

# THE JERE BEASLEY REPORT

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## I. CAPITOL OBSERVATIONS

### Nursing Homes Mislead People

As expected, the nursing home industry has come with a package of tort reform bills. However, the four-bill package is even worse than we anticipated. If passed, these bills would, among other things, put a cap of \$250,000 on both non-economic damages for an injury and a cap of \$250,000 on all wrongful death cases. These bills will do nothing to improve case and protect residents or address any problems nursing homes may have in getting insurance. What they will do is further harm those residents already suffering the greatest damage from a nursing home's abuse or neglect, and provide a windfall to the worst homes, especially repeat offenders, at the expense of good homes that try to offer good care. Clearly, the nursing home industry is intentionally misleading people in our state about their financial condition and the reason for any increases in insurance rates. What most Alabama citizens don't know is that the owners of nursing homes in our state have a monopoly under current Alabama law because the number of nursing home beds is set and can get no higher. That means no new or better facilities can be built. The Certificate of Need process that governs new facilities is locked up and must be changed.

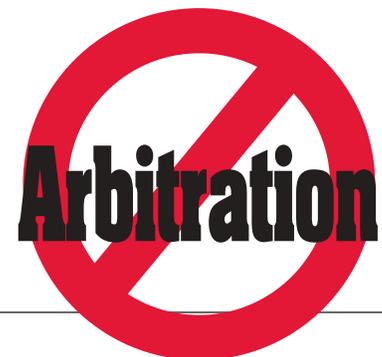
While the nursing home owners are crying wolf, even the worst of the existing nursing homes could sell out for a tremendous profit at any time if they wanted to. Under the Certificate of Need law, which makes nursing homes a state-protected monopoly, there is no incentive for the owners to operate the homes efficiently or to provide quality care and treatment of residents.

Instead of spending millions of dollars for high-priced lobbyists and paying for a multi-million dollar television advertising campaign trying to pass their lawsuit immunity bills, the owners of the nursing homes should use that money to improve conditions in their facilities and properly staff them. What the state really needs to do, however, is to open things up and bring some real competition into the marketplace. If that can be accomplished, it would guarantee that the conditions in nursing homes in Alabama would be improved greatly.

We have seen firsthand how bad many of the nursing homes are in Alabama. Our investigations have revealed some unbelievable and sometimes shocking incidents of abuse, neglect, and bad treatment of persons who reside in the facilities. For example, I don't believe that people in our state expect to find fire ants eating their loved ones. Neither do they expect maggots, which thrive in filth, to be found in the feeding tubes and bodies of their relatives. I am also convinced that finding a wheelchair-bound lady locked in a nursing home meat freezer overnight is something

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that most folks believe should not be tolerated. The last thing that a person would expect is for his or her elderly grandmother to be taken away from the facility and repeatedly raped. Yet all of these things have happened in nursing home facilities in our state. These terrible conditions will only get worse if the current set of bills is passed.

The truth is the nursing homes want immunity from all lawsuits and are using what their insurance companies are doing to get their way. We know from experience that the conditions in all too many nursing homes in Alabama are very bad. Even the best facilities are understaffed, and in many facilities owners are using employees who are untrained and sometimes not competent to do the job required of them. When even the good nursing homes are not up to the standards required of a facility that has the responsibility to care for elderly or disabled human beings, you can imagine how the rest of them operate.

There has been lots of talk about high insurance premium rates. There is a cry from the nursing homes that limiting the amount of damages that can be recovered in lawsuits will solve the problem. However, experience in Alabama and other states has proved that putting caps on damages in lawsuits will not reduce insurance rates. There is no state in this country where caps have worked to reduce premiums charged by insurance companies. This makes sense because study after study, often by insurance commissioners, has shown insurance companies raise rates because they want to make up for investment losses, not any nonexistent increase in payouts for lawsuit awards. Instead of reducing insurance rates, caps penalize the victims of abuse, neglect, and substandard treatment by bad nursing homes, and the insurance premiums continue to rise. This also penalizes a nursing home that wants to do right.

The nursing home owners admit that a good percentage of the homes have never been sued. I don't know if that is correct or not. Assuming it is, however, I have to ask, "why are insurance rates being increased on those 'good' homes?"

It is significant that the only state that has had a reduction in insurance rates is California, and that is because California's legislature rolled back insurance rates by 20% and then made the companies justify all future rate increases. That system has worked very well for California citizens. In that state, insurance rates were reduced and the people have benefited. That should be what the nursing homes ask the Legislature to do. If insurance rates were rolled back 20% from the level of rates that were in effect in 2001, that would solve any insurance problem. That is exactly what California did and it worked.

There are also some other important facts that the nursing homes in Alabama aren't telling folks. One fact is that nursing homes already have tort reform. They already have laws on the books that allow them to hire totally incompetent employees with no fear of being sued. Existing Alabama law was changed so that no prior incidents of wrongdoing in a nursing home can be allowed in evidence during a trial—regardless of how many or how bad they might be, and that gives bad nursing homes a real advantage. Nursing homes are also under the existing tort reform caps that were passed by the Legislature just a few short years ago, and as a result, the amount of damages that can be recovered in a lawsuit are already capped by law. All of this is currently the law in Alabama. So, the questions are, "why do the nursing homes feel they need virtual immunity from lawsuits in Alabama?" Then, "who will really benefit when the courthouse door is shut to victims?"



*Calliphora vomitoria*

#### **Blowflies Are Found On:**

- Decaying Flesh
- Rotting Meat
- Feces

**Blowflies Should Never Be Found In A Nursing Home**

### **The Nursing Home Package: If Passed—The Worst Laws In The Country**

The four bills were introduced and sent to three separate Senate Committees. The following is a brief summary of the bills:

**SB 266—CAPS BILL.** This bill caps all damages at \$250,000. This covers non-economic, punitive, and wrongful death cases. Even in the most egregious case, a victim or the family of the victim could only recover \$250,000, regardless of how bad the conduct is or how badly a resident suffered. For example, if a patient is repeatedly abused or neglected, the damages will be limited. The cap would apply to cases where residents were infested with maggots, were locked in a sub-zero meat freezer, were eaten by fire ants, or were repeatedly raped or assaulted. This bill was assigned to the Senate Judiciary Committee. The following Senators are the primary sponsors of the bill: Jim Preuitt, Gerald Dial, Larry Means, Hinton Mitchem, Gary Tanner, Jabo Waggoner, Harri Ann Smith, Curt Lee, and Larry Dixon.

Senator Rodger Smitherman is Chairman of the Judiciary Committee.

**SB 268—POOL BILL.** This bill creates an insurance pool, which on its face seems innocent enough. However, each nursing home participating in the pool will have caps on damages built into the pool. Each nursing home would have a per-incident cap of \$250,000, with an aggregate cap of \$500,000. Regardless of the number of cases filed against a nursing home, its total liability for the first year would be set at \$500,000. For instance, if one patient receives \$250,000, and a second patient receives \$250,000, it would not matter how bad or egregious the third, fourth, or fifth case are—there would be no liability coverage available from the pool. If a nursing home had a fire, such as the one in Connecticut and 13 residents were burned to death, as was the case there, a cap of \$500,000 would apply under the pool for all 13 deaths. The same would be true if 100 persons were killed in the fire—the aggregate cap would be \$500,000 for all 100 deaths. An administrative procedures process would be established that sets up an administrative law judge to hear all cases. This bill was assigned to the Banking and Insurance Committee. If enacted, Alabama nursing homes could incorporate the cost of belonging to the pool and their deductible as a cost of doing business and be guaranteed immunity regardless of how egregious their conduct. The following Senators are the primary sponsors of the bill: Jim Preuitt, Hinton Mitchem, Roger Bedford, Gary Tanner, Jabo Waggoner, Harri Ann Smith, Curt Lee, and Larry Dixon. Senator Bobby Denton is Chairman of the Banking and Insurance Committee.

**SB 269—PANEL REVIEW BILL.** This bill establishes a review panel that

must hear all nursing home cases before a lawsuit can be filed in circuit court. This creates another level of bureaucracy and would be unworkable for a number of reasons. First, the panel couldn't be independent and would favor the nursing home industry because it would be comprised of experts who would have a past, present, or future relationship with the nursing home industry. All nursing homes by necessity have a working relationship with the doctors in their area, and that's where the panel would come from. Furthermore, none of the witnesses or evidence submitted by the nursing home would be subject to cross-examination. The findings of the panel will be disclosed to the jury in a lawsuit before the jurors begin deliberating the nursing home case. This would be totally unfair to the victims. In effect, the panel would be the judge and jury in every case. If enacted, the bill would create a one-sided, "medical provider friendly" review panel that would be highly prejudicial to any victim's claim. This bill has been assigned to the Senate Health Committee. The following Senators are the primary sponsors of the bill: Larry Means, Jim Preuitt, Hinton Mitchem, Gary Tanner, Jabo Waggoner, Harri Ann Smith, Curt Lee, and Larry Dixon. Senator Larry Means is Chairman of the Health Committee.

**SB 267—PATIENT DESIGNEE BILL.** This bill establishes a "point person" as the primary care person for nursing home residents. The bill grants civil and criminal immunity to a "point person" who acts in good faith. This means the person could not be sued even if they were totally at fault and responsible for the injuries and damages suffered by a victim. An employee of the nursing home could even be designated as the point person. If enacted, Alabama nursing homes could include such designa-

tions in their admissions contracts or simply "assume responsibility" for the resident, thereby ensuring that they would be immune from any criminal or civil liability. This bill has been assigned to the Senate Health Committee. The following Senators are the primary sponsors of the bill: Larry Means, Hinton Mitchem, Jim Preuitt, Gary Tanner, Jabo Waggoner, Harri Ann Smith, Curt Lee, and Larry Dixon.

## Patients Bill Of Rights

In Alabama there is no statutory Bill of Rights for residents of nursing homes as there is in numerous other states around the country. In states such as Florida and Arizona, nursing home residents have specific statutory rights to protect them. In some states, a violation of these rights creates a cause of action against the nursing home. During this session a bill will be introduced establishing an Alabama Nursing Home Residents Bill of Rights and providing civil remedies for nursing home residents that have been abused and upon whom a fraud has been committed by the nursing home. I have seen this proposed legislation, and it would provide needed protection for nursing home residents in this state.

For instance, this legislation would require that every resident of a nursing home in the state of Alabama have the right to live in a safe and decent living environment, free from abuse and neglect, and the right to be treated with consideration and respect. It would give nursing home residents the right to adequate and appropriate healthcare, and the right to exercise civil and religious liberties. This bill would authorize the Department of Health to survey every nursing home to determine whether these rights were being complied with as a prerequisite to the home maintaining its license to operate the facility.

The bill would also prohibit any nursing home from requesting or requiring that anyone give up their right to trial by jury, or any other constitutional right, as a precondition of admission to the nursing home. This is a very important piece of legislation because, as I have mentioned in previous reports, many nursing homes in Alabama now require that residents sign arbitration agreements before they can be admitted into the home. This practice is simply outrageous and should not be allowed to continue. Under the proposed legislation, it would be stopped.

When you consider that most of the care provided in nursing homes is simply custodial in nature, involving feeding, grooming, bathing, etc., another important feature of this bill is that it would remove nursing home lawsuits from the unreasonable restrictions of the Alabama Medical Liability Act. The AMLA does not allow discovery into “other acts and omissions” of a healthcare provider in a lawsuit. This prevents the claimant’s attorney in a nursing home case from discovering patterns of abuse and neglect that may have existed in the facility and that the management may have known about at the time the resident was admitted. This law protects bad nursing homes that knowingly neglect their residents. No other state in the country allows bad nursing homes to hide behind a law like this. The proposed legislation I have described would do away with this “shield” now being used to keep Alabamians from finding out how severely understaffed nursing homes are and the resulting problems.

This is badly needed law in Alabama. Hopefully, the Legislature will have the courage to pass this law and protect nursing home residents in Alabama, rather than pass caps on damages and strip away the few protections these vulnerable people now have. I urge each of you to contact your Senators

and Representatives today and tell them that we need to protect our elderly in Alabama, not bad nursing homes.

### **Prisoners In Alabama Have More Rights**

A prisoner in a state penitentiary who is physically or sexually assaulted by a prison guard would have more protection and rights under the law than nursing residents if these nursing home immunity bills pass. There would be no caps or limits on claims by prisoners. A nursing home resident physically or sexually assaulted by a certified nursing aide in a nursing home would not enjoy those rights and protection. If enacted, Alabama would treat nursing home residents worse than any other state - giving less legal protection to our most vulnerable category of citizens. It will be hard to explain to families why our state government thinks more of convicted criminals than it does of elderly citizens who are residents in nursing homes.

### **Check Out The Truth About Alabama Nursing Homes**

Any person who has a relative or close friend in a nursing home in our state should check the record to see who is telling the truth about the real conditions in Alabama nursing homes. I suggest unexpected visits during non-visitor hours to check things out for yourself. Even as bad as most of the nursing homes are, it is still hard to understand exactly what their insurance companies are up to. There hasn’t been a flood of lawsuits filed against any nursing home in Alabama. Neither have there been any frivolous lawsuits filed, and that is a matter of record. Investigations and studies of all nursing home inspections nationwide have shown without a doubt that Alabama nursing homes rank at or

near the bottom in staffing and other important care categories. Instead of penalizing senior citizens and other Alabama citizens who have to live in Alabama nursing homes by taking away their constitutional rights, the nursing home industry should be suing the insurance companies who are apparently raping them financially without just cause. If they did sue, I guarantee that the owners of the nursing homes wouldn’t want their damages capped. Neither would the nursing home bosses want an administrative law judge or a panel made up of insurance company vice presidents to hear their case.

In short, the Alabama Legislature should not reward an industry that already enjoys great advantages over victims of their wrongdoing under existing laws. Certainly, making it virtually impossible for a person damaged in a nursing home facility to file a lawsuit can’t be justified. I don’t believe any person in Alabama—including the owners of nursing homes—believes a family member’s life is only worth \$250,000. The victims of abuse, neglect, or poor care and treatment in Alabama nursing homes don’t deserve what the nursing home and insurance industries are trying to do to them. Once people around the state learn the truth about Alabama nursing homes, I believe we will see these bad bills defeated. I suggest that you call your State Senators and let them know how you feel about this bad legislation.

### **Attorney General Proposes Bills To Fight White-Collar Crime**

Attorney General Bill Pryor is asking the Alabama Legislature to pass a package of white-collar crime bills. These bills, if passed, will go after criminals who use a pen rather than a

gun to steal. The bills were recommended by a white-collar crime task force created by the Attorney General last year. The bills are needed because of loopholes in current laws. There are also areas where the existing law needs to be stronger. "In a system of equal justice, the rich are held accountable just as much as any street criminal," Pryor said. I totally agree with the Attorney General. This year's crime package includes:

- An antitrust act to replace Alabama's "current antiquated version."
- A bill that makes insurance fraud a crime.
- Legislation to make money laundering a state crime.
- A bill authorizing prosecutors to file for a civil injunction to prevent transfer of funds or property by a person under investigation for criminal offenses.
- A revision of Alabama law to expand the crime of theft to include more than just personal property.
- A new securities law.

The legislation will be introduced in the State Senate by Senator Zeb Little, D-Cullman. Joe Borg, Director of the Alabama Securities Commission, said it's time to stop looking the other way when it comes to white-collar crime. "For too long white collar crime was considered a victimless event. For too long we sanitized the act of committing a crime with a pen," Borg said. The Alabama Department of Insurance wants the bills to strengthen their ability to go after those who commit fraud. "If a company is selling insurance and knows it can't pay the claims, we would have the opportunity to prosecute," said Mike Bownes, Chief Counsel for the Insurance Department. I fully support passage of these bills. State government must send a message to the white-collar criminals who have had it pretty easy

around the country. Had there been more fear of the court system—both civil and criminal—it is doubtful that the Enron, WorldCom, and Tyco criminal minds would have done what they did.

### **Payday Loan Bill On The Fast Track**

A legislative battle over payday loans is underway and the industry's legislation appears to be on the fast track. There are more than 500 short-term, high-interest moneylenders across our state that are doing very well. Consumer advocacy groups described the original bill as being much too industry-friendly. They promise a public fight as the bill winds its way through the legislative process. The bill would allow the "payday loan" sharks to charge borrowers \$16.50 for a \$100 cash advance. This amounts to a 429 percent annual percentage rate on a 14-day loan. As you probably know, the payday lenders are now unregulated in Alabama. While regulation is badly needed, the Legislature should make sure that consumers are really protected once regulation is put in place. Representative James Buskey, D-Mobile, a leading opponent of the bill, wants a number of consumer safeguards added to the bill. The following are among Buskey's proposals:

- Reduce the per \$100 borrowing fee from \$16.50 to \$15, reducing the annual percentage interest rate to 390 percent, which is still too high in my opinion.
- Set a maximum loan amount of \$300. The bill reported out of committee allows loans up to half of a borrower's income during the loan period.
- Require a long-term repayment option. The industry-backed bill would essentially allow the current practice in which borrowers roll over their full loans by paying

another borrowing fee and thus increasing their debt.

- Change the minimum loan period from 10 days to 14 days to better ensure that the borrower gets a paycheck during the loan period.
- Require lenders to use a database that tracks loans. This, in combination with a ban on multiple loans, would prevent a borrower from going to a second lender to pay back the first lender and then a third lender to pay back the second lender.

I understand that the State Banking Department and the payday loan group have agreed on how to regulate this multi-billion dollar industry. However, most consumer groups believe the agreement is too weak. For example, Joan Carter, State Director for AARP, told the Associated Press a 16.5 percent charge for a 10-day loan amounts to 602 percent in annual interest rates. "We believe this interest rate is unconscionable," she said in a report.

The lobbyists for the payday lenders claimed that Representative Buskey's limitations would force small operations out of business and that only national chain lenders would survive. Governor Riley and his Banking Superintendent wanted a bill passed that would regulate the industry, protect consumers, and still make loans available to those who need them. Hopefully, the Legislature will take a good look at this "new bill" and pass a tough bill that regulates this industry and actually protects the low-income citizens who have to borrow money. We need regulation—but it must also be consumer-friendly. The folks who have to borrow money from the payday lenders don't have the political power that the industry enjoys. Therefore, it is the duty of the Legislature to protect them.

The loans work like this: A person writes a check for \$120 and puts a future date on it, and the business pays out \$100 to the customer. The customer returns before the date on the check and pays the whole \$120 to redeem the check. If the customer can't redeem the check, he or she pays \$20 to roll it over, usually for another two weeks. Some consumers strapped for cash have found themselves paying the rollover fee again and again because they are unable to pay the full debt. Consumer groups like AARP, Alabama Arise and Alabama Watch have complained that they were never included in the talks.

The Alabama Consumer Finance Association, which represents small loan companies, opposes the legislation. Executive Director Don Gowen said the bill provides payday loan businesses with a competitive disadvantage over small loan companies that are limited to 36 percent annual interest. Since payday loan businesses opened in the state, the number of small loan businesses has dropped from 325 in 1996 to 233 in 2002, according to media reports. It is sort of weird when you consider that the "payday" lenders can charge more than the "small loan" lenders.

### **Alabama's Medical Malpractice Insurance Company Doing Well**

With all the talk about a medical malpractice insurance crisis, an interesting report concerning Alabama's leading medical malpractice insurance carrier was released recently. ProAssurance Corp., located in Birmingham, Alabama, which sells medical malpractice insurance in Alabama, is apparently doing very well. The insurer saw its fourth-quarter profits more than double. Net income for ProAssurance was \$11.9 million, up from \$4.3 million a year earlier, with revenues rising 14 percent to \$163 million. For some reason that I really can't

understand, the Birmingham-based company is raising rates for its policyholders. Since there are relatively few lawsuits filed against doctors and hospitals in Alabama and even fewer jury verdicts or settlements, it is real difficult to understand why this insurance company feels it has to raise premium rates on their policyholders. I wonder if anybody has even asked that question to the folks who run this company. I suspect there are some doctors who would want to know why their rates are being increased.

### **Tragedy In Huntsville Job Agency Shooting**

Hardly a day passes when we don't read of several violent incidents resulting in deaths. Many are senseless shootings and oftentimes involve multiple deaths. For example, recently four people were shot to death and one person was wounded at a temporary employment agency in Huntsville. The victims were looking for temporary jobs at an employment agency, and the shootings followed an argument between folks in line at the facility. Apparently, the fight was over a CD player. One of the combatants got hit in the face, reached into his jacket pocket, pulled out a gun, and started shooting. The end result was the senseless loss of human life. Ironically, the shootings took place in an office next to the offices for the Alabama Department of Forensic Sciences, State Troopers, and Madison County Sheriff's Investigators. I have to wonder what could be causing the tremendous number of similar violent acts around the country. Some believe the constant viewing of gross and graphic acts of violence on television and in the movies may be contributing to what we are experiencing in the real world. In any event, the tremendous number of senseless killings is most disturbing and must be dealt with.

### **Groups Sue To Block Chemical Weapons Incinerators In Four States**

A lawsuit filed in the nation's capitol may stop the highly controversial incinerator in Alabama. A coalition representing towns near Army bases with obsolete chemical weapon stockpiles filed suit on March 11th, seeking to force the military to consider alternatives to incineration. The complaint, filed in U.S. District Court in Washington, D.C., seeks to halt plans for burning the weapons in Alabama, Oregon, Arkansas and Utah. It is claimed in the suit that the Army violated the National Environmental Policy Act by failing to adequately consider alternatives to incineration. The groups fear that the incinerator will send toxic chemicals into the environment. The coalition of environmental, civil rights, and veterans organizations includes the Sierra Club, the Oregon Toxics Alliance and the Chemical Weapons Working Group, based in Kentucky.

Bob Palzer, a Sierra Club spokesman and retired chemist, said even the most efficient incinerators are likely to emit traces of toxic chemicals. Interestingly, the Army decided to build chemical weapons incinerators at eight chemical weapons stockpile sites in 1982. However, since that time, it has abandoned incineration plans in Colorado, Kentucky, Indiana and Maryland. In those four states, the Army will now utilize technology that uses water and other liquids to neutralize the chemicals. Apparently, according to the government, the neutralization technology works best with bulk agents, which are stored in Maryland and Indiana. The reason given for the decisions on Kentucky and Colorado is that these states have smaller stockpiles. Therefore, neutralization will also be used there. I am not sure what chance this lawsuit has of being successful. In any event, it adds a new

twist to Alabama's situation. The fact that Alabama, like Arkansas, Oregon, and Utah, has chemical agents contained mostly in individual weapons apparently makes us different. At least, that's the reason given by the government for incineration here. As I have stated on numerous occasions, if the incinerator is fired up in our state, every possible safeguard must be in place. The new lawsuit will be watched closely.

## II. THE NATIONAL SCENE

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### **Our Country At War**

We fully support our military in the war effort. The shooting had just started as we sent this issue to print. I only hope and pray the war will not only be successful, but short and with few lives lost. Our prayers must be with the President and the men and women in uniform who are now involved in the fighting. We must also remember the family members left behind. Alabama has furnished some 7,000 National Guard troops to the war effort. We must let them know that Alabama citizens support them.

### **Pledge Of Allegiance Ban Upheld**

A federal appeals court has rejected the Justice Department's request to reconsider its decision that the Pledge of Allegiance is unconstitutional because of the phrase "under God." This ruling means the case will most likely go to the U.S. Supreme Court. The 9th U.S. Circuit Court of Appeals said the request for a rehearing failed to persuade a majority of judges on the circuit. As a result, the June 2002 ruling by a three-judge panel will stand. A Justice Department

spokesman has said that the government's only recourse is to appeal to the highest court in the land. Ruling on a lawsuit brought by Sacramento atheist Michael Newdow, a three-judge panel ruled 2-1 last year that Newdow's daughter should not be subjected to the term "under God" being recited during the saying of the pledge in public classrooms. The court said that phrase in the pledge was an endorsement of God. The U.S. Constitution, the court said, forbade public schools or other governmental entities from endorsing religion. The decision was widely condemned. Public schoolchildren are now prevented from reciting the pledge in the nine Western states covered by the nation's largest appeals court. Newdow's lawsuit began as a challenge to a 1954 decision by Congress to add the words "under God" to the pledge. It is rather difficult to reconcile the fact that the federal courts, which are already keeping little children from praying in our schools, are now banning the Pledge of Allegiance because it mentions God. This is especially disturbing when you consider the "moral mess" our country is in. When prayer was forced out of the public schools, the quality of education dropped sharply. When the Pledge of Allegiance is taken out of the schools, I suspect any remaining respect for authority may leave too. Hopefully, the U.S. Supreme Court will take this case and restore some sanity to this issue.

### **The Political Mind Behind Tort Reform**

About 12 years ago, I tried very hard to warn Alabama voters about a then little-known man from Texas named Karl Rove. Because of information received from my friends at Public Citizen, I learned at that time that Rove was the chief architect of a program labeled tort reform and that

his goal was to give Corporate America virtual immunity from all lawsuits. He knew that project would take both time and a well-planned public relations effort to be successful. At that time, few people in Alabama listened to the warnings and of those who did, nobody could have anticipated all of the damage Karl Rove would inflict in years to come on people in our country. Frankly, I even underestimated Mr. Rove and never envisioned exactly what companies such as Enron, WorldCom, and Tyco actually had in mind for our country. Neither did I fully know at the time how successful Corporate America had been in keeping government regulation extremely weak and ineffective in such areas as automobile design, drug marketing, and predatory lending, to name a few.

Many Capitol observers are convinced that Karl Rove is running the government and making most of the important policy decisions. Unfortunately, these are not confined to domestic issues. A timely editorial appeared in the Washington Post on February 25th that points out the almost total control that Karl Rove has exercised over President Bush. The following is the complete text of the editorial. It will give you some insight into how both men operate and how powerful Rove really is.

*For those who argue that President Bush's support for limiting jury awards has nothing to do with politics, a complication has emerged: His top political adviser, Karl Rove, has taken credit for the issue. In an interview for a book published this week, Rove claimed responsibility for talking Bush into the subject of "tort reform" when he was packaging Bush for the 1994 Texas gubernatorial race. "The two issues, education and juvenile justice, were on his agenda list," Rove told Wayne Slater and Jim Moore in an*

interview for their book, "Bush's Brain." Rove, noting Bush's interests in "compassionate conservatism" and "faith-based institutions," said: "Later, we added tort reform. I sort of talked him into that one."

Though Bush has said a civil liability revamp, specifically his plan to limit medical malpractice awards, "is not a Republican issue, it's not a Democrat issue," Rove's claim of paternity suggests otherwise. As Slater and Moore write, Rove was then a consultant to Philip Morris, an advocate for tort reform. As part of his work for the tobacco company, Rove in 1996 provided advice on a "push poll" to see how best to damage then-Texas Attorney General Dan Morales, who was threatening to sue the tobacco industry. Rove presented a copy of the findings to Bush's office. Rove's claim of responsibility for the tort reform issue is somewhat at odds with a deposition he gave during the tobacco lawsuit. Asked whether he discussed overhauling civil liability law with then-Gov. Bush, he replied: "I can't say that I did. But I can't say that I didn't. I do not recall. I know that tort reform was a significant part of his legislative agenda but it was not my area."

Slater and Moore write that while tort reform is standard Republican fare, "Rove wanted that issue elevated because he knew that its most ardent advocates in Texas could provide millions of dollars in campaign contributions needed to unseat [former Texas governor Ann] Richards." At the national level, Bush's support for overhauling civil liability law has won him friends among insurers and doctors. According to the Center for Responsive Politics, health care professionals and insurers have given

two-thirds of their \$71 million in contributions to Republicans in the past two years. The White House has had a difficult time staying "on message" with Bush's proposed \$670 billion tax cut. The president's own economists have contradicted his and other aides' assertions that the cut would pay for itself and that deficits do not increase interest rates. Fed Chairman Alan Greenspan has raised doubts. And now, a survey of private economists has accused Bush of misrepresentation.

On Thursday, Bush implied that the private economists who participate in the "Blue Chip" forecast had based their estimates on his tax plan, saying his proposal "makes sense when analyzed by the economists behind the Blue Chip forecasts." The survey's editor, Randell Moore, called the White House to complain that Bush "made it sound as if Blue Chip economic forecasters had endorsed his plan." The economists had assumed only that some generic stimulus would pass. *Newsday* ran a headline shouting, "Editor: Bush Cited Report That Doesn't Exist." Senate Minority Leader Thomas A. Daschle (D-S.D.) said Bush is "making up imaginary supporters." Yesterday, Bush softened his claim. "These economists predicted in the Blue Chip forecast that the economy would grow at 3.3 percent if Congress responded to a simulative package," he said.

Moore proclaimed himself satisfied, adding: "Sometimes our president has a difficult time speaking." When Prime Minister Jose Maria Aznar visited the president's ranch Saturday, Bush heaped praise on the Spaniard for his stand against Iraq. He spoke of Aznar's "courage and

moral clarity," adding: "I thank you for your friendship." But Aznar shouldn't let his head swell: Last week, Bush said Turkey has "no better friend" than America. A month earlier, he told Poland's leader "I've got no better friend in Europe." Israel's Ariel Sharon "has got no better friend than the United States," which, in turn, has "no better friend in the world than Great Britain." Even the Philippines has earned "no better friend" status. Two countries notably absent from Bush's current friendship list are France and Germany, both obstacles to his Iraq policy. Has Bush concluded he does not need them? "Au contraire," said press secretary Ari Fleischer.

## A Texas Newspaper Reports On Tort Reform

As pointed out above, and as we now know, Texas is the state where Karl Rove first convinced then-gubernatorial candidate George W. Bush to "invent" tort reform as a campaign issue, thus making himself a hero to those in Corporate America located in Texas. Rove was highly successful in making tort reform a reality in Texas. In 1994, Mr. Rove, a hired gun for Philip Morris, persuaded then-gubernatorial candidate George W. Bush to make tort reform a priority. The tobacco lobby, seeking immunity from lawsuits, was clearly behind this strategy. Mr. Rove has testified under oath in deposition testimony on the extent of his role. He was being paid by Philip Morris at the time and was also being paid by then-Governor Bush. Rove's plan was to destroy the jury system and at the same time develop an unlimited pool of campaign money. He has been greatly successful and has almost reached his first goal. Clearly, the money-raising ploy too has been a major success. The recipient of that campaign money and support has

been none other than George W. Bush. Since he became President, countless audiences have been told how the “lawsuit problem” was solved in Texas. But, what is the “truth” about Texas? Let’s take a look at a piece written in the October 27, 2002 issue of the Houston Chronicle.

*It’s that time of year. No, I don’t mean football or hunting season, or concerns about who will win the World Series; I am referring to lawyer-bashing season. That time of year before an election when a group of politicians and editorialists find sport, and apparent political success, in placing the world’s ills on the back of lawyers. Lawyer bashing, more specifically trial lawyer bashing, particularly greedy trial lawyer bashing, is definitely in season. During the past few days I have heard or read something that blamed trial lawyers for everything from the shortage of doctors and the high cost of insurance, to goods that cost more than they should, the unavailability of drugs and other products, and the nursing home crisis. You have heard them, “I promise lower insurance rates, better medical care, more jobs and safer products. My opponent took money from a greedy trial lawyer.” It appears that almost everything, except the Astros’ inability to get in the playoffs, seems to revolve around this one profession.*

*I should point out that I am not a trial lawyer; greedy or otherwise. I am a law professor. I guess I can take credit for teaching those trial lawyers how to mess up an otherwise well-organized, safe and efficient world. It is obvious that if we could just get rid of the lawyers, Firestone and Ford would have voluntarily recalled all of their unsafe tires, and given generous refunds to their customers. And I know for*

*a fact that if there were no trial lawyers Enron and its officers would gladly be giving substantially more generous severance pay and bonuses to the average worker, and all of the securities firms would be returning money they took from investors they misled. If we could just get rid of the lawyers we could still buy cars like the Corvair, football helmets that cripple kids, three-wheeled ATVs, drugs such as fen-phen, polybutylene pipe for our homes and use the Dalkon Shield contraceptive. Without those meddling trial lawyers, cigarette companies could pay their shareholders much larger dividends by keeping the \$13 billion they gave the state of Texas to help pay for the costs imposed by smoking. And, of course, the \$2.7 billion recently offered by Libya to settle lawsuits would have been given even without a lawsuit. Greedy trial lawyers!*

*Like it or not, we need lawyers. All of us. We live in a country that regulates health and safety and resolves disputes through the civil justice system. Private trial lawyers make that system work. If your insurance company doesn’t pay when it should, your car doesn’t run as promised or your physician operates on the wrong leg, your recourse is to hire a lawyer and sue. We need lawyers, trial lawyers, sometimes even greedy trial lawyers. Just ask the doctors who have filed a class-action lawsuit against their HMOs.*

*True, a jury may sometimes award what sounds like a lot of money. But every juror that does so says the same thing: “We wanted to send a message not to do business that way.” We trust juries to determine the question of life or death; we should also trust their judgment about*

*punishing a business that acts wrongfully. Whether you have been defrauded by a stock broker, ripped off by a used-car dealer, injured as the result of a careless doctor, lost a parent to nursing home negligence or had medical problems because of a drug that didn’t work as promised, trial lawyers are your only hope for compensation. And more importantly, lawsuits and the threat of lawsuits are the only way the marketplace will regulate and stop such practices.*

*I concede that some lawyers are overzealous in the pursuit of a defendant, and some juries act out of malice or revenge instead of justice, but such cases are the exception not the rule. In fact, most outrageous trial court judgments you have read about were quietly reversed on appeal. The system usually works, and works well. The so-called abusive tactics used by lawyers, such as class actions, punitive damages, and damages for mental anguish and pain and suffering, are often necessary to make sure that companies do not find it economically beneficial to continue an undesirable practice, simply including the occasional lawsuit as a cost of doing business. Lawyer bashing costs us all. The consequence of focusing on lawyers instead of issues, and placing blame on one party to a system that we all need, is to deny us the meaningful debate that is necessary to elect competent public officials. More importantly, lawyer bashing often results in the deterioration of rights so many of us often need. Next time a politician starts criticizing trial lawyers, ask what is proposed as an alternative.*

A few months have passed since the law professor, who is known to be independent and not tied to any side

in the tort reform debate, penned this piece. However, it is certainly applicable today. It would be beneficial for all of us to take a look at our respective roles in the tort reform battle. We have allowed Karl Rove and the tort reformers to set the debate agenda, putting Corporate America on one side and trial lawyers on the other. In so doing, the Karl Roves of the world leave out the real group of people being victimized by Corporate America, the consumers, and that is a sad commentary. While it is real easy to bash trial lawyers, it would be hard for the tort reformers to bash the victims of corporate wrongdoing. Rove recognized that fact in planning his campaign. That is why consumers have never been invited to the debate table.

### **Has The Rush To Tort Reform Been Slowed?**

The tragic death involving the 17-year-old girl, Jesica Santillan, has received a great deal of attention. Her death brought to the public's attention the fact that medical mistakes do happen even in the very best medical facilities. You can imagine what might happen in a bad facility or at the hands of one of the few bad doctors who commit most of the malpractice. Jesica's death was a terrible thing and can't be justified. An innocent child died and a mother and father lost their child. This teenager suffered most of her life from "restrictive cardiomyopathy," which enlarges the heart and weakens the lungs. Her only hope for survival was a heart-lung transplant. Unfortunately, her chances were doomed by an extraordinary mistake in the operating room at Duke University Medical Center. While surgeons subsequently performed a second transplant, that operation was too late to save her life. As we hear all the talk about frivolous lawsuits and the cry for caps on mental pain and anguish and emotional distress, we have to

wonder what those few long days must have been like for Jesica's family and how they will deal with their loss in the future.

One would expect that the blood-type mix-up that caused this poor child's death would have stopped the tort reform movement in Congress or at the very least, slowed it down. Instead, the House of Representatives paid little attention to the need to slow down and find out if the tort reform measures were really needed. The Republican leadership pushed the bill to a vote, and it passed in a very close vote. That pointed out vividly that the fight is ordinary people versus the powerful special interests. In this first battle, the special interests won. However, the vote didn't provide the mandate that the tort reform forces needed. The kind of error that cost this life is almost always fatal. It is also most always—with good or even fair care—preventable. After the publicity surrounding Jesica's case, Congress should have taken a look at who or what is really behind this movement. Without a doubt, they should have been reluctant to limit monetary awards in malpractice cases. The misnamed "tort reform" movement, actually a carefully planned and executed plan to curb justice for injured victims and destroy the jury system, has never been anything more than an attempt to placate Corporate America, keep them happy, and make sure the political dollars keep coming.

### **The Real Record On Malpractice**

Among other things, "tort reform" would allow insurers to make up for lost investment income by punishing plaintiffs who were harmed by the few bad doctors who commit malpractice repeatedly. The real record on medical malpractice doesn't show that insurers have been mistreated by the court system. In fact, only one in eight

malpractice victims ever files a claim for compensation, according to a 1991 Harvard study. That, despite the fact that an estimated 44,000 to 98,000 patients die every year as a result of medical errors. When claims are filed, medical malpractice insurers pay nothing in 77 percent of cases, according to Americans for Insurance Reform. When they do pay, the average payment, over the last decade, was only \$28,524. Insurance companies may be losing money, but that's due to their own bad business decisions. Like so many other companies, they believed the '90s boom, which fattened their stock portfolios, would last forever. Now that their investments have gone south, the insurance companies are trying to recover their losses with sky-high increases in premiums. These rate increases have no relationship to underwriting or the number of lawsuits filed.

As for Jesica's family, they had every right to sue the parties responsible for their daughter's tragic death. Once the legislation gets to the U.S. Senate, the attention nationwide to their daughter's case could serve to slow the unseemly rush to limit justice for victims of medical malpractice. One thing is certain and that is that Jesica's story rebuts the stereotypes about "jackpot justice." The plight of Jesica's family has also caused other victims to come to the forefront and tell their stories. Persons who had been quiet are now telling about their experiences that otherwise might never have been told. The sad fact is that the doctors are being used by the tort reformers and specifically by the powerful insurance industry. What the doctors really need is "insurance reform" and a rollback in unjustified premiums. There is absolutely no justification for the large rate increases that these companies are putting on doctors—especially in Alabama, where doctors are relatively free of lawsuits, even on the rare occasions when malpractice occurs.

## Juries Are Not To Blame For Cost Surge

According to a study by a national consumer group, insurance company business practices, not jury awards, are to blame for soaring medical malpractice premiums. The group, Americans for Insurance Reform, correctly blames a sagging economy, poor stock market conditions, and insurance company pricing for the spike in medical malpractice premiums. This rebuts the tort reformers who are pushing state and federal lawmakers to pass tort reform legislation that would cap damages, claiming that would curb high malpractice insurance costs. Consumers are beginning to learn that the cause of spikes in medical malpractice premiums has nothing to do with the legal system and jury awards. It has become clear that the problem lies with the business practices of the insurance industry. The New York-based reform group is a coalition of more than 100 consumer groups led by the Center for Justice & Democracy. The coalition analyzed nearly 30 years of insurance company data from insurance rating agency A.M. Best and Co., as well as financial data from state Insurance Departments.

Medical malpractice rates are making a particularly steep jump now because rate increases had fallen below the rate of inflation for much of a 17-year period, according to Americans for Insurance Reform. From 1995 to 2000, rates fell so low they became inadequate to cover malpractice claims. As a result, several companies collapsed or pulled out of the malpractice business. We have seen a fairly well defined cycle that exists in every state. As has been pointed out, insurance companies make most of their money from investments. In years when investments are doing well, as they were in the 1990s, there is a price war in which rates are kept

artificially low, to attract more rate income that can then be invested. Americans for Insurance Reform believes the answer to curbing the growth of malpractice premiums lies in "increased regulation of insurers." The way to control the sharp ups and downs in premiums, which are causing this crisis, is to increase regulatory control over rates by State Insurance Departments. Historical data reveals without any doubt that putting caps on damages simply doesn't lower rates and doesn't even slow down the increases.

### The Bogus Tort-Reform Case

While our economy continues to falter and remains stagnant, the plan to cut taxes while waging war has become a difficult task for the White House. In my opinion, that is why Karl Rove jump-started his old standby—tort reform. One thing has become very clear, and that is people are now coming to realize that the tort reformers consider all lawsuits to be frivolous. This is why the Rove strategy to use doctors to lead the tort reform charge was a good one. Rove knows that people generally like and trust doctors, and anybody who can get doctors to go out on strike has to be pretty convincing. What he didn't count on was the coming forward of victims in large numbers to tell their tragic stories, and that is putting pressure on the Bush White House.

The White House has gone to great lengths to distort its case on the need for tort reform. An impressive six-week study by USA Today revealed that while some doctors have been hit hard by rising malpractice premiums, most "are minimally affected." Premiums aren't rising any more rapidly than other health-care costs and, on average, physicians spend more on rent than malpractice insurance. It is quite clear that on product liability and medical malpractice claims, what

the tort reformers really want is to immunize powerful interests from the consequences of irresponsible civil behavior. The tort reformers want a system that would favor the rich and powerful. Even the influential Wall Street Journal has editorialized against tort reform. The way Rove's tort reform package would work is those with resources would have easy access to the courts—those without would not. It is really that simple. My belief is that a country that destroys the jury system will not long survive as a free country. I hope and pray that our political representatives in Washington, including the President, will not allow this to happen in America. In my opinion, our Republic is worth saving!

### A Look At America's Opinion Pages And Tort Reform

Public Citizen has compiled a series of editorials dealing with tort reform by leading newspapers around the country. Here are some excerpts from a few of them:

*"Is it any coincidence that the states least likely to discipline doctors are among those with insurance crises? ... The problem is not the compensation paid to injured patients, but an epidemic of medical errors."*

—New York Times Guest Editorial, Sidney M. Wolf, Director, Public Citizen Health Research Group, 3/4/03

*"But clear away the dubious studies, the exaggerated line charts, the hysterical press releases, and look at the numbers, and the statistical case for caps is flimsy."*

—BusinessWeek, Lorraine Woellert, Legal Affairs, Commentary, 3/3/03

*"[W]hat the current advocates desire is not real tort reform but to immunize powerful interests from the consequences of irresponsible civil behavior ... But George Bush and his allies propose ill-advised tort reforms that would hurt innocent victims and are outrageously hypocritical."*

—**Wall Street Journal, Al Hunt's Column, 3/6/03**

*"Medical malpractice reform is bad medicine... Yet despite this epidemic of [medical] errors, fewer than 2% of the victims of medical malpractice ever sue their doctors... verdicts of \$1 million occur in only 4% of medical malpractice cases, and they are usually reduced to a median of \$235,000 upon final judgment."*

—**BusinessInsurance.com, Joanne Wojcik, Senior Editor, Commentary, 2/24/03**

*"[B]eware of solutions that are worse than the problem ... federal caps on the amounts juries can award would do a needless injustice."*

—**Raleigh News & Observer Editorial, 1/20/03**

*"Capping pain-and-suffering awards ... is the wrong prescription. Missouri already caps pain-and-suffering awards, yet malpractice insurance rates here continue to rise sharply."*

—**St. Louis Post-Dispatch Editorial, 1/19/03**

*"The demonstrating doctors have been playing a catchy but monotonous and thoroughly misleading tune about malpractice. For all the screaming about runaway juries and big malpractice awards, the evidence is not there."*

—**Newark Star Ledger Editorial, 2/18/03**

*"The lesson for West Virginia should be clear: insurance reform not tort reform is the real answer."*

—**Charleston (WV) Gazette Editorial, 1/17/03**

*"Jury award caps are easy to sell, but are no medical malpractice solution."*

—**Allentown Morning Call Editorial, 1/19/03**

*"In fact, nothing about California's experience suggests that limiting jury awards will reduce malpractice premiums, or even slow their rate of increase."*

—**Palm Beach Post Editorial, Dan Moffett, 2/2/03**

*"BAD MEDICINE: Doctors' malpractice lies at heart of insurance crisis"*

—**Houston Chronicle Editorial, 1/12/03**

*"Bush's damage caps do almost nothing to address the issue of frivolous cases ... the caps will penalize the most severely injured patients with the strongest claims."*

—**Chicago Tribune Guest Editorial, Steven Lubet, Northwestern University School of Law, 1/22/03**

*"Among other things, 'tort reform' would allow insurers to make up for lost investment income by cheating plaintiffs who were harmed by medical errors."*

—**Atlanta Journal Constitution Editorial, 3/2/03**

*"It doesn't make sense to further harm people who have already been hurt in an effort to restrict the earnings of trial lawyers."*

—**Oakland Tribune Editorial, 2/10/03**

*"Consumer advocates have long known that the only way to stop periodic insurance crises ... involves stricter rate regulation, public oversight and repeal of the industry's extraordinary exemption from antitrust laws."*

—**USA Today Guest Editorial, Joanne Doroshow, Exec. Director, Center for Justice & Democracy, 1/20/03**

*"Medical Mistakes, Not Lawsuits, Are The Problem"*

—**Hartford Courant Guest Editorial, Tom Baker, University of Connecticut School of Law, Director, Insurance Law Center, 1/26/03**

*"Value of Human Lives Shouldn't Be Capped"*

—**Newsday, Marie Cocco's Column, 2/25/03**

*"Crack down on the few lousy doctors, and this crisis might be cured"*

—**Newark Star Ledger, John McLaughlin's Column, 2/9/03**

*"According to The Wall Street Journal, the insurance industry folks are jacking up prices not just because their investments in the stock market have fallen dramatically, but also because they fouled up their pricing practices in the early '90s."*

—**Dallas Ft. Worth Star-Telegram, Molly Ivins's Column, 1/23/03**

*"Want to slow medical malpractice complaints? Crack down on bad doctors."*

—**Dallas Morning News Editorial, 2/15/03**

*"Quack Remedy to Cap Malpractice Awards"*

—**St. Petersburg Times, Martin Dyckman's Column, 1/19/03**

*"[State insurance commissioners] might prod insurers to ... impose higher rates on doctors guilty of malpractice, so that a small number of careless doctors don't drive up the rates for their colleagues."*

—New York Times Editorial, 1/17/03

## The AARP Fights For Consumers

We have known for the past several years that the powerful pharmaceutical industry has used its money and political influence to control what happens in Washington concerning healthcare issues. This industry used several methods to convince the American public that it had their best interests in their corporate hearts. In a most significant revelation, the AARP, a strong consumer group, has furnished information concerning how the drug industry finances non-profit groups that claim to speak for older Americans. There have been a number of these front groups that are pulling the wool over the eyes of the senior population in our country. We have all seen the evidence of how their schemes work, but most of the time we didn't realize who was actually behind the TV and newspaper advertising, massive mail-outs, and even Websites and e-mails. The following is how the AARP feels on this subject. The consumer group lists some interesting factors to consider.

- As recently as 2001, none of the organizations listed any revenue from membership dues on their tax returns.
- We should follow the money to see who is really behind the groups.
- Three nonprofit organizations that claim to speak for older Americans are in fact heavily bankrolled by the pharmaceutical industry, an examination of tax records by the AARP

Bulletin shows. United Seniors Association, for example, got more than a third of its funds in 2001 from drug-industry sources. The big donors included Pharmaceutical Research and Manufacturers of America (PhRMA), the industry's trade association; Citizens for Better Medicare, a PhRMA-funded nonprofit group; and Pfizer Inc. Total industry contributions: at least \$3.1 million.

- Records obtained by the AARP Bulletin show that the pharmaceutical industry has been a formidable financial force behind United Seniors Association, the Seniors Coalition, and 60 Plus Association.

## A Brief Look At These Front Groups

Let's take a look at some of these groups. United Seniors Association, based in Fairfax, Va., calls itself an "influential and effective" advocacy organization for older Americans. The Seniors Coalition, based in Springfield, Va., describes itself as an "advocacy organization that represents the interests and concerns of America's senior citizens." The 60 Plus Association, based in Arlington, Va., describes itself as "an advocacy group with a free enterprise, less government, less taxes approach to seniors issues." If you're like millions of other older Americans, you've seen their names many times before—either on fundraising appeals or on television spots promoting political candidates. For example, one of the groups spent more than \$10 million last year on politician-promoting ads featuring Art Linkletter, the folksy television personality. More than ever before, the powerful industry has been trying to influence political campaigns and shape policies that affect older Americans. People are now beginning to ask, "who's really behind these organizations?" Many are now wondering if they really are "working to help older Americans."

Aside from the similar descriptions and locations in the Virginia suburbs of the nation's capital, the three nonprofit organizations have several things in common. For starters, all three organizations claim to be non-partisan, though they support—almost without exception—the campaigns and causes of one political party. All three organizations were formed by, or with help from, direct mail entrepreneur Richard Viguerie, and two have been operated in recent years by former officers or employees of Viguerie's companies. All three organizations have been criticized over the years for questionable fundraising practices, and, recently, the Social Security Administration ordered one of them to halt what it determined to be misleading mailings. All three organizations claim to speak for millions of older Americans, although as recently as 2001 none of the three listed any revenue from membership dues on their tax returns. Moreover, an investigation by the AARP Bulletin shows that virtually all of their largest contributions in recent years have come from the same source—the nation's pharmaceutical industry. The industry invested more than \$30 million in the 2002 elections, with more than a third of that bankrolling television ads bearing the name of United Seniors Association. The United Seniors ads promoted candidates in five Senate and 20 House races around the nation.

Perhaps it isn't surprising that the three organizations mentioned above have so willingly done the pharmaceutical industry's bidding. "I think of the pharmaceutical industry as being like an octopus, with a deep reach no other industry can match," says Frank Clemente, the Director of Public Citizen's Congress Watch. He adds: "This is an industry that's not only spending more on direct lobbying than any other industry but also spending more on front groups and related entities than any other industry."

## Senior Citizens Take A Stand In Florida

The nursing home industry is also hard at work in the State of Florida attempting to pass additional tort reform measures there. Two years ago, the Florida Legislature passed one of the strongest pieces of nursing home reform legislation in the country. At that time, I understand that all opposing sides, including AARP, agreed to the legislation. Now the nursing home industry is saying the earlier reforms weren't enough. They are back in Florida lobbying for more legal immunity from lawsuits. Recently, the AARP issued a statement condemning the nursing home industry for seeking greater legal protection against abuse and neglect lawsuits and for demanding other changes in Florida's existing law. A large group of seniors has been very much in evidence in Tallahassee at the state capitol lobbying against any changes in the nursing home laws and specifically against any further tort reform efforts. The AARP needs help in all states, including Alabama, where nursing home tort reform measures are being promoted. Elderly citizens have a vested interest in making sure that nursing homes are not successful in taking away their rights. My experience is that seniors who have fought our wars and experienced many ups and downs will fight for what they believe in. Fortunately, the AARP is leading their fight.

## Consumer Groups Demand Investigation Of Energy Companies

I have never understood how the price of gasoline at the pump can fluctuate so greatly and so quickly. Four national consumer groups and consumer activist Ralph Nader have called on President Bush to investigate the role of U.S. oil company price-gouging in high gasoline prices for consumers.

The request came in a letter to the White House. The year-long talk of war with Iraq has doubled oil prices, raising them to nearly \$40 per barrel, the highest level since the Gulf War in 1991. The groups also asked that a \$2 cap be placed on gas prices at the pump in the event of a war. Higher gas prices have hit Americans in several different ways: first, they reduce consumer confidence through "sticker shock" at the gas pump; second, they raise companies' cost of doing business, which results in higher costs for consumers, particularly in the airline, trucking and family farm industries; and third, income is transferred from Americans to oil-exporting dictatorships such as Saudi Arabia and Iraq.

"U.S. oil companies are all too happy to receive the spoils of higher oil prices," the groups wrote. Those signing the letter include Citizen Works, The Foundation for Taxpayer & Consumer Rights, Ralph Nader, the National Consumer League, and Public Citizen. The groups seek a meeting with President Bush, citing the fact that he has yet to meet with a national consumer group since taking office in 2001. A wave of mergers over the past few years has created giants, such as ExxonMobil, ChevronTexaco and ConocoPhillips, that dominate all sectors of the oil industry, from drilling to selling gas to consumers. As a result, the top five oil companies now control more than 40 percent of all domestic production, half of the domestic oil refineries and more than two-thirds of all gas stations. The Federal Trade Commission concluded in 2001 that oil companies intentionally withheld gasoline from the western United States market to inflate prices. Because their control over the overall domestic market is even greater now, after the mergers, the ability of these oil companies to manipulate prices has increased. In addition, large oil companies continue to take advantage of the deregulated

energy trading sector that allowed Enron to price-gouge West Coast electricity consumers. The same lack of transparency that Enron exploited now can be exploited by ExxonMobil, ChevronTexaco and other oil companies with large positions in the unregulated over-the-counter energy derivatives market.

Does the war with Iraq have anything to do with oil? I certainly hope not. My friends who know the President say he would never do such a thing. Yet, the White House has done nothing to stop the economic rape of American citizens by the big oil companies. I appreciate Public Citizen furnishing the above information and spearheading the effort resulting in the request to President Bush. Even though the President is a not-so-old oil man, who is surrounded by older oil men, I hope and pray the group's request will receive prompt attention.

## FAA Screens Private Firms

In 1958, Congress created the Federal Aviation Administration to promote the safety of civil aviation. The new regulatory agency was given the authority to approve private persons and organizations to ensure that airplanes and their systems meet safety standards. For nearly 50 years, these approved individuals and organizations, officially called "designees," have been used in our nation's aviation-regulatory framework. According to a story in USA Today, without the designees' participation, the FAA's certification office and its budget would need to grow some 600% so it could do that work with government employees. Obviously, the designee system, under the current arrangement, is a necessary safety tool. However, it must work and work well. The Federal Aviation Administration has been under criticism for its performance on a number of fronts. The agency has a responsibility to improve the effectiveness of its

designee program. Hopefully, recent events will prod the FAA to improve the performance of the designees.

There have been a number of instances where the National Transportation Safety Board has faulted the FAA for contributing to crashes. Examples are the crash of the Alaska Airlines jet that killed 88 people in 1999. Another was the 1996 crash of a ValuJet plane in the Florida Everglades in which 110 people died. A two-year investigation by USA Today has concluded that the FAA might have played a role in yet another airline disaster — a 1998 crash that claimed 229 lives when a Swissair jumbo jet plunged into the Atlantic Ocean. It is undisputed that the paramount and clearly the most important mission of the FAA is to make sure that those people who are inspecting, maintaining, and modifying commercial airliners do their jobs properly. More and more, the FAA is turning to private companies to handle a range of tasks on its behalf. Unfortunately, some of these firms haven't done a very good job. In turn, the FAA has failed to put better safeguards in place to protect persons flying the nation's airlines from shoddy work by these firms.

### **Was The Church “Willfully Blind” To Sex Abuse By Priests?**

The State of Massachusetts has accused leaders of the Diocese of Manchester of being “willfully blind” to the danger that molesting priests posed to children. A long-awaited report recently released by the Attorney General's office is most disturbing. Even when priests admitted sexual misconduct with minors, Roman Catholic officials sometimes did nothing to restrict the perpetrator's conduct and failed to monitor him, according to the 154-page report. The report, laying out evidence the state would have used against the diocese in a criminal case, was accom-

panied by roughly 9,000 pages of church documents, including personnel files and correspondence. Last year, an unprecedented deal was struck by the diocese and the state's Attorney General. As a result, the incriminating evidence was released to the public. The Church acknowledged its conduct had harmed children and that it probably would have been convicted of child endangerment, a criminal offense, but for the settlement. In response, the diocese apologized, condemned child sexual abuse, and described its toughened approach to dealing with molesters in the clergy. The Church said it will now remove a priest after one credible allegation of abuse.

The state report said that in at least one case, the diocese insisted on keeping a civil lawsuit settlement confidential “to prevent the victim from speaking with law enforcement about the sexual offenses of the priest.” Prosecutors also accused unidentified diocesan officials of making “apparently false statements” in civil lawsuits and a presentencing investigation. Two of the eight priests at the center of the state investigation are in prison for criminal sexual assault convictions. The six others have been accused of abuse in civil lawsuits. The Manchester Diocese, which covers all of New Hampshire and serves about 326,000 Catholics, is one of only a few places where such a public window has opened on the inner workings of the church when confronted with abuse cases. Thousands of pages of church documents have been released in Massachusetts during the past year by lawyers for victims and alleged victims suing the church. A grand jury in New York issued a scathing report accusing the Diocese of Rockville Centre of sheltering molesters and failing to protect children. It is impossible to defend the practice of allowing a molesting priest to keep serving even after molestation charges sur-

posed. According to reports, one of the most important lessons the church has learned is that “a person who has sexually abused a minor cannot be adequately supervised or monitored.” It was sad to learn that the sexual abuse scandal also involved at least one priest in our state. That made this problem much more real for folks in our region of the country.

### **\$1.5 Billion Wall Street Settlement In Trouble**

The much-anticipated \$1.5 billion Wall Street reform deal may be in danger of falling apart. As we were going to the printer, it appeared that at least two key states, New Jersey and Massachusetts, were threatening to abandon a loosely knit coalition of state and federal securities regulators. There has been some difficulty reaching accord over the final wording of a so-called global settlement into Wall Street conflicts of interest. The dozen banks involved in settlement talks are fighting to limit evidentiary findings against them in final documents. This is because they don't want the information available to private lawsuits that will be filed as well as shareholder class-action lawsuits and arbitration cases. Some of the participants believe that Wall Street will be facing a multitude of actions from individual states in return for playing hardball. Failure to revive the lengthy and much-criticized process could prove embarrassing for newly appointed SEC chief William Donaldson. However, the government should not settle their case and leave investors and others holding the bag—so to speak. Any damaging information obtained by the federal government should be made public and available to states and private persons who have been damaged.

### III.

## NURSING HOME UPDATE

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### More On The Fire Ant Case In Huntsville

Ralph Hornsby, Jr., one of the lawyers who successfully handled the fire ant case in Huntsville (*Devers v. Greystone and Terminix*), has sent me some more information on this sad case. The evidence presented at trial not only proved that the assisted living center employees did in fact recognize the presence of fire ants, but even more shockingly, that the facility covered up their knowledge. Actually, Ms. Devers' injuries were the result of two separate attacks, occurring on consecutive nights. Several employees testified at trial that they had seen fire ants in the facility many, times during the weeks leading up to the fatal attacks. They had brought this to the attention of the nursing home administrator and tried to get her to call Terminix. Instead of reporting the problem, the administrator gave the employees cans of Raid.

Following the initial attack on the first night, Ms. Devers' room was cleaned and nothing more done. According to Ralph, the evidence suggested that the facility recognized a fire ant problem in her room, yet failed to call Terminix. The facility allowed a misdiagnosis of staph infection from Ms. Devers' personal physician to stand and put her back in the same room the following night. Subsequently, the poor lady endured yet another night of fire ant attacks. The employees were required to sign a statement of policy prohibiting discussion of residents' problems with family members. The only reason the family found out what actually happened to Ms. Devers was that her daughter came in on the second

morning in the midst of the fire ant attack and attempt by the nursing home employees to cleanup. If there ever was a lawsuit against a defendant that justifies a large damage award, this appears to be one. I believe the Supreme Court will agree. This case is a prime example of why the nursing homes don't need caps on punitive damages or any other protections from lawsuits. There have been other cases where fire ants have attacked residents in nursing homes, and that simply shouldn't happen in a good and well-run facility.

### Nursing Facility's Mandatory Arbitration Agreement Rejected In Tennessee

Relying primarily on case law pertaining to adhesion contracts and unconscionability, the Tennessee Court of Appeals has rejected a nursing facility's efforts to bind the estate of a nursing facility resident to the mandatory arbitration agreement signed by the resident's husband at the time of admission. *Howell v. NHC Healthcare-Fort Sanders, Inc.*, Tennessee Court of Appeals, No. E2002-01321-COA-R3-CV (Feb. 25, 2003). The appellate court's decision rests upon the admission agreement itself and the manner in which it was presented to the resident's husband. The arbitration clause was on page 10 of an 11-page document, was in the same font as the rest of the agreement, and did not explain how arbitration would work.

The admission agreement was signed under difficult circumstances: the wife was in a hospital and could not return home. The agreement was presented to the husband on a "take-it-or-leave-it" basis, and the waiver of jury trial was not explained adequately, particularly given that the facility employee should have had some sense of the fact that the

husband could not read or write (although he could sign his name). Although the court bases its ruling on the points discussed above, it cites two additional arguments that are most significant: (1) the resident's rights could not be waived by her husband, and (2) requiring an arbitration requirement from a Medicaid-eligible resident violates the federal law that prohibits a Medicaid-certified nursing facility from requiring additional consideration (aside from required deductibles) from Medicaid-eligible residents. See Nursing Home Law Letter, May 31, 2002 at 3, for further discussion of this federal law prohibition. This aspect of the court's opinion dealing with the federal law prohibition is extremely important.

### Nursing Homes Are Profitable

We are now hearing cries of poverty from Alabama nursing home owners. That is nothing new for this industry that enjoys the status of a monopoly. In an effort to garner more state and federal funding, the nursing home industry has routinely claimed poverty. The US News & World Report was the first to analyze the current financial state of the industry, and concluded that their cries simply don't add up. The magazine discovered the following: even as they report tough financial times in their official government filings, many nursing home operators steer big chunks of their revenues to themselves or related businesses before they calculate the bottom line. Two successive federal reports confirmed the US News findings. The Medicare Payment Advisory Commission (MedPAC), a federal advisory commission that makes recommendations to Congress regarding the funding of the Medicare program, was one agency making a report. The U.S. General Accounting Office (GAO) is another. Similarly, the National Investment Center for the Seniors Housing

& Care Industries, a nonprofit educational resource on financial and investment issues facing the long term care industry, reported last month that construction starts for nursing homes jumped to their highest levels in two years. The following are examples of the truth about nursing homes:

**“The nursing home industry is profitable and growing, with operators spinning a far brighter tale for Wall Street than for Capitol Hill. Many nursing homes are earning exceptionally healthy profit margins, often 20 and 30 percent.”**

US News & World Report, September 30, 2002

**“We do find vast differences according to whether facilities are associated with one of the top 10 nursing facility chains or not. With margins for facilities in one of top ten chains averaging around 19 percent....”**

MedPAC Report, December 12, 2002

**“Under the PPS, most freestanding SNFs’ Medicare payments substantially exceeded the costs of caring for Medicare patients, contributing to facilities’ overall positive financial condition.... By 2000...the median Medicare margin had risen to almost 19 percent. However, nearly one-quarter of SNFs in 2000 had Medicare margins exceeding 30 percent...”**

GAO Report GAO-03-183, December 30, 2002

**“More than half a billion dollars in new loans were placed in the third quarter of 2002,” said Robert Kramer, NIC executive director. “That news was encouraging, as it represented a 63 percent increase in total**

**project financing from the previous quarter. It was also the largest quarterly amount we’ve seen flowing into the industry in about two years.”**

Long-Term Care Newswire, January 23, 2003

When you consider how the nursing homes routinely do business with related companies, oftentimes at prices and charges higher than found in the open market, the cries of poverty are even harder to swallow. When you add to the mix the fact that the owners in Alabama enjoy a monopoly—and are able to keep competition out of the market—their economic plight seems even stronger. It also makes one wonder if we are not hearing a profitable industry “crying wolf” when most folks, who are not protected by the state, are having a hard time making ends meet.

### **Cover-Up Leads To Jail Time For Nursing Home Executive**

Recently, Charles Kaiser III, president of a company that operates nursing homes across the St. Louis, Missouri, region, received the maximum penalty in a criminal case that involved the beating death of a nursing home resident. Kaiser was sentenced to a year in jail and fined \$1,000 for failing to report elder abuse that occurred at one of his facilities. The criminal charge resulted from the August 1999 beating death of a 78-year-old resident in a nursing home operated by Kaiser’s company, American Healthcare Management. A nurse’s aid at the facility pleaded “no contest” to abuse in the incident and is now serving fifteen years in prison. During Kaiser’s trial, prosecutors presented a copy of an e-mail that the facility administrator sent to Kaiser, which said the incident should be reported to the state. Kaiser

responded by saying that he had also spoken with a State Official and “this is NOT going to be hot-lined.” American Healthcare Management and St. Charles Claywest Nursing Home were also convicted of failing to report this incident to the state. They each were ordered to pay the maximum fine of \$5,000. This case is believed to be the first in Missouri in which a nursing home executive has been sentenced to jail in a resident abuse case. It was hailed by nursing home resident advocates as a milestone in the fight for better care and accountability. This reminds me of the actions taken in Mississippi by Attorney General Mike Moore when he carried out nighttime raids on Mississippi nursing homes, finding evidence of resident neglect. Criminal charges were filed there too.

### **How Reliable Is Nursing Home Charting?**

In the recent surge of nursing home negligence across the country, one of the contributing factors has been poor and inaccurate maintenance of the medical charting (documentation). Charting is a method that nursing homes use to monitor the progress of each resident’s daily condition or performance. When charting becomes unreliable and/or inaccurate, a nursing home resident’s care is very likely to suffer. Nursing home residents often have multiple co-existing medical problems and long medical histories. Quite often residents cannot recall their medical histories. Their previous medical records are frequently unavailable or incomplete. There is also a danger in perpetuating old diagnoses that are inaccurate. This is especially true for psychiatric diagnoses but may also occur for other medical diagnoses such as congestive heart failure and stroke. Thus, inaccurate and unreliable charting makes it difficult and sometimes impossible to obtain a compre-

hensive medical database. All of this makes reliable charting by a nursing home that much more critical.

There are good indicators that a nursing home does in fact use reliable charting practices. First, critical aspects of the medical database should be recorded on one page or a sheet of the medical record. Additionally, standardized documentation should be used and must contain social information, such as individuals to contact at critical times and information about the resident's treatment status in the event of acute illness. This data is essential to the care of the resident and should be readily available in one place in the record, so that when emergencies arise, when medical consultants see the resident, or when members of the interdisciplinary team meet to develop and share an overall perspective, this information will be easy to locate. The face sheet should be copied and sent to the hospital or other health care facilities to which the resident might be transferred. Time and effort is required to keep the face sheets updated. It is most important for nursing homes to maintain adequate levels of staff so that proper charting and records can be maintained.

Charting of progress notes for routine visits and assessments of acute changes is frequently scanty and/or illogical. Statements such as "stable" or "no change" are too often the only documentation for routine visits. While time constraints may preclude extensive notes, certain standard information should be documented. The SOAP (Subjective, Objective, Assessment, Plan) format for charting routine notes is especially appropriate for nursing home residents. Simple database with word processing capabilities can be used to enable physicians to efficiently produce legible, consistent, yet comprehensive progress notes. In addition to placing critical information in a standardized format in readily accessi-

ble locations, it is essential that physicians thoroughly and legibly document all discussions they have had with the residents, family, or legal guardians. Failure to do so may result not only in poor communication and inappropriate treatment, but also in substantial legal liability. Notes about these issues should not be removed from the medical record and are probably best kept on a separate page behind the face sheet.

As mentioned above, reliable charting is critical to the positive health outcome of residents in a nursing home facility. Inaccurate charting is often one of the signs that a nursing home is breaching the standard of care for its residents. Family members of residents should monitor all activities of a nursing home, including record keeping, in order to assure that it is a safe place for the residents.

### **State Agency Faults Nursing Home In Death Of Ex-Judge**

A nursing home in New Hampshire failed to protect the safety of a former state Supreme Court judge who wandered off from the facility and froze to death in January. The Arbors of Bedford was ruled "not in compliance" with state care guidelines by the State Bureau of Health Facilities Administration. Judge Maurice Bois, 85, suffered from Alzheimer's disease. Temperatures that night dipped into the single digits. Judge Bois was found dead the next morning near the home. He was wearing only light clothing that included a short-sleeved shirt and pants. The state's report said the judge was wearing glasses that weren't even his. The state agency said the nursing home "failed to ensure that the resident would be free of neglect," by not providing the proper protective care and supervision of Judge Bois. The report said the Arbors also failed to complete an incident report regarding the judge's departure

from the nursing home and his death.

Judge Bois wandered out of an "alarmed door" at 3:30 p.m. The door-alarm system has cameras and monitors, according to the state's report. Staff members searched for Bois at around 5 p.m. on January 13th, according to the report. An aide at the facility reported that an alarm on a door went off about 3:30 p.m. A worker turned the alarm off and reset it, not looking outside the door. The report also noted that the home's policies contain conflicting instructions regarding notification of police. It also said that, after observation and testing of the door alarm system by the agency, there is an area in the corridor where the alarm is difficult to hear, especially if residents and staff are involved in activities. Unfortunately, this is typical of the care and attention many residents receive in our nursing homes.

### **Fire in Connecticut Nursing Home**

A recent fire in a Hartford, Connecticut, nursing home killed 13 people and injured another 23. The fire broke out at the Greenwood Health Center in the early morning hours, forcing dazed elderly residents out on the street in single-digit temperatures. Unfortunately, not all of them made it. The fire began in a wing of the nursing home that housed residents who were on respirators, bedridden, or in wheelchairs. Some of the residents in that section of the facility were blind or mentally retarded. Thus, many of the residents could not escape from the fire without assistance. The fire was contained in the building's southeast corner, but not before its devastation had claimed lives in the facility. Firefighters evacuated 100 people from the nursing home. At the time of the fire, the nursing home housed about 150 residents. A 23-year old resident told

police that she started the fire while lying in bed and playing with a lighter. The facility did not have a sprinkler system since they weren't required to do so under Connecticut law. That fact is shocking and inexcusable.

Many residents in nursing homes are confined to their beds or use wheelchairs. Others are blind or mentally impaired. Since smoke kills just like the actual fire, nursing home fires are extremely dangerous to occupants. The facilities must take all steps necessary to prevent fires to the extent possible. They must also have evacuation plans to make sure that residents have a chance to survive. Smoke alarms, sprinkler systems, and properly placed fire extinguishers should be mandated for all nursing homes in every state. Regardless of whether our politicians make these things mandatory, the owners and operators should take these steps to protect residents from harm. How they could fail to do this is incomprehensible.

## IV. LEGISLATIVE HAPPENINGS

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### Projections For The Session

This year's regular session has all of the earmarks of a barnyard brawl. However, because people around the state know for the first time how bad off we are from a fiscal perspective, I sincerely believe there will be a concerted effort by the House and Senate to work out our problems and apply permanent solutions. At the same time, we all know that any small group of Senators who know the rules, and are able to operate within those rules, can kill any legislation in the Senate if they really want to do so. All experienced lobbyists realize how easy it will be to kill legislation during this session. However, since the finan-

cial affairs of the state must have top billing and should remain the Legislature's priority until those problems are worked out, the special interest groups should hold off on any controversial legislation. Their failure to do so will result in a failed session. Observers who follow the Legislature say that controversial legislation may be put on the calendars early so that the important budget and fiscal matters will run into a roadblock when they are introduced. I hope and pray these groups will put the people's interests above their own special interests—for a change.

### More Tort Reform On The Agenda

The "tort reformers" are back again. There were a number of bills introduced during the first days of the session that would give various types of corporations virtual immunity from lawsuits. Apparently, when the tort reformers told the Legislature during the last Administration that the agreed-on tort reform package solved their problems, they were just kidding. With all of the corporate scandals creating a bad smell in both the nation's capitol, as well as in State Houses around the country—including Alabama, protection for Corporate America should be looked at with caution, if not skepticism. Nevertheless, with all of the money and arrogance that abounds in their ranks, tort reformers will move ahead at full steam. Of course, this could serve to endanger the chances for Governor Riley to "right the Ship of State" and that would be a shame. There have been a number of bills introduced to provide immunity from lawsuits to accountants, insurance companies, and others. The Corporate Hog Farm—pushed by Alfa—has also again surfaced and, without a doubt, that bill contributes to the bad smell around the State House.

## Changes In Alabama Elections

The Alabama Legislature appears to be serious about making significant changes in the state election laws. Thus far, bills to make these changes have been introduced in the House and Senate. To date, there has been no bill filed, however, that would address the real problem concerning Alabama elections. Nothing to change the campaign financing laws has been introduced to my knowledge and therein lies the problem. Unless sweeping changes are made in the way campaigns are financed in Alabama, all of the other legislation will be little more than window-dressing. Hopefully, someone will step up to the plate and address this critical issue at an early stage of the current session. We must clean up the election system in Alabama, and there is no better time than the present. Instead of worrying about voter I.D., the legislators should be concerned about the cost of elections, which is totally out-of-hand. If that problem is solved, everything else will fall in place.

### Constitutional Reform

It appears that the proponents of constitutional reform have their work cut out for them. Thus far, I have seen little enthusiasm for change around the State House. However, with Governor Riley's support, that can change. Hopefully, it will—and soon.

## V. COURT WATCH

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### The Attack On The Jury System

The jury system in our country has been under constant attack for the past several years. That which started as attacks on the courts, juries, and "trial lawyers" in selected states, even-

tually moved on to additional states. Now the movement has finally landed in Congress. With all of the corruption, outright stealing, and other wrongdoing in Corporate America, it is hard to understand why a few people in government want to destroy the jury system. On second thought, however, maybe they are simply trying to protect their political friends. In any event, the one thing that has separated our country from other countries in our troubled world is our jury system. It was important enough that our forefathers fought a war with England with protecting the right to trial by jury being one of the main contributing reasons. Now, over 200 years later, we are experiencing the most vicious attack on the jury system that our country has ever seen. Hopefully, enough people still believe the right to trial by jury is important and will fight to defend it. I am convinced that if the same assault had been waged on the constitutional right to bear arms, we would have already seen a citizens' rebellion.

### **The Alabama Supreme Court**

The Alabama Supreme Court is still having to deal with a tremendous number of arbitration cases. There have been cases of all sorts before the high court with varying results. I am convinced that if lawyers make a good record at the trial court level, the chances of success on appeal are good in the right cases. I am also convinced that this court—as a whole—tries hard to be fair to both sides of a legal dispute. When you get down to it, that's all any person should expect from the judicial system.

## **VI. CONGRESSIONAL UPDATE**

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### **The Power Of Corporate America**

Observers in our nation's capital tell me that the Republican-dominated Congress is trying to protect Corporate America like no other Congress has ever done. It is most evident that the rights of ordinary citizens are being totally ignored and threatened on almost every front. One thing is most clear—when the special interests say jump, the leadership of the House and Senate promptly responds by asking, “how high?” Apparently, the hundreds of millions of campaign dollars pumped into political campaigns give these special interests definite privileges. Because of their influence and authority over the legislative process, which is unparalleled in modern times, ordinary people suffer. The very foundations of our Republic are under constant attack. Thank goodness there are members of the U.S. Senate, such as Senators Richard Shelby, John McCain, John Edwards, and others, who “feel” for ordinary folks and are willing to stand up for their rights. There is also a bright light shining in the House of Representatives. Newly-elected Congressman Artur Davis has already made it clear that he will stand up for the rights of people, and that is most encouraging. I sincerely believe there are many others—both Democrats and Republicans—who are willing to stand with these men. If the power and influence of the special interests are not curbed, however, American citizens who work hard, pay their bills, and have to pay a disproportionate share of taxes will be in for a rough ride.

### **Needed Programs Are In Trouble**

It appears that many needs facing American citizens—especially the elderly and folks in need of health insurance—will be lost in the shuffle in Congress. Over the past two years, we have seen surpluses in the trillions of dollars slip away and be replaced with deficits, also in the trillions. At the same time, we find that domestic issues are being largely ignored. The war in Iraq and the costs after the official shooting is over will be staggering. I suspect those costs will be in the hundreds of billions. We couldn't find adequate funding for healthcare, schools, and other domestic programs even before the war started. We have learned the hard way that foreign countries will take our money, but then when we need them, they are hard to find. Some of them even turn their backs on us and side with our enemies. All of this has made President Bush's job mighty tough in his handling of the problems in the Middle East. While I disagree with the President's handling of domestic affairs, I support him in his handling of the Iraq problem. I hope and pray we will be successful in that endeavor.

## **VII. PRODUCT LIABILITY UPDATE**

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### **Beware, Soccer Moms— A Very Dangerous Minivan**

We recently settled a crashworthiness case against General Motors that was pending in DeKalb County, Alabama, involving a defective 1997 Pontiac Transport minivan. Our clients, two young children and their father, tragically lost their mother and wife, respectively, in a frontal collision when the General Motors minivan in

which they were traveling to a soccer game was struck head-on on the driver's side by a Nissan 240 convertible. In the collision, the driver's side occupant compartment, including the driver's door, floorboard, and seat, totally collapsed. This caused the driver of the General Motors minivan, who was properly wearing her seat belt, to suffer fatal head injuries in what was otherwise a moderate impact and a very survivable collision. In fact, the driver of the small Nissan sports car, which weighed substantially less than the minivan, walked away from the collision with only minor cuts on her chin. The children, ages 3 and 5, who were in the back seat of their family's minivan, received no physical injuries. However, for the rest of their lives, they will have to live with the emotional scars caused by witnessing their mother's senseless death.

The occupant compartment of the Pontiac Transport is not crashworthy because it was designed and manufactured by General Motors without adequate and proper bracing and other internal reinforcements necessary to maintain occupant survival space. The occupant compartment, or "occupant safety cage" as termed by the Institute for Highway Safety, should be designed and manufactured to maintain occupant survival space in collisions far greater than that which our clients experienced. Unfortunately, due to cost-cutting programs, General Motors designed the safety cage of the 1997 Pontiac Transport minivan without adequate support and structure. These safety reductions greatly affected the crashworthiness of the minivan. As a result, occupants of the 1997 Pontiac Minivan are subjected to an unreasonable risk of injury even though they are properly using their seat belts.

General Motors was aware of the Pontiac Transport's lack of crashworthiness or problems with its occupant area prior to the sale of our client's vehicle and for many years prior to the accident that changed our clients' lives. In 1996, the Insurance Institute for Highway Safety conducted several crash tests on various manufacturers' minivans to determine their crashworthiness and the performance of the occupant compartment in impacts almost identical to the collision in our client's case. In the Institute's tests, the Pontiac Transport and its sister vehicles, the Oldsmobile Silhouette and Chevrolet Venture, were the lowest rated of all minivans in terms of safety. In its tests, the Institute awarded grades of good, acceptable, marginal, and poor. The Pontiac Transport received the Institute's lowest overall safety rating—"poor." Most significantly, the Institute's crash test showed that the structure or safety cage of the GM minivan subjected the driver or occupants to potentially fatal head and neck injuries. Amazingly, the Pontiac Transport's occupant area that was tested by the Institute collapsed in the exact manner as our client's minivan.

Minivans are used by families across our country to go to church, family outings, and soccer games. Indeed, the vehicles are marketed and sold as family vehicles when they are actually truck frames with a van body. Experience with General Motor's Pontiac Transport has proven that it is not safe for families and loved ones. The settlement included the wrongful death claim and the individual "zone of danger" claims of the two children. The amounts of all three settlements are confidential at General Motors' request.

## **Ford Accused Of Paying Expert To Change Story**

A few months ago, we reported on the sordid tale of how Ford Motor Co. has misled state and federal courts in connection with one of the carmaker's experts. Now an environmental group has asked the nation's top auto safety regulator to reopen an investigation into Ford's Bronco II sport-utility vehicle. Although last produced in 1990, there are still a tremendous number of these dangerous vehicles on our nation's highways. In a report based on internal Ford documents, released as part of several lawsuits challenging the safety of the Bronco II, the Environmental Working Group claims that the automaker paid an expert witness to change his testimony on the Bronco II's safety record. The group claimed that Ford paid expert witness David Bickerstaff, a Southfield engineer, \$5 million to testify that the Bronco II's rollover rates were no worse than other vehicles. The group is asking the National Highway Traffic Safety Administration to open up its decade-old investigation of the Bronco II's safety.

Before those payments began, Bickerstaff had testified that the Bronco was dangerously prone to rollover collisions, the report claims. "These are not allegations. These have been found as true in courts across the country," said Heather White, the lawyer who compiled the group's report. Ford denies that it has done anything wrong. Ford's documents undercut the company's claim that fuel economy cannot be increased without compromising safety. In 2001 a federal judge in West Virginia said there was evidence of a conspiracy between Ford and Bickerstaff to mislead the judicial system. We have dealt with Ford and Mr. Bickerstaff in a number of cases. If what has been

alleged is true, there should be more than just a slap on the wrist of Ford Motor Company—somebody should go to jail.

## Occupants Should Walk Away From Rollover Crashes

Since there has been so much said and written about sports utility vehicles, let's review the safety record of these popular vehicles. As we now know, rollovers account for one-third of occupant fatalities and one-fourth of all auto-related fatalities annually. Fatality Analysis Reporting System (FARS) data reveal that 10,149 people were killed in rollover crashes in light vehicles in 1999 — one-third of all vehicle occupant fatalities for that year. As independent safety experts will tell you, rollovers are highly survivable crashes. This is because the forces applied to occupants during the collision are far lower than those experienced in other types of crashes. Given this survivability, it follows from the many fatalities that rollovers become dangerous due to poor vehicle design. Safety belts and seat structures are not designed and made so that occupants are kept in place during a crash. Vehicle roofs are so flimsy that when they absorb the full weight of the vehicle, they crush into occupants' heads and spines. This results in the inflicting of very serious injuries. In rollover crashes, sport utility vehicles are particularly deadly due to their heavy weight and boxy design. The passenger compartment of SUVs protrudes into the air and in a roll hits the ground with incredible force due to its shape.

In 1994, the National Highway Traffic Safety Administration stopped work on a rollover prevention standard and promised that a series of improvements in rollover crashworthiness and consumer information would be forthcoming. NHTSA relied in part on obsolete data from the late

1980s regarding the number of sports utility vehicles in the vehicle population. These promised improvements included advanced window glazing to prevent ejections and incentives to increase the use of seat belts. Significantly, NHTSA also promised stronger roofs. In addition, the agency promised in subsequent public statements that there would be improvements in door latches and hinges. Upper side impact protection was also to be improved. It is shocking that not one of the promised regulations on rollover crashworthiness has been issued to this very day. This record is particularly disturbing when we consider that the number of top-heavy, rollover-prone, SUVs being driven by the general public has skyrocketed since 1994. Light truck vehicles, which category includes SUVs, now comprise more than one-half of all new vehicle sales.

The time has come for NHTSA to improve vehicle rollover crashworthiness without further delay. Sports utility vehicles—like minivans—are marketed and sold as family vehicles. However, they are designed like pickup trucks. Most importantly NHTSA must provide a dynamic standard for roof crush so that the spines and heads of motorists are protected in rollover crashes. There are a number of other needed safety measures that are feasible both from an engineering as well as a cost perspective.

- Safety belts that employ sensors which trigger pretensioning in a rollover crash. Currently belts remain slack in a rollover from the lack of pressure;
- Roof structures should also be equipped with interior, energy absorbing materials to reduce damage to the occupant should any body part of the occupant contact the roof;
- NHTSA should require advanced window glazing for impact protec-

tion in side windows and should require installation of side curtain airbags;

- NHTSA should mandate improved seat structure and belt placement to contain and protect occupants by integrating safety belts into the seat structure; and
- NHTSA should eliminate the prohibition on the belt use warning buzzer beyond 60 seconds.

NHTSA has an obligation under its mandate from Congress to take action to improve vehicle design in this area of concern. Given the survivability of these crashes and the availability of lifesaving and limb saving technology, NHTSA should have a goal of bringing the fatalities from rollover and roof crush to virtually zero. The ultimate aim must be to achieve the same level of protection from injury and death for the public as is now enjoyed by professional racecar drivers. Anybody who watches NASCAR racing recognizes that cars can be designed for safety. There are two lingering questions that demand answers: (1) Why doesn't NHTSA do its job and (2) Why does the automobile industry resist needed safety improvements?

## SUV Safety Concerns— What Has Changed?

Many safety advocates are asking: What has changed in the last few weeks to cause the top federal auto safety official to change his views on how dangerous SUVs are? All of a sudden, Dr. Jeffrey Runge, the Administrator of NHTSA, for some reason has softened his stance on sport utility vehicles. He is now saying that consumers must be given more safety information so they can make informed decisions. Dr. Runge apparently upset some automakers when he said he wouldn't buy his children an SUV that has been determined to be a rollover risk "if it was the last one on Earth."

After hearing Dr. Runge's statements, Senator John McCain (R-Ariz.) called a hearing of the Senate Commerce and Transportation Committee on SUV safety. The Senator, who said he and his family drive SUVs, is skeptical about whether automakers can be trusted to improve safety of their vehicles without further regulation from Congress and NHTSA. I certainly agree with the Senator. Senator McCain has pointed out that it took government demands to make automakers include airbags and safety belts in their vehicles. "You judge people by their history," McCain said. "Where is their credibility in establishing these voluntary vehicle standards?" At the hearing, officials from General Motors Corp., Ford Motor Co. and Toyota Motor Co. insisted that safety is a priority and that they can improve vehicles faster without regulations. They contend that it takes NHTSA up to four years to put new regulations in place. I also agree with that assessment since NHTSA has moved at a snail's pace when it comes to improving safety standards. Dr. Runge has said that NHTSA is watching automakers closely. Congress in turn needs to watch NHTSA carefully and prod them to action. If the agency fails to act, then Congress needs to step in and find out why not! If Congress fails to do its duty, the American public should demand answers, and the best time to do that is when members of Congress seek reelection.

### **Pickup Trucks Present Safety Problems**

As pointed out above, sport utility vehicles have come under fire amid concerns about their poor fuel economy and safety records. However, it has been pointed out that pickup trucks in many respects are even more dangerous, according to government crash data. Even the Alliance for Automobile Manufacturers, the indus-

try's lobbying arm, which has sought to blunt criticism of SUVs by saying they are as safe as cars, released data recently that shows pickups to be less safe than either cars or SUVs. According to this data, driver death rates in pickups were significantly worse—130 per million registered vehicles one to three years old—than in cars (83 per million) or SUVs (73 per million). Unlike SUVs, for which rollover-fatality statistics have worsened increasingly over the years, death figures for pickups have been high for some time. For example, in 2001, 2,643 occupants of pickup trucks died in rollover crashes, compared with 2,142 people in SUVs. A decade ago the gap was much greater: 2,543 rollover fatalities in pickups against 882 in SUVs. Rollover-fatality rates, which take into account the number of vehicles on the road, are worse for SUVs — 9.9 per 100,000 registered vehicles — than the pickups' rate of 6.97 per 100,000 vehicles.

Joan Claybrook, who heads up Public Citizen and is one of the most dedicated persons I have ever known, says she is worried that pickups have gotten lost in the SUV firestorm. "In many ways, pickups are worse," says Ms. Claybrook, a former Administrator of NHTSA, who included pickups in her remarks to a Senate Commerce Committee hearing on SUV safety. The hearing was in response to recent concerns about SUV safety expressed by the new Administrator of the National Highway Traffic Safety Administration. NHTSA admits that the agency is concerned about the safety of pickups.

While more than 75% of SUV occupants wear seat belts, only 59% of pickup truck occupants do so, the government's latest data indicates. For all vehicles, seat-belt use rates average about 75%. Auto-industry officials say SUVs are an easier target than pickups. Brian O'Neill, President of

the Insurance Institute for Highway Safety, testified that "[t]here is a presumption that pickups are work vehicles and they're needed and SUVs are frivolous and not needed." Whatever countermeasures are developed for SUVs are applicable to pickups as well since they are typically built on the same frame. One important distinction is that the average person who drives a pickup uses it for pickup reasons, which generally are work-related.

The legislative hearing came as the head man at NHTSA was weighing recommendations from experts at his agency on how to reduce accidents, deaths and injuries that result from rollover accidents and collisions between light trucks and passenger cars. One expected proposal would be a requirement that automakers install head-protecting airbags in vehicles. However, it appears that he prefers voluntary safety improvements by automakers. Based on history and experience, as pointed out by Senator McCain, voluntary safety improvements in this or any other industry simply won't work. It is another example of putting the proverbial "fox" in charge of the "hen house." If the government got serious about regulation of the carmakers, we would see safer vehicles on our highways. Until that happens, there will be unnecessary deaths and serious injuries because carmakers will continue to put their profits over their customers' safety.

### **NHTSA Makes Seats A Top Priority for 2004\***

The new NHTSA Administrator has listed three priorities for improving vehicle crashworthiness: (1) reducing the dangers of rollovers, (2) reducing the dangers of side impacts, and (3) improving vehicle seating systems. While NHTSA in July of last year had previously published rulemaking prior-

ities for 2002- 2005 that included improved seat strength and head restraints, the agency's priority on seating systems was not on the radar screen of most observers. In its July publication, NHTSA stated that seat backs should be strengthened to better protect people in rear impact collisions. The agency indicated that a proposal to upgrade the standard would be issued in 2003. NHTSA also acknowledged the advantage of seat-integrated restraints over belts anchored to the pillars and floors.

As you may already know, the priority for updating FMVSS 207-Seating Systems is decades past due. The standard went into effect in 1968 for passenger cars and was extended to MPVs, trucks and buses in 1972. It specifies the minimum requirements for seat strength and strength of the interface between the seat and the vehicle. The seat must withstand a 3,300 in-lb moment applied at the upper cross-member of the seat back measured about the H-point. The European seat standard, ECE No. 17, which is not much better, requires the same seat back strength test procedure with a higher performance value of 4,691 in-lb. Many people are shocked to learn that an aluminum lawn chair will meet NHTSA's safety standard for seat backs insofar as strength is concerned.

The standard has not been upgraded primarily because the auto manufacturers argued that their seats perform satisfactorily in collisions. They claim there is no real need from a safety standpoint to consider increasing the seat strength requirements. When seats fail rearward in minor rear impact collisions, as many do, manufacturers argue their seats meet the NHTSA requirement and are performing as designed to yield, providing controlled energy absorption to allow the occupant to ride down the collision. However, rear impacts resulting in seat collapse generally show no evidence of controlled

energy absorption. To the contrary, they tend to show catastrophic failure of a seat component like the recliner mechanism.

Those in favor of yielding seats, which include most if not all defense experts, argue that serious injuries that result from seats yielding in rear impacts are rare. They claim that designing seats to withstand high-speed collisions will increase the instance of low-severity injuries while potentially protecting a small number of occupants from serious injuries. Their assumption is that stronger seats will cause additional whiplash injuries because the seat does not absorb the energy of the collision, causing the occupant to rebound into forward objects or ramp up the seat back and hyperextend the neck. An examination of the technical literature and submissions to NHTSA's rulemaking shows that the debate is really not about yielding versus rigid, but rather, how best to distribute rear impact loads and to minimize relative motion between body parts. NHTSA has taken the position that more research was needed before an upgrade to the standard could be proposed.

David Viano was employed as GM's chief safety scientist in the 1980s. Studies by Mr. Viano, conducted while so employed, demonstrate that ramping up the seat back does occur in rear impacts with yielding seats, with both restrained and unrestrained dummies. He notes that this ramping can cause severe neck injuries, but the problem is not significant in seats that deform less than 60 degrees. Viano recently published additional work in which he acknowledges that a strong seat back can be developed with good performance in all conditions that is both practical in mass and cost. He also admits the seat plays an important role in occupant protection in rear crashes, stating that, "In high severity crashes, energy management is needed to limit seatback rotation

and prevent the loss of occupant retention."

Mercedes Benz, known for its strong seats, argues that a proper balance is necessary between seat mounting seat back stiffness to allow occupant energy absorption and prevent seat back collapse. Therefore, this company requires seat stiffness higher than required by the standard. Mercedes Benz seats are designed to perform without "failure" in an FMVSS 301 rear-impact barrier crash test at 30 mph. In past rulemaking, the company recommended a dynamic rather than the current static test requirement to demonstrate the proper balance of stiffness.

In 1989 Transport Canada (TC) reported on 23 cases in which passenger vehicles experienced seat back failures, and concluded that the existing seat back strength requirement does not prevent seat back collapse. TC stated that "seat back failure during a crash can not only result in injury to rear seat occupants but provides an avenue for ejection even when the occupant is using the restraint system." Also in 1989, Ken Saczalski, a noted seat design expert, petitioned NHTSA to strengthen the requirements of FMVSS 207. At that time, NHTSA agreed to look into the issue and initiated a new NHTSA research project on seat back strength. Similarly, seat and seat belt expert Alan Cantor petitioned the agency to amend FMVSS 207. This expert specifically wanted to prohibit occupant "ramping" up the seat back during seat deformation. He stated that seat failure results in loss of shoulder restraint in a subsequent frontal impact, injury to rear seat passengers, and occupant ramping up the seat back. NHTSA granted this petition. In November 1992, the agency requested comments on technical studies and its research plan concerning seatback performance in rear impacts. NHTSA analyzed seat type and seat perform-

ance data from the National Accident Sampling System (NASS) data and determined that 10 percent of occupied front-outboard passenger seats were deformed in crashes. The agency's studies revealed that occupants in damaged seats "tended to be injured more than occupants in undamaged ones."

The most recent agency funded studies, each published in 1997, have found that some form of limited and controlled deformation of the front seats is desirable in order to absorb energy and reduce the risk of injury to the front seat occupants without endangering rear seat occupants. However, it was noted that excessive rotation would encroach on rear seat occupant space. For at least one study, they selected 30 degrees of seat back rotation from the design position as the maximum allowable for the 95th percentile dummy in a 30-mph rear impact crash pulse.

A NHTSA statistical study examined NASS CDS data—beginning in 1995, when the data included the initial and final seat back positions—to determine the likelihood that a seat back would maintain its initial upright position or end up in a completely reclined position. The agency also examined the injury rate to front seat occupants during rear impacts when the seat completely collapsed, and found that if all seat backs collapsed, the injury cost would be at least 2.83 times as much as if all seat backs maintained their initial position. Thus, it was concluded that "it is clearly not preferable to design all seats to collapse upon rear impact." An additional report was generated from this information that analyzed the strength and energy absorption and dissipation characteristics of 48 seats from 24 1995 and 1996 model year vehicles. There was a clear difference between the performance of dual and single recliner seats. In general, the dual recliner seats exhibited less rotation

during the applied loading and were stiffer and stronger. For single recliner seats, twisting of the seat was typical such that the inboard side deflected to a greater extent than the outboard side. The report was a major leap for the agency and concluded that the existing 207 requirement is not motivating current seat back design. A proposal for upgrading the standard is expected from NHTSA this year.

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### **DaimlerChrysler Faces Probe of Accelerators**

DaimlerChrysler may have to recall 589,596 LHS, Concorde, Intrepid and 300M sedans. Recently, U.S. safety regulators began an investigation into reports of sticking accelerators. The National Highway Traffic Safety Administration began the probe of the 1999 and 2000 model-year cars after receiving five complaints that the pedal stuck to the floor when drivers were accelerating in traffic. No accidents or injuries were listed in the agency's investigation report. The probe is the first step toward a possible recall.

### **Product Safety Agency Denies Request For Registration Cards For Children's Products**

Last month, federal regulators turned down a request to require that children's products come with registration cards intended to help companies alert users when a product is found to be dangerous. The Consumer Product Safety Commission rejected a proposal by the Consumer Federation of America. The panel's two Republicans voted against the proposal, stating that their agency's own efforts would do a better job ensuring more people are aware of product recalls. The Chairman of the Commission feels more research is needed to learn

whether consumers would actually use the cards. A broad agency study on how to improve recall effectiveness is to be completed by the fall of 2004. A forum on the issue will be held on May 15.

According to the Commission, between 50 percent and 60 percent of consumers respond to most recalls by returning a product or getting it repaired or replaced. The Consumer Federation of America petitioned the safety agency in July 2001, asking for rules requiring that makers of children's products include a postage-free card with each product. Under the proposal, consumers would put their contact information on the card and send it to the manufacturer. The company would keep the information for at least 20 years and notify consumers if the product was recalled. The card would be separate from warranty or other cards, and contact information would only be used to alert people about safety problems. The Commission and all manufacturers, distributors, and retailers should do everything possible to make sure that consumers find out about unsafe products. The consumer group will ask for legislation to improve recalls.

### **Seat Belts Are Supposed To Protect Occupants**

During the early 1980s there was a big push to start integrating passive restraints into vehicles. Airbags are considered passive restraints. A passive restraint is a system which provides protection to an occupant without requiring any action by the occupant. An active restraint, such as a manual seat belt, is one where an action by the occupant is required. Many manufacturers were reluctant to commit sufficient resources to develop the airbag technology. However, the National Highway Traffic Safety Administration (NHTSA) continued to push for the automobile manufacturers to add

passive restraint systems to vehicles. As a result of the automobile manufacturers' objections, NHTSA decided to allow manufacturers to pursue other safety options rather than airbags.

Instead of manufacturing an airbag as part of the passive restraint system, many manufacturers installed two-point passive shoulder belts. In short, a two-point belt system activates when the occupant sits in the vehicle. At that time, the seat belt automatically comes across the occupant's shoulders. These two-point passive systems were much cheaper than the airbag technology. In order to implement the 2-point passive shoulder belt system, many automobile manufacturers simply attached the seat belt to the door on one end and onto the floor of the vehicle between the driver and passenger. This design permitted the seat belt to automatically swing off the occupant when the door opened. Likewise, when the door closed, the seat belt would swing across the operator.

Within the engineering community, all design engineers are required to identify all hazards inherent in the designed product. Once a hazard is identified, that hazard must be designed out if possible. The specific hazard created when a 2-point passive shoulder restraint system is attached to a door is the likelihood that the occupant will not be restrained if the car door opens during a wreck. Once the occupant is unbelted, that person is prone to being ejected, which will result in serious injuries or death. In contrast, if the occupant remains in the vehicle, the likelihood of survival is much greater. There have been hundreds of serious injuries or deaths as a result of occupants being ejected from a vehicle equipped with a passive shoulder belt system after a door opens in a wreck. It simply was a very poor design decision.

Such decisions by automakers have and will continue to result in horrific

consequences to people. In fact, this poor design caused the death of one of our client's family members. During the wreck, the door opened and the family member was ejected. A passing vehicle struck and killed her. This automobile company refuses to recall the vehicles it equipped with door-mounted passive seat belts. However, it is significant to note that none of the company's current vehicles are equipped with these defective door-mounted passive seat belt systems. Apparently, the company prefers to quietly settle the lawsuits involving this defective seat belt design. Why wouldn't a manufacturer simply recall the system that is defective and likely to result in the loss of lives? The answer is simple—it is cheaper to settle these lawsuits than to recall hundreds of thousands of vehicles and spend the money required to "fix" the problem.

### **U.S. Probe Seeks Ford, Bridgestone Testimony**

The U.S. government is conducting a criminal investigation related to Bridgestone Corp. tires that are linked to deaths and injuries involving Ford Explorers. A U.S. Attorney in Illinois has subpoenaed documents from lawyers suing Bridgestone, the world's second-largest tire maker, and Ford Motor Co. on behalf of alleged victims. The records demanded by a federal grand jury include sworn statements by John Lampe, chief executive of Bridgestone's U.S. unit, Bridgestone Americas Holding Inc. The probe follows an allegation by congressional investigators that the Japanese tire company and Ford Motor Co. misled U.S. officials about their products' safety. The investigation will likely produce evidence needed in personal-injury suits against Bridgestone and Ford. As has been widely reported, Ford used Bridgestone's Firestone tires on Explorer sport-utility vehicles.

At press time, it was not clear where this investigation is heading. The prosecution papers don't identify the target of the criminal probe. However, it is clear that the documents requested are "pursuant to an official criminal investigation of a suspected federal offense." U.S. safety officials have indicated that flaws in Firestone tires contributed to 271 highway deaths and more than 700 injuries. After a recall of Firestone tires began in 2000, President Bill Clinton signed a law that makes it a crime to withhold tire-safety data. In addition to Lampe, the subpoena requested testimony from eight other individuals, including Sanjay Govindjee, a consultant hired by Bridgestone to investigate tire defects, and Judy Sullivan, a purchasing agent for Ford.

Joan Claybrook, President of Public Citizen, said she had been contacted last fall by the U.S. Attorney to ask about "various law violations" in the tire case. Ms. Claybrook stated that the public had been misled by the companies. She also pointed out that the companies covered up defects with protective orders in lawsuits. Public Citizen has lobbied Congress for heavier regulation of the tire and auto industries and has been a vocal critic of Bridgestone since the recall. According to media reports and information received from Public Citizen, the U.S. Postal Inspection Service, which investigates mail fraud, is also participating in the tire case, prosecution papers show.

Bridgestone has settled more than 800 victim lawsuits since the recall. Presently, there are 486 suits in federal court in Indianapolis against Bridgestone or Ford. About 10 million Firestone tires were recalled in 2000 and 2001 after reports of tread separation. Tires made at the Decatur, Illinois plant had a higher failure rate than those produced at Bridgestone factories in North Carolina and Quebec. The company said in 2000

that a strike at Decatur in the mid-1990s might have accounted for the discrepancy in quality. However, evidence obtained in lawsuits reveal a much broader problem. The investigation follows an allegation by congressional investigators that Bridgestone and Ford Motor Co. misled U.S. officials about their products' safety. Reportedly, former Firestone tire maker Alan Hogan told the grand jury that he used substandard rubber to make tires in the mid-1990s.

## VIII. PREMISES LIABILITY UPDATE

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### **Safety Takes A Risky Ride**

Many consumer groups are concerned over the safety of thrill rides and roller coasters. As we all know, thrill rides are getting faster and more dangerous. As a result, there are more deaths and injuries. In 1999, Representative Edward J. Markey (D-Mass.) introduced legislation in 1999 to restore Consumer Product Safety Commission oversight for fixed-site rides. However, the industry testified against the legislation and effectively killed the bill. Before 1981, the commission's oversight included both big theme parks and smaller traveling carnivals. The commission required the parks and carnivals to report injuries, mandated government safety inspections and conducted recalls of defective thrill rides. In 1981, however, the big theme parks convinced Congress to give theme parks an exemption from the law that required federal oversight. Clearly, this created a major safety gap.

Presently, thirteen states, including Alabama, have no injury-reporting requirements. Eleven states, again including Alabama, don't even require safety inspections. In fact, some big

theme park states like Florida, Virginia, and New York rely upon private safety inspectors accountable to no public safety authorities. California recently enacted legislation authorizing state inspections of fixed-site amusement park rides. Through its independent surveys of hospital emergency rooms, the safety commission reported that theme park injuries increased 95% from 1996 to 1999. Moreover, in August 1999, during a 6-day span, four people were killed in three thrill ride incidents in Northern California, New Jersey and Virginia. Government should do a better job of regulation in a great number of areas, and amusement parks are certainly in need of government standards and inspection requirements.

### **Other Safety Problems**

There are other areas where safety requirements need a boost. For example, fires involving upholstered furniture kill more Americans than any other kind of consumer product-related fires, with nearly 500 deaths, more than 1,300 injuries and nearly \$200 million in property damage annually. The Consumer Product Safety Commission has been working hard on this issue for more than eight years. It began regulatory proceedings, studies, and public hearings. Nevertheless, the industry has not adopted voluntary safety standards that could reduce deaths and injuries associated with these fires.

The gas-fired water heater industry also presents a problem area. The open flame of gas-fired water heaters ignites gasoline or kerosene fumes, causing hundreds of deaths and horrible injuries each year. Rather than requiring the water heater industry to design safe water heaters, the industry has consistently blamed consumers for storing gasoline too close to water heaters. We have handled a number of cases where the improper design of

gas-fired water heaters caused fires resulting in serious injuries and deaths.

There are other examples of why the fox should never be allowed to guard the henhouse. The baby bath seat industry is certainly one of them. These products caused 78 deaths and 110 nonfatal incidents from 1983 through May 2001. As a result of poor safety design, the bath seats can topple over in a tub of water, drowning children. The industry's response was not to redesign the product but to get out of the market. There are now only two manufacturers of bath seats in this country, down from 10 in 1994, when the Commission began working on the issue. In July 2000, a consumer group petitioned the Commission to ban bath seats. In 2001, the CPSC proposed safety standards because the industry had refused to act voluntarily. During this period, 10 babies drowned. The Commission has reviewed comments and hopefully will act this year. Without question, it should—babies are still drowning.

I don't advocate banning thrill rides, traveling carnivals, upholstered furniture, water heaters, or even baby bath seats. Nobody does to my knowledge. However, no one can honestly dispute the fact that effective governmental oversight is badly needed. Regardless of how strongly these industries and their political allies push for self-oversight by the industries, government must resist such requests.

## IX. WORKPLACE HAZARDS

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### **OSHA To Address Persistent Violators**

There appear to be some significant policy changes in the works at the Occupational Safety and Health Administration. Some believe this is a

legitimate move to give OSHA more power to crack down on companies that persistently flout workplace safety rules. Under the new policies, OSHA officials will be directed to conduct more follow-up inspections of companies that commit safety violations of "the highest severity." For example, McWane Inc., a major manufacturer of cast-iron sewer and water pipes located in Birmingham, Alabama, has one of the worst workplace safety records in the United States. McWane, a company that employs some 5,000 workers in a dozen American plants, has been cited for more than 400 safety violations since 1995. This is far more than all of its major competitors combined. During that time, records show, McWane employees suffered at least 4,600 injuries. Nine workers were killed, three of them because of McWane's deliberate violations of federal safety standards, OSHA inspectors concluded. That is shocking!

McWane is not the only offender—there are a number of companies that also have terrible records. The policy changes apparently were aimed at one of the most glaring regulatory deficiencies highlighted by the McWane example. As OSHA's own investigation files showed, McWane workers have been injured, burned, and killed year after year. The same patterns of safety and health failures were involved. Hopefully, OSHA's ability to police companies that continually defy workplace safety rules will be improved greatly, with better coordination between their offices—something that has been sorely lacking. The policy changes should have significant consequences for other major American corporations with high injury rates. However, only time will tell how far OSHA will really go. At least, on the surface, the agency appears to be serious about clamping down on repeat offenders, and that is promising.

I have to admit, however, there are grounds for skepticism about what OSHA is up to. An analysis of OSHA's fines during the Bush Administration shows that the average fine for a willful safety violation has decreased by 26 percent. These fines were down to \$26,888 in 2002 from \$36,487 in 2000. The average fines for companies that fail to fix safety violations have decreased by 68 percent. Hopefully, the Bush White House, an Administration that has made no secret of its overall distaste for tighter business regulations, is serious about upgrading OSHA's ability to make workplaces safer for workers. American workers deserve safer working conditions and a government that should work to make sure that happens.

### **Worker Killed At Paper Mill**

A 20-year-old man was killed when a 40-foot-long roll of paper that was being loaded into a shipping container fell on him. The incident occurred at the former International Paper Co. site. Workers were unloading a roll of paper and at some point the paper rolled over onto the worker, who was pinned underneath. The victim was crushed by the 41,000-pound roll of paper when it shifted and fell on him. The Occupational Safety and Health Administration is conducting an investigation. International Paper closed this plant, which is located in north Mobile County, Alabama, in December of 2000. The company was in the process of moving equipment from the old mill to other mills located around the country. The person killed was employed by G.A. West & Co. Inc., a mechanical and industrial contractor located in Mobile.

### **Jury Awards \$16 Million In Industrial Accident**

A federal court jury in Indiana recently returned a most significant verdict in a workplace injury case. An Indiana man, whose foot was amputated in a 1998 industrial accident, received a \$16.5 million jury award. The 44-year-old worker was compensated for his injuries and disability resulting from the mishap. The worker had incurred \$232,000 in past medical bills, will have about \$850,000 in future medical bills, and has lost more than \$650,000 in wages. The verdict was returned against Infra Metals and Crane Pro Services. The accident took place at the plant of Infra Metals, where the employee was working. He was inside a rail car hooking up steel to be unloaded when an overhead crane dropped a 14,000-pound load of steel inside the rail car and hit him. Crane Pro Services designed and installed the crane. It was proved at trial that the crane was unreasonably dangerous and thus defective. There was also a failure to warn the workers or their employer about the hazards.

## **X. TRANSPORTATION**

### **Restaurant Held Liable For Teen's Fatal DUI Crash**

The issue of drinking and driving, and the tragic consequences that result, remain a major problem around the country. There doesn't appear to be any slow-down in the number of accidents around the country where a drunk driver was involved. Recently, a Texas jury ordered a Mexican restaurant to pay \$8 million in damages for supplying an underage waitress with so much alcohol that she caused a traffic accident that killed one man and

left another with brain damage. The jury found Casa Mexican Restaurant grossly negligent and the waitress, then only 19 years old, guilty of simple negligence for the May 2000 accident. The jury found the restaurant 80 percent responsible and their employee 20 percent responsible for the death and injuries. The jury ordered the restaurant to pay \$2.75 million to the victims' mother for the death of her son. The award was \$2.27 million to the injured party in compensatory damages and \$3 million in punitive damages. Under Texas law, the mother could not receive punitive damages. Interestingly, the waitress was not ordered to pay any monetary damages.

The drunk driver rear-ended the injured party's pickup, causing it to hit the vehicle driven by the person killed. The waitress had been supplied alcohol by the restaurant and later by a bartender working at a private party the restaurant catered. Her blood alcohol level was 0.17 percent, far above the legal limit. Significantly, she was carrying equipment for the restaurant while driving home from the private party. The restaurant claimed it was not responsible for the accident, which occurred four hours after the waitress got off work. The drunk driver had been found guilty of manslaughter, served a six-month jail sentence, and is now serving 10 years probation. Her auto insurance company settled for about \$25,000 for each claim. The distraught mother stated after the jury verdict, "My son was my life, and he was such a good boy, nothing can replace him." Her 22-year-old son was a college student who worked as a computer technician, and his death was both a tragedy and unnecessary. He helped support his mother and two younger siblings and was the innocent victim of another accident caused by alcohol. The surviving victim of the crash was left with permanent brain damage. The restaurant owners hopefully

learned a lesson and one that others should learn from.

## XI. CORPORATE HAPPENINGS

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### **New Corporate Fraud Hotline**

The FBI has set up a corporate fraud hotline, which, believe it or not, will be answered by a real person. The hotline was set up to provide the general public with the opportunity to furnish information concerning suspected corporate fraud matters. The calls will go directly to the FBI in Washington, D.C. The hotline number is: 888-622-0117. According to my information, this expanded intelligence gathering effort will generate four or five new corporate fraud cases for the FBI each month. In addition to the hotline, new FBI initiatives include the enhancement of liaison between FBI field officers and other agencies that investigate fraud matters. These agencies include the U.S. Securities and Exchange Commission, the Postal Inspection Service, state attorney general offices, and state and federal regulatory agencies. The FBI has also created a corporate fraud "reserve team" to assist field officers in need of investigative assistance in major corporate fraud investigations. The FBI has announced that it will hire additional special agents with the skills needed to efficiently and effectively investigate corporate fraud cases. It is interesting to note that the FBI has opened more than 50 major corporate fraud investigations, including WorldCom, K-mart, American Online, Qwest Communications, Tyco International, Homestores.com, Rite-Aid, and Bristol-Meyers Squibb. The Enron investigation was already in the works at that time. The FBI currently has 13 corporate fraud investigations under way in which the estimated losses to investors exceed \$100 million.

### **Two Former Kmart VPs Indicted On Fraud Charges**

Criminal fraud charges have been levied against two former vice presidents of Kmart Corp. who are accused of inflating the retailer's earnings. Enio A. "Tony" Montini Jr. and Joseph Hofmeister were charged with securities fraud, making false statements to the Securities and Exchange Commission and conspiracy to commit those offenses. These charges come from the yearlong federal probe of Kmart Corp., which is currently in bankruptcy. These are the first people charged with wrongdoing in the fallout from Kmart's January 2002 bankruptcy and an investigation of its finances. One of the accused is a former senior vice president and general merchandise manager. The other is a former divisional vice president of merchandising. According to the indictment, the defendants' false statements to Kmart's accounting and auditing divisions resulted in the company filing an SEC quarterly report that overstated Kmart's operating results by \$42.3 million for the period and helped Kmart meet Wall Street's earnings expectations for the period. The conspiracy and false statements charges carry maximum penalties of five years in prison and a \$250,000 fine.

Kmart filed for bankruptcy in January of 2002. Anonymous letters, claiming to be from employees, prompted Kmart to launch a review of its accounting practices last year. The government began its investigation in February of 2002. In December, the retailer restated its financial results for the 1999-2001 fiscal years and the first two quarters of 2002 after problems were discovered as part of the company's internal review. The indictments could be a stepping-stone in a government effort to pursue executives who held higher positions. The strategy that many prosecutors use is to indict or threaten to

indict people in the lower management ranks whom prosecutors think have knowledge about or participated in the violations, so that pressure is put on people to trade up, i.e., to cooperate.

### **Will Big Companies Ever Have To Shape Up?**

One would think that with all of the corporate fraud and corruption that has been unveiled in the last two years, Corporate America would be totally on the defensive and fighting to keep top executives out of jail. Unfortunately, that hasn't been the case. William H. Donaldson, the new Securities and Exchange Commission Chairman, has indicated that his priorities will now be to "guide the agency" as it grows rapidly to handle a record number of business scandals. He says Corporate America will be "persuaded" to shape up and reset its "moral compass." I believe that the SEC should do its job and protect American investors. Instead, the SEC has been deep in controversy for months and hasn't been as effective as it could have been. Currently, investor confidence is at a near record low because of the large number of accounting scandals over the past year and a half. Unfortunately, these financial scandals have continued. Almost every day, we read or hear of a new corporate scandal. It is high time for the SEC to do its job. It will take more than "guiding" and "persuading" the corporate bosses to do the right thing.

### **SEC Says Firms Still Fall Short On Disclosure**

As we all know, over the past months, there has been a great deal of change in the public's view of how Corporate America operates and handles its financial affairs. Despite investor demand for more disclosure in the post-Enron world, the nation's

largest corporations have not made financial statements sufficiently clear and accurate, according to ongoing review by federal securities regulators. The Securities and Exchange Commission says that companies often fail to give a meaningful analysis of their financial situation or critical accounting decisions. A summary of SEC reviews of annual reports filed by Fortune 500 companies in 2002 contains these findings. The SEC found that, in the portion of annual reports known as management's discussion and analysis, companies too often "simply recited financial statement information without analysis or presented boilerplate analyses that did not provide any insight into the companies' past performance or business prospect as understood by management." By failing to disclose key accounting policies, companies continue to make it difficult for investors to understand revenue figures, restructuring charges, tax liabilities, pension funding and reserves for possible losses.

It is disturbing that over a year ago the SEC instructed the companies to do exactly what they have failed to do. This has also disturbed some SEC Commissioners. The review mentioned above was undertaken in December 2001 in response to shaken investor confidence in the aftermath of the collapse of Enron. Since then, a significant number of large publicly-traded corporations have been caught doing some pretty "bad stuff" by anybody's standards. You would think that the corporate bosses would have learned their lesson. You would think also that the politicians in Washington would have gotten the message from people all over the country that they want the "mess" cleaned up.

### **Qwest Whistle-Blower Files Suit**

A former employee of Qwest Communications International Inc. has

sued the giant phone company. Recently, a former manager in Qwest's Cleveland office filed a lawsuit in a federal court in Ohio. The employee claims that the telecom company wrongfully terminated him because he complained about inflated sales reports and that he was forced to quit after writing the company's top executives about his concerns. Six months before leaving Qwest, he wrote the company's top executives and questioned how Qwest sales representatives recorded sales contracts into the computer system, a process called flashing. The lawsuit contends that recorded amounts were regularly overstated and in some cases fabricated. Apparently, Qwest lacked controls to verify the information reported to headquarters, and managers condoned the practice. It is known that the employee's letters triggered an internal investigation. It may be significant that inflated revenue is at the heart of fraud indictments announced last month against four former Qwest executives. These individuals, along with four other current and former executives, also face civil fraud charges. The Securities and Exchange Commission and Justice Department continue to investigate Qwest. The company has restated \$2.2 billion in revenue. If this were not all too typical of how Corporate America has operated over the past several years, it would be shocking.

### **Class Action Wanted For Suit Against InterCept**

A lawsuit was filed requesting class action status on behalf of InterCept Inc. stock buyers between September 16, 2002 and January 9, 2003. The complaint, filed in the U.S. District Court in Atlanta, Georgia, alleges Atlanta-based InterCept and certain InterCept officers and/or directors violated federal securities laws. Specifically, the complaint alleges the defen-

dants made material misrepresentations and omitted to make material disclosures due to false assurances that the adult pornography Internet portion of their merchant-processing business was insignificant. The company was also accused of failing to disclose that VISA regulations implemented in 2002, which were targeted specifically to address risks of Internet pornography card processing, had caused a material loss of business. It will be interesting to see how this case progresses. Anything that will slow down the marketing and spread of pornography should be welcomed by the American people. Pornography is a plague on society, and the courts may be the last line of defense for our country. Those who make billions in the pornography industry—destroying individuals and families in the process—have hidden behind the constitutional right to free speech. Hopefully, the U.S. Supreme Court will reject that defense in the appropriate case.

### **Pfizer Settles Lipitor Case With Pennsylvania**

Last month, the State of Pennsylvania reached a settlement with Pfizer Inc. The company was accused of failing to pay mandatory drug rebates under the Medicaid program for Lipitor, the popular anti-cholesterol drug. Under the settlement, Pennsylvania will receive \$1.5 million in restitution and penalties. A \$49 million settlement, which was much broader in scope, covered 46 other states and the District of Columbia. The company violated its Medicaid rebate agreement and held onto rebate funds that should have been returned to each state's Medicaid rebate program. According to investigators, Warner-Lambert, which developed Lipitor and which Pfizer bought in June 2000, allegedly violated the federal Medicaid drug rebate statute in 1999 by failing

to accurately report "best price" information for the drug.

In order to encourage a health maintenance organization's doctors to write Lipitor prescriptions, Warner-Lambert allegedly provided unrestricted "educational grants" of \$250,000 in exchange for keeping Lipitor on the HMO's drug coverage list. The settlement is based on contentions by the states that the \$250,000 payments should have been included in the calculation of "best price" under the Medicaid drug rebate statute. Pfizer agreed to pay a total of \$49 million to the states and the District of Columbia. After returning the federal share of the state's settlement, Pennsylvania's Department of Public Welfare, which administers the state's Medicaid program, will receive \$700,000. As part of the settlement, Pfizer, of New York, entered a corporate integrity agreement with the U.S. Department of Health and Human Services' Inspector General. The agreement requires strict scrutiny of the company's marketing and sales practices for the next five years. As our firm knows, there are other pharmaceutical companies that have defrauded states, including Alabama, in their dealings with the Medicaid drug programs.

### **Bristol-Myers, FTC Settle Charges Of Patent-Law Abuse**

Federal antitrust enforcers charged that Bristol-Myers Squibb Co. illegally sought to extend patent protection on three blockbuster drugs, blocking competition from less-costly medications. The Federal Trade Commission has disclosed that the drug maker settled the charges and accepted restrictions on its conduct. In January, the company agreed to pay \$670 million to resolve related lawsuits filed by states, generic drug makers and pharmacies. It was charged that the drug maker had a decade-long pattern

of regulatory abuse, shielding more than \$2 billion in annual sales from competition by generic drugs and forcing cancer patients and others to overpay hundreds of millions of dollars for medications. The case is the latest in a string of suits alleging that drug makers use Food and Drug Administration rules to extend patent protection, allowing them to reap higher prices and stifle competition, widening a campaign against companies that use regulation to gain commercial advantage. When patents expire and generic drug makers enter a market, drug prices typically fall by more than two-thirds, the FTC has found. Congress is considering regulatory reforms to limit such abuses.

I hope this case is part of a broader campaign by the FTC to curtail efforts by companies to use federal regulation, state commissions or local licensing boards to choke off competition. Under the law, competition must be on the merits, not through misusing the government to stifle your competition. The three Bristol-Myers drugs are a widely prescribed anxiety treatment, BuSpar, and cancer drugs Taxol and Platinol. Only hours before a generic drug company was to ship its less-costly version of BuSpar, Bristol-Myers claimed a new patent on the drug and listed it in an official FDA registry. It then sued its smaller rival, triggering a 30-month period of further sales exclusivity while that litigation was pending. In another instance, it paid \$70 million to a smaller rival to keep a generic drug off the market.

Under the settlement, among other provisions, Bristol-Myers no longer will enjoy 30-month sales exclusivity for any branded drugs on which it gains new patents. Similar terms will be imposed in an agreement with dozens of state attorneys general, who also recovered \$150 million. For the drug companies, the stakes are extremely large. For example, BuSpar's

U.S. sales for 2000, the last full year before generics entered the market, were \$600 million. Before generics hit the market, Taxol was a \$1 billion-a-year product in 2000. Platinol's annual sales had been more than \$100 million. Within the first year of generic entry, sales of each drug fell 50%. Hopefully, action such as this will help consumers by making prescription drugs available and affordable.

## XII. ARBITRATION UPDATE

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### **The National Association Of Insurance Commissioners**

I was asked to testify at a public hearing on arbitration at the annual meeting of the National Association of Insurance Commissioners in Atlanta, Georgia, on March 10th. The Commissioners were interested in the positions of all sides on this important issue. I explained the evils of mandatory, binding arbitration to the Commissioners. Interestingly, the insurance industry—as well as many from Corporate America outside that industry—were present in large numbers at the convention. Frankly, I was greatly impressed by the interest expressed by the Commissioners from around the country. I sincerely believe the Commissioners may well come out with an official position against pre-dispute arbitration in insurance policies. However, it appeared that a form of arbitration agreed to by parties after a dispute arose—where both parties agreed—was looked on with favor. I detected that most felt pre-dispute arbitration agreements in insurance policies were unfair. The fact that this group was debating the arbitration issue tells me that the issue is of concern to folks all over the country.

### **A Good Alabama Opinion**

The president of a used car/car parts company allegedly hit an employee, who then filed a civil suit for assault and battery. The president invoked an arbitration clause in the plaintiff's employment contract. The Alabama Supreme Court said that the contract did not have a sufficient connection to interstate commerce for the FAA to apply, and accordingly that the Alabama statute barring enforcement of arbitration agreements did apply. Specifically, the Court said that the employment contract was separate and apart from the company's car dealership transactions, which did involve interstate commerce. The employee worked in the auto shop and did not participate in these transactions. The court was almost unanimous with only Justice See dissenting. The decision correctly recognizes the FAA language regarding interstate commerce. The case is styled: *Ex parte Webb* and was decided on February 21, 2003.

### **Employee Not Bound By Arbitration Provision In Handbook**

Another good decision, this one out of New Jersey, involved an employee handbook. The New Jersey Supreme Court ruled that an employee isn't bound by an arbitration provision in an employee handbook where he didn't sign a form acknowledging his acceptance of the provision. The employee signed a form acknowledging he had received the handbook. It is significant that nothing in the form mentioned arbitration. He never signed a second form that described the arbitration agreement as a term or condition of employment. The employee sued, claiming he was fired after blowing the whistle on officers of the company. The court said that even though the handbook unambigu-

ously waived the employee's right to sue in court, there wasn't enough evidence that the employee actually agreed to the waiver. "Without plaintiff's signature on the [second form], we cannot enforce the arbitration provision unless we find some other explicit indication that the employee intended to abide by that provision. No such indication appears in the record," the court said. The court didn't believe that the employee had "surrendered his statutory rights knowingly and voluntarily, which remains the critical inquiry." The court held that an arbitration provision cannot be enforced against an employee who does not sign or otherwise explicitly indicate his or her agreement to it.

### **Some Unpleasant Surprises For Patients In Arbitration**

There is another part of the tragic Jesica Santillan story that hasn't been told. It now appears that the parents of the 17-year-old girl may have signed an agreement with Duke University Hospital before the bungled operation to settle any medical malpractice claims through binding arbitration. Until the family gets the medical records, they won't know for sure. If they are under arbitration, I am sure the defendants will claim the parents' lawsuit would be blocked. More and more health care providers are pushing for binding arbitration, in which an arbitrator or panel of arbitrators decides the case and renders a decision that is binding on the victims. Patients who go through arbitration instead of a jury trial will be hurt twice: first by their health care provider, then by the system that is supposed to resolve the problem. The victims generally have little choice in the way claims are handled when they go to arbitration.

## A Case In Point

In 1998, Mr. Rushford, then 51 and the owner of a general contracting business, noticed pain and tingling in his foot when he worked out at the gym. He said that for over three months, his doctor in the Kaiser Permanente HMO, who worked at its hospital in Santa Clara, California, never examined him. Instead, the doctor prescribed painkillers over the phone and referred him to a podiatrist and physical therapy. Reportedly, the pain became so bad that Mr. Rushford went to the emergency room. There, doctors diagnosed a blood clot in his leg. Doctors broke up the clot, but it kept coming back. The vascular surgeon then in charge of the case failed to prescribe enough blood-thinning medication, which is standard treatment in a case like his. The clot worsened in a few weeks. Despite three operations to try to re-establish blood flow to his foot, Mr. Rushford's leg had to be amputated above the knee. The Rushfords were required to go to arbitration since Kaiser requires binding arbitration for all malpractice claims. At first, despite several attempts, the family could not find a lawyer to represent them. The Rushfords eventually were forced to use a lawyer who routinely handled legal matters relating to their construction business (rather than one who regularly handled malpractice claims) to handle their case. Selection of arbitrators varies by health care provider and by state. In California, Kaiser arbitrators are chosen by an office overseen by a 13-member board composed of Kaiser stakeholders and members of the public. The parties in a case choose an arbitrator from a large pool assembled by the office, but if they cannot agree on one, the office chooses. In most Kaiser cases, the arbitrators are usually retired judges. In the Rushfords' case, Kaiser asked the State Superior Court in San Mateo

County to pick the arbitrator. The Rushfords were not comfortable participating in the selection early on because they had no lawyer. The arbitrator was a retired judge who had dealt with 13 other disputes involving Kaiser. In four of those cases, Kaiser used the same lawyer it used in the Rushfords' case. In December 2001, the arbitrator ruled in favor of Kaiser. In his decision, the arbitrator said that although the surgeon had breached the standard of care by twice failing to give Mr. Rushford enough blood-thinning medication, the Rushfords didn't prove that failure to do so resulted in the loss of Mr. Rushford's leg.

The losing parties, the Rushfords, spent more than \$200,000 preparing and presenting their case, which included hiring medical experts. One troubling aspect of arbitration is its secrecy. Proceedings are often confidential. There is no public airing of issues or acknowledgment of error. There is no development of case law or establishment of precedent. Jamie Court, executive director of the Foundation for Taxpayer and Consumer Rights, correctly states, "Part of the value of the Seventh Amendment right to a trial by jury is that the public sees the facts." In my appearance before the NAIC, referred to below, Kaiser made a pro-arbitration presentation. Their representative told the Commissioners that the HMO's arbitration procedures were fair and always worked well. The Rushford case sure doesn't sound fair.

## XIII. MASS TORTS UPDATE

In recent weeks, I have had a number of requests to list the drugs about which our Mass Torts Section is currently handling claims. The following information was furnished by Andy Birchfield, who heads up the Section.

- **Rezulin®**—As you know, this diabetes drug was pulled off the market in March 2000 due to problems it caused with the liver. We are taking all cases involving ingestion of this drug.
- **PPA & Ephedra**—These ingredients were in many over-the-counter cold, cough, allergy and diet medications. We are taking these cases only if the person involved has suffered a stroke resulting in serious injury or death.
- **Lotronex™** - This prescription drug was for irritable bowel syndrome and was pulled off the market in November 2000. It can cause life threatening constipation, ischemic colitis and death. Due to our inventory of cases, we are not currently accepting new cases.
- **Baycol®**—This cholesterol-lowering prescription was pulled off the market on August 8, 2001. It has been linked to the sometimes fatal condition of rhabdomyolysis, a painful disorder that destroys muscle tissue and can lead to kidney failure. We are taking all ingestion cases at this time.
- **Vioxx® or Celebrex®** - We are handling only serious injury or death cases related to these drugs. The injuries that result may include heart attack or stroke.
- **Serzone®**—The FDA has instructed the manufacturer to include a black box on its label because of problems it causes with the liver. We are investigating cases involving only serious injury or death caused by this anti-depressant. There will be more information on Serzone® in this report.
- **Meridia®**—This is a drug used in the management of obesity. A consumer group recently asked that it be withdrawn from the market due to reported reactions, such as heart problems, bleeding disorders, organ failure, stroke and death. We are currently taking all ingestion cases.

- **Arava®**—This drug is prescribed to treat rheumatoid arthritis. A consumer group recently asked that this arthritis drug be withdrawn from the market due to reported reactions, such as liver problems, skin diseases, lymphoma, blood disorders, and death. We are currently taking all ingestion cases. The FDA has recently taken a shocking step, which will be discussed below, concerning this drug.
- **Other Drugs**—If any of our readers has an interest in checking out other drugs that have caused problems, please feel free to contact one of the lawyers in the Mass Torts Section.

### **Metab-O-Lite® Death Case Filed**

Our firm has filed a most significant lawsuit against REXALL Sundown, Inc., and Richardson Labs. Thirty-one year old Mary McAdams was at the zoo on a field trip when she collapsed and became unresponsive. Mrs. McAdams had been taking Metab-O-Lite® for approximately three weeks prior to her collapse. A nurse anesthesiologist on the scene performed CPR until emergency personnel arrived and took over. Mrs. McAdams was intubated and had to be defibrillated on the way to the hospital. Upon arrival at South Baldwin Medical Center, she was admitted to the Intensive Care Unit. On March 16, 2001, Mrs. McAdams was transferred to Mobile Infirmary Medical Center, where her condition was termed “a resuscitated sudden death episode.” An internal cardiac defibrillator was implanted to regulate her heartbeat.

Metab-O-Lite®, which was designed, manufactured, sold, produced, formulated and/or supplied by the defendants, was placed in the stream of commerce in a defective and unreasonably dangerous condition as designed, taking into consider-

ation the utility of the product and the risks involved in its use. Metab-O-Lite® was also defective in its marketing due to the inadequate warnings and instructions that accompanied this product. The herbal/dietary supplement industry is virtually unregulated, which is not true for prescription drugs or over-the-counter pharmaceuticals. Consequently, such products are being sold and marketed without the Food and Drug Administration’s scrutiny. Most folks are shocked to learn that there is virtually no testing of the products before they are sold. The lawsuit claims negligence, manufacturing defects, and fraud. David Miceli, Andy Birchfield, and I will handle the case for our clients.

### **Defective Pacemaker Causes Death**

We also filed a most significant lawsuit last month on behalf of a resident of Monroe County, Mississippi, whose mother died unnecessarily. Defendants in this suit include Medtronic, Inc., Medtronic Med Rel, Inc., and Accufix Research Institute, Inc. In August of 1993, our client’s mother received a pacemaker. She enjoyed good success with her pacemaker installation until she reached the end of life parameters for the Teletronics Pacing System. On February 14, 2000, she had her current pacemaker electively exchanged for a Medtronic Kappa DR Pulse Generator. At the time of the pacemaker exchange, the preexisting leads were not exchanged. In other words, both leads, which were originally implanted around August 27, 1993, were left intact. Consequently, this unfortunate lady began having problems with her pacemaker. After suffering two episodes of syncope (sudden brief loss of consciousness), she was hospitalized. Ms. Walker was admitted to the cardiology department at the

North Mississippi Hospital on August 24, 2000, for replacement of her ventricular lead. The new lead provided only temporary relief, and she continued to suffer syncope episodes.

Seven months later, this most unfortunate lady was found dead in her bed at her home. The paramedic on the scene indicated in his report that the pacemaker had stopped working. The county coroner indicated that the cause of death was a non-functional pacemaker. The State Medical Examiner’s office also documented the manner of death as a non-functioning pacemaker. The lawsuit claims negligence, fraud, breach of warranties and alleges that the pacemaker was unreasonably dangerous and thus defective. This clearly was a death that should never have occurred. Paul Sizemore and I will handle this case for our firm.

### **Defense Verdict In Baycol Trial**

At press time, I had just learned that the Texas trial against Bayer AG resulted in a defense verdict. I understand that the jury deliberated for almost two days. I will report further on this development in the May issue. The case in Corpus Christi, Texas, was the first case to be tried over Baycol. Early reports were unclear as to why the jurors rejected the 82-year-old plaintiff’s claims. I suspect the fact that he had multiple health issues, other than those caused by taking Baycol, created a problem. Personally, I felt that the plaintiff’s chief lawyer may have offended the jury by asking for too large a verdict for a single case. Andy Birchfield, who observed the trial, tells me he doesn’t believe the verdict will affect pending claims.

### **Bayer Says It Is Trying to Settle Another 500 Lawsuits**

Bayer A.G., the German drug maker, announced just before the Texas trial commenced that it was trying to

settle another 500 lawsuits over its anticholesterol drug. As previously reported, Baycol, once the mainstay of a drugs unit that Bayer is trying to spin off, was withdrawn in August 2001 as the result of dozens of deaths worldwide. Management at Bayer knew of the risks of Baycol as long as four years before recalling the drug. This exposed the company to a tremendous number of claims. Bayer has already settled about 450 cases over the use of Baycol, at a cost of \$125 million. A lawyer for the company told the New York Times they are now in talks to settle additional cases involving patients who suffered side effects. I do not believe that the Texas trial will adversely affect future trials. However, as a practical matter, it may cause more cases to be tried. A second trial is currently underway in Jackson, Mississippi.

### **Ephedra Happenings In Washington**

Controversy over herbal supplements, particularly those containing ephedra, continues to grow. With the unfortunate death of Baltimore Orioles pitcher Steve Bechler, the controversy has now turned to concern on a national level. A study completed by the Rand Corporation, and funded by the U.S. Government, has prompted the Department of Health and Human Services to start taking action to protect consumers from the serious and devastating risks of dietary supplements. The Rand Corporation study is seen by many as a starting point, but in reality only provides additional evidence of the risks inherent in ephedra-containing products, among other herbal products that are aggressively marketed and sold by a virtually unregulated industry.

Under the Dietary Supplement Health Education Act (DSHEA), ephedra product manufacturers do not have to prove the safety or effi-

cacy of the products they sell. Instead, the burden is upon the federal government to prove that products are in fact not safe. This system stands in stark contrast to how the vast majority of other consumable products, whether food or drug are regulated. Particularly, in the pharmaceutical context, drugs must pass a series of safety and efficacy screenings prior to marketing. As we have all seen, at times drugs are pulled from the market for safety concerns. The system is far from perfect. Plainly, herbal products play by a different set of rules and have no pre-market oversight. There is no pre-market testing to back up the claims made by the makers, and there is no mandated post-market surveillance system to alert consumers and government agencies of the horrific risks inherent in these products.

Only through the needless and unfortunate suffering of consumers, including a number of deaths, have we gotten to the point we are today. The Rand Corporation study demonstrated that short-term use of ephedra could be linked to an average of a two-pound per month weight loss. Additionally, and unfortunately ironically, the Rand Study concluded that there exist no studies demonstrating the efficacy of herbal ephedra-containing supplements on athletic performance, for which ephedra-containing products are heavily marketed. The FDA now proposes warning labels that identify risks including heart attack, seizure, stroke, and death, and that advise that the risk can increase with dose, strenuous exercise, or concurrent use of another stimulant such as caffeine. Commenting upon the results of this study, Tommy Thompson, the Secretary of Health and Human Services, stated, "I would not take this. I would not give it to my family, and I don't know why anyone would take these products." Pointing to the Rand study demonstrating that

ephedra does nothing to enhance sports performance and causes only minimal weight loss in a short term, Mr. Thompson concluded, "Why take the risk?" Indeed, why should the consuming public be put at risk?

### **FDA Proposes Warning Labels For Ephedra**

Obviously, the FDA has moved at a slow pace in deciding what to do with ephedra. The government says it is building a case toward a possible ban of the popular herb by proposing strong new warning labels. They will finally require warnings that the pills can cause heart attacks and strokes or even kill. The warning labels — first proposed in 1997 but blocked until now by the powerful dietary supplement industry — could be on every bottle by year's end. Hopefully, at long last, this will be the first in a series of Food and Drug Administration steps that will stop the herb's use in the United States. Unfortunately, the FDA has stopped short of an immediate ban of the amphetamine-like stimulant, which is used for weight loss and bodybuilding. Despite reports of at least 100 deaths linked to ephedra use, the FDA says it hasn't compiled enough proof of danger to stand up in court under a 1994 law that severely limits federal safety oversight of dietary supplements. I am very much shocked to hear this. What more proof does the FDA need?

Health and Human Services Secretary Tommy Thompson has indicated a full ban is still possible. Almost daily, we hear of tragic incidents that link dietary supplements containing ephedra to serious health problems. People, especially athletes and persons who exercise, should not take this herb. The latest high-profile death of an ephedra user, Baltimore Orioles pitcher Steve Bechler, put ephedra back in the headlines. On March 13th, an official finding that ephedra con-

tributed to the athlete's death was released. A new review of ephedra by the Rand think tank found it does absolutely nothing to enhance sports performance and causes only temporary loss of a few pounds. Even if the risk was small, use of products containing ephedra is pretty dumb since they do nothing for the user. With the risk being extremely high—with no benefits—the FDA should ban ephedra with no further delay. In the meanwhile, folks should stop using ephedra. At press time, Public Citizen was considering suing the FDA to force a ban. Hopefully, that will happen. It is quite sad, however, that our government has to be forced into taking action that would save thousands of lives.

### **Clear Evidence Of Pharmaceutical Influence At FDA**

On March 28, 2002, the consumer group Public Citizen filed a petition with the FDA requesting that Arava® (manufactured by Aventis) be withdrawn from the market, citing liver injuries as the primary safety concern. Following Public Citizen's petition, a division of the FDA requested a review of the serious liver events and injuries that have been reported to the FDA. A review was performed and in November 2002, Dr. Renan A. Bonnel, a safety evaluator for the FDA, and David J. Graham, Associate Director of Science with the FDA, filed their report. The report found that "we believe that the risks of Leflunomide (Arava®) greatly exceed any documented benefit." Their report also found that the studies provided to the FDA on Arava's efficacy were based, for the most part, on subjective terms, the reviewers and could not really find any evidence to support Aventis' contention that it increased the functional capacity of the patients taking the drug. On March 4th and 5th, the FDA Advisory Committee met outside Washington, D.C. to discuss Arava®.

The Advisory Committee heard evidence from the FDA and Public Citizen. However, the contents of the Bonnel/Graham report were not communicated by a live witness to the Advisory Committee. That clearly was not a good sign for consumers. The committee specifically asked if Dr. Bonnel wished to address the committee and he, for some reason, did not. Many articles have been written about the "cozy" relationship between drug companies and the FDA over the last several years. Under the Prescription Drug User Fee Act, the FDA receives much of its funding from pharmaceutical companies. When Dr. John Guerigian, the FDA medical reviewer for the diabetes drug Rezulin®, spoke out against Rezulin®, he soon found himself no longer working for the FDA. Dr. Paul Stolley spoke out against the drug Lotronex™, and soon discovered he was no longer needed at the FDA and had to find other employment. Were Dr. Bonnel and other members of the committee who submitted the November 7th report thinking about these other outspoken doctors and thus afraid to testify at the Advisory Committee meetings? Did the manufacturer of Arava® assert its influence over the superiors of Dr. Bonnel and encourage him not to testify? Now—for the "rest of the story," as my old friend, Paul Harvey, so often says.

### **FDA Advisers Support Arava®**

Considering the power of the pharmaceutical industry, I was not surprised to learn that the FDA believes Arava® is an important option that should continue to be sold. Even though users of Arava® are six times as likely to suffer liver failure than patients on methotrexate, a standard treatment for rheumatoid arthritis, the FDA turned its head, held its nose, and did what the manufacturer wanted. Even though the analysis by the FDA

recommended a ban, citing 54 U.S. cases of liver failure or damage—including eight deaths—linked to the drug, and additional reports from overseas, the final decision ignored these findings. The advisory panel ultimately unanimously agreed that Arava's risks don't outweigh its potential benefits to patients. The FDA might just find that the sun rises in the west, even though it has been repeatedly sighted coming up from the east—that is, if the pharmaceutical industry suggested such a happening to the agency's bosses.

### **What Can Consumers Do?**

In the meantime, the pharmaceutical industry is using its vast amount of influence and money to purchase virtual immunity from lawsuits through House Bill 5 in Congress. Contact your Senator and voice your opinion on giving pharmaceutical companies immunity from lawsuits. If you believe that Corporate America, including the powerful pharmaceutical companies, should have immunity, let your Senator know how you feel. On the other hand, if you believe consumers should be protected from corporate wrongdoing, let your Senator know that instead.

### **Public Citizen Calls On FDA To Ban Serzone®**

Public Citizen has petitioned the U.S. Food and Drug Administration to remove nefazodone from the market. Nefazodone hydrochloride is a popular antidepressant manufactured by Bristol-Myers Squibb. Marketed under the name Serzone®, nefazodone has no unique therapeutic benefit and has led to at least 11 deaths in the United States from liver toxicity, government records show. In January of this year, the manufacturer removed nefazodone from the European market after the Swedish

Medical Products Agency announced that it would require a warning on the drug's label about the potential for liver toxicity. In the United States, more than 4.5 million prescriptions were filled for Serzone® in 2001. "There is no good reason to keep this drug on the market. It is no more effective than other antidepressants, and it presents a unique health hazard for patients," according to Sidney Wolfe, M.D., Director of Public Citizen's Health Research Group. In its analysis of adverse event reports from the FDA, Public Citizen found that from 1994, when it was first marketed, to the spring of 2002, nefazodone was associated with at least 53 cases of liver injury, including 21 cases of liver failure and 11 deaths. Worldwide, Bristol-Myers Squibb itself acknowledges 28 reports of liver failure, including 18 deaths.

According to research by the federal Agency for Health Care Policy and Research, nefazodone is not more effective at treating depression than older drugs. However, it is uniquely dangerous to patients. Further, periodic liver testing has not been shown to prevent injury, and there is no way to predict which patients are at higher risk for liver damage. An analysis by researchers in Spain found that of 13 antidepressants, nefazodone has the highest incidence of liver injury—seven to 22 times that of the other antidepressants. The liver toxicity dangers of nefazodone are compounded by the fact that it inhibits a key enzyme that is involved in the detoxification of about half of all prescribed drugs. As a result, nefazodone increases the toxicity dangers of other drugs a patient is taking simultaneously. By inhibiting this enzyme, nefazodone can increase its own concentration with potentially toxic results. In December 2001, the FDA notified Bristol-Myers Squibb that it must add a "black box" warning to the package insert for nefazodone

warning of life-threatening liver damage and recommending that physicians advise their patients to be aware of signs of liver problems. Unfortunately, the black box warning doesn't go far enough to protect patients. This is primarily because the labeling presented a confused message. Although the black box warning recommends monitoring of patients' liver function, a second notice on the label actually downplays the necessity of such tests.

In the February 2002 issue of its monthly newsletter about drug safety, *Worst Pills, Best Pills News*, Public Citizen labeled nefazodone as a "Do Not Use" drug because of its known liver toxicity, and recommended that anyone who had been taking it consider switching to a safer antidepressant. The petition and articles from the newsletter about Serzone® are posted online at [www.worstpills.org](http://www.worstpills.org), a drug information service launched this year by Public Citizen. According to Dr. Wolfe, "The FDA is endangering the lives of patients in this country every day that it allows nefazodone to remain on the market." A copy of Public Citizen's petition is on the Web at: [www.worstpills.org](http://www.worstpills.org) under the link "Petitions to the FDA." Public Citizen is one of the strongest protectors of consumers in this country. In fact, I know of no group that works any harder and more effectively. All of us have an obligation to support Public Citizen in its fight that sometimes may seem rather lonely.

### **Vioxx® Update**

While the groundswell of cases filed against companies that manufacture drugs that have been pulled off the market continues to stay in the spotlight of mass tort litigation, cases involving the Cox-2 Selective NSAID, Vioxx®, also continue to grow. Before the effective date of recently-passed legislation that would significantly

change the law in the state of Mississippi, regarding where pharmaceutical cases could be filed when coupled with claims against physicians, numerous cases were filed in that state. However, the expanding nature of this litigation is not limited to Mississippi and cases continue to be filed in California, where state courts have consolidated litigation in Los Angeles; in Texas, where numbers of cases also have been filed in eight or more counties; and, in Alabama, Pennsylvania, and New Jersey, where numerous cases have been filed. This is clear evidence of the growth of this evolving litigation. While the numbers of firms investigating and litigating this drug grow, other firms who were in this litigation field early forge ahead pioneering the fight to save lives and avoid human misery. The risks, inherent in this product, which its manufacturer extensively markets directly to consumers, are tremendous. As the numbers of cases grow, we hope to get the first cases set for trial later this year. As this litigation develops further, you will see continuing updates in subsequent issues of this Report.

### **Settlement With Airline In Blood Clot Case Bolsters Potential Mass Tort**

Last year, American Airlines settled a lawsuit filed by a passenger who suffered deep vein thrombosis, popularly described as "economy class syndrome." This is because it often afflicts passengers who ride in cramped poorly designed seats of commercial airlines. This was the first airline to settle such a case. The settlement was closely monitored by airlines around the world. There have been other suits by passengers who have developed blood clots in their legs during long-distance flights. It has been estimated that there are thousands of potential DVT cases throughout the world. Thousands of people die or are

seriously injured each year from blood clots resulting from long-distance air travel. However, most folks remain unaware of the extent of the problem. Our firm has never handled a case of this sort. Long flights can increase the likelihood of developing a DVT, according to a medical study concluding that persons who do not wear support hose during long flights are at a much greater risk of developing thrombosis.

A combination of factors - the high altitude and dry air aboard flights, plus the fact that passengers sit still for a long time on poorly designed seats - increases the risk that blood will coagulate in the legs. If a clot in the leg dislodges and travels to the lungs or brain, it can be fatal. DVT occurs more frequently in flights longer than six hours. Airlines are obligated to warn passengers of the danger and to advise them to stand up and walk around at least once an hour during a flight. Some airlines are relying on their interpretation of the Warsaw Convention, which severely limits liability for international flights, and believe they have minimal risks here. Other airlines take the position that there is no connection between air travel and DVT. "Economy class syndrome" litigation is not limited to the United States. For example, cases have also been filed in England. There are 800 plaintiffs in a single lawsuit against 20 airlines worldwide. The plaintiffs include the families of 36 people who died after long-distance flights.

A study published in the New England Journal of Medicine in September of 2001 has brought the issue to the attention of the medical community. The study demonstrated that the danger of pulmonary embolisms increases dramatically on flights of longer than six hours. However, this article documented blood clots in only five cases per million among airline passengers. There are other

studies currently under way concerning the problem. The medicine is just developing. It may turn out that a higher percentage of persons than currently believed develop blood clots on long-haul airline flights. As far back as 1974, some airlines redesigned the seats used by pilots in the cockpit to decrease the chance of blood clots. However, nothing was done to make the same changes to passenger seats.

### **Warsaw Convention**

Because international flights are governed by the Warsaw Convention, which provides that airlines are liable only for "accidents," the law on DVT cases is still developing. The key issue here is whether DVT is an "accident." The cases say that an accident is something other than the passenger's internal reaction to the normal operations of the flight. Some airlines deny any connection between DVT and air flight, while all of them claim that DVT is not an "accident," but rather an internal reaction to flight. The airlines may have a strong case that DVT doesn't meet the definition of accident spelled out in the treaty. If DVT is an accident under the Warsaw Convention, then airlines are strictly liable up to the first \$144,000 of a plaintiff's damages. After that, the plaintiff is entitled to recover the rest of his damages if he can prove the airline did not "take all necessary measures to avoid the accident." Two years ago, it was suggested in industry guidelines that airlines tell passengers to exercise during long flights. That indicates a level of concern. Unfortunately, the reason for this suggestion was not included.

### **Pfizer Settles Lawsuit With Woman Over Rezulin®**

Pharmaceutical giant Pfizer Inc. has agreed to settle a lawsuit filed against it by an Alice, Texas, woman who

claimed that she suffered liver disease caused by a drug the company makes. In a related and interesting issue in Texas, a state Rule of Civil Procedure and a related statute allow a lawyer-legislator to delay a trial during or within thirty days of a legislative session, as long as moves for a "legislative continuance" 10 days before the start of the trial. Taking advantage of that Rule and statute, the company hired a State Representative to "assist" in its defense. Not surprisingly, some have criticized the legislator for taking the job. They say Pfizer hired him to postpone the case until after the legislative session. In her lawsuit, the victim alleged that she has end-stage liver disease caused by Rezulin®, which Pfizer manufactures. The trial was scheduled for February 13th. The legislator was hired by Pfizer on February 2nd, and he filed for a legislative continuance on February 3rd. The case was settled out of court in early March. Now that this case is settled, the lady's family is focusing on hopefully getting her a new liver. The terms of the settlement are confidential at the request of Pfizer.

## **XIV. BUSINESS LITIGATION**

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### **\$1.4 Billion Fraud Alleged Against HealthSouth Corp**

When the Securities and Exchange Commission upgraded its probe of HealthSouth Corp. to what is referred to as "formal status," that definitely was not a good sign for the company. That gave the agency the ability to subpoena documents and witnesses. Like the informal investigation begun in September, the formal inquiry was looking at stock sales by insiders such as executives and board members made before the company reported in

August that its profits would fall. U.S. laws prohibit executives from selling shares based on information not known by the public. Significantly, CEO Richard Scrushy sold \$100 million of shares in May and July before the August 27th announcement that profits would fall. Scrushy has said that when he sold the shares he had no knowledge of the lower Medicare payments that reduced profit. So, on March 18th, it was announced by the SEC that HealthSouth Corp. and CEO Richard Scrushy were in fact being charged with fraud. The government alleges that at Scrushy's insistence, the Birmingham-based company, which claims to be the nation's largest provider of outpatient surgery, diagnostic imaging, and rehabilitative healthcare services, systematically has overstated its earnings since at least 1999 to the tune of about \$1.4 billion, in a bid to meet Wall Street expectations. The complaint was filed in federal district court in Birmingham.

The U.S. Department of Justice also said former HealthSouth chief financial officer Weston Smith had agreed to plead guilty to securities fraud, conspiracy to commit securities and wire fraud, and false certification of financial records. Smith's plea follows an FBI raid on HealthSouth facilities. The charge is believed to be the first in the country brought under the Sarbanes-Oxley Act, which requires top corporate officials to sign off on the veracity of financial information in their federal filings. The company also is the subject of at least two dozen shareholder lawsuits alleging Scrushy sold millions of dollars of HealthSouth stock after learning of the earnings hit but before the company announced it on August 27th. Founded in 1984, HealthSouth operates roughly 1,900 rehabilitative and outpatient surgery facilities and employs about 50,000 people worldwide, including at least 3,000 locally.

## **Investor Arbitration Claims**

Investors have lost roughly \$7.8 trillion dollars in the U. S. stock market since its peak of March 2000. NASD Dispute Resolution, Inc., which runs the arbitration system for the National Association of Securities Dealers, reports that claims against brokers for NASDAQ stocks were filed at a record pace in 2002. Over 7,700 new cases were filed in this arbitration forum in 2002, up 11% from 2001 and up 39% from 2000. NASD reports that it was the second consecutive year that cases were at record levels. The NASD, the parent of the NASDAQ stock market, is a self-regulatory body that oversees securities firms dealing in NASDAQ issues. Typical charges that the NASD sees in arbitration include unsuitable investment recommendations, lying or cheating by brokers, or unauthorized or excessive trading.

## **Another State Sues Drug Companies On Price Gouging**

Last month, another state filed a lawsuit against the drug industry for price gouging. Seven drug manufacturers have bilked patients and state drug programs of tens of millions of dollars in a complicated price-gouging scheme, according to the civil action filed by the State of Connecticut. "These companies raided state coffers and patients' pockets," according to Attorney General Richard Blumenthal. This is just another example where the victims of corporate wrongdoing by drug companies are people paying for vitally needed medicine. Connecticut spends about \$600 million annually on pharmaceuticals through its Department of Social Services. This lawsuit, like others already filed, seeks reimbursement of overcharges to state agencies and patients. The companies allegedly inflated the costs of some drugs—primarily

those used for cancer treatments and respiratory problems—that are reimbursable under several state programs in Connecticut. The companies in turn sold the drugs at deep discounts to providers such as pharmacies or doctors, who were allowed to keep the difference between the reimbursement amount and the discount cost as an inducement to prescribe and sell the drugs. As a result, the companies used state funds to help increase the market share of their drugs. The defendants in the lawsuits filed in Connecticut are Schering-Plough Corp., Glaxo-SmithKline, Aventis, Dey Inc., Warrick Pharmaceuticals, Pharmacia Corp and Roxanne Pharmaceuticals, a division of Boehringer Ingelheim.

Under state drug programs, the state reimburses drug manufacturers for drugs based on their average wholesale price minus 12 percent. However, drug companies report the costs themselves to national databases. Thus, state officials have no way of corroborating them. As an example, a drug company might report a price of \$100 for a drug that actually costs \$20, with the reimbursement paid by the state being \$88. Drug companies then offer the difference between the actual cost and the government reimbursement - a "spread" of \$68 in this example - as an inducement to help market the drug. Among the drugs "overcharged" to the State of Connecticut in this manner were the asthma drug Albuterol and chemotherapy drugs Zofran and Anzemet. The sad thing about all of this is that the practice is industry wide. State officials in Connecticut believe the scheme employed by these companies hurts all consumers, but particularly those on Medicare, who pay 20 percent of the cost of some cancer treatments as a co-payment. State officials there are still trying to calculate the total amount overcharged. Initially the suit

will seek a \$15 million reimbursement to the state and most likely a similar amount for consumers. However, I feel sure the total recovered will be much more. Thus far, five other states have initiated similar actions against a number of different drug manufacturers. We are involved in some of these cases and have been contacted by several other states to discuss a possible suit against the drug companies.

## XV. HEALTHCARE ISSUES

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### **A Costly Result From The Use Of Usnic Acid**

Until just a few months ago, I had never heard of a chemical known as usnic acid. I have now learned that usnic acid is found in certain species of lichen plants. Interestingly, this chemical is not approved for any known medical use. However, usnic acid can be obtained in this country very easily and is available over the Internet. In early October, a 28-year-old lady in New York started taking four 125-milligram capsules a day. The label on the bottle said it would make the body burn calories “at an accelerated rate.” She was taking half the maximum dose recommended on the label and took the capsules for two weeks, skipped two weeks as the label directed, and then started again. She was not overweight and just wanted to stay in shape. The capsules were taken for a total of 17 days.

A few days later, the once healthy lady was in a coma, connected to a respirator and a web of tubes, with her skin a dusky yellow. Her liver had failed. Her swift decline put her at the top of the waiting list for a transplant at the University of California at Los Angeles. Four days later, a liver became

available from a cadaver. The lady’s liver was so badly damaged that it had shriveled to about a third of what it should have weighed. Her doctors said they thought usnic acid was almost certainly to blame. Before taking it, the lady had been perfectly healthy, and her doctors could find no other explanation for her illness. “This is a young woman who almost lost her life,” said Dr. Ronald W. Busuttill, her surgeon. “Although she’s got her life back now, she has to be under life-long medical care. Her life has been altered forever. The fact that you can get these things over the Internet is mind-boggling.”

Usnic acid is one of hundreds of substances sold either alone or with other ingredients as “dietary supplements,” a loosely regulated category of products that includes vitamins, minerals, herbs, amino acids, enzymes and other chemicals found in plants and foods. Though many are harmless and some may be beneficial, others have been linked to serious health problems. Among the most notorious is ephedra, another substance promoted for weight loss, which we have discussed in several issues of the Report.

### **A Review Of The Supplement Problem**

The true extent of illness caused by diet supplements is not known, because while the worst cases attract attention, less serious ones may go undiagnosed or unreported. The FDA itself estimates that it gets reports on fewer than 1 percent of the severe adverse effects linked to dietary supplements. A study published in January of this year, based on 489 reports to American poison control centers in 1998, found that various supplements were also implicated in heart attacks, bleeding, seizures and deaths. The supplement industry, with sales of more than \$17 billion a year, is so loosely regulated that products can be mar-

keted without the proof of safety and efficacy required for drugs by the FDA. The federal drug agency can’t take a supplement off the market unless there is proof that consumers have been harmed. As long as manufacturers do not claim that their products can be used to treat or cure disease, they are not regarded as drugs.

With supplements, the burden of proof is on the FDA to show a product is unsafe. The agency has to prove a causal link with an illness or death. FDA officials have indicated they are “monitoring usnic acid very closely.” Another weight-loss product, Lipokinetix, which contained a form of usnic acid called sodium usniate and other ingredients, has been blamed for liver failures resulting in a death, two liver transplants and seven cases of liver failure from which patients fortunately recovered. Doctors suspect that usnic acid played a role. Lipokinetix is no longer on the market, but other products containing usnic acid are still available. The supplement industry has grown rapidly in the past decade, and so have doctors’ worries about side effects from poorly understood ingredients. Recently, liver damage has been a particular concern. In the past year, several medical journals and government publications have described liver problems, including hepatitis, cirrhosis, and acute liver failure requiring a transplant, from dozens of supplements. Kava, a root extract widely promoted to help people relax, has been blamed for several deaths from liver failure in the United States and Europe since 1999, about a dozen cases of liver failure that led to transplants and dozens of other reports of liver damage. Even though such reactions are thought to be rare, kava has been taken off the market in the European Union and Canada. Kava is still available in the United States, though in March 2002 the FDA issued warnings

to doctors and consumers about potential liver problems linked to kava.

Doctors point out that supplements are popular among people who may be especially vulnerable to harm from them. That makes the problem much worse. For example, patients who already have liver disease are at greater risk. It has been reported that 25 to 30 percent of people with liver disease take supplements to treat themselves. In November 2001, the FDA warned doctors and consumers that Lipokinetix had been linked to liver problems in about half a dozen people. The agency wrote to the manufacturer, Syntrax Innovations, in Chaffee, Mo., to “strongly recommend” that the product be taken off the market. Syntrax also had problems with the FDA earlier in 2001, for marketing a weight-loss product that contained a powerful thyroid hormone. The FDA said the product was a drug and not a supplement, seized it, and obtained a court order to stop its distribution. According to its Website, Syntrax continues to market a variety of pills and powders that it promotes as muscle builders and fat burners.

### **More On The FDA**

About four years ago, a new generation of rheumatoid arthritis drugs started showing up on the market, giving patients new and unprecedented hope. Of the two million rheumatoid arthritis sufferers, thousands try one of the four drugs each year. Last month, the FDA’s scientific advisers began two days of debate over how big a risk each medication poses and whether stronger warnings or restrictions are needed. It has been reported that the drugs have been linked to cancer and to liver failure. Now the government has started to reassess the safety of these drugs. The FDA is struggling to determine if three medicines—Enbrel, Remicade, and

Humira—are linked to 170 cases of lymphoma, a hard-to-treat immune system cancer, that have been reported since 1998. Advisers to the FDA said the lymphoma reports signal a possible problem that should be monitored and explained on those drugs’ labels. But they cautioned that it might take several years to determine if there truly is a risk. Manufacturers argue that patients already are adequately warned about all possible side effects and that there’s no proof the drugs are to blame. Standard treatment for rheumatoid arthritis is a cancer drug called methotrexate. For years, few options existed for patients for whom methotrexate failed or who couldn’t tolerate its side effects, including liver damage. Hopefully, a new drug will be found to be safe for use.

### **Blood Mix-Ups Can Be Deadly, But Are Also Easily Prevented**

A mix-up in blood types in any medical situation can lead to tragic consequences, as made clear by the recent death of a teenage girl at Duke University Hospital who received a heart-lung transplant from a donor with the wrong blood type. This case has received worldwide attention and has put in focus a most serious problem. Transfusion experts say patients are 100 times more likely to receive the wrong blood than they are to pick up a disease from donated blood. By some estimates there as many as 2,600 transfusion-related errors annually in the U.S. Some mistakes, such as erroneous transfusions of “universal donor” Type O blood, don’t harm patients. But getting the wrong blood type can send your immune system into overdrive, and lead to kidney or lung damage. Some hospitals are now using a process not unlike the supermarket checkout: A nurse uses a scanning device to check

the bar code on the patient’s wristband against a label on the donor blood. Since Georgetown University Hospital began using the barcode system three years ago in the outpatient department, there’s never been a fatal mistake in a blood transfusion. All hospitals should have such a system.

While the nation’s blood banks have made great strides in screening blood for infectious agents such as HIV, it has been reported by the Wall Street Journal that hospitals have made little progress in keeping better track of blood once it is in their facilities and reducing the “noninfectious hazards” of transfusion. According to the Journal, most still rely on archaic methods prone to human error for drawing, storing and administering blood, leaving the potential for mislabeled blood products and switched or lost patient blood samples. According to the Food and Drug Administration, every year about 20 people die from misidentified transfusions. It is thought by some observers that the number of deaths is far higher.

Barcode systems are considered the most promising technology for eliminating blood errors, yet only about 1.5% of U.S. hospitals have them. All blood coming from licensed blood banks is already bar coded, and hospitals have rudimentary scanners that check the code in the lab. What isn’t yet common are scanners and barcode systems on patient floors—a system that would also protect against medication error, which is a much bigger problem than transfusion error. Hospitals have been reluctant to invest in bar coding until more pharmaceutical companies and blood banks have codes affixed to their products. Interestingly, pharmaceutical companies are waiting for hospitals to have the scanners. The good news is that the FDA is expected to require standardized barcode labels on all medications and biologic prod-

ucts such as blood later this year. Most errors have to do with misidentifying patients when collecting samples for testing and cross matching, or when they are about to get a transfusion.

## **EPA Proposal Reflects Cancer Risks To Children**

Babies and toddlers have a 10 times greater cancer risk than adults when exposed to certain gene-damaging chemicals. The federal government has proposed tougher environmental guidelines that would take into account the greater hazards to the very young. If its guidelines are made final, the Environmental Protection Agency would for the first time require that the substantially greater risk to children be weighed in the development of regulations covering a variety of pollutants. While scientists have long known that very young children are more vulnerable than adults to gene-harming chemicals, this is the first time the EPA has formally proposed calculating the difference in assessing the danger from some pesticides and other chemicals. The guidance on cancer and children, which must still be reviewed by EPA's panel of science advisers and has to be subjected to a lengthy process before becoming final, is part of a broader reassessment of how the EPA evaluates cancer risk.

The document on the risks to children focuses on so-called mutagenic chemicals that cause irrecoverable damage to genes, altering the DNA, and making the individual more susceptible to cancer later in life. According to the FDA, exposure to these chemicals cause a 10 times greater risk of a future cancer in children under 2 years old and fetuses where the mother is exposed. Children from 3 to 15 may face at least a three-times greater risk than adults. The agency said it doesn't have enough information to calculate whether similar age disparities in risk exist with respect to

other cancer-causing chemicals. The EPA plans further studies to determine if the guidance should be broadened to other pollutants.

Environmental groups, such as the Natural Resources Defense Council, welcomed the EPA's acknowledgment that young children are at dramatically great risk for carcinogens, while noting that the EPA still does not take into account other differences among the population, such as women being more vulnerable than men to cancer risk from exposure to some toxic chemicals. Still, as a scientist from NRDC stated, EPA's recognition that children under 2 years old are very susceptible is "a beginning."

## **Ruling Allows New HMO Suits**

A federal appeals court has expanded patients' rights, ruling that consumers can sue a health-insurance company for injuries resulting from the company's refusal to authorize medically necessary treatment. The ruling, issued by the United States Court of Appeals for the Second Circuit in New York, said that health maintenance organizations and their medical directors could be sued when they made decisions about the treatment of a patient. In the past, courts have often rejected such claims, saying they were precluded by the federal law on employee benefits. However, the appeals court said those precedents were no longer binding because the Supreme Court had established a new framework for analyzing the issue in a 2000 case. The Supreme Court held then that some decisions involved both an interpretation of an insurance contract and the exercise of medical judgment about how to diagnose and treat a patient's symptoms. The appeals court said that HMOs could be held accountable for such "mixed eligibility and treatment decisions" under state standards of medical malpractice. This ruling

means that there's now no barrier for anyone in New York, Connecticut or Vermont to sue an HMO when the health plan denies treatment recommended by a doctor. Millions of consumers have a right they did not have before.

The case (*Cicio vs. Vytra Healthcare*) involved a person who had a form of blood cancer known as multiple myeloma. In 1998, his oncologist wrote a letter to Vytra seeking approval to treat the patient with high-dose chemotherapy and a double infusion of his own stem cells. The chemotherapy destroys not only cancer cells, but also normal blood-producing cells in the bone marrow. The stem cell transplants replace normal cells killed in chemotherapy. His doctor said the procedure was "a well-established method of treatment" that offered a better chance of survival than any other therapy. However, Vytra's medical director denied the request. The procedure, he said, was experimental and therefore was "not a covered benefit."

After an appeal by the man's doctor, the company approved a different treatment, chemotherapy with a single infusion of stem cells, which doctors say is often less effective. The patient died in May 1998. His widow subsequently sued Vytra, saying her husband might have survived if the HMO had promptly approved his treatment, rather than waiting two months. Vytra said the claims were barred, or pre-empted, by the federal law on employee benefits, the Employee Retirement Income Security Act of 1974, known as ERISA. The appeals court, however, rejected that argument. "A state law malpractice action, if based on a 'mixed eligibility and treatment decision,' is not subject to ERISA pre-emption when that state law cause of action challenges an allegedly flawed medical judgment as applied to a particular patient's symptoms," said the court's opinion.

## XVI. TOBACCO UPDATE

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### **Government Finally Goes After Tobacco Companies**

In a surprising move, the Justice Department is finally pursuing the tobacco industry. The government is demanding that the nation's biggest cigarette makers be ordered to forfeit \$289 billion in profits derived from a half-century of "fraudulent" and dangerous marketing practices. Citing new evidence, the Justice Department claims that the major cigarette companies are running what amounts to a criminal enterprise by manipulating nicotine levels, lying to their customers about the dangers of tobacco, and directing their multibillion-dollar advertising campaigns at children. The Justice Department says those practices continue to the present day. This, despite the industry's repeated pledges to change its ways. The case was filed in a federal court in Washington by the Clinton Administration in 1999. It has been pretty much dormant, and frankly, I never thought it would get moving. It looks like I was wrong!

The Justice Department's aggressive attack on the industry surprised many legal analysts. There had been a definite message from the new Attorney General that the case was "dead." Interestingly, this is the first time the federal government has given a dollar figure for what it believes the tobacco industry should have to forfeit in "ill-gotten gains." This is the way the government came out with their demands. The \$289 billion figure is based partly on proceeds the government says the industry made from selling cigarettes to an estimated 30 million people who started smoking regularly before the age of 18 beginning in 1954, when the industry allegedly began its

illegal collusion. The five principal defendants in the lawsuit are: Philip Morris, R. J. Reynolds, the Loews Corporation's Lorillard Tobacco, British American Tobacco's Brown & Williamson, and the Vector Group's Liggett Group. The government appears to be relying on incriminating new documents from within the tobacco industry. The Justice Department has filed seven volumes of material with the court.

The Justice Department said that the tobacco companies' scheme to defraud permeated and influenced all facets of defendants' conduct — research, product development, advertising, marketing, legal, public relations, and communications — in a manner that has resulted in extraordinary profits for the past half-century, but has had devastating consequences for the public's health.

## XVII. ENVIRONMENTAL CONCERNS

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### **Alabama's Fight Against Rock Quarries**

Alabama's growing number of rock quarries has sparked the public interest in these excavation sites. Our state, with its large deposits of limestone and granite, is one of the nation's leading producers of sand, rock and gravel. It is third in the country for limestone, and is among the top five masonry cement-producing states, according to the National Stone, Sand and Gravel Association. With suburban sprawl, rock quarries are closer than ever to residential, commercial and industrial areas. "The cities have spread out," said Gus Edwards, a spokesman for the National Stone, Sand and Gravel Association. "Now you're finding a lot of areas that were

rural, where people had sand and gravel quarries around them, now have big homes next to them." The encroachment of residential and commercial areas increases the number of Alabamians affected by these quarries. Neighbors complain of vibrations, flying rocks, dust, and noise pollution from blasting and heavy machinery traffic. A more serious grievance is the development of silicosis, which is a disease caused by the overexposure to crystalline silica found in dust from rock crushing and grinding.

In addition to lowering the quality of life of neighboring Alabamians, the excavation sites have a devastating impact on the environment. They reduce the quantity of the surrounding water, as well as the quality of the air and water. Quarries can even dissipate wildlife, as in the case of Chewacla Creek, in which several imperiled species are now believed to be gone, and the creek is virtually dried up. As these problems become more pervasive, communities are speaking out. Lee County residents have protested against three quarries in recent years. Shelby County residents have fought two quarry proposals, and Limestone residents have battled two. The Morgan County community has tried unsuccessfully to persuade the County Commission to prevent a quarry from reopening at Massey. Auburn residents have complained that a nearby quarry was causing sinkholes and sucking a beautiful creek in the Auburn area dry.

With such active excavation in Alabama, residents and conservationists are demanding more regulatory control over the quarries. Many communities are unable to regulate the location of the quarries because permit operators do not need zoning approval, although they do need water pollution permits to begin operations, and most also need air pollution permits. Because Alabama has no mining act, "the environmental

permits have become the only permit that people can potentially use to keep a quarry or an industry from an area," said Scott Hughes, a spokesman for the Alabama Department of Environmental Management. "So people are using environmental permits as a zoning tool." Regulation of this industry is a pressing need in the state. After all, quarries have an estimated life of 100 years. Control is the only way to mitigate environmental and social consequences. "In the absence of local zoning control or an applicable state law, Alabama's ability to regulate quarries is seriously on the rocks," according to State Senator Myron Penn (D-Union Springs), who has filed a bill to bring some sanity to the regulation of these quarries. Senator Penn has become a champion for the thousands of citizens who are demanding stronger regulation of the out-of-control quarry operators. I suspect the first term lawmaker has already run into the special interests on this bill. Hopefully the Senator, who has already impressed his colleagues in the Senate with his knowledge of issues and his work ethic, will prevail. One thing is quite evident: Senator Penn is not afraid to take on Corporate America, and that is most impressive.

### **EPA Criticized On Mercury Standards**

The Environmental Protection Agency has expressed "growing concern" over the number of women of childbearing age who have dangerous levels of mercury in their blood. Environmental groups have accused the Bush Administration of undercutting steps to reduce exposure to mercury, an extremely toxic substance. Carol M. Browner, who was head of the EPA throughout the Clinton Administration, says the Bush Administration's proposed policy was

designed to protect the interests of major utilities and their coal-burning power plants, the nation's single largest source of man-made mercury emissions. In a report released recently, the EPA said that about 8 percent of U.S. women of child-bearing age have at least 5.8 parts per billion of mercury in their blood, the level at which the EPA says there is an increased risk of harm to a fetus. Under President Bush's proposal, mercury emissions would have to be reduced by 50 percent by 2010 and by 70 percent by 2018. According to the environmental group Clean Air Trust, those reductions would mean there would be about 26 tons of mercury emissions in 2010 and 15 tons in 2018. By contrast, the group said, under the Clean Air Act's standards for power companies that were ordered in 2000, mercury emissions could be cut to about 5 tons a year by 2007.

Frank O'Donnell, the Clean Air Trust's Executive Director, believes those standards, due to take effect next year, would be repealed by enactment of President Bush's initiative. He said the estimates of the effects of the two approaches to mercury emissions were presented by EPA officials in December 2001 to the Edison Electric Institute, the electric power industry's trade group. "The Bush plan is motivated by a desire to weaken and delay the current standards," according to O'Donnell. The tough standards will take effect in a couple of years if the Bush Administration and its power company friends don't delay it. Reducing mercury emissions to 5 tons by 2007 is unrealistic, according to EPA officials. That, according to knowledgeable sources, is subject to serious debate. Nevertheless, mercury emissions are a serious problem and must be dealt with in a serious manner.

### **Mercury Turns Up In Fish In 17 Alabama Waters**

State testing has revealed mercury-contaminated fish in 17 south Alabama streams. Information released from the annual fish-tissue monitoring program, done by the Alabama Department of Environmental Management, showed at least some mercury-contaminated fish in the water bodies. The results likely represent only a microcosm of the extent of mercury contamination in fish in Alabama waters, an ADEM spokesman told the Mobile Register. Because of a lack of funding for years, ADEM is limited in the number of areas the agency can sample and the number of fish it can collect from each site.

There is a growing list of state areas with fish consumption advisories. The advisories are issued by the state health department. Mercury in fish can cause adverse effects on brain function and overall health in the people who eat them. The form of mercury found in fish can have severe effects on brain function and overall health even in adult males. Pregnant women and children, however, are considered to be the most vulnerable to mercury poisoning, as it can lead to severe learning disabilities and other mental problems, particularly the unborn, infants, and other children at critical development stages.

Alabama's fish consumption advisories are founded on the assumption that a fish is safe to eat as long as it has less than 1 part per million of mercury. Other Southern coastal states — Florida, Georgia, Mississippi and Louisiana — and many states nationally now set a much lower safe level, of .5 parts per million. By the standards in those states, some of these Alabama fish would have mercury contamination 10 to 20

times the safe level. The state's sampling program may not capture the full extent of the mercury contamination problem. State regulators can afford to sample only a few streams and a few types of fish—typically largemouth bass and catfish—each year. Regulators can only guess what the mercury levels might be in other streams and fish not yet sampled.

Though mercury levels in the latest round of testing are quite high, even by national standards, Alabama is not alone in having a mercury problem, regulators say. Virtually every state in the country has reported some level of mercury contamination in even the most remote and seemingly pristine sites. High levels of mercury in remote streams on the Canada border and elsewhere have led scientists to theorize that much of the mercury is literally being rained out of the sky. Mercury emissions, largely from coal-fired power plants, can float through the atmosphere for hundreds of miles before they are released into water bodies. This airborne mercury contamination can be made worse by more local industrial contamination, as in the Olin Basin, where nearby chemical companies allowed mercury from their chemical processes to pour onto the surrounding land and into nearby streams. Some scientists believe that south Alabama streams may be unusually vulnerable to mercury pollution, whatever its source. Tea-colored streams with high levels of free-floating organic materials — like the two Blackwaters, the Styx, the Yellow River, and Big and Little Escambia creeks — all support healthy populations of naturally occurring bacteria that quickly convert mercury into a form that can be accumulated in fish tissue.

## XVIII. MONSANTO UPDATE

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### **Supreme Court Rejects Bid To Have PCBs Judge Recused**

The presiding judge in one of the long-running PCB contamination lawsuits in northeast Alabama will not have to remove himself from the case, the Alabama Supreme Court has ruled. The Alabama Supreme Court opinion clears the way for the damages phase of the trial in the case of *Abernathy v. Monsanto* to resume. In a ruling, the court refused to order Calhoun County Circuit Court Judge Joel Laird to recuse himself from the case, saying statements he made in court did not indicate a bias. Jurors in February of last year found Monsanto Co. and its spin-off Solutia Inc., liable for property damage and emotional distress claims, after finding them guilty of negligence, wantonness, fraud, trespass, nuisance, and outrageous conduct.

During settlement talks, company attorneys accused Judge Laird of bias for statements he made in court and in media interviews, and asked the Supreme Court to order his recusal. The companies claimed some of Laird's statements in court made him appear to side with the victims. The Supreme Court Justices wrote it is "unrealistic to expect a trial judge not to form opinions during the course of litigation, and the expression of those opinions is not grounds for a judge's recusal." The court also wrote that the judge's expression of frustration with delays in the proceedings "is the expected result of the judge's attempt to enforce courtroom discipline and is expressly not a ground for recusal."

The companies said that statements made by Judge Laird to newspaper and television reporters were out of

line. The Supreme Court decided that Judge Laird's comments to the media were only to "repeat statements he has made on the record in court or describe the procedures being used in litigation." The damages phase of the trial started last month and is expected to last for several weeks.

### **The Federal Court Case**

As previously reported, we represent 16,000 victims in federal court in Birmingham, Alabama. Our case will be tried starting on October 14th and is expected to take several weeks to complete. We have been ordered by Judge Clemon to mediate the claims prior to a trial. Mediation is expected to be held in May. It is interesting to note that the defendants have added another 8 to 10 lawyers to their already large litigation team. We have been able to hold up our end of the fight with a team of 8 lawyers who are working virtually 100% of their time on this important case. The conduct of the defendants has already been tried by a jury in Etowah County, Alabama. That jury found the defendants guilty of wrongful conduct—including the tort of outrage, which is most significant because that requires intentional conduct of a wrongful nature that can't be tolerated in a civilized society and that shocks the conscience. We have lots of work to do between now and October 14th. However, when we consider the terrible effects on our clients, resulting from some of the worst conduct by Corporate America that I have ever witnessed, I know what we are doing is the "right thing," and that makes our work much easier.

## XIX. INSURANCE AND FINANCE UPDATE

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### **Jefferson-Pilot Settles Class Action Suit**

Life insurer Jefferson-Pilot Corp. has agreed to settle a class-action lawsuit for about \$54 million. The case was brought by customers who claimed they were misled over the company's insurance policies. Jefferson-Pilot, based in Greensboro, N.C., said it would offer free term life insurance, and the opportunity to buy special bonus policies, to about 165,000 customers, who said they were misled over certain investment life insurance policies they bought in the 1980s and early 1990s. Based on assumptions regarding how many customers would take the benefits, Jefferson-Pilot said the free insurance and bonuses offered under the settlement would cost the company \$44.7 million, while it would pay out \$7.3 million in lawyers' fees plus \$2 million in costs for administering the deal. The settlement is subject to final court approval later this year.

### **Insurers' Investment Losses Mean Higher Consumer Costs**

If you've wondered why your insurance premiums have soared in past few years, look no further than the industry's bruised investment portfolios. A stark example of the battered industry can be found in the profits — or losses — of the nation's life and health insurers in the first nine months of 2002. Net income for these industry segments fell \$5.3 billion — or more than 60 percent — through the end of September 2002, compared with a year-earlier period, according to an analysis released this week by the Weiss Ratings. The Palm Beach

Gardens-based independent financial research company attributes the substantial fall-off to insurers' investment losses. So, where do insurers make up for these huge losses? Weiss officials and others who follow the insurance field are point blank with their assessments — the pocketbooks of consumers. "When the markets were doing well, the insurance companies were able to hold back rate increases because they were making so much money from the stock market and their investments," said Melissa Gannon, Vice President of Weiss Ratings. "Now, to keep a reserve and pay out, let's say a universal life policy, they can't pull that money from investments anymore. Some have turned to rate increases, which is not good news for consumers."

### **Delay In Paying \$50,000 Costs Insurer Millions**

An insurance company's delay in settling a \$50,000 claim with a car crash victim turned into a \$1 million liability for Allstate Insurance Co. An Ohio jury has ordered Allstate to pay \$1 million to the mother of a young woman temporarily rendered comatose by a car crash five years ago. The jury found that Allstate acted in bad faith, awarding the victim's mother \$1,010,000 in her claim against Allstate on behalf of her daughter, Kara McLaughlin, now 20, who suffered brain injuries that permanently affect her speech and walking abilities. The jury also awarded \$1 in punitive damages. The mother was initially willing to accept \$50,000, the driver's maximum coverage, in settlement of the claim. However, Allstate kept putting the claim off, saying it needed more facts about the accident before it could settle. "The claim was treated like they treat all cases, in a cookie-cutter fashion," according to plaintiff's counsel. With a child who was in a

coma, there was no reasonable justification for Allstate to refuse to have offered to resolve a brain-damage claim. Yet, that's exactly what the company did.

The lawsuit was filed against Allstate after the mother failed to settle the claim with an adjuster 28 days after the crash. The accident occurred on January 2, 1998, when the teen-age driver of the car began speeding and lost control. The car flipped and hit a utility pole. The daughter, who was in a coma for six weeks with severe brain injuries, was one of five teens injured in the crash. Allstate initially refused to settle, claiming it needed more time to review medical claims and the claims of others injured in the crash. Allstate was given a March 1, 1998, deadline to settle. When the deadline passed, a lawsuit was filed against the driver. Allstate eventually agreed to pay the \$50,000 in August 1998, but by that time, the lawsuit had been filed against the driver and his family. The defendants settled for \$1,060,000, and instead of paying, the defendants reached an agreement where they transferred their right to sue Allstate to the plaintiff. She then sued Allstate. The jury appears to have given Allstate what it deserved.

### **Proposed Cigna Settlement Of Doctors' Lawsuits Transferred To Miami Judge**

A major lawsuit filed by a group of doctors appears to be heading in the right direction. In a setback for Cigna, the health insurer, a federal judiciary panel has ordered that a proposed settlement of a class-action suit in Illinois be transferred to a federal judge in Miami who has sharply criticized the company's tactics. Late last year, Cigna asked the Judicial Panel on Multidistrict Litigation in Washington to allow the case to remain before Judge G. Patrick Murphy of federal District

Court in East St. Louis, Illinois. In November, Judge Murphy had given preliminary approval to a settlement in which 600,000 to 700,000 doctors could apply for payments to settle claims that Cigna had unfairly reduced or denied insurance payments for medical care. But in December, the judge in Miami, Federico A. Moreno, ruled that Cigna could not act on the settlement without his permission, a decision that led the judicial panel to decide the question of jurisdiction.

In a separate action, the Supreme Court has heard arguments by lawyers for PacifiCare and UnitedHealth, who asked justices to decide whether the doctors' complaints should be heard by an arbitration panel before being taken to the courts. Judge Moreno had ruled that the arbitration clauses, as written in the two insurers' contracts, did not take precedence. That ruling had been upheld by a federal appeals court in Atlanta. Hopefully, the High Court will agree.

### **One State's Approach To The Insurance Crisis**

Nearly 500 Illinois doctors took the day off recently to protest high malpractice insurance rates. They were greeted by state lawmakers and a governor receptive to reforms of the insurance industry. In Illinois, doctors' premiums rose 15 percent on average last year. High-risk specialties like neurosurgery and obstetrics experienced increases of 100 percent or more. Illinois Governor Rod Blagojevich and members of the Illinois Legislature believe increased regulation of insurance companies is a more likely alternative to curbing the growth of malpractice premiums than damage caps or other restrictions on victims' rights. "Every single case is different, every fact pattern is different and every injury is different," Blagojevich said in a story run by the Chicago Tribune. "If tort reform is being categorized by putting

caps and limits on the ability of juries to make decisions ... I have consistently opposed that and I will do that now. But if the reforms are about making the insurance companies more accountable and working in a way where we can work with the medical profession and reduce premiums, I'm eager to look at that and work with all the interested parties to see what we can do to help," Blagojevich said. The idea of increased regulation of malpractice insurers in Illinois is supported by several key legislative leaders. When the stock market is good, everything is fine, but when the market is bad, the insurance companies raise rates. That is not fair to doctors and is not good for their patients. It is most significant that the State of Illinois intends to look at the regulation of insurance companies rather than punish the victims and the medical community.

## **XX. PREDATORY LENDING UPDATE**

### **OCC Issues Guidelines To National Banks**

Predatory lending is like a "cancer" growing in this country. The Office of the Comptroller of the Currency has issued two releases establishing nationwide guidance to guard against predatory lending practices among institutions it supervises. Concurrently, it published for comment a request for an opinion that a Georgia law concerning predatory lending is preempted insofar as it might apply to national banks. In two separate letters to national banks, the OCC noted that many common types of abusive practices are already illegal under federal law. But even in the absence of specific legal prohibitions, the OCC believes abusive lending practices may present significant safety and soundness problems or may involve

unfair and deceptive practices in violation of the Federal Trade Commission Act.

The advisory letters emphasized that national banks should have policies and procedures in place to ensure that neither they nor their subsidiaries engage in any practices that might be considered predatory, and that their lending complies with safety and soundness standards and consumer protection laws. "Our guidance provides a framework to deal effectively with predatory lending without setting up a rigid system that creates burdens and obstacles for lenders to serve low-income customers," said Comptroller of the Currency John D. Hawke, Jr.

The Comptroller said that while the OCC has no reason to believe that any national bank is engaging in predatory lending, the agency's guidance will help prevent problems from arising in the future by prescribing steps national banks should take to avoid abusive practices. The guidance emphasizes that the OCC will review credible evidence that a national bank has engaged in abusive lending practices. If the bank is found to have violated an applicable law or safety and soundness standard, the OCC will take appropriate supervisory action. One of the two advisory letters issued by the OCC provides guidelines to help banks avoid engaging in predatory and abusive lending practices, while the other covers abusive and predatory practices in brokered and purchased loans.

The advisory letters emphasize that it is an unsafe and unsound practice to extend credit to consumers based on the liquidation value of the collateral, rather than the borrower's ability to repay the loan. These loans pose a high risk of default, and represent a defining characteristic of predatory lending—credit extended with the expectation of seizing the borrower's

equity in a home or other collateral. “Our guidance goes right to the heart of predatory lending—the provision of credit to people who cannot afford the terms being offered and who may lose their homes as a result,” said Mr. Hawke. The guidance also makes clear that abusive lending may constitute unfair and deceptive practices under Section 5 of the Federal Trade Commission Act. The OCC took the lead among the federal bank and thrift regulatory agencies in applying Section 5 to banks through a series of enforcement actions beginning in 2000, and in a 2002 Advisory Letter that provided guidance on unfair and deceptive practices.

The guidance issued by the OCC said practices may be considered deceptive if:

- There is a representation, omission, act or practice that is likely to mislead;
- The act or practice would likely mislead a reasonable consumer in the targeted audience; and
- The representation, omission, act, or practice is likely to mislead in a material way.

In addition, a practice may be found to be unfair if:

- The practice causes substantial consumer injury such as monetary harm;
- The injury is not outweighed by benefits to the consumer or to competition; and
- The injury caused by the practice is one that consumers could not reasonably have avoided.

In addition, the guidance also outlines a number of abusive lending practices that often accompany predatory loans, such as packaging excessive or hidden fees in the amount financed, refinancings of subsidized mortgages that result in the loss of beneficial terms, and “equity stripping.” Other practices that may be abusive include:

- Loan flipping, or the repeated refinancing of a loan under circumstances that result in little or no economic benefit to the borrower, with the objective of generating additional loan points, loan fees, prepayment penalties and fees from the sale of credit-related products.
- The use of loan terms or structures, such as negative amortization, that make it more difficult or impossible for borrowers to reduce or repay their indebtedness;
- Balloon payments that conceal the true burden of the financing and force borrowers into costly refinancing transactions or foreclosures;
- The targeting of inappropriate or excessively expensive credit products to the elderly, to persons who are not financially sophisticated or who may be otherwise vulnerable to abusive practices, and to persons who could qualify for mainstream credit products and terms;
- Inadequate disclosure of the true costs, risks and, where necessary, appropriateness to the borrower, of a loan transaction;
- The offering of single premium credit life insurance, and the use of mandatory arbitration clauses.

## XXI. THE CONSUMER CORNER

### Toy Recall Database

There will now be another source of information available to parents relating to safety of toys. SafeChild.net has launched a comprehensive, searchable toy recall database. The database, a project of the Consumer Federation of America, is available at [www.SafeChild.net](http://www.SafeChild.net). Due to the significant number of recalls dealing with toys for children, this database will be

most helpful to parents and others having supervisory or custodial care of young children. According to CFA, the new toy recall database supports the goal of saving the lives of children and reducing childhood injuries. The database will be as “parent-friendly” as possible, according to CFA Public Affairs Director Jack Gillis. It will allow quick, easy searches and will let parents spot and avoid potential problems when buying toys. It will also remind them to make the toys in their toy chests safe.

The safe child recall database will allow users to conduct almost any type search of 350 major toy recalls by the Consumer Product Safety Commission or toy manufacturers over the past 12 years. Searches can be made by age of child, type of hazard cited in the recall, type of toy involved, month or year of recall, and manufacturer. As we have learned from experience, most parents believe that all toys on the market have been “tested” and are “safe,” and we know for a fact that is not always true. Although there are standards for toy manufacturers, the requirements are only for minimum levels of performance. They also fail to address all known hazards. Hopefully, this new source of information will help save lives. It will also help to make toy manufacturers do a better job on safety when people realize that many unsafe toys are being put on the market.

### **The First Years® Inc. Announce New Safety Instructions To Prevent Injuries For Combo Baby Tubs/Step Stools**

The First Years Inc., of Avon, Mass., is providing a new instruction sheet for 120,000 “2-In-1 Fold-Away Tub and Step Stools.” When used as a tub, babies’ body parts can be pinched if the product’s footrest is not fully

extended so that it clicks into place firmly. CPSC and The First Years have received 20 reports of babies being pinched while using these tubs, including one bruising of a baby boy's genitalia and 10 reports of abrasions to toes and feet. This recall to replace the stools' instructions is being conducted to prevent further incidents. These "2-In-1 Fold-Away Tub and Step Stools," have model number 3141 written on the underside of the base.

The product is a folding baby bathtub that can be used as a step stool for an older child. In the step stool position, the top of the turquoise lid has raised lettering stating "the first years" followed near the bottom of the lid with the two statements, "MAXIMUM LOAD/ POIDS MAXIMUM: 200lbs/90kg" and "USE ONLY ON A LEVEL SURFACE. N'UTILISER QUE SUR UNE SURFACE PLANE." In the bathtub position, the seat back has a purple pad. The base and footrest are both white. Also, on the underside of the base is a tiny raised clock showing the year of manufacture of the product (i.e., "9?9") surrounded by the numbers of the clock. Only products bearing date codes 1999 and 2000 ("9?9" or "0?0") are included in this program. Mass merchants nationwide sold these bathtub/stools between January 1999 and February 2002 for about \$17. Consumers should not use the bathtub until they receive revised instructions on the use of the tub to prevent the pinching hazard. Consumers should contact The First Years at (800) 533-6708 between 9 a.m. and 5 p.m. Eastern Time Monday through Friday to receive free revised instructions and a warning label to attach to the product. Consumers can also visit the firm's Website at [www.thefirstyears.com](http://www.thefirstyears.com).

## **FDA Warns Fake Anemia Drug Is Contaminated With Bacteria**

In mid-March, a most serious matter was brought to the attention of the public. It appears that hospitals and pharmacies may have unknowingly bought a counterfeit version of anemia drug Procrit. The government issued a warning stating that the useless product is contaminated with bacteria. The fake Procrit poses a serious danger to patients, according to the Food and Drug Administration. Health workers and patients should very carefully examine vials of Procrit to see if they have the fake version, which shouldn't be used, the agency said. The FDA has identified three batches of the fake drug. They bear the following lot numbers and expiration dates:

- P007645, expiration 10-2004
- P004677, expiration 02-2004
- P004389, expiration 02-2004

Consumers should check for differences on the packaging and vials. The aluminum seal on a vial of real Procrit is smooth, not dented. The closure seals on the outer carton of real Procrit have writing on the underside and leave a residue when peeled away. Procrit, known chemically as epoetin alpha, is an important anemia treatment for patients with cancer and other serious diseases. The three fake batches, discovered by FDA investigators, consist of a clear liquid that contains no medication. While going untreated is dangerous enough, the FDA also discovered that the counterfeit batches are tainted with at least two types of bacteria — posing a risk of infection in already seriously weakened patients. Anyone who has vials of counterfeit Procrit should quarantine them and call the FDA at 1-800-835-4709, or Ortho Biotech Products (the manufacturer) at 1-800-325-7504, so

that investigators can examine them. Once a problem primarily in developing countries, counterfeit medicine is increasingly turning up in the U.S. In the last year, the FDA has investigated more than half a dozen counterfeit-drug cases, including a previous case of diluted Procrit. This is a most serious matter.

## **XXII. RECALLS UPDATE**

### **DaimlerChrysler Has Recalled The 1997-2002 Plymouth Prowler**

The National Highway Traffic Safety Administration has released the following information concerning the recall of Plymouth Prowlers for the years 1997-2002. The NHTSA Campaign ID Number is 03V034000. The recall date was February 4, 2003. The component involved is the suspension: front: control arm: lower arm. The potential number of units affected is 11,698. On certain passenger vehicles, the lower control arm ball joints may experience a loss of lubrication that can result in accelerated wear and possible separation from the steering knuckle. A ball joint that has separated may result in loss of directional control. Dealers will replace the front lower control arm ball joints with modified assemblies. Owner notification began during March 2003. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact DaimlerChrysler at 1-800-853-1403.

## **GM Has Recalled The 1998 Explorer Chevrolet Astro**

The National Highway Traffic Safety Administration has released the following information concerning the 1998 Explorer Chevrolet Astro. The NHTSA Campaign ID Number is 03V016000. The recall date was January 21, 2003. The potential number of units affected is 2,600. On certain conversion vans equipped with running boards supplied by Prodesign, Inc., that incorporate a courtesy light, upon exposure to excessive moisture and road salt, a high resistance arc can occur in the wiring of the courtesy light. When this occurs, the light wires can overheat to the point where they may melt the running board. This could potentially lead to a fire. Dealers will replace the courtesy light. Owner notification started during February 2003. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact Explorer Van at 1-800-926-7878

## **GM Has Recalled The 2003 Yukon XL, Suburban And Avalanche**

The National Highway Traffic Safety Administration has released the following information concerning the GMC 2003 Yukon XL, the 2003 Chevrolet Suburban, and the 2003 Chevrolet Avalanche. The NHTSA campaign ID number is 03V019000. The recall date was January 27, 2003. The potential number of units affected is 5,734. On certain pickup trucks and sport utility vehicles, during a 30 degree left angle frontal impact of sufficient severity, a tear could develop in the mid-frame cross member at its attachment to the left frame rail. If the mid-frame cross member tears during

frontal impact and produces a sharp edge, contact of the sharp edge with the fuel tank could result in a puncture of the fuel tank and possible fuel leakage. Fuel leakage, in the presence of an ignition source, could result in a fire. Dealers will install a fuel tank shield. Hopefully, that will be adequate to solve the problem. Owner notification began on February 20, 2003. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact Chevrolet at 1-800-222-1020 or GMC at 1-800-462-8782.

## **Subaru Has Recalled The 2003 Forester**

The National Highway Traffic Safety Administration has released the following information concerning the 2003 Subaru Forester. The NHTSA campaign ID number is 03V047000. The recall date was February 18, 2003. The potential number of units affected is 500. Certain passenger vehicles fail to comply with requirements of federal motor vehicle safety standard 209, seat belt "assemblies." The left and right front seat belt buckle/latch assemblies were improperly manufactured. In the event of a crash, the front seat belts could unlatch, which could result in personal injury to the seat occupant. Dealers will replace the left and right front seat belt buckle/latch assemblies. Owner notification began during February 2003. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact Subaru at 1-800-782-2783.

## **General Motors Has Recalled A Number Of Vehicles**

The National Highway Traffic Safety Administration has released the following information concerning 5 makes of General Motors vehicles. These are the 2003 Cadillac Escalade, the 2003 Chevrolet Suburban, the 2003 Chevrolet Tahoe, the 2003 GMC Yukon, and the 2003 GMC Yukon XL. The NHTSA campaign ID number is 03V037000. The recall date was February 6, 2003. There are 107 potential units affected. Certain sport utility vehicles fail to comply with requirements of federal motor vehicle safety standard No. 214 (side impact protection). These vehicles are built with four welds on the rear door upper hinge. On some of these vehicles, one or two of the welds may not be to specification. As a result, the door strength may be degraded during a side impact vehicle crash. Dealers will inspect the welds on the left rear door upper hinge. If a weld is found out-of-specification, a bolt will be installed to secure the hinge. Owner notification began February 17, 2003. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact Cadillac at 1-800-458-8006, Chevrolet at 1-800-222-1020, or GMC at 1-800-462-8782.

## **Mitsubishi Has Recalled The 2003 Outlander**

The National Highway Traffic Safety Administration has released the following information relating to the 2003 Mitsubishi Outlander. The NHTSA campaign ID Number is 03V028000. The recall date was January 24, 2003. There are 31,000 potential units affected. On certain sport utility vehicles, during extremely low temperature conditions, ice can

build up inside the engine throttle valve. This ice build-up could cause the accelerator pedal to stick or not to return to idle after accelerating. Failure to return to idle could result in a vehicle crash without warning. Dealers will reprogram the engine control computer to eliminate this condition. Owner notification began during February 2003. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact Mitsubishi at 1-800-222-0037

### **DaimlerChrysler Has Recalled The 2003 Dodge Ram**

The National Highway Traffic Safety Administration has released the following information relating to a recall of the 2003 Dodge Ram. The NHTSA campaign ID Number is 03V033000. The recall date was February 4, 2003. There are 19,500 units affected. Certain pickup trucks equipped with Cummins diesel engines and manual transmissions may experience an elevated idle speed after extended cruise control use. This can result in unintended acceleration and a reduction in braking effectiveness, increasing the risk of a crash. Dealers will reprogram the software in the Cummins engine controller. Owner notification began during March 2003. Owners who take their vehicles to an authorized dealer on an agreed upon service date and do not receive the free remedy within a reasonable time should contact DaimlerChrysler at 1-800-853-1403.

### **American Honda Motor Has Recalled The 2003 Odyssey**

The National Highway Traffic Safety Administration (NHTSA) has released the following information concerning the 2003 Honda Odyssey. The number

of potential units involved is 3,617. Some fuel tanks have surface imperfections that could allow fuel to leak from the tank. Fuel leakage, in the presence of an ignition source, could result in a fire. Dealers will inspect the fuel tank for surface imperfections. If any imperfections are found, the fuel tank will be replaced. The manufacturer has reported that owner notification was expected to begin during February 2003. Owners may contact Honda at 1-800-999-1009.

### **Saab Has Recalled The 1999-2003 9-5**

The National Highway Traffic Safety Administration (NHTSA) has released the following information concerning the 1999-2003 Saab 9-5, manufactured by Saab Cars USA, Inc. There are potentially 70,726 units involved. The dates of manufacture were November 1997 through October 2002. On certain passenger vehicles, if owners change their wheels/tires between summer and winter using a steel wheel in the winter and an alloy wheel in the summer, it is possible for rust and contamination to build up on the wheel hub during the steel wheel usage. If this occurs and the contamination is not removed, it is possible that after the tire change service, some of this contamination could flake or grind away, resulting in reduced clamping force of the wheel to the hub. Over several seasons, it is possible that this reduced force could result in fractures developing in the wheel bolts due to wheel to hub movement. These fractures would result in wheel bolt breakage, allowing the wheel to detach from the wheel hub, increasing the risk of a crash. Owners will be contacted by mail and asked whether they change between steel and alloy wheels. If they do engage in this practice, they will be instructed to bring their cars to an authorized dealer. The dealer will

remove the wheels, clean any contamination from the wheel and wheel hub, and replace the wheels using new improved bolts with attached washers. The manufacturer has reported that owner notification is expected to begin during March 2003. Owners may contact Saab at 1-800-955-9007.

### **Kia Motors Has Recalled The 2002 Sedona**

The National Highway Traffic Safety Administration (NHTSA) has released the following information concerning a recall by Kia Motors America, Inc. of the 2002 Kia Sedona. There are 9,787 units involved. The dates of manufacture were May through November 2001. Certain minivans fail to comply with the requirements of Federal Motor Vehicle Safety Standard No. 209, "Seat Belt Assemblies." The second and third seat belt buckle anchor bolts do not comply with the standards. In the event of a vehicle crash, the occupant may not be properly restrained. Dealers will replace the seat belt buckle anchor bolts. The manufacturer has reported that owner notification began during March 2003. Owners may contact Kia at 1-800-333-4542.

### **Jaguar Cars Has Recalled The 2002-2003 X-Type**

The National Highway Traffic Safety Administration (NHTSA) has released the following information relating to the 2002-2003 Jaguar X-Type cars. There are 49,174 units involved. The dates of manufacture were February 2001 through October 2002. On certain sedans, under some circumstances, the power circuit that feeds the direction indicator system could fail. This could result in the driver being unaware that the external turning indicators are not operating because the internal "tell-tail" light on the driver's instrument panel contin-

ues to work normally. The loss of rear turn signals could fail to warn a following driver that the vehicle is turning and could result in a crash. Dealers will replace the General Electric Module. Jaguar has not yet provided an owner notification schedule. Owners may contact Jaguar at 1-201-818-8500.

### **Hyundai Has Recalled The 2001-2002 Santa Fe**

The National Highway Traffic Safety Administration (NHTSA) has released the following information relating to a recall by Hyundai of the 2001-2002 Santa Fe. The number of units involved is 25,643. The dates of manufacture were March 2000 through August 2001. On certain sport utility vehicles equipped with 2.7 liter V-6 engines, improperly manufactured Crankshaft Position Sensors (CPS) were installed. The CPS cases were improperly manufactured and did not meet dimensional specifications. Internal gaps within the cases allowed epoxy to contact the printed circuit board, which resulted in cracking of the circuit board capacitor. A damaged CPS capacitor could result in engine stalling. Dealers will replace the CPS. The manufacturer has reported that owner notification began during February 2003. This recall is actually an expansion of a previous recall. Owners may contact Hyundai at 1-800-633-5151.

### **BMW Has Recalled The 2000-2002 BMW X5**

The National Highway Traffic Safety Administration (NHTSA) has released the following information relating to a recall by BMW of the 2000-2002 BMW X5. There are 84,000 units involved. The dates of manufacture were August 1999 through April 2002. On certain sport utility vehicles, it may be possible for the front brake line to slip out

of the retaining bracket located at the front strut. The brake hose that is attached to the brake line could come in contact with the tire and be subjected to wear and abrasion. This could initially cause some brake fluid leakage and eventually lead to a substantial loss of brake fluid. There could be a noticeable reduction in brake performance if a loss of front brake performance occurs. Dealers will install an additional retaining clip to further secure the brake line to the front strut. Additionally, if inspection of any brake hose indicates that it has experienced damage, the hose will be replaced. The manufacturer has reported that owner notification began during February 2003. Owners may contact BMW at 1-800-831-1117.

### **Harley-Davidson Has Recalled The 2002 Dyna Wide Glide**

The National Highway Traffic Safety Administration (NHTSA) has released the following information relating to a recall by Harley Davidson of the 2002 Dyna Wide Glide. There are 1,762 units involved. The dates of manufacture were March through June 2001. On certain motorcycles, the rear brake line assemblies could fracture internally. This condition could allow the line to leak brake fluid, which could cause loss of the rear brake function, possibly without warning, increasing the risk of a crash. Dealers will replace the rear brake line. The manufacturer has reported that owner notification began during February 2003. Owners may contact Harley-Davidson at 1-414-342-4680.

### **AFX Has Recalled The FX-3 Motorcycle Helmet**

The National Highway Traffic Safety Administration has released the following information relating to the FX-3 motorcycle helmets. The NHTSA campaign ID Number is 03E006000.

The recall date was January 29, 2003. There are 30,478 potential units affected. Model FX-3 motorcycle helmets manufactured prior to April 2002 are involved. The molding process unique to this model requires injection of the liner into the shell, which left weak spots in the front of the helmet. This does not comply with the requirements of federal motor vehicle safety standard no. 218, "motorcycle helmets." In the event of a crash, the helmet may not adequately protect the wearer from serious injury or possible death. AFX has notified its dealers and will replace the affected helmets with a 100% compliant helmet free of charge. Notification to known customers began during February 2003. Owners who do not receive the free remedy within a reasonable time should contact AFX at 519-686-6477.

## **XXIII. FIRM ACTIVITIES**

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### **Julie Beasley—A Great Lawyer And An Even Better Person**

Julia Anne Beasley, a graduate of Cumberland School of Law, practices primarily in the area of motor vehicle litigation and other bodily injury cases. She has successfully handled numerous cases against large trucking companies, major retail stores, and a number of nationally known companies. Julie has successfully handled a number of cases against Wal-Mart for persons who have been injured or mistreated by this giant retail chain. She has been involved in several cases that have resulted in multi-million dollar verdicts or settlements for her clients. She is the author of "How Subrogation Affects Your Client." Julie is also a great tennis player, having played on the college level. In her spare time, she is

real busy competing in cutting-horse competitions. She made the finals last month (placing 4th out of 108 entrants) in a prestigious event held in Jackson, Mississippi. Julie is part owner of Double B Ranch, which is located south of Montgomery, Alabama. She is responsible for a good number of horses and does all of the “hard” work required of a ranch hand. This highly successful lawyer attends Fresh Anointing International Church in Montgomery. One of the highest compliments that “trial lawyers” can receive is that they truly care about their clients. I can attest for the fact that Julie Beasley, who just happens to be my oldest daughter, cares about all of her clients and wants them to be completely satisfied when their cases are over.

### **Dr. Jim Lauridson Heads Up Our Graphic Design Department**

The complexity of our cases, especially death and serious bodily injury claims, has increased drastically over the years. As a result, we must use the latest technology to present these cases properly to judges and juries. With the hiring of Dr. James Lauridson to serve as our Director of Graphics, we have recognized this trend, and arguably the need, to add digital graphics to our case preparations in order to reduce the risk that jurors might not fully understand the essential points of a case. The Multimedia Graphics Section is devoted exclusively to preparing various types of images to serve as crucial illustrations during trials and mediations. We believe this has greatly increased our firm’s ability to represent our clients in litigation.

Dr. Lauridson, a licensed medical doctor, was a member of the team that drafted the Child Team Review Law in Alabama. Subsequently, he

served on the State of Alabama Child Death Review Team and was the first Chairman of the Montgomery County Child Death Review Team. In the mid-1990’s, Dr. Lauridson began to apply the new technology of computer graphics to illustrate the types of child abuse to healthcare providers, the police, and juries. At that time he became associated with the National Center on Shaken Baby Syndrome, and under the Center’s sponsorship produced a collection of these graphics that have been used by prosecutors and educators nationally and internationally.

Dr. Lauridson served as Deputy Chief Medical Examiner with the Alabama Department of Forensic Sciences until 2001. He joined our firm that year, and with our encouragement and support, Dr. Lauridson has continued to be active in child abuse consultation and education. In the past year, he has presented his work to the San Diego Child Abuse Conference, the Alabama Chapter of the American Academy of Pediatrics, and the Georgia Council on Child Abuse. We believe his work has been beneficial and is most important.

“The use of visual computer generated graphics is a wonderful tool in the often difficult area of children who are abused and neglected,” observed Dr. Lauridson. “I am very fortunate to have the opportunity to apply these tools in the area of child abuse. Being at Beasley Allen gives me opportunities to do this work that I would not have had elsewhere.” In addition to Dr. Lauridson’s work described above, he assists in the making of essential medical decisions and evaluations in our product liability, mass torts, and personal injury and death cases. Having a medical doctor on staff has proved to be extremely important and highly beneficial to our clients. This experienced doctor has acquired a great

number of additional skills that few other medical doctors possess. We are fortunate to have Dr. Jim Lauridson, a dedicated and compassionate man, as a member of our litigation team.

### **Bruce Huggins Heads Up The Firm’s Investigative Division**

Bruce Huggins, as Chief Investigator, heads up the firm’s Investigative Division. Bruce, who grew up in rural Autauga County, obtained a Criminal Justice Degree from AUM in 1977. He was employed as an Investigator with the Montgomery County Sheriff’s Office from 1977 through 1988. Bruce received the Montgomery Officer of the Year award in 1983 and was the first member of the Sheriff’s Office to ever attend the prestigious FBI National Academy in Quantico, Virginia. Bruce is married to his high school sweetheart, Cindy McKinnon Huggins, who is a registered nurse. They have two children (Amanda, age 21, a student at TSUM School of Nursing, and Brett, age 18, a senior at LAMP High School.) Bruce came to work as the only investigator for what was then Beasley, Wilson, Allen and Mendelsohn on April 1st, 1988. The firm had a total of 13 people at that time and was located in an old wood frame house on Hull Street. Since that time, the firm has evolved to one with 42 lawyers and 210 support staff on board.

Our Investigative Division has proven to be a tremendous asset to the Personal Injury Section and other Sections by investigating potential cases, aiding attorneys in properly evaluating these cases, offering expert analysis and advice, and assisting in the actual preparations for trial. The Investigative Division employs seven full-time investigators, who are professionally trained law enforcement officers, each having

graduated from the Police Academy. Many of the investigators have served as division heads in local police forces and have attended prestigious academies, such as the FBI National Academy. We believe that having in-house investigators is a definite advantage to our firm.

## XXIV. CLOSING REMARKS

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The tort reform battle, now being waged in our nation's capital, as well as in the state Legislatures all over the country, is the fiercest and best planned attack on the court system that I have ever experienced. Personally, I believe that corporate wrongdoers should be tried and punished in the criminal courts when criminal remedies are available and the facts justify criminal action. If that were done, we would most likely need more prisons just for white-collar criminals. When the wrongdoers can't be prosecuted criminally, they must be taken to the civil courts. There, victims of corporate wrongdoing must be compensated and when the corporation's conduct warrants it, the wrongdoer should be punished with the imposition of punitive damages. Instead, today we see the politicians continue to reward Corporate America—including the Enrons, WorldComs, and Tycos—with tort reform, giving them virtual immunity from liability. That is a sad commentary on the times and can't—by any standard—be justified.

To make matters worse for consumers, the corporations are being given complete immunity in the form of predispute, mandatory, and binding arbitration in many cases. Rather than being protected and compensated, the victims, on the other hand, are now being punished further by being stripped of their

constitutional right to a jury trial. It is quite troubling when pornography is protected by the courts, using the Constitution as its excuse, but the sacred right to a jury trial under the Seventh Amendment is cast aside. Consumers, who have been second-hand citizens for years, are now being pushed further down the pecking order by the tort reformers. How far that will go is being debated as I write.

This concerted and carefully planned attack on our nation's court system, if successful, could well result in the undoing of our Republic. When the courts are shut down, the other partners in our constitutional government will ultimately be weakened and eventually will collapse. Those of us who want to save America and keep it strong can't allow that to happen. Our forefathers fought a revolutionary war over 225 years ago, and one of the things they fought for was the right to a jury trial. It was critically important then and it is equally important today. It is definitely worth fighting for in my opinion.

On the state level, aside from tort reform, we are facing a great number of critical issues. For the first time in many years, a new Governor is going about the solving of our many serious problems in the right way. Thank goodness, Governor Riley is putting the band-aid approach to problem-solving on the shelf for good. Real solutions to our state's very real problems are being sought and that is most encouraging. If we could do away with all aspects of government and start over, the problem-solving would be very easy—but unfortunately that is not possible. We can't undo the old and create a brand new government that would operate efficiently, in a cost-effective manner, and still provide all of the necessary services. So instead,

we have to "fix" what we have and that won't be easy. However, a real and permanent "fix" is both badly needed and certainly capable of being accomplished. Some of the "fixes" won't necessarily be received well in all circles. In any event, I am convinced that the next few months will decide how successful the new Administration will be. We can't afford to put off any longer the "fixing" of Alabama's State Government. Neither can we allow special interests to selfishly stand in the way of the needed reforms and changes. Personally, I feel pretty confident that people around the state won't stand for more "politics" as usual in Montgomery and that is good news. Hopefully, the "politicians" are listening to real people—not the hired lobbyists for special interests—and will respond in a "world class" manner.

Finally, we must continue to pray diligently for all of our leaders—both at the federal and state levels. As I complete this Report, we are already in the early stages of the anticipated war with Iraq. I hope and pray that a minimum of American lives will be lost and that the war will be a short and productive one. There are clearly evil men in charge of the affairs of government in Iraq—those men must be dealt with. I sincerely hope, however, that "innocent people" in Iraq will be spared to the extent possible. My prayer now is for a speedy and successful conclusion to what I believe has become a necessary war. Our men and women serving in the military must have our total and complete support. We must constantly pray for their safety and for their return to their families and homes. Those who have taken to the streets in this country to protest what they believe to be an unjust war should now simply be quiet. We badly need unity on the war issue at this time. If they feel compelled to talk, they

should reserve their comments for the political leaders and newspaper editors.

God has blessed our nation and will continue to do so—even though we don't deserve it—if we will just let Him. For this reason, we must keep our eyes on our God—anything

less won't get the job done, putting our total trust in Him. There will be times when we won't fully understand why things aren't happening exactly like we want them to. That is when we really have to believe in God's unfailing power and authority. We must then be totally obedient in

every respect to His commands and desires, which are quite clear and easily understood in the Bible. If we will just do that, things always have a way of eventually working out in the right way. May God bless and protect us all!

# THE JERE BEASLEY REPORT

APRIL 2003

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