auction-rate securities totaling \$8.8 billion, including \$5.7 billion in securities held by over 40,000 individual investors, charities and small businesses. The \$330 billion auction-rate market normally allows issuers to borrow money for the long term at low, short-term rates. But demand at the daily auctions for the securities faded earlier this year amid a broader flight from risky investments, leaving owners unable to redeem them for cash.

Wachovia's initial buyback is slated

for November 10<sup>th</sup> through November 28<sup>th</sup>. Wachovia will offer to repurchase \$3.1 billion between June 10<sup>th</sup> and June 30, 2009. The bank also will pay a \$50 million fine and make no-interest loans available immediately for investors who need liquidity before the buyouts are completed. Wachovia also agreed to participate in a special arbitration process for investors who suffered a loss or damages due to an inability to access their money. It also pledged to reimburse investors who sold their auction-rate securities for an amount below par after the meltdown. The auction-rate securities were sold through Wachovia Capital Markets LLC and Wachovia Securities LLC, known as A.G. Edwards Inc. before Wachovia acquired it in October 2007. Wachovia owns 62% of Wachovia Securities, while Prudential Financial Inc. holds the rest. Wachovia could face additional penalties depending on its settlement performance, according to the SEC.

Source: *Reuters*

#### **GENERAL MOTORS TO PAY \$277 MILLION TO SETTLE SHAREHOLDER LAWSUIT**

General Motors Corp. has agreed to pay \$277 million to settle a shareholder lawsuit contending the automaker made false and misleading statements. Deloitte & Touche, which was GM's outside auditor, is contributing an additional \$26 million cash payment, bringing the total settlement value to \$303 million. General Motors disclosed the settlement in a regulatory filing on August 7<sup>th</sup>. The parties had reached an agreement in principle in July. The settlement is subject to the negotiation of a formal agreement, which was to be filed with the court in late August or early this month.

GM will be required to pay one-half of the money into an escrow account within 30 days of preliminary court approval of the settlement, and the other half into an escrow account in January 2009. The case is being overseen by a federal judge in Michigan. In the regulatory filing, GM also disclosed

the tentative settlement of a separate lawsuit brought by shareholders, agreeing to make unspecified changes to its corporate governance rules.

Earlier this year, Deloitte and Delphi Corp. reached a similar settlement with shareholders of the auto parts supplier. In February, the same judge from the GM case tentatively approved a \$38.25 million payment from Deloitte as part of a \$325 million settlement to investors who claimed misconduct by Delphi and those who oversaw its finances.

Source: *Reuters*

## **VII. CAMPAIGN FINANCE REFORM**

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### ***NOTHING TO REPORT***

There won't be anything of significance to report on campaign finance reform at the national or local levels for the rest of this year. Hopefully, after the elections are over, the new President and Congress can start working on a total reform of our campaign financing laws on the federal level. Maybe after the federal mess is cleaned up, the states will follow suit in 2009. The American people will not tolerate any further refusal to act in this area of concern. Anybody who is elected this year should get a test on this issue very early next year.

## **VIII. CONGRESSIONAL UPDATE**

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### ***THE STRONG PRODUCT SAFETY BILL IS NOW LAW***

Consumer, public interest and scientific groups praised the U.S. House of Representatives for passing by a vote of 424-1 strong product safety reform legislation that would overhaul the Consumer Product Safety Commission

(CPSC). The bi-partisan Consumer Product Safety Improvement Act will make consumer products safer by requiring that toys and infant products be tested before they are sold, and by banning lead and phthalates in toys. The bill also creates a publicly accessible consumer complaint database, gives the CPSC the resources it needs to protect the public, increases civil penalties that the Commission can assess against violators of federal consumer laws, and protects whistleblowers who report product safety defects. It's a great day for U.S. consumers.

This sweeping reform measure puts children's and consumer's safety first. These are the most significant improvements to the CPSC since the agency was established in the 1970's. The bill gives the commission a new life with increased resources, authority and transparency to better ensure the safety of consumer products. The Consumer Federation of America, Consumers Union, and Public Citizen worked hard to convince members of Congress to pass this badly-needed bill.

This bill is a huge victory for consumers of products in the U.S. The following are some examples of how this legislation changes and improves the safety of products sold in the United States:

- Lead will be essentially eliminated from toys and children's products;
- Consumers will have access to a publicly-accessible database to report and learn about hazards posed by unsafe products;
- Toys and other children's products will be required to be tested for safety before they are sold;
- State attorneys general will have the necessary authority to enforce product safety laws;
- CPSC has the authority to levy more significant civil penalties against violators of its safety regulations, which will help deter wrongdoing;

- Toxic phthalates will be banned from children's products;
- Whistleblowers will be granted important protections; and
- CPSC will receive substantial increases in its resources, including its staffing levels, laboratory and computer resources, and various authorities to conduct recalls and take other actions.

President Bush, who had little to do with passage of the legislation, signed the bill into law on August 14<sup>th</sup>. Thankfully, he didn't veto it. It can now be said that the most significant improvements to the Consumer Product Safety Commission since the agency was established in the 1970s are now law.

Source: Public Citizen

#### **THE NATIONAL ASSOCIATION FOR CONSUMER ADVOCATES**

The National Association For Consumer Advocates (NACA) is a non-profit association of lawyers and consumer advocates committed to representing consumers' interests. Members are private and public sector lawyers, legal services lawyers, law professors and law students whose primary focus is the protection and representation of consumers. NACA also has a charitable and educational fund incorporated under §501 (c) (3). Its mission is to promote justice for all consumers by maintaining a forum for communication, networking, and information sharing among consumer advocates across the country, particularly regarding legal issues, and by serving as a voice for its members and consumers in the ongoing struggle to curb unfair or abusive business practices that affect consumers. NACA's Key Issues are:

- **Challenging Binding Mandatory Arbitration Clauses** and other impediments to consumers' access to justice
- **Credit Card Reform**

- **Bank Fees, Federal Bank Law Pre-emption and Predatory Financial Practices**
- **Consumer Financial Privacy and Accuracy**
- **Legal Reform** protecting consumer access to the courts
- **Preserving the "Fair" in the Fair Debt Collection Practices Act**
- **Promoting "Sustainable Home-ownership"**
- **Protecting Consumers From "Rebuilt Wrecked" Automobiles**

Source: NACA

#### **THE CONSUMER SCORECARD FOR THE RECENT LEGISLATIVE UPDATE**

As we all know, Congress adjourned for the summer recess on July 31<sup>st</sup>. Even its critics must concede that the final weeks before recess were busy ones. Passage of the consumer law mentioned above was great news for consumers and there was also lots of other noteworthy consumer legislation passed. We received a brief legislative update from the National Association for Consumer Advocates (NACA) which gives a pretty good rundown of what is going on from a consumer perspective.

#### **ARBITRATION**

NACA is at the forefront of the fight against binding mandatory arbitration—facilitating the Give Me Back My Rights Coalition, coordinating all visits to Capitol Hill, and lobbying individual Congressional offices on the issue of arbitration. Presently, there are three major anti-binding mandatory arbitration bills before Congress. Two are topic specific and the third is broad sweeping. The first two bills are the Fairness in Nursing Home Arbitration Act (H.R. 6126, S. 2838) and the Automobile Arbitration Fairness Act (H.R. 5312). The strategy behind introducing these two bills is to chip away at binding mandatory arbitration one

topic at a time. The broader bill, that would ban binding mandatory arbitration from all consumer, employment, and franchisee contracts, is the Arbitration Fairness Act (H.R. 3010, S. 1782). Currently, all three arbitration bills have successfully made it out of the House Judiciary Subcommittee on Commercial and Administrative Law. The Fairness In Nursing Home Arbitration Act was the only bill that made it before the full Judiciary Committee before Congress adjourned for the summer. It was successfully voted out of the Judiciary Committee by a 17 to 4 vote and now can go to the full House for approval. The Automobile Arbitration Fairness Act was put on hold by Congressman Conyers (D-MI), the Chair of the Judiciary Committee until September. As for the Arbitration Fairness Act, we are still building support. To date, there are 103 co-sponsors to the bill. NACA is working with Congressman Hank Johnson (D-GA), the sponsor of the bill, to address the moderates' concerns about the bill.

In terms of the Senate side, the Fairness In Nursing Home Arbitration Act has bi-partisan support and is expected to go before the Senate Judiciary Committee in September. The Arbitration Fairness Act is not scheduled for mark-up and we are still trying to obtain co-sponsors. The Automobile Arbitration Fairness Act has not been presented in the Senate. Senator Feingold (D-WI) has said he wants Senator Grassley (R-IA) to co-sponsor it with him, but, to date, Senator Grassley, a staunch supporter of exempting the auto manufacturers from the Federal Arbitration Act, has not been inclined to do so. NACA is planning a major arbitration lobby day for February / March 2009 (date yet to be decided) to coincide with the re-introduction of all three bills. NACA, along with other members of the Give Me Back My Rights Coalition, are planning on bringing victims of binding mandatory arbitration to the Hill to tell their story.

## CREDIT CARDS

The Credit Card Bill of Rights (H.R. 5244) is the major credit card legislation on the Hill right now. Its intent is to restore fairness to the credit card marketplace by: (1) prohibiting card issuers from applying rate hikes retroactively to prior balances borrowed at a lower interest rate unless the borrower is more than 30 days late with their payment, has a promotional rate that ends, or receives a variable rate increase; (2) preventing credit card companies from piling on the debt that consumers owe by requiring them to payoff balances with lower interest rates before paying down balances with higher interest rates; (3) prohibiting unfair and hidden interest rate charges on balances repaid during the grace period; and (4) ending unfair late fees for on-time payments. The mark-up of the Credit Card Bill of Rights occurred on July 31, 2008. At that mark-up Congressman Castle (R-At Large DE) introduced a voluntary resolution that would substitute the Credit Card Bill of Rights with a resolution supporting the Federal Government's newly proposed regulations. Some moderate Democrats were considering the resolution, but in the end, the House Financial Services Committee successfully recommended the bill out of Committee 39 to 28, with every Democrat and two Republicans (Chris Shays R-CT and Walter Jones R-NC) voting in favor of it. This was a major victory for consumers and a major, rare, defeat for the credit card industry. The Credit Card Bill of Rights is expected to go to the House floor in September, where it stands a good chance of passing. Though it will not get through the Senate this year, the Credit Card Bill of Rights is the strongest piece of consumer legislation to pass the Financial Services Committee in many years.

## FORECLOSURE PREVENTION

As you all know, this term Congress passed major housing legislation. Although the bottom line remains that

the housing legislation's effectiveness in saving homes from foreclosure will be limited because of its voluntary nature, there are nevertheless some useful provisions within the package. The following are some of the major subjects covered:

- Higher Loan Limits—Raises the GSE, FHA and VA single-family loan limits on a permanent basis;
- GSE Regulatory Reform—Increases regulation of Fannie Mae, Freddie Mac and the Federal Home Loan Banks (the GSEs) by creating a new regulator and regulatory requirements;
- GSE Stabilization—Establishes several new powers and authorities to stabilize the GSEs in the event of financial crisis;
- Affordable Housing Trust Fund—Creates, from assessments on the GSEs' businesses, a fund to help prevent foreclosures and facilitate affordable housing;
- FHA Rescue Plan—Authorizes a new FHA "Hope for Homeowners Program" to refinance existing borrowers into fixed rate FHA mortgage products;
- Licensing—Encourages a nation-wide licensing and registry system for loan originators by setting minimum qualifications and assigning HUD responsibility for establishing requirements for those states not enacting licensing laws;
- FHA Modernization—Modernizes FHA programs;
- Active Service Members—Extends stays of foreclosure and legal proceedings from 90 days to nine months, and extends the six percent mortgage rate cap for one year after active duty;
- Redevelopment of Abandoned and Foreclosed Homes—Authorizes \$4 billion in block grant funds for states to purchase and redevelop foreclosed properties;

- Counseling—Authorizes funds for the Neighborhood Reinvestment Corporation (NRC) for foreclosure mitigation activities;
- Truth in Lending Act (TILA)—Adds new mortgage disclosure requirements under TILA;
- Veterans Matters—Provides home improvement benefits for the disabled;
- Public Housing Authorities—Reduces regulatory requirements for smaller PHAs;
- Tax Incentives—Establishes a range of tax incentives, including a first-time homebuyer tax credit, and expands the Low-Income Housing Tax Credit (LIHTC);
- Real Estate Investment Trusts (REITs)—Loosens certain restrictions on REITs; and
- Public Debt Limit—Increases the Federal debt limit to \$10.615 trillion.

The above bullets were directly taken from a key points summary produced by the Mortgage Bankers Association. Anybody who would like a copy of the full summary can get a copy from NACA.

Congress will be back in session starting in September. There will be a number of issues waiting for them that consumers will be interested in. If you want to find out more about pending pro-consumer legislation you can go to [www.capwiz.com/nacanet](http://www.capwiz.com/nacanet). You might also want to contact your U.S. Senators and House members to ask for their support on consumer legislation in the future.

Source: NACA

### **CREDIT CARD INDUSTRY FACES REFORMS**

According to consumer advocates, members of Congress and banking officials, it appears that stricter regulation of the credit card industry will be approved by the end of the year. The comment period on the Federal

Reserve's proposed actions closed in early August. By then nearly 56,000 comments had come in via e-mail and regular mail, a record response for any Fed proposal. Finally, both the Fed and Congress are working to tighten rules on the credit card industry. The large response to the Fed's proposal came on the heels of congressional action on the issue. The House Financial Services Committee moved Rep. Carolyn B. Maloney's Credit Cardholders' Bill of Rights out of committee on July 31<sup>st</sup>. The measure would prohibit unexpected increases in the rates charged on pre-existing credit card balances, among other things. Observers said the New York Democrat's bill probably wouldn't pass the Senate this year because time is running out.

Nonetheless, the fact that the bill made it out of committee despite significant pushback from the banking industry and top Republican lawmakers sends a signal to the Fed that if it doesn't take action, Congress eventually will, if not this year then during 2009. Several similar bills in the House and Senate have added to the momentum for change. Travis Plunkett, legislative director of the Consumer Federation of America, believes that the Fed will have to act because of the congressional pressure.

The Fed's proposed rules would, among other things, specify when credit card issuers can increase interest rates on existing balances, keep them from calculating finance charges based on the average of balances over two cycles even if part of the debt has been repaid, and prohibit late fees on customers who were not given a reasonable amount of time to pay.

The proposal also seeks to regulate overdraft protection on deposit accounts, requiring banks to let customers opt out of the service before assessing fees. But the proposal does not, in all cases, ban the so-called universal default—that is, raising a person's interest rate if he or she is late on an unrelated debt. It also does not address many arbitrarily high credit card fees.

A much tougher approach is needed to guard against what they call "unfair or deceptive practices," by the credit card companies. Consumer groups and key members of Congress believe the Fed's current proposal still falls short. Even if none of the bills pass this year, lawmakers and consumer advocates expect Congress to take up the matter again early next year. If Senator Barack Obama wins the presidential election the chances for reform will increase significantly.

Source: *Washington Post*

## **IX. PRODUCT LIABILITY UPDATE**

### **MILK PRODUCTS FROM DAIRY COWS TREATED WITH BOVINE GROWTH HORMONE**

Many people who buy milk products may be unaware the milk they are drinking and giving to their children may be genetically engineered and contain bovine growth hormone (rBGH or rBST), which could increase the risk of cancer and other diseases, especially in children. According to the website of Dr. Joseph Mercola, an osteopathic physician, the milk from genetically altered cows may be harmful to your health.

Posilac is a bovine growth hormone produced and marketed by Monsanto. Milk that comes from cows given the growth hormone is not required to be labeled. The hormone speeds up the metabolism of the injected dairy cows, which in turn increases milk production. However, there are reports that cows on the hormone are more likely to become sick. Dr. Mercola's website quotes Samuel Epstein, M.D., a scientist at the University of Illinois School of Public Health. According to Dr. Epstein, the use of the growth factor (IGF-1) is known to be associated with cancer of the breasts, colon and prostate.

It's reported that the milk itself can become contaminated with the growth

hormone. The cows that are given the growth hormone are required to have additional antibiotics because of infections associated with the growth hormone. The milk may have an increased concentration of thyroid hormone enzyme. In addition, the milk may have reduced levels of milk protein.

Many organic milk producers have started to take advantage of the negative publicity by labeling their products as hormone free. A group known as the American Farmers for the Advancement and Conservation of Technology, which calls itself a grassroots organization, and apparently is strongly associated with Monsanto, is organizing a counter offensive to stop organic milk producers from labeling their products as being free from the growth hormone. While the U. S. Food and Drug Administration has declared Posilac to be safe, many countries have banned the use of the product, including Canada, Australia, Japan, New Zealand, and all of the European Union.

A European Commission report recommends avoiding products using the genetically engineered hormone as a means of cancer prevention. The FDA's approval of the use of this drug is very controversial. A number of the FDA personnel that worked on the approval of rBGH were former employees of Monsanto. You can get more information by going to [www.mercola.com](http://www.mercola.com). We will continue to monitor this situation because of the potential for significant harm to lots of folks.

#### **MESOTHELIOMA CASES PRESENT UNIQUE CHALLENGES**

Because of the long latency period (the period of time from exposure to manifestation of symptoms) involved in mesothelioma cases—20 to 50 years—mesothelioma cases present unique challenges. For example, because it is necessary to properly identify the asbestos-containing products the client was exposed to, it is necessary to develop and maintain an ever-expanding library of product identification

materials. The product identification library consists of labels, photographs of asbestos products, advertising materials and the like from products used in specific industrial settings 50 or more years ago. Product identification meetings are lengthy and are the heart of a mesothelioma case.

In addition, developments in case law have placed greater emphasis on identifying former co-workers who can both identify the products at issue as well as provide testimony regarding durations and frequency of exposure as well as physical proximity to the product and any information regarding ventilation and personal protective breathing masks.

Further, many of the long-thought-of primary defendants in asbestos litigation are in bankruptcy and many claimants are left with no further recourse than to seek payment through a bankruptcy trust. As a result, development of secondary and tertiary defendants has become more important and premises liability claims are often included in current mesothelioma lawsuits. Indeed, many of the current viable mesothelioma claims proceed against little known companies responsible for manufacturing and selling asbestos gaskets, packing materials, industrial insulation used in boilers, power plants, ship yards, pumps and air compressors.

Finally, although there is a long latency period, mesothelioma cases are typically associated with a short duration of illness resulting in death. The latency period from time of exposure to time of diagnosis is 20 to 50 years; however, from diagnosis to death is typically 12 to 18 months. During this very short period of time while the client is still living, it is vitally important to secure product identification, file the lawsuit and make the client available for deposition to memorialize the exposure testimony. Additionally, recent studies pointing to carbon fiber nanotubes as potentially mimicking asbestos fibers in causing mesothelioma are a double-edged sword: on the

one hand they could herald in the next wave of defendants responsible for further mesothelioma deaths, and on the other hand they may provide asbestos defense experts with fodder to argue that nanotubes are to blame rather than asbestos products for causing mesothelioma.

Because of the long history of asbestos use in the United States and elsewhere, projections indicate that asbestos litigation is likely to continue into the foreseeable future. Further, because asbestos continues to appear in the most unlikely consumer products—in late 2007 the CPSC announced that a version of the CSI Crime Scene Investigation kit for children included a fingerprint powder consisting largely of asbestos dust—exposure to asbestos continues today, albeit at a lower rate than prior to the mid-1970's when the establishment of OSHA significantly reduced industrial asbestos exposure. Finally, carbon fiber nanotubes represent an as yet unknown risk of mesothelioma by mimicking the carcinogenic effects of asbestos fibers. In short, mesothelioma litigation will continue to change and evolve as old defendants seek bankruptcy protection, new defendants are identified and technology advances. As a result, it is critically important to associate a law firm with resources and experience to tackle these difficult and challenging cases. Mike Andrews is handling mesothelioma cases for our firm and has several cases set for trial in the coming months. If you would like more information on this subject, you can contact Mike at 800-898-2034 or by email at [Michael.Andrews@beasleyallen.com](mailto:Michael.Andrews@beasleyallen.com).

#### **CARBON NANOFIBERS MAY MIMIC ASBESTOS**

Once upon a time, asbestos was considered a wonder material. Chemically inert and an impressive insulator, it was put to use in a variety of industrial and structural settings. Epidemiologists eventually traced an otherwise rare form of cancer back to lung exposure

to asbestos particles, and building owners have been paying to have asbestos safely removed ever since. These days, nanomaterials are the objects of wonder, but, as early as 2006, some researchers were recognizing similarities in the properties of carbon nanofibers and asbestos. A paper published by Nature Nanotechnology suggests that the similarities go beyond appearances, as preliminary tests suggest carbon nanofibers pose the same health risks that asbestos does.

From a biological perspective, the fact that asbestos is chemically inert is actually part of the problem. The body can eventually absorb or encapsulate a wide variety of materials that wind up internalized, but there are simply no routes for cells to digest asbestos fibers. The alternate route, encapsulation, doesn't work well either. Asbestos fibers have a high length-to-width ratio (called an aspect ratio), which makes them hard for the body to deal with. They're small enough that single cells try to absorb them, but large enough that they fail, which triggers an indefinite inflammatory response in macrophages, the cells tasked with engulfing foreign material.

How this plays out in terms of asbestos isn't fully described, but appears to start with the small asbestos fibers traveling deep into the lung. Once there, fibers can actually be driven through cells and into the internal side of the lung, where it lodges into the mesothelial cells that line the organs and cavities of the trunk. Macrophages try to absorb any parts of the fiber that protrude, fail, and trigger an inflammatory response. This perpetual inflammation, combined with the cellular damage, helps drive the mesothelial cells into a cancerous state, producing the signature disease of asbestos exposure, mesothelioma.

Research has suggested that any fiber that's inert, small enough to make it to the lungs, and has a length-to-thickness ratio of seven or more could be capable of causing similar problems. That's where the concerns about

nanofibers started. These fibers, which are commercially available, are often only tens of nanometers in diameter, but can extend for tens of microns. The chemical bonds among the carbon atoms that comprise them are also biochemically inert.

A number of studies have looked at the effect of carbon nanofibers on cultured cells, but the authors of a new paper took the studies into a more directly relevant model: the mouse. They injected carbon nanofibers, along with tangled carbon nanotubes and graphite powder, into the peritoneal cavity of mice; asbestos was also injected as a control. At two time intervals later, they washed the cavity out with saline and sampled the cells present in the wash. Two samples of untangled nanofibers produced an inflammatory response that was statistically indistinguishable from that triggered by asbestos.

When examined at the cellular level, tangled nanofibers were safely ingested and stored in macrophages. In contrast, the fibers caused what the authors termed "frustrated phagocytosis," where the macrophage appears as if it had been pierced by the fiber while trying to engulf it. Sections of the peritoneal cavity wall of these animals reveal the presence of large numbers of immune cells.

The authors caution that these results are not yet conclusive, as we lack two additional bits of data. This work hasn't demonstrated that the nanofibers actually reach the lung or cross into the body side of the organ when ingested via breathing. On the other end of the process, the researchers haven't demonstrated that this inflammation ultimately produces mesothelioma. It does, however, suggest that studies directed towards finding out should be pursued as soon as possible and that, in the meantime, a cautious approach to nanofiber exposure may be warranted.

## ***MILLIONS OF FIRE-PRONE FORDS STILL ON THE ROADS***

More than 6 million Ford car and truck owners could be driving vehicles still equipped with a faulty cruise control switch that can start a fire under the hood even when the vehicle is parked and the ignition is turned off. As of July 31<sup>st</sup>, in its most recent report to the National Highway Traffic Safety Administration, the Ford Motor Company estimated that 4.9 million vehicles of the more than 10 million cars and trucks involved in the massive recall are now repaired. Some vehicles were included in more than one recall, making it hard to calculate precise numbers. But, it's clear that millions of Ford vehicles products produced with the faulty cruise control switch are on the highways, in garages and even at junkyards, where they are at risk of bursting into flames at any time.

Ford reported on its Web site that the parts needed to fix the fire-prone speed control system in Ford cars and trucks are available at dealerships around the country. The automaker said: "Affected customers should contact their dealer to schedule a service appointment to have final repairs completed." The Ford recall has consumed most of a decade as safety investigators struggled to identify the cause of the fires.

When NHTSA announced the recall in August of 2007, Ford was unable to complete many repairs because of insufficient parts and offered to disconnect the cruise control system as an interim fix. Ford is now prepared to install a fused wiring harness into the speed control electrical circuit or to replace the speed control deactivation system if it is found to be leaking. In the latest announcement, Ford described the recall as "voluntary," but it warned consumers not to use the speed control system in a recalled vehicle until the repairs are complete. NHTSA has warned owners of Ford cars and trucks that carry the defective speed control system to have the vehicle repaired or the system discon-

nected immediately or risk the vehicle catching fire. We have a list of Ford's most recent list of recalled cars and trucks. The NHTSA advisory cautioned:

*This condition may occur either when the vehicle is parked or when it is being operated, even if the speed control is not in use. Failure to have the switch disconnected could lead to a vehicle fire at any time, whether or not the key is in the ignition, and whether or not owners use the cruise control system.*

NHTSA concluded that the fire danger is present regardless of the age of the vehicle. Ford car and truck owners who have either not heard of the recall or failed to request the need repairs continue to report fires, some with devastating consequences. Ford truck and SUV owners wanting more information about the fire danger in their vehicle or the recall may contact Ford at 1-800-392-3673 or NHTSA 1-888-327-4236 (TTY 1-800-424-9153).

Source: [Consumeraffairs.com](http://Consumeraffairs.com)

#### **FORD AND FOCUS DRIVERS REACH SETTLEMENT IN BRAKE SUIT**

Plaintiffs in a settlement with Ford Motor Co. have until the 16<sup>th</sup> of this month to get reimbursed for brake repairs if they own or used to own a 2000 or 2001 Focus car. The class-action settlement between Ford and California owners of its 2000 and 2001 Focus models brings an end to a legal fight over whether the Detroit automaker produced a car whose front brakes were defective. Plaintiffs in the case claimed that 2000 and 2001 models of Ford's popular Focus contained a defect that caused premature wear on the front brakes and rotors, requiring replacement. Ford argued that the wear was normal and not covered under the cars' warranty. Many consumers were apparently having to pay hundreds of dollars for premature replacements of their Ford Focus front brake pads and rotors.

Ford says the settlement applies to a small group of customers who had concerns about wear of particular parts in certain early model Focuses, and the affected customers have been notified. The settlement, approved on July 28<sup>th</sup> in Los Angeles County Superior Court, allows anyone who bought or leased a new 2000 or 2001 Focus in California to be reimbursed for the costs of parts and labor for certain repairs or replacements. So far, the average claim for reimbursement has been \$350, although some claims have exceeded \$1,200. Steve Skalet, a lawyer with the firm Mehri & Skalet, represented the plaintiffs.

Source: *Associated Press*

#### **FOUR SMALL SUVs EARN TOP SAFETY PICK**

The Insurance Institute for Highway Safety says automakers are improving the crashworthiness of their vehicles and quickly installing side airbags and electronic stability control, an important crash avoidance feature, on more models. The Institute recently completed front, side, and rear crash test evaluations of eight small SUV models. For the first time, every model the Institute tested comes equipped with electronic stability control as standard equipment. That is good news.

Institute ratings of good, acceptable, marginal or poor are based on results of front and side crash tests plus evaluations of seat/head restraints for protection against whiplash injury in rear crashes. The best performers, earning the Institute's Top Safety Pick award, were:

- 2009 Ford Escape
- 2008 Mitsubishi Outlander
- 2008 Nissan Rogue
- 2009 Volkswagen Tiguan

The four models earned good ratings in all three of the Institute's evaluations, and all are equipped with standard electronic stability control and side airbags. The Escape's ratings also

apply to the hybrid version, which is sold as the Mercury Mariner and Mazda Tribute as well as the Escape.

Consumers now have multiple hybrid SUVs earning Top Safety Pick to choose from. Others include the midsize Saturn Vue and Toyota Highlander, which the Institute evaluated earlier. Institute President Adrian Lund, observed:

*In the latest tests, the Tiguan's performance is a standout. It sailed through the front and side crash tests without a single downgrade for structure or measures of injury likelihood recorded on the dummy. This is 1-of-4 models in this group that afford superior crash protection in their class. This is a huge change from just five years ago when most small SUVs were rated either marginal or poor in our side test, and standard side airbags and electronic stability control were rare.*

IIHS says electronic stability control is important because it can help drivers avoid many crashes. It helps drivers maintain control in the worst situation—loss of control at high speed—by engaging automatically when it senses vehicle instability and helping to bring a vehicle back into the intended line of travel, often without the driver knowing anything is wrong. This feature lowers the risk of a fatal single-vehicle crash by about half, IIHS said. It lowers the risk of a fatal single-vehicle rollover crash by as much as 70%.

An exception in the test was the two-door 2008 Jeep Wrangler, which was tested without its optional side airbags. The previous version of the Wrangler, in which side airbags weren't available, earned a rating of marginal for protection in side crashes, and the new model performed even worse, earning the lowest rating of poor. A new problem was that the driver door opened during the impact. This didn't significantly affect the movement of the dummy during the test, but an open door in a crash could lead to partial or complete

ejection of occupants, IIHS said.

The Wrangler and Chevrolet Equinox, also a 2008 model, were the only two vehicles tested without standard side airbags. The Jeep Patriot does have standard curtain airbags, but additional torso airbags designed to protect an occupant's chest and abdomen are optional. When side airbags are optional, the Institute's policy is to test without the option because this is how most of the vehicles will be sold. General Motors didn't request a second test of the Equinox, also sold as the Pontiac Torrent. Curtain airbags will be standard in the 2009 Equinox, and that vehicle will be tested later this year. It was pointed out by Lund that since General Motors didn't ask the Institute to test the 2008 Equinox with its optional side airbags, we have to assume it means "GM didn't expect it to perform much better, even with the option."

Chrysler didn't request another test of the Wrangler with the optional side airbags, but the automaker did request a second test of the Jeep Patriot with optional torso airbags. When tested with the standard curtain airbags only, the Patriot earned the second-lowest rating of marginal. While the curtains did a good job of keeping the driver and rear passenger dummies' heads from being struck by the barrier or hard structures inside the vehicle, forces on the driver dummy indicated that rib fractures and internal organ injuries would be likely in a real-world crash of this severity, according to IIHS. In the second side test of the Patriot with the optional seat-mounted torso airbags, the vehicle's rating improved to good.

Source: *Insurance Journal*

## X. MASS TORTS UPDATE

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### **OUR FIRM HAS A CHANTIX WEBSITE**

In response to a number of recent reports of serious side effects associated with the stop-smoking medication Chantix, our firm has launched a web site that outlines the problems associated with the drug, manufactured by Pfizer. The web site, [www.chantix-legal.com](http://www.chantix-legal.com), provides information to help patients identify risks associated with Chantix. Scott Thomas, Director of Internet Services for Beasley Allen, reports:

*Chantix is being marketed as a miracle drug that has the potential to help millions of smokers break their addiction to nicotine, but we are beginning to see a darker side. New research suggests a link between Chantix and suicide, homicidal thoughts, heart trouble, psychosis, diabetes, Stevens-Johnson Syndrome and even liver failure. We have been watching Chantix very closely over the past year and felt the public would be best served by a website dedicated to providing easy access to this new information.*

Since its approval in 2006 as a smoking-cessation aid, Chantix (varenicline) has been prescribed to more than 4 million patients. As early as November 2007, the FDA issued an Early Communication to the public and health care providers, announcing it was investigating reports of adverse events, including changes in behavior, agitation, depressed mood, suicidal ideation and actual suicidal behavior.

On February 1, 2008, the FDA issued a Public Health Advisory on Chantix requesting the manufacturer add new safety warnings. In May, the Federal Aviation Administration banned its pilots and air traffic controllers from using Chantix as a result of adverse event

reports. The FDA had more accounts of serious side effects tied to Chantix in the fourth quarter of 2007 than from any other drug. If you need more information you can contact Frank Woodson at 800-898-2034 or by email at [Frank.Woodson@beasleyallen.com](mailto:Frank.Woodson@beasleyallen.com).

### **ACTAVIS TOTOWA RECALLS MORE THAN 65 DRUGS**

Pharmaceutical manufacturer Actavis Totowa is recalling more than 65 generic drug products manufactured at its Little Falls, New Jersey, facility. The recall follows an inspection conducted by the Food & Drug Administration earlier this year, which revealed that operations at the New Jersey facility did not meet FDA standards. Actavis has acknowledged that the Little Falls facility does not meet the company's own standards for good manufacturing practices. As a result, Actavis made the decision to recall products manufactured at that facility at the pharmacy/retail level, including wholesalers and hospitals.

Earlier this year, in April 2008, Actavis Totowa issued a Class I recall of its Digitek product, which is used to treat heart problems. It had been discovered that tablets may have been manufactured at twice their intended thickness, doubling the amount of medication in the pills and putting patients at risk for serious complications as a result of higher dosages than intended. According to the company, there haven't been any product complaints or negative health incidents reported involving products affected by this new recall. All of the recalled products are prescription medications.

The manufacturer recommends that patients currently taking the affected medications should not stop taking the drugs, as a sudden stop in medication could be dangerous. Patients should consult with their doctor or pharmacist for replacement medication. Actavis Totowa has already issued recall letters to wholesalers and retailers. You can find a list of the recalled drugs on

our Web site at [www.BeasleyAllen.com](http://www.BeasleyAllen.com) or by contacting Chad Cook in our Mass Torts Section at 800-898-2034 or by email at [Chad.Cook@BeasleyAllen.com](mailto:Chad.Cook@BeasleyAllen.com).

### **LILLY TRAINED SALES FORCE TO IGNORE DRUG'S RISKS**

Documents from a pending lawsuit reveal that Eli Lilly & Co. trained its sales force to downplay risks for Zyprexa and encourage doctors to prescribe the drug beyond approved uses for schizophrenia and bipolar disorder. Lilly's research had shown some patients on Zyprexa gained as much as 80 pounds and that the incidence of high blood sugar at diabetes levels was 3.5 times higher than for placebos, according to documents obtained through discovery in a lawsuit brought by the State of Alaska. Internal Lilly documents revealed that the company knew doctors were already seeing a "logical link between weight gain and diabetes." Lilly, by way of an instruction sheet, advised the sales force of that in 2002. The company wrote in the sales document:

*We believe it is essential to weaken this link to neutralize the diabetes/hyperglycemia issue, which was provided for the Alaska case. Neutralizing any concern from our customers will be essential to the future growth of Zyprexa in the marketplace.*

Zyprexa became the company's top-selling drug, with \$4.76 billion in sales last year—about a quarter of Lilly's revenue. Company sales representatives disputed or ignored the risks and pursued primary-care and nursing-home doctors as well as psychiatrists, according to the documents in the Alaska case. These documents had been under seal until Bloomberg News filed a motion to unseal them.

Lilly agreed to pay \$15 million to settle the Alaska suit in March. The company has paid about \$1.2 billion to resolve claims brought by more than

31,000 patients who said they weren't adequately warned Zyprexa could cause weight gain, diabetes or inflammation of the pancreas. Lilly faces suits by nine other states alleging failure to warn and improper marketing, separate consumer-protection investigations in about 30 other states and an investigation of off-label marketing by the U.S. Attorney in Philadelphia.

Lilly pushed Zyprexa sales to primary care physicians and doctors in nursing homes for patients who weren't diagnosed with schizophrenia or bipolar disorder. Most of the documents came from discovery in consolidated Zyprexa litigation in a New York federal court. The unsealed documents showed that about 550 sales representatives were greeted at an October 2000 meeting with a "Viva Zyprexa" version of the Elvis Presley song, "Viva Las Vegas," touting the "many wonderful indications" for the drug. In fact, there were only two approved indications for the drug at the time.

Zyprexa wasn't approved for use with Alzheimer's or for elderly conditions. Lilly's sales representatives were advised to focus on symptoms, not diagnoses, when dealing with primary care physicians or PCPs, according to the company's documents. There are a number of Lilly internal documents and emails that are very damaging to the company. Lilly's sales representatives encouraged doctors to prescribe for such non-approved uses, according to call notes produced in the Alaska suit.

Lilly added a warning to its packaging in October 2007 saying that more than half of patients in 13 studies gained an average of 12 pounds after taking the drug for less than a year. It said Zyprexa was more associated with higher blood sugar levels, a risk factor for diabetes, than similar medications. Before the October 2007 label change, Lilly didn't instruct its sales force to say Zyprexa's diabetes rates were higher. It is clear that Lilly was not telling doctors about the diabetes issue. In fact, one document reads: "The competition wins if we are

distracted into talking about diabetes." It's quite apparent that Lilly has serious exposure in this litigation. Without the information obtained by discovery in these lawsuits, neither the public nor the FDA would have known how Lilly was misleading and using the medical community.

Source: Bloomberg News

### **PHARMACIA & UPJOHN SETTLE TWO CLAIMS IN NEVADA TRIAL**

After little more than a week of trial, Pharmacia & Upjohn settled the claims of two women that its hormone replacement drugs caused their breast cancers. The company agreed to pay an undisclosed amount to settle the claims which were pending in a Nevada state court. Wyeth, the maker of Prempro and Premarin, two other hormone replacement drugs, had settled its claims in the same case a few weeks prior. These settlements against Wyeth and Upjohn are important benchmarks since both women used estrogen and progestin for less than five years. Wyeth and Upjohn have vehemently denied that there is any proof to suggest that short term use of their drugs can lead to cancer.

Recently there have been two court orders which are very beneficial to victims of hormone therapy. First, Judge Wilson, who presides over the federal court cases, issued an order denying the company's attempt to throw out all cases with less than five years use. The denial of this motion is a significant win since it preserves the right for these women to have their cases heard by a jury.

Secondly, Judge Wilson issued an order on punitive damages. This is important because the companies have been taking the position across the country that the recent Scroggin order (taking away the jury's punitive award in that case) disposed of any future punitive damages claims. Judge Wilson has now indicated that such a position is incorrect. There are currently in excess of ten thousand plaintiffs in

Judge Wilson's Court. Ted Meadows, Melissa Prickett, and Russ Abney, the lawyers working on hormone therapy at our firm, continue to investigate potential cases. If you need additional information contact any of them at 800-898-2034 or by email at Ted.Meadows@beasleyallen.com, Melissa.Prickett@beasleyallen.com or Russ.Abney@beasleyallen.com.

#### **AMGEN ORDERED TO REWORD DRUG LABEL**

The Food and Drug Administration has ordered Amgen to change the labels for its flagship anemia drugs in a way that could further restrict its use in treating patients with cancer. This move by the FDA is the first time the agency has invoked its authority granted under a 2007 law that empowered it to order changes in a drug's prescribing information. Previously, the FDA could only negotiate with a drug's manufacturer to change the label. I could never understand why that situation was allowed to exist since it made the FDA powerless in its ability to require needed label changes. Sales of the drugs, Aranesp and Procrit, fell in the last year because of studies suggesting that their use to treat the anemia caused by chemotherapy could actually make cancer worse or shorten lives.

Procrit is manufactured by Amgen but sold under license by Johnson & Johnson. Sales of Aranesp, generally considered Amgen's flagship product, fell 13% in the second quarter from a year earlier, to \$825 million. In the United States alone, sales plunged 26%, to \$427 million. It's estimated that the new label could reduce the use of Aranesp for cancer patients in this country—the drug is also used by people with kidney disease—by an additional 40%.

The labels for the drugs have already been changed a few times since new safety concerns arose early last year. The FDA and Amgen have been negotiating the latest changes since the advisory committee in March recommended further restrictions on use of the drugs.

While the company and the agency agreed on most of the language changes, there were some points on which they could not reach agreement. Apparently, only then did the FDA invoke its new authority to order the changes. Amgen had wanted a much weaker label.

Source: *New York Times*

#### **CONGRESSIONAL COMMITTEE CONTACTS WYETH OVER CONTROVERSIAL PET DRUG**

Leaders of a powerful House committee sent a letter to Wyeth last month asking the company to detail why a controversial ingredient in a drug used to treat heartworm in dogs is being tested in humans with river blindness in Africa. Democratic leaders of the House Committee on Energy and Commerce are investigating why moxidectin, the active ingredient in ProHeart 6, is being tested in humans despite the drug having been pulled off the market in 2004 amid reports that 500 dogs died while taking it.

In June, the Food and Drug Administration said a reformulated version of ProHeart 6 could be allowed back in the U.S. to treat heartworm in dogs, though distribution of the product would be restricted. As you may know, heartworm is a parasite that affects millions of dogs. Senator Chuck Grassley had asked the FDA in June why the drug was allowed back in the U.S.

It appears that Wyeth is testing moxidectin in people infected with a parasite that causes river blindness, a major cause of blindness in West Africa. Wyeth says about a decade ago the World Health Organization approached the company to see whether moxidectin could help kill the worms that transmit river blindness between people. According to reports, the trials are being conducted in collaboration with the Special Programme for Research and Training in Tropical Diseases, which is sponsored by the United Nations Children's Fund, United Nations Development Programme, World Bank, and the WHO. Wyeth says

the safety profile of the drug has "continued to be positive," since it went on the market in June.

Source: *Dow Jones Newswires*

#### **DRUG MAKERS REPORT CASES OF BRAIN DISEASE**

Biogen Idec and Elan Corporation have reported two cases of a rare brain disease in patients treated with Tysabri, which is the companies' multiple sclerosis drug. The cases of progressive multifocal leukoencephalopathy were disclosed in a filing with the Securities and Exchange Commission. Tysabri, which is produced and distributed in an alliance between the two companies, was withdrawn from the market in 2005 after three clinical users of the drug contracted the brain disease, and two died. But Elan and Biogen had reported no new cases since Tysabri's return to the market under restricted conditions in June 2006.

The three cases in 2005 involved patients who were simultaneously taking another drug to fight multiple sclerosis. It should be noted that such combined therapy has been banned since 2005. The patients in the most recent case had a history of taking other multiple sclerosis drugs, but had been on Tysabri alone for at least 14 months, according to the SEC filing.

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

#### **ABBOTT LABS SETTLES AIDS DRUG LAWSUIT**

Drug company Abbott Laboratories has agreed to pay between \$10 million and \$27.5 million to settle an antitrust lawsuit filed by AIDS patients over the company's 400% price hike of a popular HIV drug. The actual payout under terms of the settlement depends on the resolution in an appeals court of three legal questions. The settlement must be approved by a federal judge in Oakland, where the lawsuit had been set to go to trial.

If the judge agreed with the patients'

economic experts and found Abbott raised the price of the drug to stifle competition, the company would have faced as much as \$1 billion in damages. The drug, Norvir, is a key component in several important “cocktails” containing drugs made by rivals to treat the disease. On December 3, 2003, Abbott increased the price of Norvir’s average daily cost per patient from \$1.71 to \$8.57, prompting cries of “price gouging.” Abbott claimed it increased the drug’s price because patients required much smaller doses of Norvir when used as a booster rather than as a standalone drug.

Source: *Associated Press*

### **U.S. ATTORNEYS SUBPOENA JOHNSON & JOHNSON UNIT**

Johnson & Johnson has been subpoenaed by the Justice Department in connection with its sales of bile duct stents. This broadens an investigation that has already affected its competitors Abbott Laboratories and Boston Scientific. We have learned that the United States attorney’s office in Massachusetts requested the information from Johnson & Johnson in June. Abbott Laboratories and Boston Scientific, which also produce the stents, have admitted previously that they have been contacted by investigators. The devices, also called biliary stents, are plastic or metal tubes intended to treat obstructions to the liver. They had an American market of about \$40 million in 2007 for approved uses, according to the Millennium Research Group, a Toronto market research firm.

The Justice Department had been investigating the unapproved use of the devices by the manufacturers, including the repair of weakened blood vessels. Johnson & Johnson and Boston Scientific say they are cooperating and responding to the subpoena. Biliary stents are approved to treat obstructions in tubes that carry bile, a digestive fluid, to the intestines, but reports to the FDA indicate that they are often inserted to prop open blood vessels in

the legs. It has been reported that unapproved uses may be injuring patients.

Once a medical product is approved by regulators, doctors are free to use it to treat any ailment. But FDA guidelines say drug companies and device makers may not promote their products for unapproved purposes or patient categories, like prescribing adult medicines for children.

Source: *Bloomberg News*

### **FDA REPORTS DEATHS WITH DIABETES DRUG BYETTA**

Federal regulators are working on a stronger label for a widely-used diabetes drug marketed by Amylin Pharmaceuticals Inc. and Eli Lilly & Co. after deaths were reported with the medication despite earlier government warnings. The Food and Drug Administration says it has received six new reports of patients developing a dangerous form of pancreatitis while taking Byetta. Two of the patients died and four were recovering. Regulators stressed that patients should stop taking Byetta immediately if they develop signs of acute pancreatitis, a swelling of the pancreas that can cause nausea, vomiting and abdominal pain. The FDA warned that it is very difficult to distinguish acute pancreatitis from less dangerous forms of the condition.

The FDA announcement updated an October alert about 30 reports of Byetta patients developing pancreas problems. None of those cases were fatal, but Byetta’s makers agreed to add information about the reports to the drug’s label. However, the FDA now has made it clear Monday that it is seeking a stronger, more prominent warning about the risks. Byetta competes against blockbuster drugs from Glaxo-SmithKline PLC and Takeda Pharmaceuticals in the \$24 billion global market for diabetes medications, according to health care research firm IMS Health. More than 700,000 patients with type 2 diabetes have used the injectable drug since it was launched in June 2005. It is jointly developed and manufactured by

San Diego-based Amylin and Eli Lilly. Byetta’s \$636 million in sales made up about 80% of Amylin’s total revenue last year. The drug accounted for just 3% of Eli Lilly’s sales.

Source: *Associated Press*

### **RECENT FDA ACTION**

Recently, the FDA has taken action with respect to a number of pharmaceuticals and drug products. These actions and the drugs involved include:

- **Regranex**—A boxed warning that the use of this product may increase the risk of cancer-related deaths. Regranex (becaplermin) is a topical agent used to treat certain diabetic foot and leg ulcers. Based upon existing studies, the FDA determined that patients who use three or more tubes of this product have a five times greater risk of dying from cancer compared to patients who do not use the drug. The FDA cautions that further study is needed to determine whether new cancer rates may exist from use of the product. The boxed warning specifically states that the product should only be used when the benefits outweigh the risks and should be used with greater caution in patients with known malignancies.
- **Cellcept and Myfortic**—An advisory was issued to healthcare professionals, informing them that the use of these products has been shown to increase the risk of fetal harm when women become pregnant. Cellcept (mycophenolate mofetil) and Myfortic (mycophenolic acid) are immunosuppressant drugs. Myfortic has been approved to prevent kidney transplant rejection, while Cellcept has been approved to prevent heart, liver and kidney transplant rejection. These drugs are also used by some in off-label applications to treat immune-mediated conditions such as lupus and erythema multiforme. A warning has been added to the label about these potential risks.

- **TNF Blockers**—The FDA has issued an advisory to healthcare professionals that drugs that block tumor necrosis factor (TNF) may be associated with the development of lymphoma and other cancers in children and young adults. The TNF blockers in question include Remicade (infliximab), Enbrel (etanercept), Humira (adalimumab) and Cimzia (certolizumab pegol). These drugs are commonly used to treat juvenile idiopathic arthritis, Crohn’s disease, and other inflammatory conditions. The drug label previously warned of the risk of cancer. It appears that the 30 or so reports received by the FDA to date were in patients under the age of 18 who were concomitantly taking other immunosuppressant agents, such as methotrexate and azathiopine. The FDA is continuing its investigation and estimates that it will take about six months to determine if there is sufficient evidence to establish a causative connection.

**PHARMACEUTICAL COMPANIES MUST TAKE RESPONSIBILITY**

The blood thinner heparin is one of the most commonly-used drugs in America. It’s used daily in hospital surgeries and for kidney dialysis patients. But a safe supply of this critical drug fell into jeopardy last winter in a catastrophe that illuminated severe problems caused by the fact that most ingredients for American drugs now come from foreign sources. Unfortunately, these sources are not being adequately monitored by either the pharmaceutical industry or the Food and Drug Administration. According to the FDA, at least 55 people may have died from the contaminated heparin. However, the numbers may be much higher. So far the FDA says it has only been able to definitively link three deaths to specific lots of the tainted drug.

Heparin used to be primarily produced by the pharmaceutical giant Baxter, but that company recalled its entire stock, nearly half the nation’s

supply, after the deaths from contaminated heparin. A number of smaller companies also recalled their supplies. To date, Baxter says it has received 955 reports about contaminated heparin in 2008.

It’s evident that the FDA simply can’t perform its regulatory responsibilities for a number of reasons. Obviously, lack of staff and inadequate budgets are part of the problem. But the root cause is much deeper. The laws under which the FDA operates are much too weak and favor the drug industry. Investigations into the deaths related to heparin pointed to China, where the raw ingredient for heparin originates. According to the FDA, someone there spiked the crude heparin with a counterfeit look-alike drug to increase profit. Former FDA commissioner William Hubbard made this observation:

*I see these foreign drugs as essentially a string of time bombs. Heparin has gone off, and there will be more until we fix the problem.*

It should be noted that Heparin isn’t the only drug that’s manufactured overseas. Roughly 80% of all the raw ingredients for America’s drugs now come from foreign countries. According to Hubbard, China and India will be “the breadbasket of raw materials, creating the raw materials for the rest of the world.” Heparin may be used in high-tech medicine, but the raw material is literally hand-wrung from pigs’ intestines in crude agricultural workshops. And it appears that the process is virtually unregulated.

FDA Commissioner Janet Woodcock says the FDA is taking a “much closer look” at the safety of drugs that come from overseas, but the administration is woefully underfunded to safeguard America’s drug supply. Commissioner Woodcock made this interesting observation:

*The FDA can only inspect less than 1% of imported foods and drugs. For example, [the FDA] can*

*go to virtually none of these foreign drug manufacturers because it simply does not have the staff to do so. We don’t have the resources to do that, nor should it be our primary responsibility.*

In fact, the FDA never even inspected Baxter’s supplier “SPL” in China because it couldn’t find it. The plant wasn’t inspected because there was a mix-up between that plant and another one. The bottom line is the pharmaceutical companies are left to police themselves. For example, Baxter did conduct its own inspection last September and gave itself a passing grade, just months before Americans began dying from contaminated heparin. Congress must protect American citizens and that will require a complete overhaul of the FDA, with increasing funding and staffing, and passage of needed legislation to give the agency authority to do its job.

Source: ABC News

## XI. BUSINESS LITIGATION

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### **\$10 MILLION VERDICT UPHELD AGAINST PRICEWATERHOUSECOOPERS**

Georgia’s Court of Appeals has upheld a \$10 million jury verdict against PricewaterhouseCoopers on behalf of four family trusts associated with two Cobb County, Georgia, businessmen. The appellate panel, in an opinion authored by Judge John J. Ellington, rejected the international accounting firm’s appeal of the 2007 verdict, one of the largest in Cobb County’s history. After a trial that lasted more than a month, the Cobb jury found the Big Four accounting firm liable for negligent misrepresentation in a series of financial audits of a nursing home conglomerate. The Plaintiffs in the case had merged their Marietta, Georgia-based nursing home business with Mariner Health Group in

1995. That company and its successors were not part of the suit, which had been filed in 2002.

In 2002 the two individuals, two of their limited liability partnerships, and four Kellett family trusts sued PwC and three former senior executives of Mariner Health—with which the Kelletts had merged their firm, Convalescent Services Inc.—claiming that the defendants had engaged in fraud that cost the Plaintiffs more than \$126 million in stock losses. In the Cobb suit, the plaintiffs, their partnerships and the trusts accused PwC and the Mariner executives of fraud, breach of fiduciary duty, professional negligence, negligent misrepresentation and racketeering. They sought more than \$400 million and the banishment of PwC from doing business in Georgia. Mariner executives were cleared of civil liability by the jury. The suit claimed that PricewaterhouseCoopers predecessor, Coopers & Lybrand, had generated inaccurate financial reports—both before and after the merger—that overstated Mariner's earnings and understated the company's liabilities. Those alleged misstatements, according to the plaintiffs, convinced them the merger would be profitable and the expanding business would continue to make money.

Coopers & Lybrand and Price Waterhouse later merged to form PricewaterhouseCoopers. While awarding \$10 million to the family trusts—and \$1 each to the individual Plaintiffs and their two limited liability partnerships—the jury found for PwC on the fraud and racketeering claims. A breach of fiduciary duty claim against the accounting firm had already been dismissed. The jury also rejected claims of racketeering, fraud, breach of fiduciary duty and negligent misrepresentation against the Mariner executives.

PricewaterhouseCoopers appealed the sole claim that the jury had allowed to stand, seeking relief from the \$10 million judgment. In that appeal, lawyers for the accounting firm argued that the trustee for the Kellett family trusts, who was the lead plaintiff, didn't

present any evidence to prove claims that the Plaintiffs' interests relied on alleged misrepresentations by PwC about Mariner's financial condition. The appeals court disagreed.

Source: *Law.com*

### **HEDGE FUNDS SUBPOENAED IN SEC PROBE**

The Securities and Exchange Commission has sent subpoenas to more than 50 hedge-fund advisers as part of its investigation into whether individuals spread false rumors to manipulate shares of two Wall Street firms. The subpoenas are seeking trading and communications data related to short-selling and options trading in Bear Stearns Cos. or Lehman Brothers Holdings Inc. Some of the hedge-fund advisers have received subpoenas related to both probes, while others were contacted with respect to only one. A hedge-fund adviser can operate several different hedge funds.

Among the firms that have received subpoenas are Citadel Investment Group LLC in Chicago and SAC Capital Advisors in Stamford, Conn. The subpoenas relate to trading in securities of the brokers, as well as correspondence between the hedge funds and other parties, according to people familiar with the inquiry. The subpoenas are part of a broad inquiry, and firms that have received subpoenas were told by the SEC that they aren't necessarily the focus of specific allegations.

The probe is still in its early stages. Bear Stearns was on the brink of collapse in March, and the SEC has been investigating whether a combination of false rumors and manipulative short-selling combined to drive down the firm's share price. The probe comes as the SEC and other Wall Street regulators have launched examinations of investment banks and hedge-fund advisers' compliance programs to ensure that they have the right training and policies in place to detect market manipulation that can include rumor mongering.

Source: *Wall Street Journal*

### **SECURITIES FRAUD LAWSUIT SURVIVES**

Mississippi Public Employees Retirement System filed a securities class action lawsuit against Boston Scientific, a manufacturer of medical devices, and a number of its executives, alleging that the defendants withheld information about problems with its coronary stents, and made misleading positive statements, in violation of the Securities Exchange Act. Boston Scientific manufactured a coronary stent that it sold in Europe beginning in January, 2003. Boston then obtained FDA approval for use of the stent in the U.S. in March, 2004. PERS contended that between those dates, Boston became aware of problems the stent caused for patients in Europe, and planned a manufacturing change which was not disclosed to the public. After the stent was introduced in the U.S., doctors reported similar problems, which Boston attributed to the doctors' unfamiliarity with the product.

PERS contended that the defendants knew there was a manufacturing defect causing the balloons in the devices to not deflate. PERS further contended that the defendants purposely kept the information quiet to preserve its market share. After a series of injuries and deaths when the balloons failed to deflate, Boston announced a recall of the stents, to be replaced with those incorporating a manufacturing change, and its stock price dropped.

The District Court granted Boston's motion to dismiss, finding that PERS failed to meet the heightened pleading requirements of the Private Securities Litigation Reform Act of 1995. PERS appealed the court's ruling. On appeal, the First Circuit held that the evidence relating to the manufacturing change was arguably material. To make a long story short, the appeals court ruled that what Boston had done could be found to be misleading and there was sufficient evidence to go to the jury. The bottom line is the Court ruled that PERS had raised a jury question. The

dismissal was sent back to the trial court.

Source: *The Judicial View*

### **Pfizer To Settle Lipitor-Related Suit**

Pfizer Inc. has agreed to settle litigation with Canadian generic drug maker Apotex Inc. related to Pfizer's cholesterol drug Lipitor. No details were provided by Pfizer but the company said the settlement, which is subject to some conditions, was signed in July. Pfizer has been involved in a patent litigation with Apotex to prevent the selling of a generic version of Lipitor in Canada. Apotex was the only current challenger to Lipitor in Canada.

Pfizer recently settled patent-infringement litigation with India's Ranbaxy Laboratories Ltd. that is intended to keep a generic version of Lipitor off the U.S. market until November 2011. This would be 20 months later than some had expected. The agreement delays Ranbaxy's generic version of Lipitor and is estimated to be worth billions of dollars in additional sales for Pfizer. For your information, Lipitor sales totaled \$12.7 billion in 2007. To qualify as a "blockbuster drug," a drug has to bring in at least \$1 billion annually for a company. So it's evident Lipitor is tremendously important to Pfizer.

Source: *Wall Street Journal*

### **Lawsuit Threatens Sarbanes-Oxley Act**

In 2002, Congress passed a law aimed at punishing corporations for publishing false information in their financial statements. Regrettably, the future of this law, known as the Sarbanes-Oxley Act (SOX), is now in jeopardy. An accounting firm has filed a lawsuit in a Washington DC federal court questioning the law's constitutionality. This law is essential to the nation's need for accurate and honest corporate reports and Congress could rescue SOX by revising it. This law is also important because employee shareholders and

regular investors alike, rely on these statements when determining how much of their retirement savings to invest in particular companies.

Congress passed Sarbanes-Oxley in 2002 after the Enron and WorldCom frauds, which were accompanied by the Adelphia Communications, Global Crossing, HealthSouth, and Tyco International frauds, as well. During those years, the accounting industry was supposedly regulating itself for audit quality and integrity. In practice, accountants were working hand in hand with the corporate cheaters in return for lucrative consulting fees. Sarbanes-Oxley set up the Public Company Accounting Oversight Board (PCAOB) to create better corporate auditing standards and police their quality. It made other sensible changes, too, including enhanced requirements for auditing a company's internal financial controls and insisting that chief executives and chief financial officers certify the financials as accurate. For instance, the law holds chief executives accountable for the accuracy of corporate reporting and sets out criminal sanctions and heavy fines for false reporters.

The legal challenge to PCAOB is technical, having to do with whether a corporation's president rather than the Securities and Exchange Commission should appoint corporate board members. The plaintiff in the lawsuit, Beckstead & Watts, a small accounting firm in Henderson, Nevada, audits companies trading on the Over the Counter Bulletin Board Exchange. In 2004, PCAOB reviewed Beckstead's audits and found that, in eight cases, the firm "did not obtain sufficient competent evidential matter to support its opinion on the issuer's financial statements." Beckstead disagreed, the board instituted formal proceedings against the firm, and a lawsuit was filed.

The lawsuit questions whether the PCAOB created by Sarbanes-Oxley to clean up the Enron-tainted auditing profession is constitutional. Beckstead asked the federal court to cease the accounting oversight board's opera-

tions, upon holding a portion of the Act unconstitutional. If the federal court finds one of the acts' provisions to be unconstitutional, the whole law is sidelined. That's because the law lacks a "severability" clause.

In theory, Congress could respond just by changing the structure of PCAOB's board. However, should Congress not act and the federal court does strike down PCAOB, it couldn't come at a worse time for investors. The financial crisis linked to subprime loans left the valuation of trillions of dollars of securities in doubt. Nothing is more important to the functioning of American markets than ensuring that its hard-working citizens can trust the corporate financial statements that their retirement and savings accounts invest in and rely upon.

If the court supports PCAOB, Beckstead may appeal to the United States Supreme Court. With the makeup of the current Court, unfortunately this means that Sarbanes-Oxley still won't be out of the woods. We will watch this case with great interest.

Source: *The Washington Post*

### **Chrysler Sues Battery Supplier**

Chrysler LLC has filed a lawsuit in a Michigan court alleging supplier Johnson Controls Inc. charged inflated prices for batteries. The suit, filed last month in the Oakland County circuit court, is the latest sign of rising tension between Chrysler and parts suppliers since the auto maker was acquired by private-investment firm Cerberus Capital Management LP just over a year ago. Chrysler seeks more than \$15 million in damages on the suit. The automaker alleged JCI has charged Chrysler for more lead that it actually put into batteries. It alleges JCI's actions were "systematic and deliberate."

Source: *Wall Street Journal*

## XII. INSURANCE AND FINANCE UPDATE

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### **MISSOURI COURT UPHOLDS \$16 MILLION BAD FAITH AWARD AGAINST ALLSTATE**

Allstate Insurance Co. has lost its appeal of a \$16 million judgment against it for not settling a claim for the \$50,000 limit on an automobile liability insurance policy. The Missouri Court of Appeals upheld an award of more than \$5.8 million in compensatory damages and \$10.5 million in punitive damages against Allstate. The insurer failed to settle a demand for insurance policy limits of \$50,000 made against its insured, Wayne Davis, Jr., by Edward and Virginia Johnson. The Johnsons made the demand after Davis drove across the center line of a highway in March 2000, and crashed head on into the Johnsons' car. The Johnsons suffered life-threatening injuries that required extensive hospital treatment. After Allstate failed to settle their claims, the Johnsons sued Davis.

Subsequently, Davis consented to a \$5 million judgment and negotiated a settlement agreement with the Johnsons. As part of the settlement, the Johnsons agreed not to collect any of the \$5 million judgment from Davis in exchange for his assigning to them 90% of his claim against Allstate for a bad faith refusal to settle. The Johnsons and Davis jointly sued Allstate for its bad faith refusal to settle a just claim and for equitable garnishment. Allstate had questioned whether the Johnsons' injuries were actually caused by the crash.

A jury in 2006 found that Allstate had acted in bad faith and awarded compensatory damages plus interest, as well as punitive damages against Allstate. The company appealed, claiming that the Johnsons and Davis had not proved their case further and that they failed to establish that Allstate had acted in bad faith in refusing to settle the Johnsons' claim against Davis or

that it had acted with malice, a necessary element for punitive damages under applicable Missouri law. A three-judge panel of the Missouri Court of Appeals affirmed the lower court's judgment, holding that the evidence was sufficient to submit the Johnsons' and Davis's bad faith refusal to settle claim and to justify the verdict. The court's opinion reads:

*Allstate's failure to recognize the severity of the Johnsons' injuries and the probability that the claim would far exceed Davis's policy limits; its failure to investigate the claim and respond to the demand in accordance with insurance industry standards and its own good faith claim handling manual; and its failure to advise Davis of the demand, his likely exposure for an excess judgment, and his right to retain counsel, are all circumstances supporting a reasonable inference that Allstate's refusal to settle was in bad faith.*

It was evident from the facts proved at trial that Allstate had acted in bad faith. There was a claim that should have been paid within the insured's policy limits. Instead, Allstate put both the injured party and its own insured through a long and drawn-out ordeal with no legal justification.

Source: *Insurance Journal*

### **MISSISSIPPI ATTORNEY GENERAL SETTLES WITH STATE FARM**

Mississippi Attorney General Jim Hood has reached a settlement of the state's breach of contract suit against State Farm. The suit was filed after State Farm refused to comply with a January 2007 Hinds County Chancery Court settlement. As a result of the state's suit against several insurance companies, State Farm paid an additional \$74 million and Nationwide paid an additional \$40 million to coastal policyholders, according to the Attorney General. Under the settlement with the Attorney General, State Farm will send out new

notices to the remaining 148 slab-and/or pier-only policyholders, who have not yet sued, settled or already participated in the reevaluation process.

The settlement in the Hinds County Chancery Court required that State Farm establish an administrative procedure under a federal court's approval to reevaluate policyholders' claims in Hancock, Harrison, and Jackson counties. It also required State Farm to make new offers to its policyholders for no less than 50% of coverage limits to slab-or pier-only claims, subject to policy limits and prior payments.

Eligible policyholders who completed their reevaluation forms by August 29<sup>th</sup> were to receive an offer from State Farm. Those policyholders will have 21 days from the date the offer is mailed to accept the offer, or it will be deemed rejected by the policyholder. The policyholder will still have 30 days from the date of actual or deemed rejection to pursue legal action, if desired.

Source: Office of the Attorney General of Mississippi

### **BLACK BOX USED BY ALABAMA DRIVERS**

Alabama is among the first states in the nation where an automobile insurance company is rolling out a new technology that has privacy advocates concerned. In July Progressive Insurance Co. began offering Alabama customers a "black box" that records information, including when a car is driven and its speed and mileage, and transmits the information back to the insurer. For \$5 a month, customers can get the optional device, which plugs in under the dash and sends data to the insurance company by way of a cellular connection. Those who drive little or who have good defensive driving habits will get lower rates, according to the company.

Alabama is the fourth of six states where Progressive has introduced the device, though the technology being used and the program, (MyRate), vary slightly from state to state as the company develops the concept. Pro-

gressive is the fourth-largest auto insurer in Alabama, with about 7% of the market. The device records the time of day the car is driven, the number of miles driven and its speed. The company uses the information to determine, among other things, whether a driver has a tendency to accelerate too quickly or slam on the brakes. In order to participate, the customer's car must have a diagnostic port under the dash, a feature on most cars manufactured since 1996. Most modern cars already have similar devices installed by the manufacturers, but they record different information, such as brake status before an impact, and most do not transmit data.

Source: *Birmingham News*

#### **AMERIGROUP LAWSUIT SETTLED FOR \$225 MILLION IN ILLINOIS FRAUD CASE**

Amerigroup, an insurance company giant, has agreed to pay \$225 million to settle a lawsuit that accused it of discriminating against pregnant women and other high-risk patients in Illinois. The Illinois attorney general's office announced the settlement with Virginia-based Amerigroup on August 14<sup>th</sup>. The agreement resolves allegations that Amerigroup and its Illinois subsidiary defrauded the state's Medicaid program. Attorney General Lisa Madigan says the settlement sends a clear message that Illinois won't tolerate such conduct. Amerigroup serves about 1.7 million people in a dozen states.

Source: *Insurance Journal*

## **XIII. PREDATORY LENDING**

#### **NACA SAYS FANNIE AND FREDDIE STILL BUYING SUBPRIME PRODUCTS**

We wrote about the federal government bail out relating to the housing industry in a prior section. Now let's take a look at two of the main players.

It's obvious that Fannie Mae and Freddie Mac were bailed out of their subprime meltdown by the American taxpayers. However, they continue to buy subprime junk, according to Bruce Marks, CEO of the non-profit Neighborhood Assistance Corporation of America (NACA). In this regard, Marks told the *Corporate Crime Reporter*:

*They (Fannie Mae and Freddie Mac) continue to purchase interest only, ARM resets and other problematic loan products. Fannie and Freddie should be prohibited from buying this stuff. But I have evidence from the borrowers that Fannie and Freddie are still buying these products. They buy 50% of all mortgages. So, it might not be a huge chunk. But it is still significant.*

In September 2000, Marks went before a House committee and predicted that the government would be forced to bailout Fannie and Freddie because of their involvement in the subprime market. And earlier this year, he opposed the bailout bill, saying that it would provide virtually no benefit to at-risk homeowners. In this regard, Marks says:

*The beneficiaries of the bailout bill will be Fannie and Freddie. And it may cost the taxpayer \$800 billion or more. It rewards these companies for their past failures.*

NACA is a mortgage broker in the business of providing low-interest, fixed-rate 30-year mortgages. Over the past five years, its business has stagnated, because it refused to get involved in the subprime market and couldn't compete. But Marks says that now, homeowners facing foreclosure because of the meltdown, are flocking to NACA to get their mortgages restructured.

Marks wants criminal prosecutions of the top Wall Street firms and their executives for engaging in the predatory lending that caused the mortgage

meltdown and the resulting housing crisis. He made some very interesting comments concerning the evils of subprime lending:

*We should not be doing subprime lending. We should go back to the traditional lending. Fannie and Freddie should expand their pool for prime loans. We are not talking about the loan shark on the corner who says—if you don't make your payments in three months, I'm going to break your legs. We are talking about the most well established, most well known financial institutions, and "respected" institutions, not just in this country, but in the world. GMAC, Wells Fargo, Countrywide, Bank of America, Washington Mutual, Citigroup—engaging in predatory lending. You are talking about institutions that are well known and supposedly respected worldwide.*

*Citigroup is engaging in predatory lending. If you are a homeowner and someone says to you—you can purchase a home in a neighborhood where you don't have to be afraid of your children's safety, where you can have your children go to a good school, where you can have a house that you could never even have dreamed of. And this is not some loan shark giving you an outrageous loan. These are some of the most respected financial institutions in this country and in this world. And what they were saying is—trust us, you can refinance after two years. Trust us, you can afford that. You tell me the homeowners who are going to turn that down? Who never even dreamed of such an opportunity? You cannot blame the homeowner. You put the responsibility where it lies. On predators. On lenders. On Wall Street.*

If NACA spotted the problem I have to wonder why it took the government-

tal regulators so long to realize things were going badly for the mortgage industry.

Source: *Corporate Crime Reporter*

#### **COUNTRYWIDE SUED BY ANOTHER STATE OVER ITS LENDING PRACTICES**

Connecticut is the latest state to file suit against Countrywide Financial Corp. over its lending practices. State Attorney General Richard Blumenthal alleges that Countrywide misled borrowers into taking on risky home loans they could not afford. California, Illinois, Florida and the city of San Diego have made similar claims in their own lawsuits against the company. As we have reported, Countrywide was the nation's largest mortgage originator before its highly questionable lending practices led to the rash of bad loans. In fact, the mortgage lender has been blamed for helping to cause the nation's mortgage meltdown. The Attorney General's office and Connecticut's departments of Banking and Consumer Protection are the plaintiffs in the lawsuit which was filed in state court. The company violated state consumer protection and banking laws and charged unjustified fees to homeowners who defaulted, according to allegations in the complaint. As he filed the suit, Attorney General Richard Blumenthal stated:

*Countrywide conned homeowners into mortgages they simply could not afford. Hundreds, possibly thousands, of Connecticut homeowners are affected.*

Like Connecticut, the other states suing Countrywide want the company to pay restitution to borrowers who lost their homes or paid excessive fees. When homeowners defaulted on their Countrywide loans, the company "bullied" them into repayment plans known as "workouts" with excessive fees that made it nearly impossible for consumers to repay the loans and get out of the debt. The Attorney General observed:

*Countrywide stacked the deck and the deal against its customers. Our goal is to unstack the deck and undo the deals, restoring fairness and fiscal sense to mortgages.*

Countrywide, which faces numerous other lawsuits by individuals related to its lending practices, has also been under scrutiny by federal authorities. A federal grand jury has been investigating Countrywide, New Century Financial Corp. and IndyMac Bancorp Inc. Prosecutors are looking into whether fraud and other crimes might have contributed to the mortgage crisis that led to the demise of all three California-based lenders. The governor of the state of Washington, Chris Gregoire, also has accused Countrywide of discriminatory and predatory lending practices that targeted minority borrowers, and of cheating Washington state out of \$5 million in fees. That state's Department of Financial Institutions is seeking to revoke Countrywide's license and impose a \$1 million penalty for predatory lending practices. The old saying that "when it rains—it pours" certainly applies to Countrywide and it appears that company's problems are clearly self-imposed. The SEC has escalated its scrutiny of Countrywide Financial Corp. into a formal investigation, according to a regulatory filing by Bank of America Corp.

In addition, a federal bankruptcy judge has rejected a settlement involving Countrywide, saying he wasn't convinced it was fair to nearly 300 borrowers allegedly hurt by the mortgage lender's abusive practices. The settlement calls for Countrywide to pay \$325,000 to the Chapter 13 bankruptcy trustee in Pittsburgh, Ronda Winnecour, to cover costs and settle litigation in 293 separate cases. In the order issued on August 14<sup>th</sup>, the judge said the settlement failed to address many issues. The court was "concerned that the essential substance of the settlement agreement leaves too much open to future contingencies."

Source: *Associated Press and Reuters*

#### **JURY AWARDS WOMAN \$1.25 MILLION IN HER MORTGAGE-RELATED LAWSUIT**

A Baltimore woman who defaulted on a subprime loan has been awarded \$1.25 million in damages from her lender, Wells Fargo Bank N.A. The case may lead to similar lawsuits nationwide, and also may help Baltimore's suit against the bank, claiming it targeted minority neighborhoods with subprime loans. Kimberly L. Thomas was awarded \$250,000 in damages and \$1 million in punitive damages in Montgomery County Circuit Court. A jury found Wells Fargo guilty of fraud, negligence and other charges for inflating Ms. Thomas' income and assets on her mortgage application, and locking her into a bigger loan than she had applied for—one she couldn't afford.

Source: *Baltimore Business Journal*

## **XIV. PREMISES LIABILITY UPDATE**

#### **TOUGHER CRANE SAFETY STANDARDS NEEDED**

Recently, a rash of crane-related fatalities has occurred around the country. As a result, Democrats in Congress are pushing for a stronger federal safety standard, one that in my opinion is badly needed. Clearly, because the crane-related deaths are taking place at construction sites, OSHA should be much more involved in seeing that an adequate standard is adopted. Nine Senate Democrats sent a letter to Labor Secretary Elaine Chao, urging her to issue a new safety standard for cranes and derricks. The letter says it was "unfathomable" that OSHA, which is responsible for maintaining worker safety, including inspecting cranes, hadn't implemented recommendations made in 2004 by industry and labor to issue a new standard to improve crane safety. To say the least, that delay is very hard to justify.

OSHA claims regulatory and legal

requirements have slowed the rule-making process. According to OSHA, the agency is sending more inspectors to its training-institute class that focuses on crane safety and organizing training events with local unions and industry groups. So far this year, more than 20 construction workers have died in crane-related accidents. That figure doesn't include bystanders' deaths. OSHA estimates there are 96,000 cranes used in construction each year in the U.S. Developers and contractors are under increased pressure to complete projects, since delays can be costly.

Between 1992 and 2006, there was an average of 22 construction-worker deaths a year involving cranes, according to an analysis of government statistics by the Center for Construction Research and Training, a nonprofit organization affiliated with the AFL-CIO. The leading cause of death was electrocution while operating a crane. For example, a crane would contact a power line and then the crane would collapse. Obviously, those working around the crane would be in great danger. Now we are seeing all sorts of crane accidents that don't involve electricity.

Among those attributing the accidents to a shortage of qualified crane inspectors is Frank Burg, a safety consultant in Woodstock, Illinois, who is chairman of a committee with the American National Standards Institute that sets safety standards for cranes. He says there aren't enough "qualified people to inspect cranes." Mr. Burg said he believes that it will never be possible to inspect all of those cranes and that companies need the threat of large fines to upgrade crane-related maintenance and safety practices on their own. Clearly, the federal government should take prompt action and the obvious need is an adequate safety standard for cranes.

The OSHA Region VI office in Dallas has established a Regional Emphasis Program (REP) covering employees in the construction industry who

perform crane operations. The program conducts safety inspections of workplaces in Texas, Arkansas, Louisiana, Oklahoma and sites in New Mexico that are under federal OSHA jurisdiction. The REP will address various hazards associated with cranes, including but not limited to, being struck by objects, electrocution, crane tip-over, being caught in or between machinery, and falls. While this appears to be a good move, I still believe a stronger standard is needed. The OSHA standard requires that employers conduct tower crane inspections prescribed by the manufacturer.

Source: *Wall Street Journal*

### **SIX FLAGS TRIAL SET IN KENTUCKY KINGDOM CASE**

A trial date has been set in the lawsuit filed by the parents of a Louisville teenager whose feet were severed by a Six Flags Kentucky Kingdom amusement ride last summer. However, the trial isn't scheduled in the near future. It is set for January 5, 2010. Kaitlyn Lasitter's parents, Randall and Monique Lasitter, are seeking an unspecified amount of punitive and compensatory damages. According to the trial judge, the trial date was set so far in the future in part because lawyers for both sides still have much preparation left to do.

Even though it's estimated that 77 depositions are yet to be taken, the Lasitters' lawyer, Jennifer Barbour, says much work already has been completed. That includes the filing of more than 15,000 pages of discovery and the conducting of four on-site inspections of the Superman Tower of Power ride. Interestingly, the judge has set a deadline of November 23, 2009, for both sides to mediate a settlement in the case.

State officials recently released a report blaming a faulty cable and slow response by a ride operator in the accident, but they said it was impossible to know exactly why the cable snapped. A year after the accident, Kaitlyn, now 14, continues to recover after doctors re-

attached her right foot. Unfortunately, the medical team could not save her left foot. Her parents filed suit last year against the theme park, claiming it failed to maintain the equipment and provide for riders' safety.

Source: *Louisville Courier Journal*

### **DROWNED WOMAN'S FAMILY FILES LAWSUIT**

The family of a 23-year-old Baltimore County woman who drowned in a swimming pool in 2005 has filed a lawsuit against the apartment complex and pool management company. It is contended that unqualified lifeguards with just one week's training were on duty. Cassandra Blake drowned in the pool in Windsor Mill. The family is suing that complex along with American Pool Management Inc., American Pool Enterprises Inc., Westminster Management and Doug Kusher Co. Blake was not a resident of apartment complex, but had a friend who lived there. The suit was filed in Baltimore Circuit Court. Ms. Blake took her sister, her son and other children to the pool, where she approached a security guard and lifeguard on duty and asked whether they could use the pool. Both the security guard and lifeguard agreed. Blake, who could not swim, started out in the shallow end but got out of the pool in the deeper part at some point. Shortly thereafter, she was pushed or she fell into the deep end, then went under and drowned.

According to the suit, the lifeguard was not qualified to watch the pool and was not able to see all areas of the water from his stand. The children told the lifeguard that Ms. Blake was underwater, but the lifeguard couldn't initially find her because the water was too cloudy. He was forced to put on goggles, according to the complaint. After re-entering the pool, the lifeguard pulled Ms. Blake from the water, but could not resuscitate her. It's alleged that the defendants kept the pool in murky and unsafe conditions, and that the complex failed to provide two or more lifeguards during busy hours.

American Pool hired Jamaicans to come to Baltimore for a one-week life-guard training program. It's contended that some of the men were issued licenses even though they didn't pass any tests.

Source: *Sun Reporter*

#### **ANOTHER SETTLEMENT IN RHODE ISLAND CLUB FIRE**

The State of Rhode Island and the town of West Warwick have each agreed to pay \$10 million to survivors and victims' relatives in the 2003 nightclub fire that killed 100 people. The state and the town are the last major defendants to agree to settlement offers, now totaling nearly \$175 million, after the fire at the Station nightclub. Before the settlement is final, more than 300 survivors and victims' relatives still must approve them. As you will recall, the blaze began when pyrotechnics used by the rock band Great White ignited foam used as soundproofing on the club's walls and ceilings.

Source: *Associated Press*

## **XV. WORKPLACE HAZARDS**

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#### **BUSH ADMINISTRATION RUSHES TO CHANGE WORKPLACE TOXIN RULES**

The Bush Administration is doing everything possible to help its powerful political buddies during its last days in office. Political appointees at the Department of Labor are moving with unusual speed to push through in the final months of the Bush Administration a rule making it tougher to regulate workers' on-the-job exposure to chemicals and toxins. The agency did not disclose the proposal, as required, in public notices of regulatory plans that it filed in December and May. Instead, Labor Secretary Elaine L. Chao's intention to push for the rule

first surfaced on July 7<sup>th</sup>, when the White House Office of Management and Budget (OMB) posted on its Web site that it was reviewing the proposal, identified only by its nine-word title.

The text of the proposed rule has not been made public, but according to *The Washington Post*, it would call for reexamining the methods used to measure risks posed by workplace exposure to toxins. The change would address long-standing complaints from businesses that the government overestimates the risk posed by job exposure to chemicals. The rule would also require the agency to take an extra step before setting new limits on chemicals in the workplace by allowing an additional round of challenges to agency risk assessments. The Department's speed in trying to make the regulatory change contrasts with its reluctance to alter workplace safety rules over the past seven and a half years. During that time, the Labor Department adopted only one major health rule for a chemical in the workplace. It took a court order to bring about the adoption of that rule.

The fast-track approach has brought criticism from workplace-safety advocates, unions and Democrats in Congress. The Bush Administration is being accused of working secretly to give industry a parting gift that will help it delay or block safety regulations after George Bush leaves office. The public will have 30 days to critique the draft rule after it is published. Adam Finkel, a professor at the University of Medicine and Dentistry of New Jersey who is a former health standards director at Labor's Occupational Safety and Health Administration, observed:

*It's an insult to America's workers for the Department of Labor to be spending its time in the last year of this administration allegedly fine-tuning the details of how to do these regulations when, other than the one ordered by a court, they have issued no major worker-health regulations. The reality is there's a great need to*

*light a fire under this moribund agency to do something—anything—to protect workers.*

There are a number of Democrats in Congress who recognize what the Administration is up to. Rep. George Miller (D-CA), chairman of the House Education and Labor Committee, has vowed to protect workers. In this regard, he said:

*The fact that the Department of Labor seems to be engaged in secret rulemaking makes me highly suspicious that some high-level political appointees are up to no good. This Congress will not stand for the gutting of health and safety protections as the Bush administration beads out the door.*

In spring 2007, the department listed 38 potential workplace-safety regulations as works in progress. Among its priorities were a proposal to reduce deaths and injuries from cranes and derricks, which we mention in this issue; a new rule to reduce illnesses from silica, which can cause respiratory diseases; and a proposal to change regulation of beryllium, a light metal that can harm the lungs of dental and metal workers. But virtually overnight, changing the risk-assessment process became the agency's top priority for workplace regulations. The July submission of its proposal broke a deadline set by White House Chief of Staff Joshua B. Bolten, who had ordered that all agencies submit proposed regulations before June 1<sup>st</sup> and "resist the historical tendency of administrations to increase regulatory activity in their final months." It's quite obvious that pressure from the White House has caused a change in policy.

Nevertheless, the OMB agreed to work with Labor on the proposal. The July 7<sup>th</sup> posting on its Web site shocked many inside and outside the agency who had been following the events. Changing the job safety and health laws and reducing required workplace protections at this stage is just plain

wrong. It's believed by many safety experts that the rule would add another barrier to creating safety standards. The Bush Administration has not been worker-friendly in any respect, but its latest attempts to make it virtually impossible for any good safety regulations to come out of OSHA is a last-ditch attempt to actually hurt workers. The fact it is being done in secrecy makes it even worse. It's a blatant attempt to tie the hands of the next administration.

Source: *Washington Post*

### **CELL TOWER CLIMBERS MAY HAVE THE MOST DANGEROUS JOB IN AMERICA**

Based upon the latest national census of fatal occupational injuries from the Department of Labor's Bureau of Labor Statistics, workers who are required to climb cell towers and other communications structures throughout the country have been identified as having the most dangerous job in America. In previous years, inaccurate Occupational Health and Safety Administration coding and an unknown total of tower climbers prevented the tower erection and maintenance industry from revealing the most fatalities per 100,000 workers. Tower climbers are one of the smallest specialized construction groups with less than 10,000 employees nationwide.

OSHA, the National Institute of Safety and Health, and the communications construction industry universally agree that there are too many fatalities every year from workers falling from telecommunications towers. There has always been disagreement regarding the methods the federal agencies use to gauge the industry's health. The majority of fatalities are the result of climbers not being tied off to a safe anchorage point at all times or relying upon faulty personal protection equipment. In addition, many deaths occurred during the erection, retrofitting or dismantling of a tower.

In April, five workers fell to their

deaths from mobile phone towers in the space of 12 days. There was another death reported in May, the sixth this year. There were ten fatal falls from elevated structures of all kinds (including TV, electrical and water towers) in 2007, and a record 18 in 2006. But this year's concentrated run of cell tower accidents is said to be extraordinary. The following, as recorded by *Wireless Estimator*, an online newsletter that covers the communications construction industry, is a list of known incidents over a period of six weeks involving a fall from a tower resulting in death:

- April 12<sup>th</sup>: A 34-year-old cell tower technician from Oklahoma died after falling 150 feet from monopole antenna in Wake Forest, Nor Carolina. It was the nation's first death in 2008 of a communications worker falling from an elevated structure.
- April 14<sup>th</sup>: A tower worker employed by Cornerstone Tower of Grand Island, Neb., fell to his death in Moorcroft, Wyoming.
- April 15<sup>th</sup>: A 38-year-old technician finished tightening the bolts on a guyed wireless tower in San Antonio, Texas, "sort of lean[ed] back a little," according to witnesses, and fell 225 feet to his death.
- April 17<sup>th</sup>: North Carolina suffered its second cell tower fatality in a week when a 46-year-old Chesapeake, Virginia, man fell from a communications antenna in Frisco, NC.
- April 23<sup>rd</sup>: A Griffin, Georgia, man died from extensive head and chest injuries after falling 100 feet from a communications tower near Natchez, MS. He was reportedly hanging boom gates to a Cell South antenna when he fell.
- May 16<sup>th</sup>: Jonathan Guilford, who was from Ft. Payne, Alabama, was rappelling down a load line attached to a 200 foot monopole when he stopped abruptly 140 feet up and bounced as

if on a bungee cord, disengaging the carabiner that was secured to the tower. This was on an AT&T VMTS (3G) project in Indiana.

At least three of the six incidents occurred on AT&T projects. On May 21, AT&T issued a press release describing its \$20 billion roll-out of a nationwide 3G network. It promised to have 275 of the markets it serves in the U.S. 3G-ready by the end of June, and to finish the remaining 75 by the end of the year. AT&T is the exclusive U.S. carrier for Apple's iPhone. A new, 3G version of that device is widely expected to be released in June.

AT&T is continuing to bring 3G networking to new markets in the U.S. That will involve building new towers and installing new antennas. On April 21<sup>st</sup>, after the first two deaths on its projects, AT&T called for a construction stand down and issued an order to subcontractors that read, in part:

*AT&T ... requires you to hold, at a minimum, a half-day safety refresher training course this week with all of your construction employees and subcontractors providing services for AT&T. Upon completion of the safety refresher training this week, AT&T expects that you will reinforce this training with additional random safety checks at the construction sites to ensure that appropriate safety measures are being used.*

If you would like more information relating to the above issues, you can contact Graham Esdale, who handles crane and tower cases for the firm, at 800-898-2034 or by email at [Graham.Esdale@beasleyallen.com](mailto:Graham.Esdale@beasleyallen.com).

Source: *CNN*

### **IMPERIAL SUGAR MAY FACE \$8.7 MILLION IN FINES**

Federal officials say that Imperial Sugar Co. should face fines of more than \$8.7 million for violations at two plants, including a Georgia facility

where an explosion killed 13 people. The fines would be the third-highest in the history of the Occupational Safety and Health Administration's nearly 40-year existence. They include \$5 million for the explosion near Savannah on Feb. 7 and \$3.7 million for the plant in Gramercy, Louisiana. OSHA investigators concluded the explosion was most likely caused when a large bucket used to haul sugar in a silo elevator broke loose and struck the metal siding, causing a spark that ignited sugar dust accumulated beneath the 100-foot silos. The agency said its investigation uncovered company audits, insurance records and other documents showing Imperial Sugar had been warned about combustible dust hazards in its plants since 2002. Its inspection of the Louisiana plant a month after the Georgia blast found workers wading through sugar dust up to 4 feet deep. OSHA chief Edwin Foulke says: "This catastrophic accident could have been prevented if Imperial Sugar had complied with existing OSHA safety and health standards."

OSHA found 120 violations against the Georgia plant, including 61 considered egregious. In Louisiana, Imperial Sugar was cited for 91 additional violations, 47 of which were considered egregious. Many violations were similar to those in Georgia. Fines for the Louisiana plant included \$36,000 proposed by OSHA in March, after an inspection revealed levels of dust it considered so dangerous that Imperial Sugar was forced to shut down its powdered sugar operation for several days.

OSHA officials are preparing for potentially lengthy litigation over the citations. The day of the Georgia explosion, workers beneath one of the storage silos had been knocking loose hardened sugar with metal rods, causing large amounts of dust to accumulate in a confined space, according to Kurt Petermeyer, OSHA's lead investigator in the case. He says the silo elevator and conveyors beneath it were shut down at the time. But when workers on the next shift turned them on later, enough dust remained in the air to

ignite like gunpowder. The initial explosion forced more dust into other parts of the plant, he said, causing several secondary explosions.

Sugar Land, Texas-based Imperial Sugar has owned the 90-year-old refinery, which produces Dixie Crystals brand sugar, since 1997. Located in Port Wentworth, a few miles outside Savannah, it is the second-largest sugar refinery in the U.S. Three refinery workers remain hospitalized with severe burns at the Joseph M. Still Burn Center in Augusta. Two are in critical condition, while the third is in good condition. A U.S. Senate subcommittee is looking into the matter and hearings are being held. Imperial Sugar plans to spend \$180 to \$230 million to rebuild the refinery's packaging plant and silos destroyed by the blast. It plans to resume refining raw sugar before the end of year, and complete a new packaging plant and storage silos by next summer.

Source: *Associated Press*

## XVI. TRANSPORTATION

### **MORE THAN 41,000 KILLED IN HIGHWAY CRASHES IN 2007**

Traffic deaths in the United States declined last year, reaching the lowest level in more than a decade, according to a government report. An estimated 41,059 people were killed in highway crashes, down by more than 1,600 from 2006. It was the lowest number of highway deaths in a year since 1994, when 40,716 people were killed. The fatality rate of 1.37 deaths for every 100 million miles traveled in 2007 was the lowest on record, the National Highway Traffic Safety Administration said in its report.

California had the largest decline, 266 fewer fatalities than the previous year. The largest percentage decreases were in South Dakota and Vermont. North Carolina's death toll increased the most in the nation, up 121 over the previous

year. The District of Columbia and Alaska had the highest percentage increases. Motorcycle deaths increased for the tenth straight year. There were 5,154 motorcycle deaths last year, compared with 4,837 in 2006.

Fatalities in crashes that involved a driver or motorcycle rider with a blood-alcohol level of 0.08%, the legal limit, declined to just under 13,000 deaths in 2007, a 3.7% decrease. Traffic injuries fell for the eighth straight year, to fewer than 2.49 million injuries in 2007, compared with 2.58 million in 2006. And the number of people killed in large-truck crashes fell by more than 4%.

According to Adrian Lund, president of the Insurance Institute for Highway Safety, the sluggish economy was likely a factor in the declines. He predicted that the combination of a slowing economy and gas prices approaching \$4 a gallon throughout the U.S. could lead to further reductions in highway deaths in 2008. Many states have reported double-digit drops in fatalities during the first part of this year.

Source: *Associated Press*

### **BUSH ADMINISTRATION DEFIES CONGRESS AGAIN**

In announcing last month that it would extend its cross-border trucking pilot project for two more years, the Bush Administration continues to ignore mandates from Congress at the expense of highway safety. This is the latest of many moves by the Administration to give Mexico-domiciled carriers operating authority in the United States beyond a limited border zone despite lawmakers' clear instructions to the contrary. In December 2007, Congress passed a measure aimed at requiring the Federal Motor Carrier Safety Administration (FMCSA) to comply with certain safety assurances. The measure, contained in the appropriations bill for the Department of Transportation, prohibited the use of funds to "establish" cross-border trucking pilot projects.

But FMCSA extended the program to more carriers in clear defiance of the

intent of Congress. Public Citizen, the International Brotherhood of Teamsters and other groups argued against the program in February in the U.S. Court of Appeals for the Ninth Circuit, citing numerous violations of repeated congressional mandates, including the recent spending bill. A final ruling is expected soon. Until then, FMCSA must not be permitted to extend the pilot program any further.

In addition, U.S. Reps. Peter DeFazio (D-OR) and James Oberstar (D-MN) introduced a bill July 29<sup>th</sup> to prohibit the Secretary of Transportation from granting authority to Mexico-domiciled carriers to operate beyond the commercial zone unless authorized by Congress. A committee approved the bill two days later, although the full House of Representatives has yet to vote on it. The pilot program not only is unlawful, it is reckless. Extending it for two more years sends the wrong message and ignores multiple entreaties by Congress to terminate the program until safety concerns have been addressed. In 2001, a NAFTA tribunal ordered the United States to permit access to all U.S. roads for Mexico-domiciled trucking companies. The Clinton Administration refused to comply, citing serious safety and environmental concerns with Mexico's trucking fleet. The Bush administration has tried since 2002 to enforce the NAFTA order to open U.S. highways to unsafe trucks.

Source: Public Citizen

### **UNSAFE TRUCKERS ARE A PROBLEM ON THE NATION'S HIGHWAYS**

Members of the U.S. House of Representatives jumped federal regulators recently for failing to implement recommendations made in 2001 that were designed to keep medically unfit commercial truck and bus drivers off the nation's highways. House Transportation and Infrastructure Committee Chairman James Oberstar, (D-MN), told Rose McMurray, the chief safety officer for the Federal Motor Carrier Safety Administration, that deaths and injuries

caused by medically unfit drivers are "on your conscience" because the agency has taken so long to act. A strong message was sent by the committee to the agency to "get people moving." The agency's efforts to fulfill the eight recommendations made by the National Transportation Safety Board was described as having been "painstakingly slow." It appears little—if anything—has been done.

So far the agency has proposed only one rule. However, an agency spokesman says they are close to proposing another to address two of the recommendations: to merge the licensing and medical certification of commercial drivers; and to create a national registry of examiners approved to issue medical certificates. The agency claims to have made progress on two other recommendations. But, nothing of consequence has been done on the remaining four recommendations.

The NTSB made the recommendations in response to a 1999 motorcoach accident in New Orleans that killed 22 people. Those recommendations were on the agency's "most wanted" list in 2003. In the New Orleans motorcoach accident, the NTSB said the bus driver suffered life-threatening kidney and heart conditions, but still held a valid license and medical certificate. A passenger recounted seeing the driver slumped in his seat moments before the crash. It's been reported that tractor-trailer and bus drivers have suffered seizures, heart attacks or unconscious spells while behind the wheel of their vehicles. Such illnesses have been a critical factor in thousands of serious truck and bus accidents.

The NTSB recommended that examiners who certify drivers as medically fit be qualified and know what to look for, and that a system be set up to track medical certificate applications and prevent drivers from doctor shopping. A study by the House committee found that it's so easy to fabricate the medical certificates required to operate commercial trucks and buses that there's

almost no incentive for drivers to obtain a legitimate document. It was reported that there are so few controls over how drivers obtain medical certificates that it's "relatively easy for a motivated commercial driver to circumvent the physical examination requirement." Another problem is that there is no database or central repository which would allow state inspectors to verify the legitimacy of a medical certificate. It was concluded by the study:

*Because so few attempts are made to authenticate a certificate, there is little risk that a driver will be caught if he or she forges or adulterates a certificate.*

The study was based on a sample of 614 medical certificates obtained from truck drivers at roadside inspections in California, Illinois and Ohio. The committee's staff attempted to contact the examiners named on the medical certificates but could only verify 407 as valid. One Ohio doctor contacted by the committee said forgery of medical certificates is so commonplace "no one gets alarmed by it anymore." Hundreds of thousands of drivers have commercial licenses even though they also qualify for full federal disability payments, according to a U.S. safety study disclosed by the Associated Press last month.

The Government Accountability Office said in the study that 563,000 commercial drivers were determined by the Veterans Affairs Department, Labor Department or Social Security Administration to also be eligible for full disability benefits over health issues. It should be noted that the GAO says disability doesn't necessarily mean a driver is unfit to operate a commercial vehicle. Nevertheless, GAO investigators found alarming examples of drivers who were physically unfit that raised doubts about the safety of the nation's highways.

Source: Associated Press

## **NTSB RECOMMENDATIONS SHOULD BE IMPLEMENTED**

Recent bus crashes have gotten a great deal of attention around the country. Two bus crashes in Mississippi and Nevada should have put bus safety back on every politician's agenda. Three women were killed when a tour bus they were riding in rolled over, while 29 people were injured in an unrelated crash after their bus left the road in Nevada. It's obvious that the regulators must do a better job when it comes to bus safety. Legislation, known as the Motorcoach Enhanced Safety Act, which would require bus owners to provide seat belts, fire extinguishers and other safety enhancements, was introduced after a bus crash in Georgia killed several athletes from an Ohio college. It's now being considered by the Senate's Commerce, Science and Transportation Committee. Senator Kay Bailey Hutchison, the ranking member of the committee, says:

*Such tragedies are becoming all too common, and many of these deadly accidents are preventable. I urge Congress to make this a priority after the August recess so the roads will be safer for everyone.*

The NTSB made 17 recommendations in June 2007, including four key bus safety regulations. However, there has been no response from the National Highway Traffic Safety Administration on drafting new federal regulations to implement the recommended changes. Sometimes it takes a series of tragic events to get the attention of those who have the power and authority to address safety issues. Hopefully, there won't be more deaths before action is taken on the federal level.

Source: *Houston Chronicle*

### **COMPANIES LINKED TO TEXAS BUS CRASH TOLD TO SHUT DOWN**

Companies linked to a bus that crashed in Texas and killed 17 people, most of them from Vietnamese Catholic

congregations on their way to a religious festival, were found to pose an "imminent hazard" and will have to cease commercial operations. Federal inspectors also took another bus out of service in Carthage, Missouri. The bus failed inspection. It was registered to Iguala BusMex Inc., the unlicensed company that also owned the bus in the Texas crash.

The Federal Motor Carrier Safety Administration issued its cease-operations order to Iguala BusMex and Angel Tours Inc., of which Angel De La Torre is owner and president. A second order issued to him finds that his "activities in connection with motor carrier operations pose an 'imminent hazard' to the public." The bus in the Texas incident crashed into a guardrail and skidded off a highway early on August 8<sup>th</sup> near the Oklahoma border, killing 12 people at the scene and five others who died at hospitals. The passengers, most of them from three Vietnamese Catholic congregations in Houston, were traveling to Missouri for an annual religious festival. Authorities have also released the driving record of the bus driver, 52-year-old Barrett Wayne Broussard. Since 2001, he has been cited by police three times—once for driving while intoxicated and twice for speeding. His license was suspended for nearly two months in 2001 as a result of the DWI conviction. His speeding violations came in 2004 and 2007. Broussard also failed roadside inspections twice in the past year, both times resulting in his vehicle being taken out of service for driver logbook violations. The vehicle's right front tire, which blew out, had been retreaded in violation of safety standards, according to reports.

Source: *Insurance Journal*

### **SCHOOL BUS SAFETY STUDY STARTS IN ALABAMA**

Hundreds of students across our state boarded school buses last month that were equipped with seat belts. The State of Alabama launched an unprecedented three-year study to determine if

the belts make the buses safer. Interestingly, Alabama is the first state to conduct such a study. This came about as a result of the Huntsville bus wreck that killed four Lee High School students in November 2006. Six states already have laws requiring some level of belts on school buses, but there are no nationally set guidelines. Transportation Secretary Mary Peters issued a proposal last November that would expand the use of shoulder belts, but stopped short of ordering that all new buses be equipped with seat belts. Over the years, the school bus manufacturers have successfully lobbied the federal government and have kept safety belts out of school buses.

The Alabama study will be conducted by the University of Alabama at a cost of \$1.4 million over three years. Twelve seat belt-equipped buses were purchased for ten participating school systems and six bus aides were hired to assist with compliance among students. Other costs include hiring more drivers and adding more buses. Officials hope to learn the extent to which students will use the belts and their behavior on buses equipped with the restraints. Alabama's bus fleet is one of the newest in the country and consists of 7,408 buses transporting 373,982 students daily. Our firm is currently involved in the litigation arising out of the Huntsville bus crash. We could have saved the state \$1.4 million if they had simply asked Kendall Dunson, a lawyer in our firm, whether seat belts in buses are needed for the safety of our children. The simple answer to that inquiry would have been "yes!" In any event, the study is now in progress and, hopefully, it will result in improved school bus safety.

Source: *Associated Press*

### **LAWSUIT FILED OVER HELICOPTER CRASH IN IRAQ**

A wrongful death lawsuit is being filed against a maintenance contractor arising out of the crash of a UH-60 Black Hawk helicopter last year in Iraq

that killed the four crew members and ten soldiers aboard. There were no survivors. The night mission was to pick up two “small kill teams” totaling 20 soldiers who had been dropped off the night before for a mission in Multaka, near the northern Iraq city of Kirkuk. The families of the dead soldiers who are from across the country will participate in the lawsuit against a unit of Massachusetts-based L-3 Communications. The mechanical work was done by a civilian contractor under contract with the Army. The contractor was L-3 Contractors, a subdivision of L-3 Communications, which does a lot of Army work.

The official Army investigation into the crash, a 224-page report known as an Article 15-6, doesn’t provide a definitive answer as to what caused the helicopter to go down. It may be as simple as a small leftover spool of wire that caused the death of four soldiers and the loss of a \$5 million helicopter. Seconds into the flight, when the 18,000-pound chopper was at an altitude of about 150 feet and as the helicopter fought for higher air, the pilot in command made his last radio call: “1-2 is going down.”

Witnesses in accompanying helicopters reported between one and four rotations as the Black Hawk fell to earth. The Army investigation, obtained by The Honolulu Advertiser through the Freedom of Information Act, and the most detailed account yet of the fatal crash, found that the soldiers suffered blunt force injuries in an impact of 150 Gs. The Corpus Christi Army Depot inspected the downed Black Hawk airframe and discovered a gouged and cut tail rotor shaft. An “unknown foreign object” in the tail rotor housing traveled aft and became lodged between the housing and the tail rotor drive shaft, causing gouging and cutting damage to the tail rotor, which then failed by sheering forces while under torque, according to a report.

The Depot report concluded that the failure of the tail rotor drive shaft was the primary cause of the crash. Tail

rotor control cable failure was secondary and occurred after the tail rotor problem. No pilot or crew error was discovered. Origin and responsibility for the foreign object causing damage to the tail rotor drive shaft is not known, according to the report. While the report concluded that loss of tail rotor control led to the fatal crash, it said the “foreign object causing the damage was not found.” The investigative report did note, however, that a damaged safety wire spool was recovered in the wreckage and was sent to the lab.

Source: *Honolulu Advertiser*

### **AMERICAN AIRLINES FINED \$7 MILLION FOR SAFETY PROBLEMS**

The Federal Aviation Administration has accused American Airlines of safety and drug-testing violations. The agency says the Texas-based airlines returned two aircraft into service after pilots reported safety problems. The FAA says two MD-83 airliners were flown 58 times in violation of federal safety regulations. The FAA also cited the airline for deficiencies in its drug and alcohol testing programs. The agency is seeking more than \$7 million in penalties from the airline.

## **XVII. ARBITRATION UPDATE**

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### **THE CHAMBER OF COMMERCE’S RESEARCH ON ARBITRATION IS FLAWED**

Two recent papers published or financially supported by the U.S. Chamber Institute for Legal Reform paint a grossly inaccurate picture of the empirical evidence on binding mandatory arbitration, a comprehensive study by Public Citizen reveals. Both papers were written by Catholic University law professor Peter B. Rutledge. One was issued by the Chamber Institute as an official response to a September 2007 Public Citizen report that found

that consumers lost nearly 94% of credit-card disputes administered by the National Arbitration Forum. The second paper was published as a law review article. Collectively, these “Chamber papers” purported to show that the broad sweep of empirical academic research suggests that individuals enjoy “superior” results in arbitration, notwithstanding anecdotal evidence suggesting otherwise.

In mandatory, binding arbitration—which consumers unwittingly agree to when they obtain a credit card, cell phone, bank account or a number of other goods and services—consumers lose their right to settle disputes in court and instead are routed to a private, secretive system that favors the company. Congress has a number of pending bills that would give consumers a fair shake when it comes to arbitration. Congress should ban any consumer arbitration and go back to what arbitration was originally supposed to cover—business disputes between businesses.

Public Citizen’s new study analyzes the empirical evidence on arbitration and finds that it proves that individuals fare worse in arbitration than in court. Significantly, not a single study cited in the Chamber papers showed individuals receiving higher average payments in arbitration than court. Individuals also fare worse in most other measures comparing arbitration and court, the actual text of the academic research indicates. David Arkush, director of Public Citizen’s Congress Watch division, observed:

*This debate is not just academic. It’s critical to anyone who owns a cell phone, has a bank account, buys a computer or engages in any basic transaction with a large corporation. The Chamber is trying to fool Congress into thinking that arbitration is generally fair, despite some well-publicized injustices. But the evidence flatly contradicts the Chamber’s claims.*

The study also reveals that in his past scholarship, Professor Rutledge has

voiced many of Public Citizen's criticisms of arbitration. For example, he has previously expressed views that arbitrators may have incentives to favor certain parties and that arbitration lacks meaningful appeal provisions and can be excessively secretive. Rutledge even called for revoking arbitrators' immunity from lawsuits in part because they too often ignore the law or their own rules. Despite their celebration of the "empirical evidence," the Chamber papers take significant liberties in reporting that evidence. Some of these liberties include:

- The Chamber claims that one study concluded that most arbitration clauses appear "to put the consumer on equal terms with the businesses that drafted them..." The Chamber omits what followed the ellipses: a warning that "the appearance of a level playing field may be deceptive" and a three-paragraph litany of criticisms against arbitration.
- Rutledge's law review article claims that only one academic study found that individual claimants prevailed less than 50% of the time in arbitration. In fact, Public Citizen's review found five other such studies—and four of them are cited in the Chamber papers.
- Both papers use evidence from a 1995 dissertation in their attempt to demonstrate that lawyers require prohibitively high provable damages to take most court cases. Although the papers proffer arbitration as a more feasible alternative, they neglect to mention that the same dissertation found that lawyers required higher provable damages to take a case to arbitration.
- The papers cite several surveys that they say demonstrate that individuals are satisfied with arbitration. The papers neglect to inform readers that the majority of these surveys concerned the voluntary use of arbitration. The difference between voluntary and mandatory arbitration

is stark. It's the difference between being forced into a private, secretive forum chosen by business or having the choice whether to go to court or to arbitrate in a fair forum. The Chamber wants businesses to have the right to force arbitration on people. It argues that voluntary arbitration won't work because people won't choose it. But people would choose arbitration if it were fair.

- Four of the five surveys the papers cite were financed by industry groups or by the Chamber itself. Although Rutledge's law review article singles out one survey as not underwritten by industry associations, this claim turned out to be spectacularly inaccurate. Not only was the group that funded the survey headed by a founder and director of the National Arbitration Forum, it listed the same address as the NAF. When Public Citizen called the group's most recently listed phone number, it reached the NAF managing director's voice mail.

Taylor Lincoln, Research Director of Public Citizen's Congress Watch division, had this to say concerning the group's report:

*The Chamber has expressed a great deal of concern about ensuring that people of modest means have access to justice. Hopefully, our report will disabuse the Chamber of the notion that mandatory arbitration is part of the solution.*

Congress has the opportunity to stand up to the powerful lobbyists who are opposing all of the arbitration legislation on behalf of their corporate clients. Hopefully, we will see some legislation passed on the arbitration front that favors consumers for a change.

Source: Public Citizen

## XVIII. HEALTHCARE ISSUES

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### **RED BULL MAY INCREASE RISK OF HEART DAMAGE**

New research suggests just one can of Red Bull, the popular energy drink, may increase the risk of heart damage. A study of university students between the ages of 20 and 24 years old found that drinking one sugar free can of the caffeinated energy drink increased the "stickiness" of the blood and raised the risk of blood clots forming. The Australian students, who were targeted in the study, showed a cardiovascular profile similar to that of someone with heart disease after drinking one can. Red Bull has denied that the drink, which is distributed to 143 countries worldwide, is dangerous. In a statement sent to the media outlets, the company said it had been proved safe by "numerous scientific studies," and it had never been banned anywhere. But, Dr. Scott Willoughby, of the Cardiovascular Research Center at the Royal Adelaide Hospital and Adelaide University, was "alarmed" at the results of his survey. In this regard, Dr. Willoughby observed:

*After one can it seemed to turn the young individual into one with more of the type of profile you would expect to see in someone with cardiovascular disease. People who already have existing cardiovascular disease may want to talk to their physician before they drink Red Bull in the future.*

The results shocked the 30 students tested, some of whom drank up to eight cans per night to help them stay awake to study, and according to media reports, many now refuse to consume the energy drink again. It will be interesting to see what develops now that concerns have been raised relating to safety and health issues associated with this popular product.

Source: Fox News

## XIX. ENVIRONMENTAL CONCERNS

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### **MORE SIGNS THAT THE BUSH WHITE HOUSE COMPLETELY CONTROLS THE EPA**

While it may come as no surprise to anyone that the Bush Administration has played a major role in shaping the Environmental Protection Agency's policies and its approach to enforcing our nation's environmental laws over the past seven years, two recent events should serve as a reminder.

To begin with, the *Associated Press* reported last month that the EPA has told its pollution enforcement officials not to talk with Congressional investigators, reporters, or even the agency's own inspector general about EPA-related matters. In an internal e-mail dated June 16, 2008, 11 managers in the EPA's Office of Enforcement and Compliance Assurance were reminded by division chief of staff, Robbi Farrell, that their staff members were to keep quiet. Among other things, the email advised; "If you are contacted directly by the IG's office or GAO requesting information of any kind ... please do not respond to questions or make any statements...." Instead, Farrell advised that staff members should forward inquiries to a representative designated by the EPA to handle those sorts of requests.

In response to the *Associated Press's* story, the EPA issued an official statement suggesting that the e-mail was aimed at making agency responses to the press, the EPA's Inspector General and Congress' General Accountability Office more efficient, consistent and coordinated. The EPA also said officials could still talk to investigators as long as they checked in with the appropriate representatives. About 900 lawyers and technical support staff are employed by the division at EPA headquarters in Washington.

The e-mail, according to EPA, was a response to a May 2007 audit by the

Inspector General's Office that found the agency had not responded to earlier IG reports on problems with water enforcement and other matters. However, after learning of the email, the Office of Inspector General said that it did not approve of the language in the e-mail and was engaged in discussions with enforcement officials to ensure the electronic dispatch would not hinder its access to information. The EPA's statement said:

*All EPA officials and employees are required to cooperate with OIG. This cooperation includes providing the OIG full and unrestricted access to EPA documents, records, and personnel.*

Of course, the real driving force behind the email is the fact that the EPA is currently under pressure from several Congressional committees to disclose documents relating to its position on global warming and its denial of a petition by California to control greenhouse gases from motor vehicles. That issue has become a hot-button issue on Capitol Hill in the wake of testimony given by EPA Administrator Stephen Johnson at a January hearing held by the Senate Committee on the Environment and Public Works.

In fact, a number of Senate Democrats are now calling for a perjury investigation into Johnson's testimony that the EPA decided on its own to deny California a waiver that would allow the state to implement environmental regulations of greenhouse gas emissions from cars that would exceed federal standards. Johnson also told the panel that any contact with the White House on the issue was routine.

Unfortunately, a former EPA official, Jason Burnett, who worked closely with Johnson, recently gave the Senate committee a very different version of that story. According to Burnett, Mr. Johnson was about to approve California's request until he ran the issue by the White House. Burnett, a former EPA global warming specialist, said the response was that "the President had a

policy preference for a single standard that would be inconsistent with granting the waiver." Burnett said Johnson then overruled the unanimous recommendation of his staff and denied the waiver request.

After receiving that testimony, several committee members asked the U.S. Attorney General to investigate whether Johnson lied when he told the Senate that no one outside of his own office played a role in the decision to deny California's request to move forward with tougher emission standards. Regardless of what comes from the Senate and Justice Department investigations, these latest incidents are just further evidence to me that the Bush Administration has two over-arching goals when it comes to our nation's environmental policies. First, it is dead-set on watering down every pollution standard that big-business must comply with in this country; and second, it wants to keep the public in the dark about its role in that process. As far as I'm concerned, the Bush Administration's strangle-hold over EPA policy decisions can't end soon enough.

Source: Associated Press and NPR

### **A REPORT ON THE HOT FUEL LITIGATION**

Our firm is involved in the "Hot Fuel case" in Kansas where a federal court is allowing discovery to proceed against petroleum marketers, refiners, and oil companies. The case involves claims brought by 46 plaintiffs against defendants in 26 states and territories in the United States. The Kansas court has consolidated various underlying class actions in these States and territories into one action. The 46 named plaintiffs in this multi-district litigation proceeding represent the plaintiffs in all the underlying class actions.

Plaintiffs' claims arise out of a concerted effort by the oil industry in the U.S. to sell consumers less fuel than the amount of fuel consumers believe they are purchasing. Every time you, as a consumer, fill up your tank, you pay the posted price-per-gallon for each gallon of gasoline or diesel fuel you pump

into your vehicle. But, the actual amount of fuel a consumer pumps is less than the amount of fuel for which he or she pays, because fuel is sold to consumers “hot,” at a temperature above industry standard.

The science behind the hot-fuel controversy isn’t in dispute. The U.S. government defines a gallon of gas this way: At 60 degrees, a gallon is 231 cubic inches. When fuel is hotter than 60 degrees, the liquid expands, yielding less energy per gallon. When fuel is colder, it contracts. Gasoline expands or contracts 1% for every 15-degree change in the fuel’s temperature. Diesel volumes change 0.6% per 15-degree change.

The phenomenon—and the economic effects of it—are so well known that U.S. oil companies and distributors track the temperature of the fuel they sell one another and adjust the price to conform to the 60-degree standard. But, when these same oil companies sell fuel to consumers in the U.S., the companies do not adjust the price to account for temperatures over 60 degrees for one simple reason: the average temperature at which fuel is stored in the U.S. exceeds 60 degrees.

When consumers purchase this “hot fuel,” they do not receive an honest gallon. Instead, they receive an expanded gallon with less energy than the standard 60 degree gallon the oil companies sell each other. As a result, the oil companies sell more gallons of fuel each year to consumers than the companies produce and have reaped windfall profits in excess of \$3.4 million just this summer. Judy Dugan, director of Consumer Watchdog, formerly, the Foundation for Taxpayer and Consumer Rights, observed:

*It’s the equivalent of the grocer taking your meat into the back room to weigh it and putting his thumb on the scale. With gasoline, everybody has their thumb on the scale.*

In Canada, where colder weather keeps the average temperature of fuel

storage less than 60 degrees, the oil companies have voluntarily installed Automatic Temperature Compensation (ATC) devices on virtually every fuel pump in the country. Canadian consumers would benefit from purchasing non-temperature-adjusted gallons, because colder fuel contains more energy per gallon, giving consumers the advantage at the pump. But in the U.S., these same oil companies refuse to install ATC devices, claiming the devices are cost-prohibitive and would not benefit consumers in the long run—as if to say, “trust us, we’re the oil industry.”

As anyone knows who has watched gasoline prices skyrocket as Big Oil profits keep climbing to record heights—and certainly as anyone knows who has followed the State of Alabama’s stymied efforts to recover money oil companies have cheated out of the State—the oil industry is at the bottom of the list of folks who should be trusted. A number of firms across the country are working together to hold the oil companies accountable for what the companies have cheated out of consumers. Our firm is one of several firms taking a leadership role. Rhon Jones, who heads up our Toxic Torts Section, is handling the Hot Fuel litigation for our firm.

Source: *Los Angeles Times*

### **DUPONT FINALLY PAYS FAMILIES OF CHILDREN**

In 1997 six British families set out to battle a huge multinational corporation over the deaths and serious birth defects of their children. The plaintiffs, from New Zealand and England, contended that exposure to Benlate, one of DuPont’s most successful fungicides, caused their children to be born with eye abnormalities. Eleven years later, two families finally obtained confidential settlements from DuPont.

Karen Ison was exposed to Benlate while working as a parks worker before the birth of her son, Blake, in 1993. As a result, Blake was born

without eyes and with a double cleft palate. Two other children born to park staff around the same time also suffered birth defects. Seven-year-old Jesse Hanham, also born with eye abnormalities caused by Benlate exposure, died in 1998. His mother, Andrea Reilly, filed a wrongful death suit.

Benlate was introduced in 1970 and was considered one of DuPont’s most successful fungicides; its active ingredient is benomyl. In 1989 and 1991 DuPont recalled their dry-flowable Benlate 50 DF due to the presence of the herbicide atrazine in some lots. Subsequent to the recall, the corporation faced hundreds of claims of growers blaming Benlate 50 DF for crop damage. In 2000, DuPont was ordered to pay over \$100 million to two Texas fruit companies for damage to their orchards caused by Benlate dust. The company also had to pay \$10.2 million and \$12.3 million to Ecuadorian shrimp farmers. DuPont stopped selling Benlate worldwide in 2001.

The eleven year old battle between DuPont and the injured families went to the U.S. Supreme Court three times before DuPont announced a tentative settlement of \$9 million last May for the original six families and the other 26 who contended Benlate also caused birth defects in their children. While the payouts to the individual plaintiffs were not that large, the Isons and the other plaintiffs believe that they succeeded in their main goal. They wanted to have Benlate pulled off the market, so that no one else would have to go through what they had experienced.

Source: *Associated Press*

### **POLLUTION AT NATION’S BEACHES IS A MAJOR PROBLEM**

The summer of 2007 was marked by a significantly high number of beach closures due to poor water quality and safety concerns, according to a new report. The Natural Resources Defense Council’s annual report finds that the number of days beaches were closed or under advisory last summer soared to

22,571—the second highest level in 18 years. Of particular concern were beaches on the Great Lakes, where 15% of water samples taken didn't meet health standards, largely due the discharge of raw sewage after a rainfall. Nancy Stoner, director of NRDC's clean water project, observed:

*The contamination problems in the Great Lakes are very significant. That's more than twice the national average and the highest level of contamination of any coastal region in the continental U.S.*

Also worrisome was a sharp increase of 33% in closures and advisories along the New York-New Jersey coastline, as well as a 38% jump in closures and advisories on the Gulf Coast. The report stressed that last season was the first full season Gulf Coast beaches had been reopened and monitored since 2005 hurricanes Katrina and Rita demolished the coast. On the other hand, New England beaches that saw a 69% spike in closures and advisory days in 2006 again fell 46% last summer.

However, whether from sewage or contaminated water flowing from streets to beaches after a storm, much of the nation's shoreline was polluted enough for closures and warnings to be put into effect. According to the report, sewage spills more than tripled from 2006 to 2007, and dirty storm water was responsible for more than 10,000 warnings and closures. The report also highlighted that coastal development can erode coastlines and prevent pollutants from being filtered out before they enter the water.

The Centers for Disease Control and Prevention emphasizes to swimmers that it's important not to swallow water in lakes, rivers and oceans and recommends avoiding swimming after rainfalls. The NRDC has called for more rapid testing that would allow people to make a determination within a matter of hours about whether beaches are safe. Assessing data from the Environmental Protection Agency, the NRDC found there were slightly fewer

closures last summer than in 2006. The summer of 2006 saw a record high of 25,643 days when beaches were closed or under advisory during the summer season. The bottom line is simply that pollution at our nation's beaches raise safety and health issues.

Source: ABC News

### **BENNETT ENVIRONMENTAL PLEADS GUILTY TO DEFAUDING THE EPA**

Bennett Environmental Inc., a Canada-based company that treats and disposes of contaminated soils, recently pled guilty to participating in a conspiracy to defraud the U.S. Environmental Protection Agency at a New Jersey Superfund site. The company entered into a plea agreement in U.S. District Court in New Jersey. The agreement involves the EPA-designated Superfund site, Federal Creosote, which is located in Manville, New Jersey. The Department of Justice charged Bennett Environmental with conspiring to commit fraud which carries a maximum fine of \$500,000. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine. An order of restitution is also mandatory.

Bennett Environmental has agreed to pay a \$1 million criminal fine. In addition, the Department of Justice will recommend that Bennett Environmental and its co-conspirators pay a total of \$1.66 million in restitution. The cleanup at the Federal Creosote site is partially funded by the EPA. Under an interagency agreement between the EPA and the Army Corps of Engineers, prime contractors oversaw the removal, treatment and disposal of contaminated soil at the Federal Creosote site.

Bennett Environmental has admitted to inflating the prices it charged to a prime contractor of the EPA and paying kickbacks to employees of the contractor over a period of two years. According to the charge, Bennett Environmental, through its agents and co-conspirators,

frustrated the competitive bid process and defrauded the EPA at the Federal Creosote site. Bennett Environmental, having access to confidential bid information, inflated invoices to cover nearly \$1.3 million in kickbacks to employees of the prime contractor in exchange for their assistance in steering sub-contracts to Bennett.

These charges are said to be a result of the National Procurement Fraud Initiative, announced in October 2006, which is designed to promote the early detection, prosecution, and prevention of procurement fraud associated with the increase in contracting activity for national security and other government programs. They also reflect the Department's commitment to protecting U.S. taxpayers from procurement fraud through its creation of the National Procurement Fraud Task Force. Hopefully, corporations like Bennett will be banned from all federal government programs.

Source: PR Newswire

## **XX. THE CONSUMER CORNER**

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### **FIGHT AGAINST TOXIC CHEMICALS MAY EXPAND**

As you may recall, the State of Maine passed legislation earlier this year that gave the state the authority to broadly identify and investigate "chemicals of high concern" in consumer products, particularly those that may reach children. The bill, signed into law in April, made Maine the first state in this country to have such authority. Hopefully, it will serve as a model for other states trying to fill a regulatory void left by the federal Environmental Protection Agency. It's become quite obvious that the EPA isn't able—or willing—to do what's necessary in this area of concern.

Just five chemicals out of 82,000 known to be hazardous to human

health, for instance, have been banned by the EPA since 1976, the most recent being asbestos in 1989. Maine's law coincides with mounting concerns in the United States over chemicals found in everyday products, from cars to clothes, and follows similar European Union laws. The EU in 1999 banned phthalates—chemicals used to make plastic more flexible—and last year implemented a law known as REACH (Registration, Evaluation and Authorization of Chemicals) that requires businesses to prove substances in everyday products are safe and submit data about them. Maine's bill follows closely the EU approach, requiring makers of toxic chemicals to notify state authorities of the quantity and purpose of the chemicals and work to develop safer alternatives.

Since the EPA isn't doing its job, many experts believe Maine's law will lead to tougher measures nationwide. Under the law, Maine will test chemicals and issue a "certificate of non-compliance" to manufacturers stating their chemicals do not meet state laws. The state can notify retailers that a product contains toxic chemicals and legislation can be approved to ban its sale. Environmentalists in Maine say there is growing evidence that harmful toxic chemicals are working their way into the state's ecosystem. A recent study, conducted at the BioDiversity Research Institute in Gorham, Maine, found some extremely disturbing evidence that confirmed the fears.

Other U.S. states have also begun to act on chemicals in consumer products. The state of Washington signed into law on April 1<sup>st</sup> legislation that places restrictions on the manufacture of children's products containing lead, cadmium and phthalates. In February, the Massachusetts Senate approved a bill to identify dangerous chemicals in household goods, but the legislation has yet to be passed into law. In 2007, Washington became the first state to ban toxic flame retardants, and California banned toys containing phthalates. Lawmakers in Maryland, Nebraska and Hawaii have been considering bills

similar to Maine's legislation. Until the federal government does its job on a national scale, the states will have to take action to protect their citizens.

Source: Reuters

### **THE FEDERAL GOVERNMENT NEEDS TO GET SERIOUS ABOUT SAFETY OF TOYS**

Public Citizen and five other leading consumer groups released a report recently detailing the reforms needed to ensure consumers' safety. Among other findings, the report states that the number of recalls of toys and children's products is up 22% over the first half of last year, despite industry promises last year to solve the problems that made 2007 the "year of the recall." Defective and dangerous products—from lead-painted toys to vacuum cleaners that catch fire—are being allowed onto our store shelves and into our homes. The Consumer Product Safety Commission has failed to do its job to protect American consumers.

Public Citizen recently released a study showing that manufacturers often wait nearly three years before telling the CPSC about defective products that can kill people—and the agency typically takes another seven months to warn the public. These products include infant swings implicated in six deaths. We need a strong, effective agency that can warn the public quickly about dangerous and defective products—and enforce the law against violators. Under current law, the CPSC can do neither effectively. The status quo is unacceptable—the CPSC should protect American consumers, not manufacturers!

Source: Public Citizen

### **GAS STATIONS IN TEXAS ACCUSED OF CHEATING CUSTOMERS**

With gas prices in the U.S. at record levels, folks should at least expect to get exactly what they pay for at the pump. A fuel company in Texas with dozens of gasoline stations in the Houston area shortchanged customers at nearly 1,000

of its gas pumps and could face fines topping \$100,000, according to the Texas Department of Agriculture. State investigators said more than 60% of the pumps at 47 Sunmart stations owned by Petroleum Wholesale were short-changing customers. At 15 of those stations, every pump was "cheating drivers," according to Texas Agriculture Commissioner Todd Staples. The problem pumps were shut down until they can be recalibrated. Commissioner Staples said the company could face fines of more than \$100,000. The Commissioner had this to say:

*At a time when families are struggling to purchase fuel, I am sure all Texans would agree with me that despicable violations such as these are repulsive and must be prosecuted to the fullest extent of the law.*

This matter was referred to Texas Attorney General Greg Abbott. However, Houston wasn't the only place where customers were being cheated. Statewide, more than 5% of the 109,369 pumps inspected last year in Texas—5,778 of them—gave the wrong amount of gasoline or had other problems that put them out of commission until they were fixed. Of those problem pumps, almost 28%, or 1,612, shorted customers on gasoline beyond a small variance allowed by the state, according to Texas Department of Agriculture inspection data analyzed by the *Houston Chronicle* and *San Antonio Express-News*. That percentage reflects only categories that measure gas output, not other problems that can affect pump accuracy.

Another 27% of the problem pumps statewide, or 1,575, gave more gasoline than purchased. Even pumps that pass inspection are allowed to be off by as much as six cubic inches per five gallons—about six tablespoons—which legally can cost customers two cents a gallon, based on \$4-a-gallon gasoline. The standard is stricter for newly-installed pumps. If 60% or more of a station's pumps short the cus-

tomers, even within the tolerance level, they are shut down. Commissioner Staples said at the Sunmart stations, the amount customers were shorted ranged from “slightly over to substantially over” the legal tolerance level. The pump that shortchanged customers the most—about a tenth of a gallon for every five gallons purchased—was in the Houston area.

The operation was triggered when officials found Sunmart inspections were yielding a 34% rate of noncompliance with state standards, compared with the standard of 4% to 6%. The department, with a team of about 50 inspectors and coordinators, conducted an inspection blitz of every station over a weekend.

Source: *San Antonio Express*

### **BANKS CHARGE LARGE OVERDRAFT FEES**

For years, banks have charged customers large fees for overdrawing their checking accounts. Now a growing number of institutions are charging customers such fees even before the transaction overdraws their account. It appears that Bank of America and TD Banknorth started doing it earlier this year. SunTrust, among other banks, had been doing it for a few years. Here’s how it works: If you pay with your debit card, some banks will now charge you a fee—\$35 or more—if you don’t have funds in your account at the time you sign for the purchase.

Previously, customers didn’t get charged this fee unless they were short of cash when the signature debit transaction cleared a few days later. While the signature debit transaction was pending, under that situation, consumers could often deposit money to cover any potential overdraft. Leslie Parrish, senior researcher at the Center for Responsible Lending, believes that this is another way for banks to “manipulate account holders’ balances to spur more overdraft fees.” Regulators are now considering whether to crack down on overdraft practices. The Federal Reserve has proposed a rule to

give customers the right to demand that banks deny transactions that overdraw their account. The Fed has also asked for comments on banks’ processing of transactions from high-to-low dollar amount. This practice, according to research by *USA Today* in 2006, often triggers more overdraft fees than if banks paid the transactions in the order they were received.

*USA Today* reported that in 2007, banks collected a record \$45.6 billion in overdraft fees from consumers, up 50% from 2001. This information came from Moebis Services, a consulting firm. That firm recommends to minimize fees, consumers should keep track of their account balances and seek out small banks, which often have lower fees. Most folks don’t understand the various fees charged by their own banks and many of us don’t take the time to find out what fees and charges are on our bank statement. I would recommend that all consumers get a good understanding of how their banks operate when it comes to fees and charges.

Source: *USA Today*

### **AIRBORNE PAYS MILLIONS TO SETTLE SUIT**

Over the past decade, millions of consumers have been using a product called Airborne to keep cold germs at bay. Airborne, when used as directed, does not prevent the common cold. Lydia Parnes, director of the Federal Trade Commission’s Bureau of Consumer Protection, which filed a complaint against Airborne’s makers, says:

*There is no credible evidence that Airborne products... will reduce the severity or duration of colds, or provide any tangible benefit for people who are exposed to germs in crowded places.*

The remedy prescribed by the FTC is for Airborne to pay consumers back for as many as six purchases, a nationwide total of as much as \$30 million. Under a settlement announced last month, the privately held Airborne Health, based in

Bonita Springs, Florida, will add \$6.5 million to funds it has already agreed to pay to settle a related class-action lawsuit. That suit, which alleged that Airborne falsely claimed its products could cure or prevent colds, was settled earlier this year for \$23.5 million. Consumers who bought Airborne products between 2001 and 2008 have until September 15<sup>th</sup> to apply for a refund for as many as six purchases. Claims will be paid by October 15<sup>th</sup>. I must confess that I have taken Airborne, but can’t say it ever stopped a cold that was in its early stages. It did make me hope for relief though and I guess that’s important.

### **THREE SIMPLE TIPS FOR HELPING TO COOL THE PLANET**

While a lot is being said about how little our government is doing to combat global warming, individuals also must do their part. There are a number of things that all of us can do to help in the battle against global warming. The following are three simple suggestions:

- We can turn off the lights both at home and at work when not needed.
- We can replace incandescent light bulbs with compact fluorescent bulbs.
- We can run dishwashers and washing machines in our homes only when they are full.

## **XXI. RECALLS UPDATE**

### **BMW RECALLING 200,000 VEHICLES**

BMW AG is recalling 200,000 vehicles over concerns that the front passenger air bag may not deploy in a crash. The German automaker said the recall involves the 2006 3 Series, the 2004-2006 5 Series, and the 2004-2006 X3 compact sport utility vehicles in the

United States. The National Highway Traffic Safety Administration said in a posting on its Web site that small cracks could develop in a seat detection mat and deactivate the front passenger air bags. According to NHTSA, the air bag warning lamp and the passenger air bag “on-off” light would remain on. The head protection system, however, would not be affected, NHTSA said. BMW says there were no injuries or accidents reported. If the seat detection mat fails to sense that a person is sitting in the passenger seat, it deactivates the air bag. Customers alerted the company when they noticed that the air bag light indicated a deactivated air bag even when a passenger sat in the seat.

NHTSA opened an investigation into the issue in September 2007 and upgraded its probe in January. In addition to the vehicles under this recall, the ongoing investigation also includes the 2004-2006 Z4, 2006 X5, 2006 6 Series and some 2004-2006 7 Series vehicles. BMW had received 23,739 warranty claims over the air bag system issue by early January, NHTSA said. It’s not known why the additional vehicles under NHTSA’s investigation were not part of the recall. To respond to the problem, BMW said it would extend the warranty to ten years without any mileage limit for the following vehicles: 2006 6 Series, 2006 3 Series with standard seat, 2004-2005 Z4, 2004-2006 7 Series, 2006 X5, and 2004-2006 5 Series with comfort seats. BMW said under the extended warranty program, the detection mat in a vehicle with the air bag system problems would be replaced at no charge to the customer.

Owners can contact BMW at (800) 525-7417.

#### **BEF TIED TO CAMP OUTBREAK RECALLED**

A California company has recalled 153,630 pounds of frozen ground beef, some of which has been linked to an outbreak of E. coli bacteria that shut down a Boy Scout camp in Goshen, Virginia. S&S Foods of Azusa, California, is

recalling 30-pound boxes of ground beef that went to distribution centers in Milwaukee and Allentown, Pennsylvania. The company acted on the recommendation of the U.S. Department of Agriculture’s Food Safety and Inspection Service. The meat was intended for food service companies and institutions and was not being sold in stores.

The Food Safety and Inspection Service designated the recall “Class I,” meaning “there is a reasonable probability that the use of the product will cause serious, adverse health consequences or death.” The meat could contain E. Coli O157:H7, a toxin-producing strain of bacteria. State health officials said there are 25 confirmed cases among people who attended camp between July 20<sup>th</sup> and 26<sup>th</sup>. Two campers who attended a later camp were also infected. More than 80 people have shown symptoms since the outbreak.

#### **MORE BEEF RECALLED AS A RESULT OF E. COLI FEARS**

Federal authorities assured consumers last month that a meat plant linked to nearly 50 illnesses caused by tainted ground beef had made enough changes after a recall to ensure that its products were safe. But, less than a month later, the same processor has recalled 1.2 million pounds of other beef products that might have sickened more than 30 people. The changes made after the first recall of meat processed by Nebraska Beef Ltd. affected only ground beef, according to the U.S. Department of Agriculture. Nebraska Beef recalled 1.2 million pounds of primal cuts, subprimal cuts and boxed beef that were made on June 17<sup>th</sup>, June 24<sup>th</sup> and July 8<sup>th</sup>. The products have been linked to illnesses in California, Colorado, Connecticut, Idaho, Illinois, Massachusetts, New Jersey, New Mexico, New York, Ohio, Pennsylvania and Virginia.

As in the earlier recall, all the beef now being recalled was sold to retailers and other companies that planned to

further process the meat. So product labels probably will not include the “EST 19336” code that identified Nebraska Beef. The Department of Agriculture isn’t sure whether, at the time of the first recall, the USDA investigation had spread beyond the area of the Omaha plant that produces ground beef, which has been linked to at least 49 cases of E. coli in seven states. But information compiled in the weeks after the June 30<sup>th</sup> recall showed another strain of the potentially deadly E. coli bacterium in other beef products.

Some of Nebraska Beef’s products were sold by Whole Foods Market, which also has announced a recall. Whole Foods is recalling fresh ground beef sold June 2<sup>nd</sup> to August 6<sup>th</sup> because of worries about E. coli contamination. Reports that seven people in Massachusetts and two people in Pennsylvania who shopped at Whole Foods became ill have been received. Even though on July 10<sup>th</sup> the USDA said they were satisfied that Nebraska Beef had made enough changes to ensure product safety, it appears there are still problems. The plant was to receive additional scrutiny in July, August and September to make sure the changes were made.

The company’s July recall covered all beef trimmings and other products intended for use in ground beef that were produced between May 16<sup>th</sup> and June 26<sup>th</sup>. Several lawsuits have already been filed against privately-held Nebraska Beef as a result of the earlier E. coli outbreak and recall. The company, which slaughters about 2,000 head of cattle a day, is located in Omaha, Nebraska.

Cooking ground beef to an internal temperature of at least 160 degrees should kill E. coli bacteria, if they are present. The USDA recommends that people use a meat thermometer to verify they have cooked meat thoroughly. The Centers for Disease Control and Prevention estimate that the E. coli O157:H7 variant sickens about 73,000 people and kills 61 each year in the United States. Most of those who die

are the elderly or young children have weak immune systems. Symptoms of E. coli infection include stomach cramps and diarrhea that may turn bloody within one to three days.

#### **BABY APPLESEED RECALLS CRIBS DUE TO FALL HAZARD**

Baby Appleseed, located in City of Industry, California, has recalled about 500 Davenport Cribs. The cribs fail to meet the federal safety standards for cribs. The cribs have a two-mattress support system. The secondary mattress support, used for the lowest position, does not meet the full 26-inch minimum height in its lowest position, allowing children inside to crawl over the railing, posing a fall hazard.

Federal Regulations require that all full-size cribs have a minimum rail height of 26 inches to help prevent fall hazards. To determine whether or not a crib meets this requirement, the mattress support platform must be placed in the lowest configuration (for the oldest users of the crib). Once in the lowest setting, the mattress must be removed and the distance from the top of the mattress platform (not the top of the mattress) to the top of the front rail must be measured. If the crib has a drop side or movable front rail, the measurement should be taken when the rail is in the uppermost locked position.

Consumers should stop using the recalled cribs in the third lowest position, which uses the wooden mattress support, and contact Baby Appleseed to receive a repair kit. The company says consumers who are currently using the crib with the metal mattress support in the top or middle positions can continue to use the crib in those positions while awaiting a repair kit. If there is any doubt, I recommend not using the crib until repairs can be made. For additional information, contact Baby Appleseed at (877) 348-2199, or visit the firm's Web site at [www.babyappleseed.com](http://www.babyappleseed.com).

#### **DEWALT RECALLS CORDLESS BRAD NAILERS**

DEWALT Industrial Tool Co., of Towson, Md. has recalled DEWALT DC608 Cordless Brad Nailers. The nailer can operate when the lock-off (safety) is in the locked position. Also, the nailer can operate when the trigger is not pulled and the contact trip is depressed. The unexpected ejection of a nail poses a serious injury hazard to consumers. DeWALT has received two reports of nailers operating when the lock-off (safety) was in the locked position. The company says no injuries have been reported. This recall involves the DEWALT DC608 18 Volt Cordless two-inch 18 Gauge Straight Brad Nailer with date codes 200728 through 200821. "DC608" is located on the right side of the magazine. The date code can be found on the underside of the handle, once the battery pack is removed. Units stamped with an "M" following the date code are not included in this recall. Consumers should immediately stop using the nailers and contact DEWALT for the location of the nearest service center to receive a free repair. For additional information, contact DEWALT toll-free at (866) 220-1481 or visit the company's Web site at [www.DEWALT.com](http://www.DEWALT.com).

#### **HALOGEN WORK LIGHTS RECALLED**

Harbor Freight Tools has recalled Chicago Electric Halogen Work Lights. The halogen work lights can overheat and melt, and pose a risk of fire and electrical shock to consumers. There have been three reports of incidents in which the recalled halogen work lights overheated and melted. The company says no injuries have been reported. The halogen work lights are 500 watts. Model number 30858 is included in this recall. The lamp measures 7 inches wide x 5 7/8 inches high and is mounted on a yellow frame. "UL Listed E163392" and "Work Light 8F95" is printed on a sticker on the back. The model number is printed on the light's packaging. The work lights were sold by Harbor

Freight Tools stores nationwide, Harbor Freight Tools' catalogs, and at [www.harborfreight.com](http://www.harborfreight.com) from February 2006 through March 2008 for about \$10. Consumers should immediately stop using the halogen work lights and contact Harbor Freight Tools for a full refund. For additional information, contact Harbor Freight Tools at (800) 444-3353, visit the firm's Web site at [www.harborfreight.com](http://www.harborfreight.com), or email the firm at [recalls@harborfreight.com](mailto:recalls@harborfreight.com).

#### **GAS GRILLS SOLD AT LOWE'S STORES RECALLED**

Perfect Flame Double Lid Four Burner Gas Grills have been recalled due to fire and burn hazards. The cooking chamber of the grill can melt and/or ignite, posing a risk of fires and burn injuries to consumers. There have been 175 reports of grill fires and 25 reports of grills melting, some of which resulted in minor property damage. No injuries have been reported. This recall involves Perfect Flame brand grills, Model GAC3615 four-burner LP gas grills. The grill has two lids. "Perfect Flame" is printed on the larger lid. The model number, serial number, and date code are printed on a label on the right side cart frame panel. The grills were sold at Lowe's stores nationwide from October 2007 through July 2008 for about \$300. Consumers should immediately stop using the recalled grills, disconnect the propane tanks, and return the grills without the propane tanks to any Lowe's store to receive a full refund. For additional information, contact Lucas Innovation toll-free at (877) 385-8226, or visit [www.gac3615grillrecall.com](http://www.gac3615grillrecall.com).

#### **FISHER-PRICE RECALLS LEARNING POTS AND PANS™ TOYS DUE TO CHOKING HAZARD**

Fisher-Price has recalled about 15,000 Learning Pots & Pans™ Toys. Missing screws in the blue toy pan can cause the clear plastic cover to come loose and release small balls, presenting

a choking hazard to young children. Fisher-Price has received five reports of the plastic covers detaching and releasing the small balls. The company says no injuries have been reported. This recall involves Learning Pots and Pans™ toy sets with stackable pots and pans, a lid and shape-sorting blocks. The toys have light and sound features that operate on three AA batteries. Model number G6685 is located on the bottom of the blue pan. Consumers should immediately take these recalled toys away from children and examine the bottom of the blue pan. The pan should contain six screws. The company says if all six screws are installed, no further action is necessary. If any screws are missing, the consumer should contact Fisher-Price to arrange for the return of the blue pan for a replacement. For additional information, contact Fisher-Price at (888) 521-0820 anytime, or visit the firm's Web site at [www.service.mattel.com](http://www.service.mattel.com)

#### **ATICO INTERNATIONAL USA RECALLS PERSONAL BLENDERS**

About 124,000 Signature Gourmet™ and Crofton® Personal Blenders are being recalled due to laceration hazard. While placing the cup on or off the base of the blender, the blender can be inadvertently turned on, activating the blade. This can pose a serious laceration hazard to consumers. The company has received 14 reports of lacerations, including 11 that required medical treatment and stitches. This recall involves the Signature Gourmet™ (item number W14A3691) and the Crofton® (model number SB-19) personal blenders. The blenders are white and have 3 components parts—a base containing a power button, a blade assembly, and a blending cup. Signature Gourmet™ or Crofton® is printed on the front of the base of the unit. “SB-19” or “W14A3691” is located on a label at the bottom of the unit.

The Signature Gourmet™ blenders were sold at Walgreens stores nationwide from July 2006 through March

2008 for about \$16. The Crofton® blenders were sold at Aldi stores nationwide from May 2007 through March 2008 for about \$13. Consumers should stop using the recalled blenders immediately and call Atico International USA for instructions on returning the product for a full refund. Consumers should call Atico International USA toll-free at (877) 546-4835 or visit the company's website at [www.aticousa.com](http://www.aticousa.com).

## **XXII. FIRM ACTIVITIES**

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### **SPOTLIGHTED EMPLOYEES**

#### **CHAD COOK**

Chad Cook is a lawyer in our Mass Torts Section and is currently responsible for a number of cases including Welding Rod litigation, Ortho Evra, Fosamax, Heparin, Digitek and Zithromax litigation. Chad also assists in investigating new drugs and medical devices which present a serious danger to consumers. He received his Bachelor of Science degree in Criminal Justice from Auburn University at Montgomery in 1998. While attending college, Chad was a member of Sigma Phi Epsilon Fraternity and was selected to represent AUM's first Mock Trial Team in the Southeastern Intercollegiate Mock Trial Competition at Kennesaw State University.

After graduating, Chad pursued his Juris Doctor degree at Thomas Goode Jones School of Law. Chad was placed on the Dean's Honors List and given the Scholastic Achievement Award for Employment Law in 2001. In addition, he was a member of Sigma Kappa Delta Law Fraternity and the Christian Legal Society. While attending law school, Chad also worked for our firm as a staff assistant in the Mass Torts section. After graduating in 2002, he was hired as a staff attorney for the firm, working primarily on defective construction cases. Chad now serves as

one of the lawyers in the Mass Torts Section, focusing his practice on pharmaceutical litigation, representing victims of defective prescription drugs and medical devices.

Currently, Chad is on the Plaintiff's Discovery Committee for In re Fosamax Products Liability Litigation, MDL-1789 which is venued in the Southern District of New York Federal Court before Judge John F. Keenan. Chad is also assisting in this litigation by serving on the Fosamax Science and Administrative Committees. In addition to his work at our firm, Chad has served as an instructor in Civil Procedure and Evidence at Faulkner University and as a member of the Legal Studies Advisory Committee.

Chad and his wife, the former Sharon Broadfoot, are both from the Montgomery area and have a three-year-old son named Parker. They are members of First Baptist Church in Montgomery where Chad serves on the Board of the Nehemiah Project, a program designed to bring church leaders, businesses, civic organizations and city officials together to address the spiritual and social needs of Montgomery's inner city. Chad is also a member of the Alabama Chapter's Cystic Fibrosis Foundation Young Professionals Leadership Committee and serves of the Board for Montgomery Partners in Education, where community members volunteer as tutors, mentors and partners, helping students build skills and find the link between school and the future. Chad is a very diligent and dedicated lawyer who works hard for his clients. We are blessed to have him with us.

#### **ASHLEY PUGH**

Ashley Pugh, who has been with our firm since 1999, is an integral part of our trial technology and graphics department. Ashley assists our lawyers and their legal assistants with their trial preparation and provides them with cutting edge electronic courtroom technology. Her current projects include Alabama Medicare fraud litigation and numerous personal injury and products liability cases. Ashley also

takes a very active role in the firm and is quick to lend her support and top-notch organizational skills to many of the firm's events. She has spearheaded a number of important firm events, including our very successful, first ever two-day lawyer retreat at the Robert Trent Jones Golf Trail in Prattville.

Born and raised in Montgomery, this dedicated employee is the former Ashley Age. Her parents, Wayne and Mary-Frances, and brother, Stephen, still reside in Montgomery. Ashley is married to Patrick Pugh and they currently reside in Mathews. Patrick works at Knox Kershaw as a Manufacturing Engineer and is the Captain of the Mathews division of the Pike Road Volunteer Fire Dept. They have one son, J.P., who is four years old. J.P. is a K-4 student at Macon East Montgomery Academy.

In her spare time, Ashley enjoys riding motorcycles with her husband, league bowling, riding four-wheelers with her family, fishing, watching dirt track racing and spending time relaxing with her friends. Ashley is a dedicated employee who does outstanding work for the firm. We are blessed to have her with us.

#### **ANGELA TALLEY**

Angela Talley, who started with the firm three years ago as a receptionist, now serves as a clerical assistant in our Products Liability Section. She also serves as Law Librarian, which includes keeping the firm's library up to date. Angela assists all the legal assistants and legal secretaries in her section and has a number of responsibilities. Angela has three children, Tony, Katie and Neal. Tony has already graduated from high school and lives in Covington, Louisiana. His goal is to be a Chef. Katie attends Prattville Junior High and Neal attends Daniel Pratt Elementary School. Angela enjoys taking her children to the YMCA to swim and spending as much time with them as possible. Angela works part-time at Cracker Barrel on the weekends. Angela is a very good employee, who works very hard, and we are fortunate to have her with us.

#### **DIANNE BROWN**

Dianne Brown, who has been with the firm for five years, is a Legal Nurse Consultant in our Mass Torts Section. As a consultant, Dianne is responsible for researching drug side effects, collecting, organizing, and reviewing medical records and other relevant healthcare or legal documents, summarizing and analyzing the information in medical records, and preparing reports of reviewed material. This work is extremely important to lawyers and staff personnel in the firm's Mass Torts and Personal Injury Sections.

Dianne is originally from Fayette, Alabama, which interestingly is still one of the few dry counties left in the state. She is married to Randall Brown who is a sergeant on the evening shift with the Montgomery Sheriff's Department. They have three children —Jeff, Amanda and Nathan. Jeff recently graduated from UAB with a bachelor's degree in criminal justice. Amanda attends Troy University and is majoring in Accounting, and Nathan just graduated from Alabama Christian Academy and will attend CACC in Alexander City. The Browns are members of Taylor Road Baptist Church where Dianne is active in the music ministry as a full-time keyboardist. Dianne is a valuable employee who does outstanding work. She is a real asset to the firm and we are most fortunate to have her with us.

#### **KATIE TUCKER**

Katie Tucker has been with the firm since November of 2001. She is a legal assistant for Ted Meadows and Russ Abney in our Mass Torts Section. Katie has been involved in a number of important cases involving Lotronex, Meridia, Smith & Nephew Knee Replacements and Guidant Ancure Stent. She is currently assisting with the hormone therapy (Prempro) cases. Katie has been married to Gerald for nine years, and they have a daughter, Georgia, who is 21 months old. Katie enjoys scuba diving, hiking, and spending time with her family and friends. She is a very good employee and we are fortunate to have her with the firm.

## **XXIII. SPECIAL RECOGNITIONS**

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#### ***FAVORITE BIBLE VERSE***

My friend Lindora Snyder, a former school teacher who is a brilliant historian, sent in her favorite Bible verse this month. Lindora said she initially wanted to include the entire eighth chapter of Romans, which she says is inspiring and a source of great comfort during difficult times, but decided not to. However, she suggests we read this entire chapter. Lindora said that verses 26-28 have had a special meaning in her life, but that she puts special emphasis on one particular verse that has helped her deal with life's ups and downs:

*And we know that in all things  
God works for the good of those  
who love Him, who have been  
called according to His purpose.*

*Romans 8:28*

Lindora has been a real inspiration to her many friends over the years. She is a dedicated Christian lady who "talks-the-talk," but who also most definitely "walks-the-walk" on a daily basis. She is also one of the biggest Auburn football fans on this planet!

#### ***THE KIM HILL CONCERT WAS A HUGE SUCCESS***

On August 9<sup>th</sup>, our firm sponsored a night of worship and inspiration called "At the Cross," featuring Kim Hill, Ashley Cleveland, and Auburn's Chette Williams. The event was held at Saint James United Methodist Church and attracted an overflow crowd. It was one of the best.

Kim Hill is a Dove Award-winning and Grammy-nominated Christian music artist. Ashley Cleveland, also a Christian music artist, is a Grammy and Dove award winner. These soulful, talented women led a capacity-crowd in

worship and praise. From Kim's original compositions, "I Have to Believe" and "Sing Praises" to wonderful old hymns and spirituals such as, "It is Well" and "Precious Lord," Christ was exalted and all were inspired by this excellent night of music. The evening was made even more special when Kim's 11-year-old son, Benji, and Chette Williams' young son, Chette Jr., performed a Christian rap song. It was a great evening of exceptional and uplifting music.

For those who do not know Chette, he is the Chaplain for Auburn University's football team and the director of the Fellowship of Christian Athletes at Auburn. Chette is doing great work at Auburn, not only in the lives of athletes, but also in the lives of young people in the community. During "At the Cross," Chette gave a powerful message from God's Word, sharing from the book of Ephesians and his own personal walk with the Lord. Chette challenged each person to run the race of faith with God's power, obeying His Word, and not giving up or growing weary. It was a great challenge to me—and I know to many there—not to rely on my own strength but the strength of the Lord. Chette ended the message with a call for anyone who did not know Jesus personally to come to Christ for forgiveness of their sins and for salvation. Several responded and embarked on a new life in Christ. To God be the glory!

Julia Beasley, Leigh O'Dell, Alyce Robertson and Cole Portis from the firm put this program together and did an outstanding job. A number of groups helped out greatly, including the FCA, Faith Radio and the staff at St. James. We thank the Lord for this wonderful evening and look forward to more events like this in the future.

#### **A LOSS FELT BY THOUSANDS**

The death of John Mark Stallings on August 2<sup>nd</sup> was a loss that touched thousands of people around the country. In case you don't recognize the name, Johnny was the son of Gene and Ruth

Ann Stallings. He was universally known and loved by followers of University of Alabama football. His Daddy was a highly successful football coach at the University. Johnny's extraordinary life affected folks from all walks of life, not just football fame. He was truly an inspiration to all who knew his life story. Being an Auburn football fan, I have never paid much attention to the character or private lives of the Alabama coaches. However, Gene Stallings was an exception. While he was a great coach, he was an even better person. Sara's sister Della and her husband Kyle Wilcutt lived next door to the Stallings' when Gene was a young assistant coach under Paul Bryant in Tuscaloosa. I learned a great deal about the Stallings family from Della and Kyle and it was all good.

I read about Johnny in a number of newspapers and what was said really touched me deeply. It tells us lots about Gene and Ruth Ann Stallings and their son Johnny. Since it's such a tremendous testimony to the goodness of the Stallings' family, I am setting out what Greg Thompson wrote in its entirety.

#### **ALL I REALLY NEED TO KNOW I LEARNED FROM JOHN**

*All I ever really needed to know, I learned from Johnny Stallings. You can go to the finest schools and get any advanced degree they offer. Or you can read all of the business and self-improvement books you want. But for a Ph.D in true wisdom, take a look at the life of Johnny Stallings. You may have never heard of Johnny. He had Down Syndrome. When he was born, 46 years ago in Alabama, the doctors said he wouldn't live even a year or two because of a severe heart defect. Other well-meaning doctors advised his parents to put him in an institution. "In a year," they said, "you'll forget you ever had him." But fortunately for all of us, Gene and Ruth Ann Stallings*

*didn't take their advice. They chose to treat Johnny as a vital part of their family. And we are all the better for it. As his father advanced his football coaching career—first at Alabama, then to Texas A&M, the Dallas Cowboys, Arizona Cardinals and finally to a national championship in 1992 at Alabama—Johnny was an integral part of the team. To Johnny, the most important person was the trainer. "Trainers take care of the players," he once said. "You can't win without trainers."*

*To the day he died, Johnny Stallings wore a massive, diamond-encrusted National Championship ring on his frail fingers, which were tinged a grayish blue from the lack of oxygen caused by his heart condition. Johnny was front and center in that National Championship team photo. In fact, he was a part of every team his father coached, including the storied Dallas Cowboys. The players drew inspiration from him. When Johnny turned 40 years old, for example, his birthday party was attended by a Who's Who of former NFL stars. Johnny had some accomplishments of his own. He was featured with his father on a popular national United Way TV commercial, has a playground named for him at the RISE center in Tuscaloosa, had the athletic training facility at Alabama named for him, and won a "Change the World" award from Abilene Christian University. But perhaps the most important thing that Johnny Stallings accomplished is this: he taught us that it doesn't matter what awards you win, or what worldly accomplishments you achieve, it is how you live your life that matters most. So what can we learn from Johnny Stallings?*

- Every life matters. The life of Johnny Stallings teaches us that

God can use anyone, no matter how insignificant in society's eyes, to make an impact on others. Johnny had none of the things that you and I take for granted, but Johnny touched countless lives in ways none of us can even begin to imagine. Our materialistic, success-driven culture doesn't really know what to do with people like Johnny. Society certainly didn't know what to do with Johnny when he was born 46 years ago. But God did.

- See the good in everyone. "Be my friend." When Johnny got to know you, you became his "friend." And he never forgot you. Despite being mentally disabled, Johnny never forgot a name or a face. Johnny literally saw no evil in people. Johnny had more friends in his short lifetime than any of us will ever enjoy.
- Walk openly, simply and humbly with God. The Bible tells us, "And what does the LORD require of you? To act justly and to love mercy and to walk humbly with your God." That describes the way Johnny lived. He could barely read or write, but Johnny Stallings prayed the sweetest prayers you ever heard. He didn't necessarily know the fine points of theology, but you could tell that he knew God. He walked with God, openly, simply and humbly. And everybody knew it, whether they acknowledged that God or not.
- Love unconditionally. In Johnny's world, you didn't keep score or attach strings to love. He loved unconditionally, all of the time.
- Smile. Laugh. Hug. The last time I saw Johnny, we brought him a T-shirt from Dreamland Barbecue in Tuscaloosa, one of his favorite places to eat. Johnny hugged us.

He patted us. He smiled all of the time. Johnny was one of these people who always made everyone feel better just for having been around him. Who among us can say that about ourselves?

- Treasure every moment. Johnny, of course, was supposed to be put away in an institution. Doctors told them Johnny wouldn't make it to age four, and when he did, they then said he wouldn't live past 11 because of heart and lung issues common to people with Down Syndrome. Then we always heard that Johnny wouldn't live past 16. And on and on. So with Johnny, you treasured every moment.
- Little victories are the ones that matter the most. Everyone focuses on the championships, but with Johnny, you celebrated all of the little victories. Then, after a while, you realized that those are the ones that really matter the most.
- Trust God because He really does know best. Despite being frail and disabled, Johnny Stallings wore a National Championship ring. Every member of that 1992 Alabama team will tell you of Johnny's impact on that team. Johnny Stallings literally changed the world and made everybody he met a better person—if only for that moment.

Gene Stallings, a star football player, championship coach and tough enough to be one of Bear Bryant's legendary Junction Boys, probably used to dream of a son who would be an impact player; who would change the world, make a difference and someday maybe—just maybe—wear a National Championship ring. "I prayed to God that He would change Johnny, but He changed me," Coach Stallings once said in

a speech. He added that if God offered him the choice of going back and having a "perfect" son without a disability or having Johnny, "I'd take Johnny every time."

Greg Thompson is a 1972 graduate of Paris High School, former sports writer for The Paris News and currently director of corporate communications for Chick-Fil-A in Atlanta, Georgia.

Source: *The Paris News*

### **A JUDGE HOPES HIS WILLINGNESS TO SERVE ON JURY WILL INSPIRE OTHERS**

Many folks try hard to avoid jury service, which I have never fully understood. I consider jury service as an obligation of citizenship. Recently, Autauga County Circuit Judge Ben Fuller found himself in an unusual situation when he was called for jury duty. Judge Fuller was among about 125 potential jurors called to fill out the 18-member grand jury, but was excused, since he is one of the judges who would have to preside over any criminal trials that came about due to the panel's actions. However, the judge wasn't selected to serve on any of the court juries that week. He told the *Montgomery Advertiser*:

*My name was in the bowl just like everyone else's, but it wasn't picked. I was really looking forward to going through the selection process. I think it would have given me an important perspective of what the jurors go through.*

Judge Fuller has been vocal over the past few years about the importance of people showing up for jury duty. He became visibly upset several times when as many as one-fourth of those summoned for jury selection didn't make it to the courthouse. The judge has been on the bench for 13 years and he knows first hand the importance of jury duty. Judge Fuller hopes his willingness to serve sets an example for all citizens. He believes—as I do—that

“People need to understand that serving on a jury is a privilege.” Judge Fuller says, “For our justice system to work, we need the participation of citizens. If you had a trial coming up, civil or criminal, wouldn’t you want a jury of citizens engaged in the community to make the decision?”

Source: Montgomery Advertiser

## XXIV. SOME CLOSING OBSERVATIONS

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### **JOHN MCCAIN IS NO FRIEND OF FARMERS**

Coming from a long line of farmers in my home county of Barbour, I have always had a soft spot in my heart for American farm families. I know first hand how tough life can be for farmers and their families. That’s why Senator John McCain’s recent comments opposing the Farm Bill were so disturbing. McCain came out in strong opposition to the bill, saying “I don’t support agricultural subsidies no matter where they are. The farm bill, \$300 billion, is something America simply can’t afford.” It’s quite obvious that McCain doesn’t understand the economic issues American farmers are facing. Alabama Agriculture Commissioner, Ron Sparks, had this to say about McCain’s position:

*McCain is worried that our farmers are getting rich through subsidies, but I can tell you that in Alabama without the Farm Bill many Alabama farmers would not be able to continue farming.” Of the \$300 billion in the Farm Bill, less than 30% goes to farmers as subsidies. The rest of the money goes to other agriculture related programs. The Farm Bill would expand nutrition aid for the poor, elderly, children and babies; increase funding for conservation programs; provide marketing resources for agricultural prod-*

*ucts; and create a \$4 billion disaster program for farmers. Another important component of the Farm Bill provides food to school children through the free lunch program. It is widely documented that there is a direct correlation between low performance schools and the number of free lunches provided there. The Farm Bill helps ensure that all children are in a better position to learn by having a hot meal each school day no matter what their family’s income is.*

In the last few years, Alabama has experienced the worst drought in the nation, hurricane and tornado disasters, and a late spring freeze that devastated many farmers. Alabama farmers need and deserve assistance from the federal government. The cost of food has been going up, but that is due to the rising cost of equipment, fuel, and fertilizer. Add to that the costs of recovery following a disaster and losses due to drought or other bad weather and it is clearly taking a toll on farmers. I suspect Senator McCain will change his position on American farmers before the November election date, but I doubt if any real farmers will forget what he has said.

Source: Alabama Agriculture Commission News Release

### **POST-LABOR DAY POLITICS**

Now that Labor Day has come and gone, the political season will officially get under way. In years past, little campaigning took place before Labor Day, but that tradition has gone by the wayside. We have been hearing political speeches and debates relating to the presidential race for at least a year. However, even that race will jump into overdrive now. All I will say about that is simply that it’s one of the most important Presidential races to the American people since the Hoover days, and perhaps the most important ever. I fear that unless we undo the

tragic mess George W. Bush and Dick Cheney have caused and are leaving behind and get our country back on the right path, our Republic may never be the same!

### **BIRDS OF A FEATHER STILL FLOCK TOGETHER**

Despite all of the efforts to cut ties with the Bush Administration, John McCain, realizing that he might be losing the election before it officially gets started, opened his doors to disciples of Karl Rove from the 2004 campaign and others from the Bush White House. The candidate who started out talking about high-minded, civil debate has now wholeheartedly adopted Rove’s brand of politics which is evil to the core. Anybody who has observed Rove’s work in prior campaigns recognizes that the current attacks on Senator Obama are clearly the work of Rove and his disciples.

Since they killed his own 2000 presidential bid, of all people McCain should certainly recognize the Rove tactics and his ugly brand of politics. Nevertheless, McCain has put day-to-day management of his campaign in the hands of one Rove acolyte and awarded top positions to two others. The résumés of the new team’s members included stints in the Bush White House and in his 2004 re-election campaign, one of the most negative and divisive in recent memory.

It is hard to imagine a worse role model than the one McCain has adopted. It’s significant that President Bush isn’t in great demand by any other Republican candidates. The voters don’t want an extension of President Bush’s two disastrous terms, but that’s exactly what the McCain new handlers are offering. When you combine the Rove disciples and all of the special interest lobbyists who are still helping to run the McCain campaign, we should have anticipated that the Arizona Senator would turn up the level of his personal attacks on Senator

Obama. Of course, the worst attacks have come and continue by way of the Internet.

## XXV. SOME PARTING WORDS

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Most sports fans recognize the names Matt Hasselbeck (QB Seattle Seahawks), J. D. Drew (an outfielder with the Boston Red Sox) and Stephen Drew (the starting shortstop for the Arizona Diamondbacks) because of their accomplishments on the playing field. Each has been highly successful at their trade. However, they share another common bond and that's their strong commitment to Jesus Christ.

Matt says that a particular Bible verse gives him the most guidance in his

daily walk with Christ and it is Colossians 3:23. He says this is a verse that lots of folks know, but that "it's hard to do." Based on all that I know about Matt, he does a tremendous job of living up to this message.

The Drew brothers, who grew up in Hahira, a small town in South Georgia, have made it real big in the major leagues. J.D., the older of the two, has been around longer than Stephen. They too have a love and devotion to Jesus and are willing to share their faith with others. The examples they set for teammates and young athletes has been tremendous. J. D. and Stephen share a favorite Bible verse which is Romans 10:9.

However, there is a third Drew brother, Tim, who is currently with the Bridgeport Bluefish, a minor league team. While Tim hasn't made it to the majors and was going through rehabilitation because of an injury that

occurred last season, he is just as committed in his faith as his more famous brothers. Tim's Christian faith has helped him deal with the adversity that comes with serious injuries to athletes. The younger Drew says that Psalm 119:165 means a great deal to him and that he learned long ago that God is sovereign and in charge of his life.

*Great peace have those who love  
Your law, And nothing causes  
them to stumble.*

*Psalm 119:165*

It is great to know that there are athletes like Matt, J. D. and Tim who realize what's really important in their lives and who have their priorities in the correct order. When we read and hear about famous and not so famous athletes who get in trouble—and are not good role models for young folks—it's good to know there are others who are.

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