



THE  
**JERE BEASLEY REPORT**

JULY 2004

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**A NATIONAL LAW FIRM LOCATED IN MONTGOMERY, ALABAMA**

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# I. CAPITOL OBSERVATIONS

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## **THE STATUS OF THE STATE'S EXXON CASE**

As has been widely reported, ExxonMobil Corp. has appealed the verdict in favor of the State of Alabama to the Alabama Supreme Court. On May 28th, the court ordered mediation in the case against the giant oil company. The mediation will take place on July 30 and 31, 2004, before Eric D. Green. The Boston-based mediator, who enjoys a national reputation, has handled some of the largest civil cases ever filed in this country and has compiled a tremendous record as a mediator. I have been asked by a number of persons whether the fact that the Supreme Court saw fit to order mediation should be viewed as a good sign for the State's case. My answer has consistently been: "Frankly, I have no idea." I can only say that the State will negotiate in good faith and make every effort to resolve the matter satisfactorily.

Without any doubt, I do know that the State has a very strong case. There will never be a stronger case of intentional fraud, committed at the highest levels of a giant corporation, to ever find its way to the high court. When you consider that oil company's manager of the Mobile project told his bosses – all the way to the top – that you can't do what you intend to do to the State, and the bosses still elected to cheat the State, that pretty well tells the story. It can't get much worse than that—but it did.

Fortunately, we have documentary proof in the case that proves legal fraud, and that shouldn't be disputed. Nevertheless, we will make every effort to settle the case for the State and hope ExxonMobil will negotiate in good faith. However, some corporate giants still believe they are above the law and I have seen nothing so far to make me believe ExxonMobil doesn't operate in that fashion. I hope they will prove me wrong on that belief.

## **ALABAMA NEEDS A NEW CONSTITUTION**

I have written on the subject of constitutional reform on a number of occasions. I sincerely believe we need a new constitution for the State of Alabama and especially for our people. The Alabama Constitution of 1901 was adopted at a time of great social and political unrest in our State. Many believe that a main objective of that document was to deny the vote to blacks and poor whites. The measure was pushed through to ratification by big landowners and industrialists who wanted to insure a continuing supply of cheap labor, cheap land and low taxes. The 1901 constitution was so restrictive that it did not even allow state or local governments in Alabama to build public roads. In fact, county governments were granted almost no power to conduct routine public business. Some of these problems have been remedied somewhat by amendments, but there remain serious deficiencies that limit our state's ability to compete with other Southern states economically.

The fact that Alabama's constitution has been amended over *744 times* – at last count – may be the best evidence of how truly bad this document really is. With all these amendments, many of which only apply to one county, our constitution has become totally unworkable. Simply put, it needs to be replaced. Under a case decided by the Supreme Court of Alabama in 1984, it appears that the only way we can get a new constitution is by first holding a convention of elected delegates. Those delegates would then draft a proposed constitution, which would have to be approved by a vote of the people. But before there can even be a convention, the Legislature would have to pass a bill authorizing it. There are numerous safeguards in the process, and that is good for the average Alabama citizen. We must assure, however, that the delegates are properly selected, and that means limiting campaign donations and expenditures by persons running for the slots.

I believe strongly that we need a new constitution and don't believe we can wait any longer. Persons interested in seeing our state replace its outdated constitution with one more suitable to today's needs can enter their name on a petition by logging on to [www.gopetition.com/online/4334.html](http://www.gopetition.com/online/4334.html). In the alternative, folks can simply write a note saying, "I support a new constitution drafted by a convention for Alabama," and mail it to: ACCR, P.O. Box 10099, Huntsville, Alabama 35801. All persons responding should include their name and zip code.

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## **WISCONSIN AG SUES DRUG MANUFACTURERS**

The State of Wisconsin is the latest state to file a lawsuit against the pharmaceutical industry. The state's Attorney General filed a lawsuit last month accusing 20 major drug manufacturers across the nation of inflating wholesale prices and driving up costs for health care programs for the poor and other drug buyers. According to the lawsuit, the manufacturers "embarked on an unlawful scheme" designed to distort the drug-pricing system. The suit seeks to force the manufacturers to stop the practice. If successful, a restitution program for citizens, private payers and state health programs would be established. It also seeks forfeitures of up to \$10,000 per violation if the court finds the violations were against senior citizens. Manufacturers named in the lawsuit include Pfizer Inc., Johnson & Johnson, Inc. and Bayer Corp.

This lawsuit is another step by states that are trying to combat skyrocketing prescription drug prices. An interesting comment on the Wisconsin lawsuit was made by Tom Frazier, who is the executive director of the Coalition of Wisconsin Aging Groups. He said the allegations in the lawsuit have added to senior citizens' anger over high prescription drug prices. Mr. Frazier believes that seniors are outraged and I believe he is 100% accurate in that assessment.

The lawsuit alleges the manufacturers inflated wholesale prices for their drugs, deeply discounted the published wholesale prices for some customers, and kept the discounts secret. According to the lawsuit, the manufacturers supply inflated wholesale prices to medical publications, which federal and state agencies as well as private payers such as HMOs use as a basis for drug reimbursements. Providers such as doctors and hospitals buy the products at a lower price and use the false wholesale rate to get bigger reimbursements and drive up their profits. The plan enabled drug providers in Wisconsin's

Medicaid program to charge the state false prices and interfered with the state's ability to set reasonable reimbursement rates for the drugs.

The Medicaid program provides medical benefits, including prescription drugs, to low income and disabled people. The program is jointly funded by state and federal governments. It reimburses physicians and pharmacies for drugs and other services they provide. As most of us know, Medicare is a federal insurance program that covers senior citizens and some disabled people. It also covers some prescription drugs. More than 700,000 Wisconsin residents are entitled to reimbursement under the section of Medicare that covers their medicines. At least 13 other states have already sued drug manufacturers for allegedly breaking wholesale pricing laws. Those suits are now pending. Thus far, Alabama hasn't seen fit to get involved.

### **WAL-MART BENEFITS FROM STATE TAX BREAKS AND INCENTIVES**

A report from a study that was released a few weeks ago was most interesting, to say the least. In fact, I was shocked to learn from the report that Wal-Mart Stores Inc., the world's largest retailer, had benefited from more than \$38 million in tax breaks and other government perks in Alabama. This information was received from Good Jobs First, a Washington research group that tracks subsidies in economic development projects. The study found that Wal-Mart has received subsidies exceeding \$1 billion from state and local governments across the United States. Interestingly, Wal-Mart earned \$9 billion last year on sales of \$256.3 billion. It is absolutely mind-boggling that a company with \$9 billion in profits, after paying tremendous salaries to its top executives, can get job subsidies from state and local governments. The Good Jobs First report says Wal-Mart benefited from \$38.8 million in tax breaks, infrastructure improvements and other subsidies in Alabama.

Local merchants can't be too happy about the subsidies offered to Wal-Mart. Maybe they were like I was and simply didn't know about these gifts. While recruiting corporations, such as Mercedes, Hyundai, Toyota, Honda, and other auto manufacturers, using tax incentives and subsidies, may make good economic and political sense, subsidies to a giant retailer that is making a financial killing already, fall in a different category. I suspect this is a prime example of what political clout can accomplish when Corporate America deals with governments at every level. Frankly, I have great difficulty in justifying the giving of subsidiaries to giant retailers such as Wal-Mart, while many hometown retailers in Alabama are having a difficult time making payrolls.

### **EXXONMOBIL WANTS TO BUILD LNG TERMINAL IN GULF WATERS**

ExxonMobil Corp. has asked the U.S. Coast Guard for permission to build a liquefied natural gas terminal 40 miles off the coast of Louisiana, near the Texas border. Gas from the terminal would be piped to shore in Starks, Louisiana. The company, which also is considering a land-based LNG terminal on Mobile Bay, has filed permit applications with the Federal Energy Regulatory Commission (FERC) for two land-based terminals in Texas ports. ExxonMobil's new filing with the Coast Guard represents the company's first offshore terminal proposal. ConocoPhillips Co. and ChevronTexaco Corp. have filed for permits seeking to build offshore terminals in the Gulf of Mexico. The ConocoPhillips terminal, which would be located about 11 miles south of Dauphin Island, would be the offshore facility closest to Mobile.

In a recent development, FERC has issued official orders stating that the federal government, not the states, has final say over where new LNG terminals can be built. Also, a new bill in the U.S. House seeks to remove decision-making power regarding LNG ter-

minals from the states. Knowing how powerful and influential ExxonMobil is, I don't view this as a good sign for the Mobile area. I hope the Alabama congressional delegation will watch this matter closely and protect the State's interests.

#### **CALHOUN ENTERPRISES AND OTHER ALABAMA COMPANIES HONORED**

My good friend, Greg Calhoun, is the principal owner of Calhoun Enterprises, located in my hometown of Montgomery. Recently, Calhoun Enterprises was listed as among the nation's leading black-owned businesses. Being included on the list of the top 100 industrial and service businesses is quite an honor when you consider that it includes businesses located throughout the country. Other Alabama companies on the list include Booker T. Washington Insurance Co. and First Tuskegee Bank. We salute these 3 outstanding Alabama businesses and wish them continued success.

#### **ALABAMA'S PRISON POPULATION**

It is no secret that Alabama has serious prison problems. Many observers feel we have a powder keg that is ready to explode. A recent Associated Press report was most revealing and should get the attention of all Alabama citizens and I hope our political leaders. We learn from the report that a higher portion of the population lives in the overcrowded prison system in Alabama than live in the prisons in almost every other state. Alabama had the fifth-highest rate of prisoners as a percentage of its population in the country. Only Louisiana, Texas, Mississippi and Oklahoma are ahead of our state. Under current Alabama law, felony offenders are generally sent to prison. Alabama has 612 inmates per 100,000 residents, according to a survey of prison and jail inmates released by the U.S. Department of Justice. This is much

too high and the reasons for that statistic should be examined.

Nationally, America's inmate population grew by 2.9% last year, to almost 2.1 million people, with one of every 75 men living in prison or jail. Alabama prisons experienced a 3.4% jump in its overall inmate population from mid-2002 to mid-2003. There are more people in Alabama prisons—28,440—than in larger states such as New Jersey and Tennessee, according to the report. According to a spokesman for the Alabama State Department of Corrections, the state is operating at approximately 185% of designed capacity. The facilities were originally designed for 12,000 to 13,000 inmates. With money so short in state government, it is quite evident that we are heading for some real problems in the prisons.

#### **MORE ON CHANNEL ONE**

I wrote about Channel One in an earlier issue and got a tremendous response from our readers. In fact, I even received a multi-page letter taking me to task for my views from a lobbyist representing Channel One. However, all other responses came from folks who were shocked to learn that our children were being subjected to this advertising medium in our schools. One thing is certain though and that is it doesn't appear that anybody in government seems to believe that Channel One presents a problem. I encourage all of our readers who are interested in the young people of today to find out more about Channel One. At present, a number of local school systems in Alabama are allowing Channel One to take up a significant amount of time each day that should be spent on schoolwork. But, the worst part of Channel One is the content of what our young children are required to view. If you believe that drug use, scenes with sexual content, and nudity are okay for 6th graders to watch while in school, you will probably like Channel One. But, if you don't, you might want to find

out more about what children are watching in our public schools, you might consider calling Dr. Joe Morton, the acting State Superintendent of Education, at 334 -242-9700 or e-mail him at [jmorton@alsde.edu](mailto:jmorton@alsde.edu) and ask him to tell you why Channel One is a part of our children's school day.

## **II. LEGISLATIVE HAPPENINGS**

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#### **REPORT CARD ON THE COMPLETED SESSION**

The media reviews on the recently completed regular session of the Alabama Legislature, without exception, have been pretty bad. However, I believe the legislators actually performed better than expected, considering the magnitude of the fiscal problems they had to deal with and the lack of any real long-range plan. Unfortunately, more "band-aid" approaches to solving our state's fiscal problems were used once again. While this approach satisfies the powerful special interests, it simply doesn't get the job done. It is high time for our elected officials to put politics aside and get down to some serious problem solving. I sincerely hope and pray that the Governor and our legislative leaders will have a real plan when the legislators come back to the Capitol City. Of course, that takes cooperation, hard work, and some tough decision-making. I really hope the Governor won't call a special session of the Legislature. In my opinion, it would be a major mistake. Without a workable plan, and one that is fully explained to both the public and the Legislature in advance, a special session would be a total disaster.

#### **LEGISLATIVE COMMITTEE DELAYS CONTRACT WITH OUT-OF-STATE FIRM**

Two State Representatives are becoming quite well known as a result

of their hard work on the Legislature's Contract Review Committee. Companies wanting to contract with state government in Alabama now know who Alvin Holmes and Neal Morrison are. A contract with a Maine company to find cases of Medicaid fraud and abuse in Alabama was delayed last month by the committee members, questioned the need for the agreement. I understand the company could be paid \$1.4 million under the contract if it is approved. The committee held up the Alabama Medicaid Agency's proposed contract with HWT Inc. of Portland for 45 days. The contract calls for HWT to investigate and discover cases in which the Medicaid Agency is the victim of fraud by clients or doctors who provide Medicaid services. Representative Holmes, who has been a vocal committee member, held up the contract. This came after he and Representative Morrison complained that the work could be done by state employees. The two legislators believe that the contract duplicates work currently being performed by the Attorney General's office.

The contract in question calls for the company to be paid a contingency fee, based on how much money is recovered for Medicaid. The company would receive 14% of what it collects in most fraud cases. Veteran capitol reporter Bob Johnson, in an Associated Press article, reported that Medicaid director Carol Herrmann believes the contract will save the state millions of dollars currently being lost because of fraud. It appears that Director Herrmann believes there is lots of fraud around the state. About \$2 million in revenue in the current year's Medicaid budget and \$4.7 million in next year's budget is based on savings anticipated from the contract. HWT was chosen after Medicaid sent out a request for proposals and received responses from five companies, according to the Associated Press story. Representative Holmes wants the state agency to go through a formal bid process. He pointed out in the meeting that for \$1.4 million the state could

hire an additional 36 lawyers to staff the Attorney General's Medicaid fraud unit properly. Representative Morrison questioned why HWT hired a Montgomery lobbyist to help it secure the contract, and I have to wonder myself why that was necessary. The contract review process – if carried out properly – is a very good thing. I commend the committee members for doing their jobs well.

### III. COURT WATCH

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#### **NEW CHIEF JUSTICE NAMED**

Governor Bob Riley has named Drayton Nabors as Chief Justice of the Alabama Supreme Court. Drayton will fill the post vacated when Judge Roy Moore was forced off of the court. The new Chief Justice, who graduated from law school at Yale University, served as the State Finance Director during some tough financial times. John Giles, who heads up the politically active Christian Coalition of Alabama, was quoted by Associated Press as saying that "he (Nabors) wouldn't favor the trial lawyers." David Marsh, immediate past president of the Alabama Trial Lawyers Association, told the media that he has dealt with Nabors on funding issues for the courts and found him to be most fair. David aptly stated: "I believe he is such a man of integrity that he would not put his personal background in the way of fairly dealing with each issue before him." Based on my dealings with Drayton over the years and most recently in Montgomery, I share David's views. I really resent the fact that John Giles, who has turned into a pure politician, would try to put Drayton in a box right off the bat. I am totally convinced that the new Chief Justice will be fair to all litigants and decide cases on a case-by-case basis based on the law and facts. That's all any party should expect.

#### **A LOOK AT THE ELECTION RESULTS**

The Roy Moore influence was most evident in the recent Republican primary races for vacancies on the Alabama Supreme Court. Clearly, in the Tom Parker – Jean Brown race, it appears to have been the only real issue. Most political experts say it is virtually impossible to unseat a sitting Republican Justice – especially one who is heavily financed by the Business Council of Alabama, the Alabama Forestry Association, the Alabama Retailers Association, the Alabama Petroleum Association, the Automobile Dealers Association, the Alabama Nursing Home Association, the Alabama Banking Association, and other special interest groups. However, with limited funds and no paid staff – but with the support of Roy Moore, Tom Parker pulled off a major upset. The outcome in that race sent shock waves throughout the state.

The BCA-backed candidates won nomination in the Republican Primary for the two other open seats, outspending their opponents by a large margin. It has been estimated that the BCA-backed candidates for the 3 seats were supplied with about \$5 to \$6 million, directly or indirectly, for their races. The creation of several groups that spent big bucks pushing the Brown-Bolin-Smith ticket came about with little fanfare. These groups reportedly received their funding from several special interest groups, including the oil and gas industry. Two of the GOP Supreme Court nominees got financial contributions from a secretive conservative advocacy group, the American Taxpayers Alliance, which has been actively involved in elections in other parts of the nation. Its influence on the recent Alabama primaries raises questions about the effectiveness of our campaign finance laws. The Alliance paid for television advertisements, which don't come cheap, for Patti Smith and Mike Bolin and pushed hard for their candidacy. Based on the saturation, it appears the Alliance spent millions of dollars on the ads. The

group is not registered with the state, nor do the ads provide any information about the sponsor. I don't believe that any person who saw the ads would say they were not political endorsements. Clearly, the ads were designed to convince voters to vote for the specific candidates mentioned. I believe the public is entitled to know who put up the money for the ads and why. People should be concerned that nobody really knows exactly who put the money into the advertising campaign or what their specific interests in the Alabama Supreme Court might be.

### **THE BIRMINGHAM NEWS MUST PAY \$15.6 MILLION**

The Alabama Supreme Court has ruled that The Birmingham News Co. must pay \$15.6 million to six former newspaper dealers in what was labeled a contract dispute. The court upheld an arbitration panel's decision in the dispute, but reduced the award from nearly \$20 million to \$15.6 million. The former dealers were under contract with the company to deliver newspapers to homes, newsstands, news racks and other places. They sued claiming breach of contract and fraud after The *News* canceled their contracts, failed to renew their contracts or asked them to sign new contracts.

In 2002, a 3-member arbitration panel awarded the dealers nearly \$20 million in compensatory and punitive damages for loss of profits and loss of franchises for up to 20 years. After the circuit court entered judgment on the arbitration award, the *News* appealed the award to the state Supreme Court, arguing that it was excessive and that the arbitrators exceeded their authority. This is a case where arbitration didn't work too well for the corporate defendant. Ironically, the case was first filed in a state court and moved to arbitration by the newspaper. The case has received widespread attention around the country.

This is an important case, and one that will be cited often by courts exam-

ining arbitration awards. The court went through a long discussion of the history of the "manifest disregard of the law" standard for reviewing arbitration awards. Interestingly, this standard is not actually found in the Federal Arbitration Act, but has been formulated by way of case law. Our high court stated that all federal and most state courts have adopted the standard. The standard was then formally adopted for future Alabama cases. In defining what the standard means, the court said, in order to invalidate an award based on this standard, a court must first find that the arbitrator knew of a particular law that should have applied to the facts, and then disregarded that law in making its decision.

### **FORD CITED FOR HOLDING KEY EVIDENCE**

A Texas judge fined Ford Motor Co. \$44,000 in February for failing to produce internal documents about substandard pickup truck door handles. The interesting thing there was that it was far from an isolated incident. As reported in detail last month, Ford has drawn fines and sanctions from courts in product liability lawsuits across the country. In recent years, judges have accused the automaker of withholding key documents and — in a few cases — of actually concealing evidence. In one Michigan lawsuit, arising from an accident that left a small child with brain damage, the judge ruled the automaker's conduct was an "outrageous fraud" and directed a verdict for the plaintiffs. For our non-lawyer readers, that was a drastic ruling. The judge in the Michigan case wrote in a very toughly worded ruling:

*For over two years, Ford has concealed very significant documents and information, and, worse, had blatantly lied about these documents and about the information in them.*

Ford is not the only company that has run afoul of judges for failing to turn

over internal documents in a timely manner. In 1998, a Georgia court sanctioned General Motors Corp. for allegedly concealing an internal report in a case involving a Chevette fuel tank fire. Tobacco companies and asbestos producers concealed for decades studies that were extremely damaging to the companies. As many of you already know, Wal-Mart has a long history of discovery abuse. There are others, but critics say that Ford's recent actions show a pattern of stonewalling during the discovery states in civil lawsuits that may be close to the top of the list.

Andrew Gilberg, a former Ford engineer, testified as an expert in the Texas trial that resulted in the February fine. Commenting on Ford's conduct, Mr. Gilberg stated: "It's not only a pattern. I believe their [Ford] lawyers are schooled in how to avoid producing documents. It is policy with them." The Environmental Working Group, a watchdog group in Washington, D.C., wrote to the Justice Department last year alleging Ford was guilty of a "pattern and practice of willfully concealing safety-related defects data from courts, federal regulators and consumers." The group published a detailed account of the company's alleged efforts to suppress information about testing problems and complaints about the Bronco II sport utility vehicle. The group asked the Justice Department for a criminal investigation. At this time, it can't be determined whether the government is actually looking into the case. Arianne Callender, senior attorney with the Environmental Working Group, says that, "Ford's behavior has been consistent. It's a pattern that needs to be exposed and investigated."

### **THE 10TH ANNIVERSARY OF THE INFAMOUS COFFEE-BURN CASE**

For 10 long years, we have been hearing about the infamous McDonald's coffee-burn case. The \$2.9 million jury award for a grandmother who accidentally spilled McDonald's

coffee on herself was the best thing that the tort reform movement could have asked for. The 1994 case was immediately seized as a symbol of an out-of-control judicial system and has done more harm to the judicial system than any other single thing in years. Nobody recalls the name Stella Liebeck, the plaintiff in the case, but everybody has heard about her case. What the public doesn't know, however, is what actually happened to the lady. Few folks know that there were about 700 victims of too-hot coffee before Ms. Liebeck was burned. Even fewer know that Ms. Liebeck was badly burned and simply wanted her medical bills paid. When McDonald's refused, she hired a lawyer and filed a lawsuit.

We do know that the Liebeck case had a significant impact on the sale of coffee in fast food restaurants. Coffee sellers heard the jury's message, understood it, and subsequently added safety features such as better-gripping lids to their cups. Actually, McDonald's Corp. settled the Liebeck case rather than taking an appeal. Interestingly, the case never prompted a flood of coffee-spill cases in the civil courts.

We also know that McDonald's is part of a 90-million-cup-a-day industry. Let's look back at what actually happened in the Liebeck case. The jury found that McDonald's sold "unreasonably dangerous" and "defectively manufactured" coffee. Ms. Liebeck, then 79 years old, had placed a cup of extremely hot coffee between her legs while sitting in a parked car. She pulled too hard on the lid and coffee poured into her lap. The result was that the 170-degree coffee cooked her skin. McDonald's was the only fast food company selling coffee that was that hot. They did it to make more profits since it took fewer coffee beans to produce its coffee. The elderly lady spent a week in the hospital and returned a month later for skin grafts to heal the second- and third-degree burns across her buttocks, thighs, and labia. Clearly, she was badly burned.

McDonald's denied it was selling coffee that was too hot, or had done

anything wrong at all. The jury awarded \$200,000 for compensatory damages, which was reduced by 20% because the jurors found the plaintiff had contributed to the accident. The jury clearly intended to punish McDonald's for its corporate coffee policy, directing the company to pay \$2.7 million in punitive damages. The judge reduced the total award to \$640,000. The parties subsequently settled the case for a confidential amount. What hasn't been told about the trial was the fact 700 people had complained to McDonald's about the heat of its coffee before Ms. Liebeck was burned. McDonald's had settled hundreds of claims without making it known to the public and continued to serve coffee that was too hot. The company's bosses had to know vehicle occupants would buy coffee from drive-through windows and leave with the beverage in tow.

The coffee seller industry subsequently made some significant changes in the way they operated. Here is what one person in the industry had to say. Ted Lingle, the executive director of the Specialty Coffee Association of America, stated:

*It caused the industry to look at itself and its standards, and say, 'Are we sure we know what we are doing?' We are selling a product that represents a hazard, no one denies that, so the question then is, how do we keep it reasonably safe for the millions of consumers who enjoy it every day? And the answer is in more secure packaging.*

It is significant that hot beverages to go are sold now with stronger cups and often sleeves to make the cups easier to handle than in 1994. Most vehicles now include beverage holders. While the McDonald's coffee spill case was tailor-made for use by the tort reformers, it also was responsible for some needed safety changes in the industry. However, it is virtually

impossible to defend the case's outcome after 10 years of hearing about how "frivolous" it was. The fact remains, there have been few similar cases filed in any state, including Alabama. That doesn't mean the Liebeck case, decided 10 years ago, was frivolous. It does mean that case taught the coffee seller industry an important and needed lesson.

### ***POW JUDGMENT THROWN OUT***

An appeals court panel has thrown out a \$959 million verdict for U.S. prisoners of war who say they were tortured by the Iraqi military during the 1991 Gulf War. The panel ruled that Congress never authorized such lawsuits against foreign governments. The appeals court overturned a lower court ruling that said 17 former POWs and 37 family members were entitled to the damages under a federal statute allowing suits involving countries that financed or aided terrorists. The three-judge panel said, however, that the statute only allows lawsuits for pain and suffering if the suits are filed against agents and officers of those foreign states responsible for the torture who are not acting on behalf of their government. The panel said that even though the lawsuit named Saddam Hussein as a defendant, he is immune because the POWs sued him for his alleged activities in his capacity as Iraq's president. The opinion stated:

*We are mindful of the gravity of (the POWs') allegations in this case. That appellees endured this suffering while acting in service to their country is all the more sobering. Nevertheless, we cannot ignore ... its impact on the United States' conduct of foreign policy where the law is indisputably clear that appellees were not legally entitled.*

The POWs in the lawsuit, which also named the Iraqi Intelligence

Service, say they endured severe beatings, starvation, electric shock, threats of amputation and dismemberment and repeated death threats. The Iraqi government never appeared in the U.S. court to argue its case, leading to the default judgment last July. The Justice Department actually intervened in the case after the POWs tried to get paid from frozen Iraqi assets in the United States. The U.S. government took the position that the money was needed to rebuild Iraq. Government lawyers had argued that huge legal judgments against foreign governments would hamper diplomacy efforts as the United States wages its war on terror. That seems somewhat inconsistent with the Administration's stated policy of protecting our troops who are putting their lives on the line in Iraq.

The government lawyers also argued that the POWs weren't entitled to the money because President Bush made an official determination in May 2003 that a statute allowing payment from frozen assets wasn't applicable to Iraq because it no longer supported terrorism after Saddam was overthrown. A concurring opinion noted:

*Denying Bush's authority to make these determinations and having them apply retroactively could unfairly force new regimes like those in Iraq to pay for the wrongs of the previous ones.*

I have great difficulty with this decision and hope it is overturned. It makes no sense – legally or otherwise – to keep American soldiers who were captured and tortured in Iraq from suing those responsible and collecting damages.

#### **PATIENTS BEWARE**

The U.S. Supreme Court has ruled that patients who claim their HMOs wouldn't pay for medical care recommended by their own doctors can no longer sue for damages in state courts. The High Court said that two HMO

patients in Texas cannot pursue malpractice or negligence cases against their insurers in state court. The patients had claimed a Texas patient protection law allowed them to pursue their cases. This ruling is a tremendous victory for the powerful insurance and HMO industries and is a blow to consumers.

Congress should act immediately to correct this situation. I believe that Senators John McCain (R-AZ) and John Edwards (D-NC) have already filed a bill to remedy this anti-consumer decision. If Congress fails to act, the real losers will be doctors and their patients across the country. It is absolutely wrong for insurance companies and HMOs to take over the practice of medicine, and that is exactly what is happening. Medical decisions about what treatment to pursue should be made by medical professionals and not by bean-counters working for HMOs and insurance companies, who have no medical training and no hands-on contact with the patients involved. The situation arises frequently in managed care, where doctors belong to a closed network of providers overseen by administrators who are not doctors, but who nonetheless decide what the company will pay for. This dictates the level of medical care that the patients will receive.

The court ruled against a hysterectomy patient, Ruby Calad, who had claimed that Cigna Healthcare of Texas essentially evicted her from a Houston hospital after only one day of recovery. The HMO would not pay for a longer stay, even though the unfortunate lady's doctor recommended it. The patient was back in the hospital a few days later, suffering complications that most likely could have been avoided had she remained hospitalized longer after surgery. A lawsuit was subsequently filed seeking to make the HMO pay a price for the negligent care. The Supreme Court did not decide whether Calad deserved better medical care – only whether and where she could bring her lawsuit. The fact that her case would have to be filed in federal court under the ERISA law gives the poor lady absolutely no chance of prevailing.

Employers provide most private health insurance to American workers, and HMOs or other managed care options have become increasingly popular. Today millions of workers are covered by HMOs. Texas and 9 other states regulate HMOs in making decisions about whether treatment is medically necessary. State Attorneys General from several states backed the plaintiffs in the two cases before the Supreme Court. Other states had passed some form of consumer protection from HMO decisions, and still more states were considering such laws. Currently, Arizona, California, Georgia, Louisiana, Maine, New Jersey, Oklahoma, Washington, and West Virginia have laws similar to Texas.

The result in these cases will go down in history as one of the worst decisions insofar as consumer rights are concerned. Congress should pass a patient's bill of rights act without delay. With President Bush in the White House, however, that won't be easy. I doubt if many people recall the President's position when he was "running" for the office. He stated clearly that patients in managed care plans should have the right to sue the HMOs and insurance companies in **state** court. However, the President has taken a totally different position before the U.S. Supreme Court in these cases. The President now says the patients should no longer have that basic right. I predict the persons affected by the Supreme Court action will make this a major political issue this fall. That is the only way for patients and their doctors to be protected. The cases are *Aetna Health Inc. v. Davila*, 02-1845 and *Cigna Healthcare of Texas Inc. v. Calad*, 03-83.

## **IV. THE NATIONAL SCENE**

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### **TROOPS IN IRAQ NOW HAVE BODY ARMOR**

The Army's top supply command-

er has announced that all American troops in Iraq are now equipped with bullet-resistant vests. While that is great news, the question has to be asked, why did it take so long? A report by the Associated Press revealed that many soldiers have been actually paying for costly body armor out of their own pockets. As late as March, some soldiers headed for Iraq were still buying their own body armor, despite assurances from our government that the equipment would be available before the troopers were in harm's way. Obviously, that wasn't the case. We have been in Iraq for a long time and this sort of thing is inexcusable. We must support our troops, and to allow something like this to occur is shameful. There can be no excuse for not having our troops fully equipped. This is especially true when you consider all of the profiteering by some in Corporate America. Some of the money given to Halliburton for meals they charged for and never served would have bought lots of body armor.

#### **SEC OPENS HALLIBURTON BRIBERY INVESTIGATION**

The Securities and Exchange Commission has opened a formal investigation into whether KBR, a subsidiary of Halliburton, illegally paid \$180 million in bribes to Nigerian officials between 1995 and 2002 in order to win a contract to build a natural gas complex in Nigeria. If KBR did this, it would be a violation of the Foreign Corrupt Practices Act. The SEC investigation closely tracks a separate investigation by French investigators, who reportedly have evidence that the former chairman of KBR, who is now a KBR consultant, deposited \$5 million in payments related to the Nigerian project into a Swiss bank account. Halliburton officials have stated that they will cooperate with the investigation, but deny that it violated the Foreign Corrupt Practices Act. The more we learn about Halliburton and its subsidiaries, the worse they look.

#### **IS THERE A CHENEY CONNECTION?**

It now appears that Halliburton Co. has enjoyed a very special relationship with the federal government during the Bush Administration. Shortly before the Pentagon awarded a division of Halliburton Co. a sole-source contract to help restore Iraqi oil fields last year, an Army Corps of Engineers official wrote an e-mail saying the award had been "coordinated" with the office of Vice-President Cheney. As we all know, the Vice-President was Halliburton's former chief executive officer. The March 5, 2003, e-mail, disclosed last month by *Time* magazine, noted that Douglas Feith, a senior Pentagon official, had signed off on the deal "contingent on informing WH [the White House] tomorrow. We anticipate no issues since action has been coordinated w VP's office." The contents of this e-mail certainly appear to indicate that the office of the Vice-President – if not Cheney himself – was in the loop.

Three days after the e-mail, the Halliburton subsidiary was granted the contract, which was worth as much as \$7 billion, according to information on the Army Corps of Engineers website. The first job under the contract was putting out oil fires. It was later expanded to include shipping fuel to Iraq, which led the Pentagon to charge that KBR had over-billed the government. Officials in Cheney's office deny any influence being exerted, claiming that the word "coordinate" referred only to the public announcement of a deal that had been in the works for months. You will recall the United States began hostilities in Iraq on March 20th. The author of the e-mail about the contract was blacked out of the document. Judicial Watch, a nonprofit watchdog group, secured the document in a lawsuit. Frankly, I have no knowledge that the Vice-President has used his tremendous power and influence to help his old company. However, it appears without dispute that Halliburton has done very well since Cheney went to the nation's capitol as the number two (which is debatable) man.

#### **YOU CAN TRACK HALLIBURTON ON THE INTERNET**

Essential Information, a non-profit, non-partisan public interest group based in Washington, D.C. has launched a website to track Halliburton. The website, [www.HalliburtonWatch.org](http://www.HalliburtonWatch.org), is designed to be a one-stop watchdog portal for persons who are interested in probing the company's history. I would encourage private individuals to use this website to see how Halliburton operates and how American taxpayers have suffered in the process. Over the past few years, Halliburton has made a literal financial killing from its connections to its former CEO and other high-level contacts in the Bush White House. According to sources, the last count for Halliburton was over \$9 billion and still climbing. For example, the site contains information about the company's Iraq contracts, alleged bribery in Nigeria, and business dealings with countries such as Iran, Libya, and Iraq who have been labeled as "axis of evil" nations.

One would certainly believe that an American corporation – especially one with connections in very high places – would never do business with the "bad guys." Worse than Halliburton's profiting over the war in Iraq, appears to be the company's use of offshore tax havens. In my opinion, the company's dealings with the so-called "axis-of-evil" countries, can never be justified. How can a corporation with such close and personal ties to the Bush Administration do business with both the U.S. government and its stated enemies? Even without close ties, this sort of thing is just plain wrong. It simply doesn't meet the old-fashioned **smell test!**

#### **IT APPEARS THAT SOMEBODY BROKE THE LAW**

President Bush has hired a private lawyer in connection with the grand jury investigation to identify who leaked the name of a covert CIA oper-

ative last year. Interestingly, the lawyer is Jim Sharp, a Washington **trial lawyer** and former federal prosecutor. The President said he would cooperate with the grand jury, which is commendable on his part. Bush told the Associated Press, "This is a criminal matter, it's a serious matter." President Bush has expressed doubts in the past that the government's investigation would ever pinpoint who was responsible for the leak. He may be right. I don't believe the President could be the guilty party, but it sure does fit the pattern of previous actions by some folks who advise him daily.

A federal grand jury in recent months has questioned numerous White House and Administration officials to learn who passed along the name of CIA operative Valerie Plame, wife of former Ambassador Joseph Wilson, to the news media. Disclosure of an undercover officer's identity can be a federal crime. Wilson has said he believes his wife's identity was disclosed to attack his credibility because he criticized Bush Administration claims that Iraq had tried to obtain uranium from Niger. Wilson went to Niger for the CIA to investigate the information about Iraq and found the allegation to be highly unlikely.

Plame's work for the CIA was first revealed by syndicated columnist Robert Novak, who wrote that two Administration officials said Wilson's wife suggested sending him on the Niger trip. Wilson went public regarding Niger in March 2003. In a New York Times op-ed commentary on July 6, 2003, Wilson disputed Bush's statement in his State of the Union address that Iraq was trying to develop a nuclear bomb and had sought to buy uranium in Africa. Plame's identity surfaced eight days after the New York Times commentary ran. I certainly don't believe President Bush has violated the law. However, it has been suggested that someone very close to the President and Vice-President was quite possibly the guilty party. While I don't believe Karl Rove is **dumb** enough to do this sort of thing himself, it sure smells like

his work. Frankly, I really hope he is innocent on this one. After all, what happened is a criminal matter and not just raw politics, taken to the extreme. This sort of thing can't be tolerated and somebody should be held accountable.

### **SPECIAL INTEREST TAKEOVER**

The Center for American Progress and OMB Watch recently released a comprehensive report detailing the Bush Administration's record of dismantling protections for public health, food safety, auto safety, and the environment. The report was prepared on behalf of the Citizens for Sensible Safeguards Coalition. As documented by the report, crucial safeguards have been swept aside or watered down, enforcement efforts have been curtailed, and emerging problems are being ignored. The Bush Administration, under the leadership of Karl Rove, accomplished all of this by placing regulatory agencies under the control of industry insiders, dismissing independent scientists from government advisory boards, suppressing information, distorting scientific findings that document a need for action, and using cost-benefit analysis to prioritize industry interests over the public interests. You will see from the report a prime example of what can happen to the public interest when this sort of thing occurs in government.

The Bush Administration delayed a proposed rule on Listeria and eventually only issued the rule in a much-weakened form. The Department of Agriculture ignored a federal inspector's repeated reports of food safety violations at a Pennsylvania Wampler Foods plant. In 2002, Listeria-contaminated turkey meat from the plant killed 8 persons, sickened more than 50 others, and caused miscarriages and stillbirths. This prompted one of the largest meat recalls in U.S. history. This report is most disturbing and paints a picture of special interest domination of the Bush White House. To view the complete report, you can go to [www.SensibleSafeguards.org](http://www.SensibleSafeguards.org).

### **\$10 BILLION BORDER SECURITY DEAL**

Accenture LLP, a technology and management consulting company, has been awarded a government contract worth up to \$10 billion to develop and expand biometric technology for checking identities of foreigners visiting America. The system, known as US-VISIT, requires foreigners to be fingerprinted and photographed upon entering the United States at a major airport or seaport. The technology also can include iris scans to identify people. The Department of Homeland Security awarded Accenture the contract over two other bidders, Lockheed Martin and Computer Sciences Corp. Accenture's parent company is Accenture Ltd., which is incorporated in Bermuda. Incidentally, Accenture was formerly Arthur Andersen. The company recently moved its official headquarters offshore to Bermuda to avoid paying U.S. taxes. Accenture executives have given the President \$60,000 in campaign contributions since 2000. The company also hired Charlie Black, a Bush family confidant for the past several years, to lobby on its behalf.

The contract is for five years with five one-year options beyond then. Homeland Security officials put its value as high as \$10 billion. The system (US-VISIT) began operating in 115 airports and 14 seaports in January. By the end of the year, the Department hopes to have a similar system in place at the country's land borders. It also is required to have a system in place to keep track of whether foreigners leave when required. In 2002, 358.3 million U.S. and non-U.S. citizens entered the United States through the nation's land borders.

### **BUSH ADMINISTRATION VIOLATES FEDERAL PROHIBITIONS**

The General Accounting Office has said that three videos, packaged to look like independent news reports and distributed to television stations across the country, were a misuse of federal money appropriated by Congress. The

Bush Administration has been found to have violated federal prohibitions on propaganda when it issued the video press releases promoting the new Medicare law. The videos were produced by a subcontractor for the Department of Health and Human Services and its Center for Medicare and Medicaid Services. Incumbent presidents have always found ways to spend tax dollars during their reelection bids. However, this president's advisors have gone to new heights with their spending practices. Most folks don't realize the President flies around the country at taxpayer expenses and attends functions that sure do look political. Of course, under the law, the flights on Air Force One are legal.

### ***THE SECRET CAFTA SIGNING***

Even if it is brought to Congress, the Central American Free Trade Agreement (CAFTA) may be dead on arrival. Polling shows that U.S. citizens believe that our current trade policy has failed and as a result strongly oppose its extension. I share the view of Public Citizen that this trade pact is bad for jobs, the safety of our food and our futures. Interestingly, this major trade pact was signed on the Friday before a holiday weekend, and at a time when Congress was in recess. I suspect the White House knew the public wouldn't be paying much attention to government business during a holiday weekend. American citizens are dealing with job losses, a declining tax base and other harsh realities of Bush trade policies.

Now the Bush Administration has sought another way to satisfy its corporate donors by signing this expansion of NAFTA to five Central American nations. It was done in such a way as to minimize the public fallout for policies opposed by most consumers in this country. Public Citizen calls CAFTA the linchpin of a trade agenda written by Bush campaign backers representing utility companies, drug companies and Wall Street. It is most significant that

the Bush Administration has signed a bad trade agreement that is so strongly opposed that the GOP-majority House and Senate are expected to vote it down. I have not talked to a single person – including Republicans – who back the President's actions. However, the power of the White House could change the vote on this measure overnight.

### ***MEXICAN TRUCK SAFETY CASE***

The U.S. Supreme Court has ruled that the Bush Administration can skip a lengthy environmental study and open U.S. roadways to Mexican trucks at any time. The High Court ruled against labor and environmental organizations that have long fought expansion of Mexican trucking within the borders of the United States despite a guarantee this country made when it signed the North American Free Trade Agreement more than a decade ago. The Supreme Court said the President has authority to open the border, and the federal agency responsible for truck safety has no say in the matter. As a result, the agency was under no obligation to study environmental effects from opening the border, as a lower federal court had ordered. President Bush ordered the opening of all U.S. roads to Mexican trucks in 2002, but the dispute has been tied up in courts. The long fight, begun during the Clinton Administration, had come down to one last battle over an environmental assessment, or study, called an EA. Opponents of the truck expansion argued that a particular kind of study was required by law and that the Bush Administration was ducking that requirement.

Under NAFTA, Mexican trucks were to have gained full access to U.S. roads beginning in 2000. But the Clinton Administration refused to grant them entry. Mexico successfully challenged the moratorium through a free trade tribunal. The U.S. Court of Appeals for the Ninth Circuit had ordered the government to do a \$1.8 million study, which was expected to run a year or

more. It was not immediately clear whether the study will continue now that the High Court has ruled. The Bush Administration badly wanted the two-decade moratorium on Mexican trucks to end. Many accused the President of playing politics on this issue, to the detriment of American citizens. The Bush appeal was obviously successful.

The ruling ends a challenge from Public Citizen, the Teamsters union and others who had sued on safety and environmental grounds. The opponents argued that Mexican trucks are typically older and pollute more than American trucks. Mexican trucks make approximately 4.5 million border crossings every year. The final result of all this is not good for this country in my opinion.

### ***CLEAR CHANNEL REACHES INDECENCY SETTLEMENT***

The Federal Communications Commission has reached a nearly \$2 million settlement with Clear Channel Communications to resolve a number of indecency complaints that include Howard Stern. The agreement would settle fines proposed by the agency for sexually explicit remarks Stern made in an April 2003 broadcast. The agreement also covers any and all outstanding listener complaints lodged against Clear Channel. I am hopeful this is a sign of more good things to come. We owe it to our young people to clean up the airways and TV screens in this country. Interested citizens should keep up the pressure on our political leaders and demand that they protect our children.

## **V. CONGRESSIONAL UPDATE**

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### ***LAME-DUCK SESSIONS AREN'T USUALLY GOOD FOR PEOPLE***

It certainly appears that Congress is heading toward a "lame-duck" ses-

sion. House and Senate leaders say they are trying desperately to avert such a session this year. They acknowledge, however, that it is likely that Congress will be working on **unfinished business** after the November elections. With Republican Senate bosses refusing to compromise on a budget resolution and both chambers behind schedule after missing a week to memorialize former President Reagan, several high-ranking members are now predicting that they might have to spend at least part of the late fall in Washington.

The Senate is already behind schedule on the Department of Defense authorization bill, and with nearly 200 amendments still pending on the bill, it may be another week or more before the Senate passes the measure. The 13 appropriations bills won't be considered until the Senate completes the defense authorization bill. It makes no sense for Congress to allocate money until they know what's been authorized. If the 108th Congress ends in a lame duck, it will be the 15th lame-duck session since 1940. Most recently, Congress came back to Washington for an extended session in 2000 and in 2002 and very little of consequence occurred. While much of the work in lame-duck sessions centers around appropriations bills, lawmakers will also try to move other major measures. Even though some good legislation is pending, it is more likely that bad things could happen. We will all be better off if we simply shut Congress down until the new crop of members and a President are elected.

### **A MAJOR CHALLENGE**

Congress will be called on to pass a patient's bill of rights act before the November election. This will be a monumental challenge for a Congress that is closely aligned with the powerful and influential insurance and HMO industries. It will take real political courage to buck these special interests and to stand up for working men and

women and others who are tied to managed care programs for their healthcare needs. I hope right will prevail – for the good of our nation.

### **SPECIAL INTERESTS PREVAIL OVER THE PUBLIC INTEREST**

In the final push for Medicare prescription drug legislation, the pharmaceutical industry, HMOs and related interests spent more money and hired more lobbyists in 2003 than ever before, according to a report issued last month by Public Citizen. The pharmaceutical and managed care industries spent a combined \$141 million last year, according to Public Citizen's analysis of newly released federal lobbying disclosure records. Drug makers and HMOs hired 952 individual lobbyists in 2003 - nearly half of whom had "revolving door" connections to Congress, the White House or the executive branch. That's nearly 10 lobbyists for every U.S. Senator. No wonder the people took a beating on this issue.

It is very clear that the Medicare Modernization Act, a top priority of President Bush, will safeguard industry profits at the expense of America's taxpayers. We will soon learn by experience that the bill passed was tailor-made to serve the powerful special interests, which will profit greatly, instead of senior citizens. Public Citizen has been conducting a study of Washington lobbying by the pharmaceutical industry on an annual basis. The most recent report, *The Medicare Drug War*, exposes the extent of the drug industry's latest lobbying barrage. I appreciate Public Citizen sending me this information. The following are among the findings from the study:

- In 2003, the drug industry spent a record \$108.6 million on federal lobbying activities and hired 824 individual lobbyists - both all-time highs. In 2002, based on a more narrowly defined survey, the drug industry spent \$91.4 million and hired 675 lobbyists.

- This army of lobbyists helped ensure that the new drug benefit will be administered by private companies. The new law expressly prohibits the government from using its bargaining clout to negotiate lower prices and effectively bans the "reimportation" of cheaper drugs from Canada.

- The Pharmaceutical Research & Manufacturers of America (PhRMA), which represents more than 40 brand-name drug companies, shelled out more than \$16 million last year on lobbying, a 12.5% increase from the year before. PhRMA alone hired 136 lobbyists.

- HMOs and other managed-care health plans mounted an extensive lobbying effort. Managed care companies that lobbied on the Medicare bill spent \$32.3 million on federal lobbying in 2003. HMOs and health plans hired 222 lobbyists to work on the Medicare bill.

- Managed care lobbyists helped ensure their clients got a windfall in the bill - \$531.5 billion over 10 years based on data from the Medicare actuary - as enrollment in managed care plans is expected to climb from 12% to 32% of all Medicare beneficiaries.

- The Blue Cross Blue Shield Association spent more on lobbying than any other health plan in 2003, shelling out \$8.1 million. The two major industry trade associations - the American Association of Health Plans (AAHP) and the Health Insurance Association of America (HIAA), which merged in October 2003 - spent a combined \$8.3 million.

### **A REVOLVING DOOR IN WASHINGTON**

Both the pharmaceutical and managed care industries have relied heavily on lobbyists with "revolving door"

connections. It is most significant that 431 lobbyists employed by the drug industry or HMOs - or 45% of all their lobbyists - previously worked for the federal government. Among them were 30 former U.S. senators and representatives from both parties. It breaks down into 18 Republicans and 12 Democrats. Consider the following:

- At least 11 top staffers who left the Bush Administration lobbied for the drug industry and HMOs in 2003. White House and Administration insiders working as lobbyists on the Medicare bill included several former top advisers to Bush, Vice-President Dick Cheney and Department of Health and Human Services Secretary Tommy Thompson.
- The exodus from the Administration has accelerated since the President signed the new Medicare law. At least four key Bush Administration officials - most notably Tom Scully, administrator of the Centers for Medicare and Medicaid Services - have exited to help industry clients benefit from the Medicare bill that they wrote or promoted. Another six top congressional staffers at the center of negotiations over the Medicare bill now lobby for drug companies or HMOs.
- The revolving door spins both ways. Three prominent drug industry and HMO lobbyists have recently moved into senior health policy positions at HHS. Another is now a spokesman for the Bush campaign. And the lead White House negotiator on the Medicare bill - presidential adviser Doug Badger - previously represented half a dozen drug companies as a lobbyist.

Drug industry and HMO executives and lobbyists rank very high on the list of President Bush's elite fundraisers. Twenty-one executives and lobbyists achieved "Ranger" or "Pioneer" status by collecting at least \$200,000 or

\$100,000, respectively, for Bush in the 2000 or 2004 campaigns. It appears that the Bush White House has brought in more drug industry and HMO insiders to implement and promote the new law. The revolving door policy that exists in our nation's capital must be corrected. It is difficult, at the very least, to regulate an industry when the regulator is looking toward a second career in the very industry he or she is regulating. Once folks find out how truly bad this law is and who it actually benefits, it will become a major political issue this fall. So far, the mass confusion over the act is the main topic of the day.

## VI. THE CORPORATE WORLD

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### *A LOSS OF CONFIDENCE IN CORPORATE AMERICA*

Who would have ever believed Corporate America could be so corrupt? I must confess that, even with the vast amount of litigation our firm has been involved in, the massive amount of fraud and other wrongdoing involving so many companies surprised even me. I really couldn't believe how bad and how widespread the corruption actually was. When I first reported well over a year ago that over 25 major corporations were under criminal or quasi-criminal investigation by some federal agency, many of my friends questioned the accuracy of my sources. Now I realize they were right - it was actually worse than I believed it to be at the time. The result has been that the public has largely lost all confidence in Corporate America. Almost on a daily basis, another corporate officer is either charged with some criminal offense or pleads guilty to a crime. Currently, civil lawsuits are being pursued by thousands of folks who have been victimized by corporate wrongdoing. Corporate America's answer to all of the wrongdoing seems to be more tort

reform and less government control and regulation. Fortunately, the public just doesn't seem to be buying it any longer. Not even the U.S. Chamber of Commerce, with all of its corporate donors, can defend all of the lying, cheating, and stealing that have gone on in all too many corporate boardrooms in this country.

### **STATE OF CALIFORNIA SUES ENRON**

California's Attorney General has filed suit against Enron and several subsidiaries for manipulating the market during the state's 2000-01 energy crisis. Their blatant wrongdoing cost Californians hundreds of millions of dollars. The lawsuit, filed in state court, seeks restitution and other, unspecified damages from the Houston-based energy giant. The lawsuit contends that between 1998 and 2001 Enron engaged in a variety of fraudulent schemes to artificially boost electricity prices and the company's profits. Among other things, Enron was accused of deliberately causing congestion along power transmission lines, then reaping extra revenue for taking action to relieve the congestion. "While the state reeled from the combined impact of sky-high power prices, supply shortages and rolling blackouts, the Enron defendants enjoyed massive, unprecedented profits and extracted millions of dollars in ill-gotten gains from utilities and their customers through a variety of fraudulent schemes," according to the complaint.

The lawsuit cites excerpts from recently released transcripts of Enron traders' phone calls during the energy crisis in which they gloated about manipulating California's power market and boasted of ripping off "those poor grandmothers." More will be said on that below. Each violation of the state's unfair-competition law is punishable by a fine of up to \$2,500, while breaches of the state's commodities law can be punishable by up to \$25,000 per incident.

## **PROOF OF ENRON'S CORRUPT MENTALITY**

After all I have seen and experienced over the years, I usually don't shock easily. However, the more we learn about the Enron scandal, the more shocked I become. It has now been reported that when a forest fire shut down a major transmission line into California, cutting power supplies and raising prices, Enron energy traders actually celebrated. Audiotapes, which have now been obtained by the media, allow Enron energy traders to be heard gloating and praising each other as they helped bring about, and cash-in on, the western power crisis. Many of the audiotapes contain expletives that need not be repeated, but one statement by the traders on the audiotape as they watch the massive California forest fire is, "Burn, baby, burn. That's a beautiful thing."

Other portions of the audiotapes include statements about Enron traders such as, "he steals money from California to the tune of about a million." Another employee is then heard asking, "Will you rephrase that?" The other employee then responds, "Okay, he, um, he arbitrages the California market to the tune of a million bucks or two a day." With the release of these tapes, many claim confirmation of what has been reported previously: that in secret deals with power producers, Enron traders deliberately drove up prices by ordering power plants to shut down. One exchange includes, "If you took down the steamer, how long would it take to get it back up?" Another employee says, "Oh, it's not something you want to just be turning on and off every hour. Let's put it that way." The first then responds, "Well, why don't you just go ahead and shut her down."

Other portions of the tapes are even more disturbing. When discussing rates they have been charging and utilities' attempts to get the money back, employees are heard saying, "The are (expletive) taking all the money back from you guys?" complains an Enron employee. "All the money you guys stole from those poor grandmothers in

California?" Another employee is heard saying, "Yeah, grandma Millie, man." The other responds, "Yeah, now she wants her (expletive) money back for all the power you've charged right up, jammed right up her (expletive) for (expletive) two hundred and fifty dollars a megawatt hour."

As we have seen in other corporate scandals, the tapes appear to link top Enron officials such as Ken Lay and Jeffrey Skilling to schemes that fueled the energy crisis. One trader observed on tape that "Government Affairs has to prove how valuable it is to Ken Lay and Jeff Skilling," says one trader. The tapes also indicate how important the election of President Bush was to their plans. One says, when discussing the chances of President Bush in the 2000 election, "It'd be great. I'd love to see Ken Lay Secretary of Energy." While we know that did not happen, the Enron employees on the tape were sure President Bush would fight any limits on sky-high energy prices. Their comments are chilling, "When this election comes, Bush will (expletive) wack this (expletive) man. He won't play this price-cap (expletive)." While the language is crude, it does appear that this is exactly the course the present Administration has taken. President Bush, in fact said on May 29, 2001, "We will not take any action that makes California's problems worse and that's why I oppose price caps."

All of the above is just an example of how Enron believed – because of strong **political connections** – it was above the law and virtually immune from detection. If any person in this country deserves to be held accountable for his blatant wrongdoing, it is the President's old buddy and confidant, Ken ("Kenny Boy") Lay. I hope the civil action by the California Attorney General will be successful. However, criminal convictions appear to be what are needed in the Enron scandal.

### **MITSUBISHI OFFICIALS CHARGED**

Mitsubishi is having big-time problems and there appears to be no

end in sight. A former president was one of six arrested recently arising out of the death of a truck driver. The firm is accused of a massive cover-up of vehicle defects. The bad news at Mitsubishi Motors Corp. turned from the **scandalous** to the possibly **criminal** when the company's former president was charged with failing to recall and repair deadly defects in buses and trucks. Broken propeller shafts caused by a faulty clutch system are believed to have led to brake failure on a 9-ton Mitsubishi Fuso truck that smashed through a highway tollgate and into a concrete wall in October 2000. The late-night crash killed a 39-year-old driver as he drove a load of refrigerated vegetables to market. Mitsubishi's then-president, Katsuhiko Kawasoe, and five other former executives, who were also arrested in June, are being charged with criminal responsibility for the truck driver's death.

It is being alleged that the executives conspired as far back as 1996 to hide the faulty clutches, instructing company mechanics to fix the problem secretly during routine servicing rather than issuing an embarrassing recall. It is most significant that Mitsubishi recalled 168,000 trucks in May to fix the problem that allegedly killed the driver. This was the second time this year that police have linked Mitsubishi design flaws to a road death. A pedestrian was killed in 2002 when she was struck by a wheel that had flown off a Mitsubishi truck. Five executives were charged over that death as well, accused of falsifying data that the company provided to industry regulators.

Mitsubishi has issued 9 recalls this year alone, affecting more than 400,000 of the estimated 6 million vehicles it has on the road in Japan. An additional 220,000 cars it sold in Europe have turn-signal problems and may have to be recalled, the company says. To my knowledge, no evidence of defects has been reported in North American models. The company's troubles stem in large part from what analysts describe as an arrogant corporate culture that reflected a belief that Mitsubishi could

get away with not reporting the bulk of its manufacturing problems. In 2000, it was disclosed that tens of thousands of consumer complaints had been ignored and mechanics had been instructed to fix problems surreptitiously when owners brought their vehicles in for regular servicing. Mitsubishi Motors has had a history of hiding defects relating to its vehicles. The company has been hiding defects in its cars from regulators for years. This was done in an effort to avoid issuing recalls for the vehicles. All of this has been acknowledged by the company. It is shameful that any carmaker could act in such a manner.

#### **WARNER-LAMBERT PLEADS GUILTY TO ILLEGAL MARKETING OF NEURONTIN**

Warner-Lambert, a subsidiary of the world's largest pharmaceutical company, Pfizer Inc., pled guilty in May to criminal charges and paid fines in excess of \$430 million as a result of illegal marketing of its drug Neurontin. Originally approved as a supplemental anti-seizure treatment for epilepsy, Neurontin has been widely prescribed by doctors for treating migraines, mental illness, and a variety of pain conditions. While doctors are free to prescribe medications for such "off-label" uses, the Food, Drug and Cosmetic Act prohibits drug companies from promoting and marketing their products in such a way.

According to the agreement announced by federal prosecutors on May 13, the company acknowledged spending hundreds of thousands of dollars to promote unapproved uses of Neurontin. In addition to a \$240 million criminal fine, the second largest criminal fine ever imposed in a health care fraud prosecution, the company will pay \$152 million in civil fines, to be shared among state and federal Medicaid agencies. Another \$38 million will go to state consumer protection agencies for the purpose of educating consumers and doctors about the potential hazards of off-label uses,

although that amount is only a fraction of what drug companies spend on marketing these drugs.

The agreement with the Justice Department is a result of a whistleblower lawsuit filed against Warner-Lambert in 1996 by David Franklin, a former scientist for the drug company. Franklin's lawsuit alleged that the company paid doctors to put their names on ghost-written articles about Neurontin and induced them to prescribe the drug for various uses by furnishing the doctors with tickets to sporting events, trips to golf resorts, and fees for speaking engagements. As a result of such practices, Franklin has said that much of the current off-label use of Neurontin is to treat conditions on which the drug has little or no effect.

However, Pfizer has not given any indication that its off-label uses will be curtailed at all. Pfizer received \$2.7 billion of revenue in 2003 from Neurontin, and the drug is sold in over 100 countries and has been prescribed to approximately 10 million patients since marketing began in 1994. This is quite a deal. A corporation can pay a one-time fine of a few hundred million dollars for a license to reap the benefits of a crime to the tune of over \$2 billion a year. This will not deter any company from promoting drugs for off-label use. In fact, it will most likely encourage this type of behavior. While we applaud the efforts of the prosecutors involved in this case, more action is needed to protect consumers from illegal promotion of drugs by pharmaceutical companies. Folks are fed up with the pharmaceutical industry and will eventually demand action from the White House and Congress.

#### **OTHER NEURONTIN NEWS**

In addition to the recent charges and plea agreement, Pfizer is also facing a petition that asks the Food and Drug Administration (FDA) to act on claims that Neurontin may be tied to suicidal behavior. The petition, filed by a New York law firm, is based on the

FDA's own adverse event reporting database. Several lawsuits have been filed against Pfizer on behalf of people who committed or attempted suicide. The petition asks that the FDA add a warning to the Neurontin label concerning the link to suicidal behavior and also send a letter to doctors and other health care professionals making them aware of this problem. According to the petition, the number of suicides reported by Pfizer jumped to 17 in the first six months of 2003, which is the latest information available. That is a significant increase when compared with a total of eight that were reported from 1998 to 2002.

#### **ABBOTT LABS CHARGED**

A coalition of consumer and advocacy groups have charged Abbott Labs with increasing the price of Norvir, a critical anti-AIDS drug, by 400%. This action is in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The Illinois law protects consumers from "unfair methods of competition and unfair or deceptive acts or practices." The Prescription Access Litigation (PAL) Project, a coalition of 93 consumer and advocacy organizations in 35 states, contend that Abbott's price hike is so enormous and unjustifiable that it constitutes an illegally unfair practice. Abbott is accused of quadrupling the price of a life-saving drug for which no alternative exists. In December 2003, Abbott raised the wholesale price of Norvir from \$205.74 to \$1,028.71 for 120 capsules. This increase of over 400% is shocking and can't be justified or tolerated.

#### **LUCENT FINED BY THE SEC**

The Securities and Exchange Commission has fined Lucent Technologies, Inc. \$25 million for failing to cooperate with the agency in its investigation of securities fraud. The SEC charged that Lucent fraudulently and

improperly recognized approximately \$1.148 billion of revenue and \$470 million in pre-tax income during its fiscal year 2000. Lucent has agreed to settle that case without admitting or denying the allegations. What makes this case noteworthy, however, is the fact that Lucent agreed to pay the \$25 million penalty for its lack of cooperation.

#### **GLAXOSMITHKLINE SETTLEMENT**

GlaxoSmithKline Corp. will pay a \$75 million settlement in a lawsuit that alleged the company used illegal tactics to maintain its patent on Relafen, an anti-inflammatory drug, and keep a cheaper generic version off the market. The agreement creates a \$25 million pool to reimburse individuals for overcharges on the drug. As part of the settlement, the company will also establish a \$50 million pool for third-party payers, such as health insurers. The settlement, which must be approved by a federal judge in Boston, arises from a lawsuit brought last year by consumer group Prescription Access Litigation.

Clearly, drug companies shouldn't be allowed to manipulate drug prices. Cases such as this one put the drug industry on notice that consumers are sick and tired of manipulation of this sort that hurts them badly. PAL, a nationwide coalition of 93 consumer groups in 34 states, sued GlaxoSmithKline on behalf of two individuals and two consumer organizations, Health Care For All and Wisconsin Citizen Action. I am reasonably sure there will be other lawsuits brought against companies that have committed similar acts. The powerful pharmaceutical industry must be brought under control and made to obey the law. So long as the federal government refuses to do its regulatory job properly and effectively, citizens will have to continue using the courts to step into the breach.

#### **FORMER RITE AID CEO GETS 8 YEARS**

Martin Grass, the former chief execu-

utive of Rite Aid Corp., the number three drugstore chain in this country, has been sentenced to eight years in prison for directing an accounting fraud that prompted the company to erase \$1.6 billion in reported profit. Grass was also fined \$500,000 for conspiring to defraud investors and obstruct investigations by the federal government. The corporate executive pleaded guilty last June and helped prosecutors unravel the fraud at Rite Aid. Grass was one of six executives convicted in the case. He admitted inflating income and giving backdated severance letters, which Grass signed after resigning. The letters would have given seven employees \$23 million over 20 years.

Rite Aid had grown from 1,618 stores and \$943 million in debt in 1995 to 3,821 stores and \$4.1 billion in debt by 1999. Cooperation with federal prosecutors by Grass helped convict three other executives who once hid the truth from internal investigators at Rite Aid, the Securities and Exchange Commission, and the U.S. Justice Department. After the sentencing, the SEC settled a civil fraud suit it filed against Grass, which must be approved by the trial judge. After his guilty plea, Grass, who was the fourth Rite Aid executive sentenced, also forfeited \$3 million that he had wrongfully taken.

#### **ARTHUR ANDERSEN IS STILL OUT-OF-BUSINESS**

A federal appeals court ruled against Arthur Andersen recently. You will recall the company was convicted and put out of business by a jury verdict convicting the firm of obstruction of justice in the Enron affair. The U.S. Court of Appeals for the Fifth Circuit rejected Andersen's claims that its conviction for shredding documents at the beginning of the Enron scandal was flawed. Describing the case as "one of many arising from the rubble of the Enron Corporation," U.S. Circuit Judge Patrick Higginbotham, a native of Bessemer and an honor graduate of the University of Alabama Law School, detailed in the

ruling the various reasons why the case was properly tried. Judge Higginbotham specifically upheld the trial judge's decision to allow evidence that Andersen was "a bad corporate actor," having already been sanctioned for its role in the Sunbeam and Waste Management accounting scandals. "These 'prior acts' were indisputably relevant to the question of Andersen's intent in its destruction of Enron-related documents," according to the distinguished and widely respected jurist.

#### **CHAMBERS OF COMMERCE POLITICS**

I firmly believe that no local Chamber of Commerce has any business being engaged in partisan politics. Most of them aren't and that is the way it should be. This same prohibition against partisan politics should apply on the national level. Over the past few years, the U.S. Chamber of Commerce has spent millions of dollars to elect candidates to judicial office. In my opinion, that is clearly wrong. I understand the Chamber has budgeted about \$200 million for judicial races around the U.S. this year. I have to wonder who is supplying the money and why all of a sudden the Chamber of Commerce has become a political activist. The U.S. Chamber has become nothing but a tool of those in Corporate America who are attempting to destroy the jury system and trample on the rights of American citizens. Eventually, ordinary folks will start asking where all of the Chamber's millions of **political money** is coming from. That may be sooner than later.

## **VII. PRODUCT LIABILITY UPDATE**

#### **JURY ORDERS FORD TO PAY \$368.6 MILLION IN EXPLORER LAWSUIT**

A San Diego jury has ordered Ford

Motor Co. to pay a total of \$368.6 million to a woman paralyzed in a wreck of an Explorer SUV. This is the first-ever damage award based on a finding that the popular vehicles are defective because of their rollover risk and weak roofs. The verdict in the first phase of the trial included only compensatory damages and resulted in an award of \$122.6 million. The jury considered whether to award punitive damages in the second phase of the trial. Over the years, Ford has settled hundreds of Explorer rollover claims. Some involved tire failures and some didn't. Ford always denied liability, but paid in each case. Ford had compiled a perfect record in the few cases it had elected to fight in court. The company picked cases to be tried that had good facts for Ford. It was smart enough to settle the cases with bad facts. Ford has always settled the Explorer cases where it believed juries would return substantial verdicts against the company. Companies such as Ford simply won't admit they are wrong even though they have put dangerous vehicles on the roads and highways. Without question, the Explorer had serious design problems.

The San Diego plaintiff, Benetta Buell-Wilson, 49, was paralyzed in January 2002 after she lost control of her 1997 model Explorer while trying to steer around road debris on an Interstate highway. The vehicle ran off the road and rolled over 4-1/2 times. Jurors decided in the punitive phase that Ford "knowingly and willfully" ignored stability concerns and awarded \$246 million in punitive damages. This is a case where the victim's lawyer had a good case, knew it, and wasn't afraid to hear the jurors' knock on the door after a verdict was reached. Finally, the truth on the Explorer will now be told to the public.

#### **FORD FINALLY ADMITS FAULT**

The most important thing to come out of the California case was not the amount of the verdict. Instead, the most significant and far-reaching effect

from the case will be what a Ford lawyer told the court and jury. Ford Motor Co., speaking through its defense counsel, told California jurors on June 2nd that Ford engineers were "sorry that they let the rest of the company down" and that Ford "knowingly put a defective product on the market" when it sold the Explorer. After hearing this testimony, as stated above, jurors awarded the punitive damages of \$246 million in addition to the compensatory damages, which had already been awarded. It is refreshing to know that Ford has finally told the truth about the design of the Explorer. Ford design engineers – pressured by the marketing arm of the carmaker – designed a defective vehicle. Because of a very effective advertising campaign, the Explorer has become the most popular SUV on the highways today. Unfortunately, the vehicle has stability and handling problems when confronted with situations requiring emergency movements. Finally, Ford has admitted what we have known for a good while.

#### **FORD EXPLORER SCORES AVERAGE IN ROLLOVER TEST**

Some other interesting news was released on Ford's popular SUV last month. The Ford Explorer has posted only average scores in the government's most extensive analysis of its risk for rollover. Explorer ratings are closely watched because of the vehicle's tremendous popularity and troubled history in rollover crashes as well as a greater propensity of SUVs to roll. Dr. Jeffrey Runge, who heads up the National Highway Traffic Safety Administration (NHTSA), has made reducing SUV rollover deaths a priority. Last month, the agency released long-delayed data on new rollover risk tests for the most popular Explorer models, showing they performed overall about the same as other vehicles in their class. Explorer models in recent years have been redesigned with a lower center of gravity and other changes to reduce rollover. The four-

wheel and front-wheel drive Explorer, both four-door vehicles, scored a "three" in NHTSA's five-star rating system in which "five" is the best. A three-star rating means rollover risk is between 20 and 30%. The front-wheel-drive vehicle earned an average rating even though it tipped on two wheels during the government's handling test.

#### **A LOOK AT THE SUV ROLLOVER PROBLEM**

SUVs represent about a quarter of vehicles sold in the United States. Studies have shown them to be far more likely than cars to be involved in fatal rollovers. Rollovers represent about 3% of crashes, but about a third of deaths in passenger vehicles. SUVs are considered more rollover prone because of their high center of gravity. Consumer and safety groups, which have long targeted SUVs as unsafe, are asking the government to require tougher design standards. As mentioned in another section, congressional lawmakers are close to starting negotiations on a final version of long-term highway legislation that could mandate SUV safety changes. Some consumer groups believe the new rollover rating system is flawed. David Pittle, a former regulator and senior vice-president for technical operations at Consumers Union, which publishes *Consumer Reports*, says, "When a vehicle tips up on two wheels during the rollover testing program, that should drop its score. But that doesn't currently happen. We believe tipping up is a serious performance consideration." Mr. Pittle agrees that the rating system is "flawed."

As was mentioned above, the rear-wheel-drive version of the Ford Explorer, tipped up on two wheels during a rollover test performed by the government. The government said three other popular SUVs tipped during tests: the Chevrolet Tahoe and the GMC Yukon, both by General Motors, as well as the rear-wheel-drive version of the Mercury Mountaineer, also made by Ford. The extended cab version of a pickup truck made by Toyota, the

Tacoma, also tipped up on two wheels. The results underscore that sport utility vehicles and pickup trucks are not as safe as many consumers believe because they ride higher from the ground than passenger cars do. SUVs and pickup trucks have higher fatality rates for their occupants than passenger cars, and substantially higher death rates than minivans. The problem shows no sign of going away. The version of the Explorer tested by the government was the 2004 model.

### **MORE ON NHTSA'S TESTING**

Earlier this year, the National Highway Traffic Safety Administration started its first rollover tests on a track. Previously, the agency used a mathematical calculation, factoring in a vehicle's specifications, to gauge rollover risk. But Congress in 2000 ordered regulators to develop track tests after nearly 300 rollover deaths in Explorers equipped with Firestone tires in the late 1990s. Results of the new tests started coming out in February. The latest batch of results covers 17 passenger cars, 6 SUVs, 3 pickup trucks and one minivan, though in some cases multiple versions of the same vehicle were tested, creating an even larger number of scores. In others, one version of similar vehicles, like the Explorer and Mountaineer, was tested.

None of the passenger cars received less than four of five stars in the government ratings, indicating a 10 to 20% chance of a rollover during a single-vehicle crash. On the positive side for Ford, the RX-8 from the company's Mazda affiliate was the only one of 27 vehicles tested to receive the government's highest rollover rating of five stars, indicating a less than 10% rollover risk. By contrast, at least one version of four of the six SUVs tested tipped up on two wheels; both versions of the Chevrolet Tahoe and GMC Yukon did so. The Dodge Durango and the Honda Pilot did not. As you know, Dodge is a unit of Daimler-Chrysler.

Consumer groups have been

sharply critical of the government's new testing because it has inflated grades for some vehicles; even the Tacoma that tipped up on two wheels received four of five stars on the test, a finding that baffled some experts. David Pittle of Consumer's Union, the publisher of Consumer Reports, stated: "How can the Tacoma tip up and get four stars? In our view a vehicle that tips up in that test is failing that test and we will never recommend it." The four-wheel-drive Explorer, which outsells the rear-wheel-drive version two-to-one, did not tip up. Adding four-wheel drive can improve stability by adding weight below a vehicle's center of gravity.

Consumer groups argue that rollovers need to be addressed as a design problem and are urging the government to make vehicles meet a minimum rollover performance standard. Senator John McCain (R-AZ) has proposed such a change in the bill now before Congress. In the new tests, vehicles are driven through as many as 10 fishhook maneuvers, a jarring series of turns intended to replicate what happens when drivers drift off the road and then try to overcompensate. The tests are conducted at speeds ranging from 35 to 50 miles an hour. Vehicles are outfitted with equipment to prevent an actual rollover, and testing is halted as soon as a vehicle tips on two wheels.

### **FORD FINALLY PAYS IN 1995 KENTUCKY CRASH**

Ford Motor Co. has paid \$37.5 million in a case arising from the deadly 1995 crash of a 15-passenger van. The additional amount was created by interest and delayed damage penalties on the \$20 million verdict issued by a Scott County jury in 1999. In late May, the Kentucky Supreme Court refused to hear an appeal brought by Ford. That decision let stand a 2003 state appeals court ruling that upheld the original verdict against the carmaker. In August 1995, 15 adults and children in a Ford van were headed to a festival at the Kentucky Horse Park. A car

sideswiped the van near the park, and the van slid off the highway and rolled three and a half times. Three persons died in the wreck, including a coach and two teenagers.

Families sued Ford, the Pony Clubs and the driver of the car that hit the van. The driver's insurance company and the Pony Clubs settled out of court. The coach's family settled with Ford prior to trial. The plaintiffs argued that the van had design flaws that made it prone to rolling over. Ford first successfully appealed the 1999 verdict. In 2001, the appeals court ordered a new trial on a jury-selection issue. But the state Supreme Court reversed that appellate decision and sent the case back to the Court of Appeals to be heard again. Last year, on the second time through, the appellate court disagreed with Ford and upheld the jury verdict. On April 15, the state Supreme Court declined to hear Ford's appeal. On April 30, Ford made two payments of approximately \$12.5 million each to the estates of two of the children. The company paid about \$11.3 million to the young girl who lost her arm, and about \$1 million to the van's driver who was injured.

As we have repeatedly reported, despite warnings from the National Highway Transportation Safety Association, 15-passenger vans remain popular with athletics teams and church groups. Ford continues to claim that rollovers for 15-passenger vans are rare. The company line is that other factors, such as inexperienced drivers, excessive speed and unbelted occupants, lead to serious injuries or fatalities. I know for a fact that the 15-passenger vans are unsafe and have a propensity to roll over. The more people and baggage put in one of these vans – because of the already high center of gravity, the more dangerous the vehicles become.

### **FORD SETTLES ANOTHER TRAGIC CASE**

The family of a Dallas police officer, who burned to death in October 2002 after his Ford Crown Victoria police car

exploded in a rear-end crash, has reached a settlement with Ford Motor Co. Ford will pay the family of Officer Patrick Metzler an amount, confidential at Ford's request. The mother of the victim, who has another son and daughter-in-law who are police officers in Colorado, told the *Dallas Morning News* that what brings her peace is the fact that the City of Dallas and her lawyers "are trying to make the cars safer. It shows they really care." Officer Metzler, an eight-year Dallas police veteran, died while working traffic control in an overnight freeway construction zone. A 1994 Jeep Wrangler struck the Crown Victoria from behind, causing the vehicle's fuel tank to burst into flames. Officer Metzler died in the fire.

At least 18 police officers in the United States have died in rear-end crashes. Ford says that the cars – used by more than three-quarters of the nation's police agencies – meet federal safety standards and that no design can completely prevent a fuel fire in a high-speed freeway crash. Since Officer Metzler's death, the City of Dallas has demanded that Ford redesign the Crown Victoria fuel tank system. The City paid about \$271,000 to retrofit its police department's 775-car fleet with fire-resistant panels on the tanks. Ford has to know it has a major problem with the design of the fuel tanks for the Crown Victoria. Several cases against Ford are pending, involving officers killed in Crown Victorias in Arizona, Florida, Missouri and New York. Many cities are not buying any new Crown Victoria cruisers and I can certainly understand that decision. Ford should recall all of the vehicles that are currently on the highways and should redesign the fuel tank system.

#### **GOVERNMENT ISSUES NEW WARNING ON 15-PASSENGER VANS**

The National Highway Traffic Safety Administration has issued a new safety warning on 15-passenger vans. The regulatory agency said that with every seat filled, a 15-seat van is five

times as likely to roll over as a van containing just the driver. Concerns have been raised by safety advocates for years about the safety of 15-seat passenger vans. The new warning shows far greater risks than previous government research suggested. It is well known in the industry that many van passengers don't wear seatbelts, which leads to greater numbers of fatalities. NHTSA found that vans have a greater chance of rolling over on curvy roads or when their speed exceeds 50 miles per hour. This is the third time NHTSA has issued a warning about the rollover dangers of 15-seat vans. However, the agency hasn't required manufacturers to significantly change the design of the vehicles to make them safer.

A provision in the highway bill currently being considered in Congress, if passed and signed into law, would require NHTSA to toughen stability standards for 15-seat vans. So far, NHTSA has relied on safety warnings, rather than tougher safety standards, and that makes no sense. Currently, 15-seat van crashes kill about 100 people a year. From 1990 to 2002, more than 1,500 15-seat vans were involved in fatal crashes, resulting in the deaths of more than 1,100 people. Almost 350 of those accidents involved rollovers.

NHTSA has focused on warning universities, camps and church groups about "the dangers of fully loading these things and then putting an inexperienced driver behind the wheel." States don't require special training for drivers of 15-seat vans. Nor are occupants in the back seats required to wear seatbelts. The message from NHTSA should have been, these vans are too dangerous and should be taken off the highways of this country. But at least NHTSA has taken some action. The strong warnings are a step in the right direction, but that is not enough.

Both Ford Motor Co. and General Motors Corp. have recently agreed to put electronic stability control on their 15-passenger vans. GM also agreed to put lap-shoulder belts in its vans. Those moves followed van-safety rec-

ommendations issued by the National Transportation Safety Board. Interestingly, GM and Ford are among the last makers of 15-seat passenger vans. Currently, there are about a half-million 15-seat passenger vans on U.S. roads.

One of the report's principal findings was that large vans handle similarly to large sport utility vehicles when lightly loaded. But when filled with passengers, or driven above 50 miles an hour, the vehicles become substantially more unstable than SUVs or pickup trucks. Large vans are five times more likely to roll over when filled than when only the driver is in the vehicle, the report said. Over all, large vans have a significantly higher risk of being involved in a fatal rollover or another single-vehicle accident than SUVs or pickup trucks, though the higher number of occupants increases the chance of someone dying, the report said. Despite being more prone to rollovers than cars, large vans, as well as large SUVs, are not subject to many car regulations, including minimum roof strength requirements. Joan Claybrook, the president of Public Citizen, believes the agency should make large vans comply with such rules. She also supports the bill backed by Senator John McCain that would establish a minimum rollover risk threshold for all vehicles, including large vans.

#### **GOVERNMENT ACTION AGAIN FALLS SHORT**

The National Highway Traffic Safety Administration, which you know is the only federal agency responsible for issuing auto safety safeguards, has issued rules that fall far short of what Congress mandated in improving motor vehicle safety. In 2000, after nearly 200 people died and 700 were injured in crashes caused by defective Firestone tires and Ford vehicles, Congress passed the Transportation, Recall Enhancement, Accountability and Documentation (TREAD) Act. This legislation was designed to warn the

public about vehicle defects soon after manufacturers become aware of them and help people avoid crashes by requiring new tire standards, better tire pressure monitoring systems, and better consumer information about rollover propensity. Congress ordered NHTSA to carry out its mandates and gave the agency additional funds and staff to carry out the new law. NHTSA did its job and issued the rules in a timely fashion. Unfortunately, the agency - under pressure from the auto industry and the White House Office of Management and Budget (OMB) - shortchanged the public in the substance of the rules. Many of the rules actually favored the auto industry's interests over the public. The agency, in some cases, even undermined the specific intent of the Congress. For instance, the agency declared much of the information in the early warning database to be secret, when in fact it was supposed to be public.

Congress provided clear direction in the TREAD Act, and that's the only way effective oversight of NHTSA can be assured. The following is a scorecard put together by Public Citizen that I will pass on to our readers. Public Citizen graded NHTSA's rules from "A" to "F." I think you will find the results both interesting and informative.

- Early warning database got an "F." Through mandatory disclosure of potential safety defects to both NHTSA and the public, the early warning database was supposed to help consumers educate themselves about potentially dangerous vehicles and alert the government to growing problems. Automakers were to submit information to NHTSA about vehicle defects, deaths, injuries, consumer complaints, warranty claims and more. However, NHTSA decreed that almost all the information would remain secret. This undermines the point of the act: to arm consumers with information about developing defects so they can protect themselves.

- Tire pressure monitoring system also got a failing grade. In the TREAD Act, Congress required NHTSA to develop a standard for warning systems to alert operators when a vehicle's tires are underinflated. NHTSA selected an effective system, but OMB intervened, and NHTSA instead issued a rule that would allow automakers to install an ineffective system. Public Citizen and other consumer groups sued; in August 2003, an appellate court ordered NHTSA to rewrite the rule, saying the agency had acted against congressional intent. Ten months later, NHTSA has yet to issue a revised rule.

- Dynamic rollover consumer information test did better, receiving a "C minus." After the TREAD Act, NHTSA established a star rating system and began publishing information about how rollover-prone vehicles are. But under the system, even the most rollover-prone vehicles are awarded an inflated score of at least one star, and the on-road ("dynamic") test is used to inflate scores but not downgrade them.

- Reimbursement rules barely passed with a "D." The TREAD Act required manufacturers to reimburse owners who have paid to repair a defect prior to being notified of a recall. But NHTSA established a system impossible for consumers to follow. Consumers can be reimbursed only if they apply after NHTSA opens an engineering analysis or the repair is one year prior to the date the manufacturer tells NHTSA about a defect. Of course, most consumers don't know what an engineering analysis is or how to check NHTSA's defect investigation calendar. The system is stacked against motorists. Public Citizen's petition for reconsideration remains unanswered after 18 months.

- Tire safety standards got the same poor grade, a "D." As required by

the TREAD Act, NHTSA in June 2003 issued a rule updating tire performance. However, it failed to adequately address tire strength and road hazard protection, or to establish minimum standards for aging or a tire strength test.

The question now remains, what should Congress do? Public Citizen believes the solution is to pass the safety provisions in S.1072, the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004. I totally agree and hope our lawmakers will stand up to the powerful automobile industry and act promptly. These safety provisions would establish rollover prevention and protection standards, anti-ejection standards, a standard to prevent the extensive harm from vehicle mismatch, and other crucial, long-overdue safeguards, preventing thousands of deaths and injuries annually. Clear and precise direction from Congress about the safety goals of new laws - which is included in S. 1072 - would help avoid a repeat of the disappointments of the TREAD Act. While that Act took a step toward improving crash avoidance and consumer information, the pending legislation is much more comprehensive and tackles decades of neglected priorities to improve vehicle crash safety. Between 2000, when the TREAD Act was passed, and the end of 2003, 41,462 people died in rollover crashes alone. This was more than 200 times the number of people killed by Firestone tires and Ford Explorers. I appreciate that Public Citizen provided the above information so that we could pass it on to our readers. A copy of Ms. Claybrook's testimony is at [www.citizen.org/autosafety/legislation/tea3/articles.cfm?ID=11721](http://www.citizen.org/autosafety/legislation/tea3/articles.cfm?ID=11721). It is worth your time to read it.

**CHILD CAUGHT IN TRUCK'S POWER WINDOW DIES**

In our May issue at page 16, we reported on the problems relating to

power windows in vehicles. Recently, a 3-year-old girl suffocated after her neck became caught in the power window of her parents' pickup truck. The child was reaching out the window and accidentally hit the window button with her knee or foot. Her mother was sitting next to her in the driver's seat, but was talking to her husband, who was standing outside the truck. It was unclear how long the child was stuck before her parents realized she was trapped, but it was likely a very short time. This tragic death is just another example of what happens when technology, that is both available and affordable, isn't used in designing vehicles.

As we have reported, hundreds of children have been injured or have died because of dangerous power windows in vehicles. At least seven deaths have occurred over the past few months. Most folks don't realize that power windows are powerful enough to cut a cucumber or a carrot or a grapefruit in two. More relevant is that a child in a rear seat can lose a finger or suffocate. Today, too many cars on the road have "rocker" or "toggle" switches that are too easy for children to unknowingly activate. Also, windows do not automatically reverse when encountering resistance. A child in a car, with his or her head out of the window, and a knee inadvertently pushing the switch, is a disaster in the making. The message to automobile manufacturers is clear: every single car must have installed safer switches that must be pulled up to raise the car window. Further, just as with garage doors, every car must be equipped with an "auto reverse mechanism" on all power windows.

In July 2003, a Harris poll was conducted on this power window safety hazard. In it, the poll discovered that 75% of Americans were unaware of the dangers power windows pose to children. 84% of Americans believed automakers should take the known steps to install safer power windows. 89% believed American automakers should install the same safer power windows in vehicles sold in the United

States that they do install in automobiles sold overseas. 75% of Americans agreed to pay the negligible increased costs for a car with safer power windows, which prevent accidental child injury or strangulation.

In Europe, the automobile manufacturers are required to install power window switches that must be pulled up to activate. All Asian automobile manufacturers use pull up switches. However, U.S. automakers, including General Motors, Ford Motor Company and DaimlerChrysler, continue to install the older "rocker" or "toggle" switches. While GM, Chrysler and Ford are phasing in new pull-up switches over the next several years, these manufacturers will not commit to put the safer switches in all future vehicles. It is unfortunate that automobile manufacturers have decided based on the nominal cost that the safety of our children is unimportant to them.

The automobile industry can prevent children from being killed or injured by designing and installing safer power windows and power window switches. Unfortunately, they choose not to do so. Instead of fixing the problem, they spend millions to settle lawsuits. Many families who have lost a young child because of the power window hazard have endorsed the efforts of KIDS AND CARS to promote the "safe power window" campaign. In this campaign, the group is asking Ford, General Motors and DaimlerChrysler to install safer power window switches in all new models, warn parents of the power window dangers and immediately begin planning for the installation of the auto-reverse features that stop a rising window when an obstruction is detected.

#### **EXPLODING CELL PHONES**

When most consumers think of defective products, automobiles, tires and industrial machinery come to mind. Consumers must now add the commonly-used cell phone to the list. News outlets have been flooded within the last

year or so with reports of cell phones either exploding or venting their contents and causing serious bodily injuries. In 1994, 16 million Americans subscribed to cellular phone services. That number increased to 110 million in 2001. It is estimated that by the year 2005, worldwide cellular phone subscribership will reach 1.2 billion. Given the surge in cell phone usage, these reports cannot be taken lightly.

The majority of the defective cell phones are manufactured by Nokia. There have been numerous documented incidents of injuries caused by exploding cell phones. After being put on notice, Nokia's official response blamed the explosions on counterfeit batteries. Counterfeit batteries are cell phone batteries manufactured by other entities that are cheaper and often indistinguishable from the batteries provided by the cell phone manufacturer. While the vast majority of the exploding cell phone incidents involved counterfeit batteries, there is a least one documented cell phone explosion involving a Nokia manufactured battery. Nokia is not alone in this cell phone exploding batteries phenomenon. The U.S. Consumer Product Safety Commission recently issued its first-ever recall of a cell phone battery. The recall affected Kyocera Wireless phones sold for service on the Verizon Wireless network. To date, consumers have reported just one explosion incident with Kyocera cell phones. Most of the reported incidents involved the batteries overheating to a point where it vents superheated gases to avoid an explosion. The venting of the contents of the batteries has caused numerous burn injuries.

The principles of safe and responsible design engineering apply to cell phones and cell phone batteries just as much as they apply to automobiles, tires and industrial machinery. Consumers should be wary. Cell phone explosions can cause serious bodily injury or even death. Imagine the implications of a cell phone exploding while someone is talking and driving an automobile. Such an

event could put the user, passengers in the vehicle, occupants of other vehicles and walking pedestrians in danger. Cell phones have become as commonplace and as indispensable as the automobile. Defective designed automobiles have taken the lives of countless innocent victims. I hope cell phone manufacturers will take the necessary safety precautions to prevent to the cell phone from following the same path.

### **CHRYSLER'S FAILURE TO RECALL UNSAFE HATCHBACK LATCHES**

Our firm represents a little girl who was ejected from a Dodge Shadow during a right-side impact crash. In this case, the hatchback door latch failed during the accident, allowing it to open. The child, who was four years old at the time of the accident, was ejected through the hatchback opening as the vehicle spun around after colliding with the striking vehicle. She is now quadriplegic and will never walk again. Neither will this child be able to use her arms and hands. She can't breathe on her own and is dependent upon a ventilator to help her breathe. Tragically, this manufacturer knew the failing latch was unsafe long before the accident occurred. The company had even recalled 4,000,000 of the same latches installed in its minivans, but not the ones installed in other hatchback model vehicles containing the same latch. All were defective and unsafe and the company knew it.

As many of you know, automobile manufacturers have a responsibility to keep vehicle occupants as safe as is practical in the event of an accident. For years, the data from the National Highway Traffic Safety Administration has documented that occupant ejections from a crash vehicle during an accident enhance significantly the chance for serious or fatal injuries occurring to the occupant. As a result, for decades the focus has been to contain drivers and passengers inside the *protected occupant space* of the vehicle during a crash event. Two of the main

ways manufacturers have approached this problem is to provide seatbelt restraint systems and otherwise minimize ejection of unbelted occupants by making certain that vehicle doors, hatchbacks and lift gates stay closed during accidents. One key factor in keeping hatchbacks closed is to equip the vehicle with a strong, safe latch that will perform well in accidents.

The Federal government adopted a regulation, Federal Motor Vehicle Safety Standard 206, which applies currently to all vehicle doors (including rear hatchbacks). However, the application of FMVSS 206 did not always apply to rear doors. The standard has always expressly stated its purpose was to minimize occupant ejections, and when initially adopted there was no such thing as a hatchback vehicle. For over a decade, the absence of government regulation allowed manufacturers to set their own standards for performance of rear hatchback latches. Chrysler's insensitivity to potential occupant ejections through the rear portal of hatchbacks and minivans has left hundreds seriously and fatally injured. An inadequate service action or recall adopted by DaimlerChrysler for the minivan and not other hatchback models leaves hundreds of consumers still at risk.

Chrysler Corporation (now DaimlerChrysler) introduced the first minivan with a lift gate (or hatchback) in 1984. From 1984 through 1995, this minivan model contained a rear lift gate latch that failed to withstand foreseeable loads and inertial forces during an accident. Chrysler's design and development standard established very low load requirements and *no* inertial load requirements for production lift gate and hatchback latches. The consequence to the public was deadly serious before NHTSA's Office of Defect Investigation got involved. Between 1984 and 1995, it is estimated that the vehicle population for the Dodge Caravan, Plymouth Voyager, and Chrysler Town and Country minivans was 4,372,000 vehicles. The Office of Defects Investigation started an investi-

gation on January 31, 1994, after receiving 207 complaints. Of those complaints, 134 involved ejections, with 37 fatalities and 98 serious injuries. The investigation involved the inability of the lift gate latch to remain closed during motor vehicle crashes.

Documents from the Office of Defects Investigation indicate that "lift gate latches in the subject vehicles have failed in low- and moderate-speed impacts, resulting in occupant ejections, injuries, and fatalities. There are two failure modes associated with latch failure: fork bolt-detent lever bypass, and inertial unlatches. NHTSA analyses of Chrysler and peer minivans took the form of static and dynamic crash testing, engineering evaluations, complaint and field analyses, and real world data analyses. A technical report discussing these analyses can be found in the Engineering Analysis Technical Report in the public viewing file."

As the ODI investigation was continuing, it became apparent that NHTSA was moving toward a finding of a safety defect. As a result of this continuing investigation, NHTSA reported: "Chrysler has advised NHTSA that it will conduct a campaign to replace the latches on all the subject vehicles. The Chrysler campaign will consist of notification letters to all owners; free replacement of all latches with stronger, safer latches regardless of the age of the minivan; national advertising to promote customer awareness of the campaign; quarterly reports regarding campaign completion rate; as well as additional measures to insure a high completion rate, above and beyond the action that normally would be taken in a formal safety recall. These include follow-up written and telephonic notifications to owners who do not bring their vehicles in for corrective action."

NHTSA, in accepting Chrysler's recall, acknowledged that the crash performance of the latches on these minivans raised serious safety concerns and accepted that the campaign announced by Chrysler addressed its concerns. NHTSA specifically relied on Chrysler to increase the strength of the

lift gate latches and decrease the potential for inertial unlatching, thereby reducing the risk of crash-related openings of the lift gate and possible occupant ejection through the lift gate opening. The NHTSA acceptance of Chrysler's solution emphasized that owners of Chrysler minivans would get a stronger, safer latch free of charge at the earliest possible time, without the need for further technical investigation and what was described as complex time-consuming litigation with an uncertain outcome. Therefore, NHTSA closed its Office of Defects Investigation. However, through ongoing litigation in our firm, we have learned that the Chrysler minivan latch that was determined to be unsafe for consumers also was used in a number of other vehicle models comprised of hatchbacks or lift gates prone to experience the exact same failure modes with a high risk for occupant ejections during a crash.

Two such vehicles that contain the same latch on their hatchback doors are the Dodge Shadow and Daytona. During Chrysler's defense of the minivan lift gate latch with NHTSA Office of Defects Investigation, it submitted statistical accident data analyzed from the NASS and FARS government-maintained databases. Their own statistical analysis actually showed that hatchback model vehicles had nearly a three to four times greater unintended hatchback opening during a tow-away crash than did the minivan that was the subject of the ODI inquiry.

Thus, Chrysler knew that the same latch, which was failing to keep the lift gate closed during minivan real world crashes, was experiencing similar failures during crashes involving hatchback models in the field. In fact, Chrysler produced further documentation that indicated that the Dodge Shadow was experiencing a higher incidence of openings during crashes than did the minivan under investigation. The designer of the subject latch was recently questioned under oath during a corporate representative deposition. He testified that the Dodge

Shadow latch was substantially the same as the defective minivan latch of the 1984-1995 eras. He referred to it as "family of latches."

The initial use of this latch family was designed for keeping trunk lids closed when the only risk of an unintended opening during a crash was the ejection of some luggage or cargo. Chrysler never bothered to increase the strength, durability, and performance of the trunk lid latch before installing it in hatchback vehicles, when instead of cargo, it was children and adult rear seat occupants that needed protection from ejection. They simply stuck a "trunk lid latch" in the hatchback and lift gate doors without sufficient safety design changes that would assure or minimize the opening of these potential deadly ejection points during a crash.

Simply put, Chrysler knew that a high percentage of the population in America was not wearing safety belts. Chrysler knew that the importance of keeping doors shut during an accident was to minimize or prevent occupant ejections and resulting deaths and serious injury. Sadly, even with Chrysler submitting data to NHTSA showing that the rate of failure of the hatchback models utilizing the substantially similar latch as the minivan had greater incidence of openings, the company failed to recall the latches. The result has been a continuing exposure to ejections of occupants resulting in serious injuries and the loss of life.

## VIII. MASS TORTS UPDATE

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### ***POLITICS AT THE FDA HURTS FOLKS***

President Bush has appointed in excess of 100 high level officials to government positions overseeing industries that they once represented as lobbyists, lawyers or company advo-

cates. Bush's political supporters send their folks to the regulatory agencies and that just doesn't seem right. In the May issue, we mentioned Daniel E. Troy was appointed Chief Legal Counsel at the Food and Drug Administration. We pointed out that Mr. Troy came from a law firm whose main clients came from the pharmaceutical industry. Troy's record since his appointment has caused great concern in the ranks of consumer advocacy groups. The FDA is "taking sides in private litigation," says Thomas McGarity, a University of Texas Law School professor and president of the Center for Progressive Regulation, which supports government regulation on health and safety issues. Many individuals see Troy's intervention for drug companies as dangerous to the public.

The question has been asked: Is Daniel Troy working for the benefit of consumers, or is he still working for his former clients who have contributed many millions of dollars to President Bush? Daniel Troy is only one example of over 100 other appointments that are similar in their effect on government. With the examples over the last few years with Phen-Fen, Rezulin and other medications being pulled off the market and the discovery that the drug companies hid information from the FDA, there is no question that private litigation has and will deter that type of behavior. The FDA becoming a partner with the pharmaceutical industry will do nothing but make the drug companies more comfortable that they can get away with anything. That will not be good for consumers. These appointments are very disturbing from the standpoint of a government based on "by and for the people" being run like it is "by and for corporations." The American public is fed up with Corporate America running roughshod over their rights and hurting them badly in the process. When the fox is in charge of the henhouse, the hens generally suffer and eventually lose their battles!

## **ANOTHER BLOW FOR CONSUMERS BY THE NEW YORK ATTORNEY GENERAL**

I have always believed that drug makers should disclose all studies, good or bad that shed light on the safety of medicines they sell. I also knew they weren't doing this. In early June, New York State Attorney General Eliot Spitzer charged GlaxoSmithKline with concealing data about the safety of its antidepressant Paxil. The claims involve consumer fraud with allegations that the company had withheld negative information and misrepresented data about the efficacy and safety of prescribing the antidepressant drug Paxil to children. This suit will bring to the public's attention that a drug maker's failure to publicize negative safety data is bad and may constitute fraud. The industry's practice of concealment means that data given to the FDA by drug manufacturers are never passed on to doctors or made available to them. That has to be disturbing to the folks who are taking medications.

According to the lawsuit, Glaxo's revenue for Paxil prescriptions in children and adolescents totaled \$55 million in 2002. The return of all profits from Paxil obtained by Glaxo as a result of the conduct alleged in the lawsuit is being sought. As you may know, Public Citizen has filed several suits over whether safety studies are confidential business information. The manufacturers won a round in 1999, when a court ruled that safety data may remain confidential if attached to an abandoned drug candidate. With a product already on the market, such confidentiality is even less justifiable. I am hopeful the New York lawsuit will bring about some needed changes.

The civil lawsuit, filed in New York State Supreme Court, says that starting in 1998, Glaxo suppressed the results of four studies that did not find the drug effective in treating children and adolescents and that suggested a possible increased risk of suicidal thinking and acts. Attorney General Eliot Spitzer stated when filing the suit: "By concealing critically important scientific

studies on Paxil, GlaxoSmithKline impaired doctors' ability to make the appropriate prescribing decision for their patients and may have jeopardized their health and safety." Paxil has been approved by the Food and Drug Administration for the treatment of depression in adults.

GlaxoSmithKline now says it will post the results of all of its drug trials on the Web. The move comes as a direct result of the New York lawsuit. The American Medical Association had passed a resolution calling for a comprehensive, government-run registry for all drug study results so unfavorable results aren't buried. While this move by Glaxo was to stop the New York lawsuit, it won't have that effect in my opinion.

### **A HISTORY ON PAXIL**

Doctors have professional discretion to prescribe Paxil for treatment in children, a so-called "off label" use. I am told that doctors routinely recommend antidepressants for children suffering from depression and other psychological disorders. In April, a European Union advisory panel recommended that Glaxo strengthen warnings about severe withdrawal symptoms when patients stop taking Paxil. European Union regulators also recommended that Paxil not be given to children because clinical trials had found the drug to be associated with increased risk of suicidal behavior and hostility. In this country, the Food and Drug Administration has recommended caution in prescribing Paxil in children and adolescents for the treatment of major depressive disorder, and is currently conducting an analysis of the data related to the use of Paxil in children and adolescents and the possibility of increased suicidal thoughts. All of this is why the New York lawsuit is critically important. When the FDA doesn't do its job, the courts are the only answer.

## **METABOLIFE LOSES SECOND SUIT, MUST PAY \$7.46 MILLION**

Metabolife International has been ordered by a Texas jury to pay \$7.46 million to a lady who suffered a stroke after taking the company's ephedra diet pill. Jurors found that Metabolife was responsible for the stroke that the 35-year-old Texas plaintiff suffered in 2002. The damages award was broken down as follows: \$2.4 million compensatory and \$5 million punitive. That verdict is at least the second jury award against the San Diego dietary supplement company involving Metabolife 356, which was once the company's flagship product. As you know, it has now been discontinued. In 2002, a jury in Alabama awarded \$4.1 million in damages to four people who suffered heart attacks or strokes after taking Metabolife 356. That case is now on appeal.

As we have reported, federal regulators banned the use of ephedra supplement products in April, after the herbal stimulant was linked to 155 deaths and numerous serious injuries. We know that Metabolife – or its insurers – have paid at least \$5 million to settle 29 other cases. The Texas lawsuit is one of the first to be tried since the U.S. Food and Drug Administration banned ephedra and is one of a mounting number of cases pending nationwide. An estimated 12 million people used Metabolife in 1999, and the company's revenues at one time exceeded \$1 billion.

During the seven-day trial in Texas, it was shown that Metabolife tried to conceal thousands of complaints about the adverse reactions to its product. Metabolife had sent letters to state and federal regulatory agencies stating that the product had no adverse effects and that the company had comprehensive safety monitoring procedures. The company later admitted it had received reports of 15,000 adverse events and that it lacked safety monitoring procedures. Several top Metabolife officials could not testify in the trial because they had been under

investigation for two years and were asserting their Fifth Amendment right against self-incrimination.

The FDA announced in 2002 that it had asked the U.S. Justice Department to investigate allegations that Metabolife had made false statements about the existence of adverse event reports. Evidence was presented in the Texas trial that at least one top company official was indicted in 1989 on charges of manufacturing and distributing methamphetamine, an illegal drug also known as speed. I find this most interesting since some have described Metabolife containing ephedra, a stimulant, as a legal form of speed.

### **CRESTOR APPEARS TO BE UNSAFE**

Despite eleven new cases of rhabdomyolysis reported to the Food and Drug Administration since February, the cholesterol drug Rosuvastatin remains on the market. AstraZeneca markets Rosuvastatin as Crestor. Rhabdomyolysis is an adverse reaction caused by the breakdown of muscle tissue that can ultimately lead to kidney failure. We have learned that Crestor had previously been linked to 14 known cases, seven of which were prescribed a 10mg dosage. Of the new cases, nine required hospitalization and no less than five were under age 50. One of the earlier known cases included the death of a 39-year-old American woman who was prescribed a 20mg dose.

Recently four incidents of rhabdomyolysis have been reported in Britain. AstraZeneca wrote doctors in Great Britain encouraging them to start patients on a 10mg dose and increase the dosage to 20-40mg as required, because of a concern in relation to rhabdomyolysis. According to a company spokesperson, all of the cases occurred after the patients were started on a higher dosage than recommended. The company also maintains that all reports of adverse incidents have been comparable with the side effect profiles of other statins. Prior to its

approval last August, seven cases of rhabdomyolysis had occurred during pre-approval studies among patients taking an 80mg dosage.

According to an FDA spokesman, the agency is monitoring Crestor closely. The FDA has advised that patients be started on doses of 5 to 10mg and should never be prescribed a dosage beyond 40mg. The FDA claims that the information they have reviewed to date has not shown an alarming pattern. Apparently, they will continue to watch the situation. In the meantime, AstraZeneca has launched a full-scale media promotion of Crestor directly aimed toward consumers. As previously reported, another statin, Baycol, manufactured by Bayer, was pulled from the market in August of 2001 after at least 31 cases of fatal rhabdomyolysis were reported. Public Citizen has reiterated its concerns relating to Crestor to the FDA, calling for the immediate removal of this drug from the market. Dr. Wolfe petitioned the FDA stating, Crestor "is a doomed drug... We renew our effort to get the FDA to ban this uniquely dangerous drug before it does any further damage." I hope the FDA will respond to this timely request and pull Crestor from the market.

### **BAXTER WARNED OVER ADVATE PROMOTIONS**

Baxter International Inc. has recently pulled some promotional literature for Advate, its new blood-clotting drug. The company had received a warning from the U.S. Food and Drug Administration. The FDA was concerned that the company had not provided appropriate descriptions of side effects or sufficient supporting data for its statements. Baxter Healthcare Corp. is the medical products company's main operating subsidiary in this country. Advate was launched in the United States last August. The company cut prices for the hemophilia treatment this spring. Many believe this was a result of industry pricing pressures brought about by stiff competition.

The FDA raised concerns about select materials sent by Baxter's sales representatives to medical doctors. The concerns dealt with the brochures' references to adverse events and supporting materials. The FDA does not typically comment on warning letters. You can review the warning letter on the FDA's website, [www.FDA.gov](http://www.FDA.gov). Baxter must submit a written response to the FDA and outline its remedial plan.

### **MERCK SINKS LOWER TO PROTECT VIOXX**

Over the last several years we have reported on many drug companies taking seemingly questionable avenues to protect a drug's marketability, and to distance the drug from any negative information. Recently, the *Wall Street Journal* reported on another such event concerning the popular prescription drug Vioxx. For the last several years Merck has been having to defend itself against repeated claims – in both the legal arena and the medical literature – alleging that Vioxx causes an increased risk of cardiovascular events, primarily heart attacks. A recent study conducted by well-respected physicians and epidemiologists at Harvard Medical School concluded that there in fact is an association between Vioxx and an increased risk of heart attack.

The pharmaceutical industry needs to be brought into check by the federal government. The Federal Drug Administration is more of an extension of the industry than an effective regulator. As a result, consumers find themselves paying far too much for their prescription drugs and wondering at the same time whether the drugs they are taking are really safe. The retail pharmacist is caught in the middle of an ugly picture. The manufacturers are making record profits, the consumers are paying way too much for their medicines, and the retailers are making small profits and are the folks on the front lines along with the doctors.

## **DANGERS OF LOTRONEX STILL EXIST**

The reintroduction on the drug Lotronex, used to treat irritable bowel syndrome, continues to endanger patients, and the drug should be taken off the market again. Public Citizen Health Research Group Director Dr. Sidney Wolfe has led the fight for consumers on the risks connected to Lotronex. A recent analysis conducted by the drug's manufacturer, GlaxoSmith-Kline, and the FDA has failed to provide sufficient evidence to conclude the drug should remain on the market. Lotronex, approved in February 2000 to treat irritable bowel syndrome (IBS), was withdrawn from the market in November 2000 because of dangerous adverse effects experienced by patients taking it. In August 2000, Public Citizen petitioned the FDA to remove the drug because of evidence it caused ischemic colitis, a life-threatening condition in which bowel tissue dies as a result of a lack of blood flow to the colon.

The drug, also known as alosetron, was reintroduced in November 2002 under the guidelines that physicians who want to prescribe the drug must state that they are qualified to diagnose IBS and manage ischemic colitis and that they understand the risks associated with Lotronex. But, the guidelines did not include a way to verify the doctors' qualifications or check to ensure patients have been informed of the drug's risks. The guidelines also assume that all prescribing doctors report adverse reactions. Dr. Wolfe told the FDA in 2002 that the reintroduction of Lotronex into the market, even with the restrictions proposed by Glaxo, would be a serious public health mistake. In recent testimony before an FDA committee, Dr. Wolfe stated:

*It is time to end this failed effort to resuscitate marketing and to take alosetron off the market again. ... Given the marginal evidence of effectiveness and the continuing serious risks of the drug, Glaxo's suggestion to relax the restric-*

*tions on availability of alosetron to increase its use is nothing but ghoulish.*

## **COURT EASES PATH FOR FEN-PHEN PLAINTIFFS**

A federal appeals court has made it easier for people suing Wyeth to present evidence suggesting they were harmed by the two recalled drugs in the company's "fen-phen" diet cocktail. The U.S. Court of Appeals for the Third Circuit in Philadelphia invalidated lower court rulings limiting evidence of potential heart valve damage that thousands of former fen-phen users could present in lawsuits against the drug maker. The decision could make it easier to seek compensation for heart valve damage and other problems blamed on the drugs.

Wyeth has taken \$16.6 billion in charges to cover liability to the 6 million Americans who took fen-phen before the two drugs used in it were recalled in 1997. The company reached a national settlement in 1999 under which past users of the drugs, Pondimin and Redux, were entitled to differing levels of compensation, depending largely on the seriousness of their health problems. But an estimated 50,000 patients opted out of the settlement, reserving the right to individually sue Wyeth in state courts. The appellate court ruling appears to say that more evidence can now be introduced against the company.

The appeals court said the lower court had unfairly limited plaintiffs from introducing proof they had suffered heart valve damage and had unfairly limited certain other types of evidence. The overwhelming majority of lawsuits involve accusations of heart valve damage. But, a jury verdict in Texas came in a case with another medical condition. The jury found one of the drugs in fen-phen was linked to a woman's death from a deadly lung condition. Hundreds of former fen-phen users have been diagnosed with the condition, called primary pul-

monary hypertension, but the verdict in Beaumont, Texas was the first involving those patients, none of whom are covered by the prior national settlement.

## **IX. BUSINESS LITIGATION**

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### **APPEALS COURT REINSTATES GAS PRICE-FIXING LAWSUIT**

The U.S. Court of Appeals for the Ninth Circuit has reinstated a lawsuit accusing ChevronTexaco Corp. and Shell Oil Co. of operating a price-fixing conspiracy. The suit accuses the companies' joint ventures – Motiva Enterprises and Equilon Enterprises – as being part of a plan by the oil giants to inflate fuel prices beginning in 1998 and ending as early as 2001, when Texaco sold its stake to win approval of its purchase of Chevron. The court, while noting that Texaco and Shell charged the same for gasoline after the formation of the joint ventures, has ruled that "the very purpose of the alliance was to eliminate competition in order to realize efficiency gains and gain market share."

A jury must now decide whether two competitors that agreed to charge the same for gasoline created the alliance "to restrict competition." Between September 1998 and February 1999, when crude oil was at historic lows of \$10 to \$12 per barrel, Equilon increased the Shell and Texaco brands 40 cents per gallon in Los Angeles and 30 cents in Seattle and Portland, Oregon. A U.S. District Judge had dismissed the case in 2002, which was brought by 23,000 gasoline vendors. That court ruled that a jury could not find that the companies "formed Equilon and Motiva merely to achieve an ulterior anticompetitive purpose or that the ventures are patently anticompetitive." This order was appealed to the U.S. Court of Appeals for the Ninth

Circuit. The vendors claimed that the companies fixed prices in violation of federal law. The distributors allegedly paid \$1 billion or more in excessive charges, which the vendors will seek to recoup. While the distributors passed the alleged excess costs to consumers, antitrust law allows them to recover the illegal fees. If the vendors prevail, as I understand it, consumers are not eligible for refunds.

### **FLORIDA DRIVERS SUE SHELL OVER SULFUR IN GAS**

Two Florida residents have sued Shell and Motiva Enterprises LLC, accusing the companies of violating Florida law by engaging in unfair and deceptive trade practices. The suit says the companies knew, or should have known, that gasoline with high levels of sulfur would damage vehicles. The drivers seek class action status and a court order to force the companies to inspect affected vehicles for up to a year and cover the cost of any repairs. The suit alleges that fuel gauges on their cars were damaged by high-sulfur gasoline supplied Shell Oil Co. and its refiner.

About 400 Shell and Texaco stations, including 300 in south Florida, were affected by high levels of sulfur in gas supplied by Motiva. A small number of stations with other brand names also may have received the bad gas because Shell and Motiva have exchange agreements with other suppliers. Shell officials have said the sulfur-tainted fuel can corrode silver sensors in fuel gauges. Repairs can cost from \$300 to \$600 or more.

### **ANALYSIS OF THE WORLDCom CLASS ACTION SETTLEMENT**

The first securities class action was filed against WorldCom on April 30, 2002. Shortly thereafter WorldCom admitted to inflating the earnings for 2001 and first quarter 2002 by about \$3.8 billion. As the WorldCom scandal

developed, it was revealed that WorldCom had overstated previous years earnings by more than \$10 billion. In 2002 WorldCom filed for bankruptcy. Multiple WorldCom class actions have been filed. These were consolidated before the Honorable Denise C. Cote in the United States District Court for the Southern District of New York. Comptroller Alan G. Hevesi, sole Trustee of the New York State Common Retirement Fund, was appointed lead plaintiff to prosecute the class action on behalf of the class members.

On October 11, 2002 Hevesi filed a consolidated class action complaint. That complaint alleged that the Citigroup Inc, through its wholly owned subsidiary, Travelers Insurance Company, had made hundreds of millions of dollars in secret loans to Bernard J. Ebbers, WorldCom's CEO. The complaint also alleged that analyst Jack Grubman had deliberately written his research reports to lead investors to believe that WorldCom was in much better financial condition that it really was. The complaint also states claims against WorldCom's Board of Directors, its former auditors, Arthur Andersen LLP, the Citigroup defendants and 11 other underwriters of WorldCom's two huge bond offerings in May 2000 and May 2001.

Last month we reported on the \$2.65 billion settlement in the WorldCom class action litigation. That settlement was by a group referred to as the Citigroup defendants, which includes Citigroup, Inc., Citigroup Global Markets, Inc. (formerly known as Salomon Smith Barney, Inc.), Salomon Brothers International Limited and former securities analyst Jack Grubman. Many are hailing this settlement as groundbreaking in securities litigation because of its size and the fact that the settlement does not conclude the litigation. However, an analysis of the numbers involved gives a better picture of the significance of this settlement.

The class action complaint alleges that during the time period relevant to

WorldCom's fraudulent activity, approximately 2.96 billion shares of WorldCom stock were issued and outstanding. In addition, approximately \$17 billion of bond debt was issued through WorldCom's underwriters in May 2000 and 2001. The settlement is to be divided between the two types of injured investor: 55% or \$1.4575 billion to settle claims of bond holders, and 45% or \$1.1925 billion to shareholders who invested between April 29, 1999 and June 25, 2002. The net effect is that \$1.1925 billion dollars are going to be divided between about 3 billion shares.

### **WHITE-COLLAR OVERTIME SUITS ARE INCREASING**

Lawsuits alleging that U.S. companies failed to pay white-collar workers required overtime have tripled since 1997, according to a report by the Administrative Office of the U.S. Courts, which tracks federal litigation. White-collar workers filed 102 overtime class action suits in 2003, compared with 31 in 1997. Managers with few managerial duties, who had been told they were ineligible for time-and-a-half pay after 40 hours, were among the groups that sued. The misuse of manager titles and forced unpaid overtime have contributed to the litigation increase. The white-collar workforce also has benefited recently from more favorable overtime rulings by courts. The burden is on the employer in these cases to prove it did the right thing. Companies are required to keep detailed records about a worker's time and duties. We reported last month on the case involving Dollar General Corp. These managers were allowed to proceed in a class action that seeks \$100 million in overtime pay from the discount chain.

The Labor Department has drafted new rules that would guarantee overtime for salaried workers making less than \$23,660. Employees earning more than that, up to \$100,000, would get overtime unless they performed execu-

tive, administrative or professional work. The new regulations, which require congressional approval, were rejected by the Senate in May and at the time we went to the printer were being negotiated in a conference committee with members of the House.

### **HIGH COURT REJECTS APPEAL IN LIBEL CASE**

Are business executives public figures? That is a question put recently to the U.S. Supreme Court in a libel case. The High Court refused to consider the case that asked that very question. Business executives – like those in recent corporate scandals – weren't considered the type of "public figure" entitled to less privacy under the Constitution. The High Court rejected the appeal of a California newspaper, which had been ordered to pay \$2.25 million to a major stockholder in the now-defunct Santa Barbara Savings and Loan. A Beverly Hills businessman had accused the Santa Barbara News-Press of libeling him in 1988 and 1999 stories that said he was investigated by federal agencies. The victim claimed the stories improperly linked him to a former partner who was convicted of investor fraud. A lower court said that Ross was a **private figure**, who had to prove only that the newspaper acted **negligently** to receive compensatory damages. This appears to be a most significant decision by the highest court in the land.

The newspaper argued that this businessman, and other corporate leaders, should be considered **public figures** who in order to receive damages in libel lawsuits must show that journalists acted with **actual malice** in their reporting. The newspaper contended the public benefits when reporters scrutinize prominent people. The premise for the paper's contention was that business executives influence people's lives in a way that makes them more than private citizens.

The plaintiff was seeking regulatory approval to increase his stake in the sav-

ings and loan. Apparently, a reporter spent three months researching him for a profile. His case against the newspaper was tried twice in lower courts. The first time, the plaintiff was awarded \$7.5 million. That decision was thrown out, and he received a \$2.25 million judgment at a second trial in 2001. Media groups, including newspapers and television networks, said the press should be encouraged to play an active role in scrutinizing regulated industries and bringing to light the information that it learns. I tend to agree with their position. Unless the media can report on the bad guys' activities, the public will never know how bad they really are. My question now is, will the Court reach a like decision if a person such as Ken ("Kenny Boy") Lay happens to be the plaintiff in a libel case. My less-than-educated **guess** on defamation law is that they won't.

### **WEBSITE PROBLEMS**

Many companies in the consumer product or service business have come to rely on the Internet as an important means of communicating and doing business with their customers. I understand that companies in this field spend millions of dollars designing, maintaining, and upgrading their websites. It has been reported that companies with more than \$500 million in sales spend an average of \$3.9 million per year on website design and maintenance. There are a number of industries in which a great portion of overall sales are made by way of the Internet. An example would be the travel and entertainment industry. It has been reported that the Internet accounts for as much as 50% of total rentals for some rental car companies. Unfortunately, there are problems that affect companies that depend on the Internet for sales and rely heavily on their websites. Company websites should be free from ads or solicitations by competitors. If a consumer logs onto a company's website, they should not see a pop-up ad for a competitor or for a company in a related line of business

suddenly appear on the consumer's monitor. Our research indicates this sort of thing is happening today on an all-too-frequent basis.

A company operating on the Internet called Gator Corp. (now known as Claria Corp.) has been one of the culprits in this problem area. Gator designed a series of consumer-friendly software programs allowing the user to store personal information commonly used in on-line transactions. Name and address, passwords, user identification number, and credit card numbers were being stored. Gator gives programs such as "eWallet," "Precision Time," and "Date Manager," to consumers for free. When a consumer signed up for one of the programs, he or she would agree (electronically) to a contract with Gator. Under the terms of the contract, the consumer agrees to permit Gator to install an additional software program on the user's computer. In the trade, this additional software is known as "spy-ware." This software allows Gator to monitor the user's Internet activity. Gator software was labeled as "OfferCompanion." It was programmed to detect the consumer's visit to popular websites.

The second component of Gator's scheme involved the solicitation of advertisers who are interested in having their ads appear on popular websites. Gator would sign a contract with an advertiser promising to deliver the company's ads to consumers who visit the website of one or more of the company's competitors. Gator, under their contract, would deliver the advertiser's pop-up ad on the competitor's website.

## **X. INSURANCE AND FINANCE UPDATE**

### **INSURER SETTLES WITH MINORITIES**

American National Insurance Co. has agreed to pay \$1.5 million to black and Hispanic consumers from Texas who paid higher prices for burial poli-

cies because of their race. The Galveston-based insurer will pay an estimated \$3.2 million to \$3.5 million to 40,000 policyholders and beneficiaries in Texas and four other states. The Texas Insurance Commissioner, who was the lead regulatory negotiator for a five-state group, announced the settlement. Correcting past practices that were just plain wrong was motivation for the settlement. "The restitution will help restore the value that otherwise would have been available without the consideration of race," according to the Commissioner.

American National acknowledged that at one time, race was one of many factors considered in determining life insurance rates by many companies. The company said it stopped issuing policies with racially differentiated premium rates in 1964. The regulatory settlement does not affect three class action lawsuits filed against American National and other companies. Those cases have been consolidated and are pending in U.S. District Court in New Orleans. The settlement affects small policies, commonly known as burial policies, which were sold at a higher cost to blacks and Hispanics. The settlement applies to policies with a face amount of \$1,000 or less, issued to black and Hispanic consumers between 1936 and 1939 and to blacks only between 1948 and 1964. Settlement benefits will be paid in the form of an increased value of the policy, or cash where policies already have been paid. Notices will be published in newspapers and in Parade and Ebony magazines. Potential claimants will have 18 months to file their proof of claim to share in the settlement. Several other insurance companies have settled state investigations and class action lawsuits resulting from their charging of race-based premiums.

#### **CALIFORNIA COMMISSIONER'S OFFICE RECEIVES \$110 MILLION FROM SETTLEMENT**

\$110 million paid by Artemis S.A. in a settlement with the United States

Attorney's Office in connection with the Credit Lyonnais criminal case has been transferred to the California Insurance Commissioner. The funds are earmarked for distribution to claimants in the rehabilitation proceeding involving the failed Executive Life Insurance Company of California to compensate the claimants for their losses. The transfer, which occurred on May 25th, is the result of a settlement agreement between Artemis, a holding company controlled by French businessman Francois Pinault, and the United States Attorney's Office. Pursuant to that agreement, Artemis paid \$185 million - the \$110 million that has been transferred to the California Commissioner, and an additional \$75 million that is being held in reserve in a settlement fund pending the outcome of the Commissioner's civil lawsuit that was filed on behalf of former Executive Life policyholders. Artemis also paid \$500,000 to compensate the United States Attorney's Office for costs incurred during the criminal investigation. You may recall that we wrote on this subject in a prior issue.

#### **CITIGROUP TO PAY PENALTY IN SUBPRIME LOAN CASE**

The Federal Reserve (hereafter "the Fed") has announced a \$70 million penalty against Citigroup and a subsidiary regarding practices related to borrowers taking out riskier, higher-interest "subprime" personal and home-mortgage loans. New York-based Citigroup, the nation's largest financial institution, and its Baltimore-based subsidiary, CitiFinancial Credit Co., a consumer finance company, have agreed to the penalty and will take steps to ensure compliance with federal lending regulations and to enhance compliance with consumer protection laws. The \$70 million penalty could be reduced by up to \$20 million, depending on the amount of restitution payments actually made to certain borrowers, according to the Fed.

Restitution will be made available to borrowers who purchased joint cred-

it insurance in connection with a co-applicant loan from CitiFinancial or any one of its U.S. retail branches during the period of January 1, 2001, through December 31, 2002. It was alleged that CitiFinancial violated federal regulations when it improperly required the signature of a co-applicant on some loans when the creditworthiness of the person taking out the loan was already sufficient. "These alleged violations occurred in connection with attempts to increase joint insurance sales through an increased volume of co-applicant loans," according to a spokesperson for the Federal Reserve. Restitution also will be made available to certain borrowers whose personal loans from CitiFinancial or its subsidiaries were refinanced by CitiFinancial to a so-called EquityPlus loan.

It appears that Citigroup has been working to satisfy community groups and consumer advocates that have criticized the bank for its 2000 purchase of Associates First Capital Corp., which specialized in loans to high-risk borrowers. Associates has since been merged into CitiFinancial. Citigroup should settle all of the pending claims against the company. That would be the right thing to do. There have been far too many folks victimized who are entitled to compensation, but whose claims haven't been resolved to date.

## **XI. PREDATORY LENDING UPDATE**

### **PREDATORY LENDING LAWS IN SOME STATES ARE WORKING**

When North Carolina passed anti-predatory lending legislation in 1999, some predicted that the subprime mortgage market would suffer. However, the subprime market is currently growing and thriving in North Carolina but with fewer predatory loans. Other states, from New Jersey to New Mexico, have passed similar legislation to pro-

tect their citizens and the vibrancy of the subprime mortgage market. The success of these efforts was affirmed most recently in May, when Standard & Poor's issued a report recognizing that most subprime home loans in states with anti-predatory lending laws do not create additional risk to investors.

S&P's analysis highlights that high-cost home loans - subprime home loans with excessively high fees or interest rates - do pose a significant risk. States' efforts to discourage superfluous high-cost lending have been successful while providing homeowners more tools to fend off foreclosure resulting from predatory lending practices. The Center for Responsible Lending (CRL) recently examined a large sample of relevant state and federal court records in North Carolina and found no court cases involving loan "flipping" (loans with no net tangible benefit to the borrower) since the North Carolina predatory lending law became effective. The CRL study helps allay concerns that predatory lending reforms will trigger a rash of lawsuits that would be detrimental to the lending community.

These recent reports come on the heels of research published by the University of North Carolina -Chapel Hill Center for Community Capitalism showing that the number of loans with predatory characteristics has declined without restricting access to subprime loans or increasing the costs of these loans. The S&P report and related research findings show that North Carolina has sustained a healthy subprime mortgage market while dramatically reducing abusive lending - just as the law intended.

## XII. PREMISES LIABILITY UPDATE

### **ALABAMA STARTING ELEVATOR INSPECTIONS**

Alabama has instituted standards for new elevators and is starting

inspections of existing elevators. The Alabama Legislature voted last year to set up the State Elevator Safety Review Board. Inspection rules and safety regulations were developed and became official after a 30-day public comment period ended on June 16th. As of June 21st, all new elevator installations in Alabama must meet state certification standards. In addition, all existing elevators will have to be inspected annually. Previously, only Birmingham required elevator inspections in Alabama. I certainly believe this action will prove to be good for Alabama citizens and businesses.

Alabama is the 44th state to adopt safety standards for elevators. The standards also apply to escalators. More than 17,000 people are injured on elevators and escalators in the United States each year. About 30 people, including workers and repairmen, die each year from such accidents. The State Labor Department - headed up by my old friend Jim Bennett - will be responsible for implementing the new law. I hope the inspections will result in improved safety in our state.

### **AMUSEMENT PARK RIDE TO UNDERGO CHANGES**

As we enter the summer vacation months, it is appropriate to take a look at safety at amusement parks and similar vacation spots. Sometimes it takes tragic events to force people who operate facilities where hazards exist to make necessary safety improvements. For example, an amusement park ride where a 7-year-old girl was killed last month will have seatbelts, more lighting and a second attendant when it reopens, officials announced recently. Westchester County, New York, officials said they planned changes to the Mind Scrambler ride at Playland Park on Long Island Sound even though the park was not cited for any violations or required to make improvements to the ride. Investigators concluded that child died on May 22nd when she apparently wriggled free of the restraining bar

on one of the Mind Scrambler's cars, knelt on the seat and fell soon after the ride started up.

Operators of amusement parks appear to be placing some pretty dangerous rides at their facilities. The Mind Scrambler involved in the New York incident spins riders around in a darkened tent to flashing lights and loud music. Investigators said the girl had been on the ride several times before. No operator error was found and the little girl met the ride's requirements for being at least 6 years old and 4 feet tall. Planned changes include adding seatbelts to each car, creating space for an additional employee with an emergency stop button and printing safety instructions in glow-in-the-dark paint so they will be more visible. A safety specialist will be hired to review all rides at the park, the nation's only **government-owned and -operated** amusement park. The county is also developing a safety guide to remind customers how to monitor their children. There are no standards in place in many states for rides at amusement parks. All attempts to pass legislation requiring safety standards and inspections in Alabama have been defeated. As a result, we have had no safety legislation for amusement parks in our state.

### **RESULTS OF A STUDY ON MOLD PROBLEMS**

A recently released study has shed some light on the mold problem in this country. It is undisputed that respiratory problems, including some asthma, can be caused by mold. However, the study failed to blame the fungus for a host of other illnesses. Noreen Clark, dean of the School of Public Health at the University of Michigan, headed an Institute of Medicine panel that studied the health effects of mold, which has drawn increased attention in recent years. Dean Clark made this observation: "Even though the available evidence does not link mold or other factors associated with building moisture to all the serious health problems that some attribute to them, excessive

indoor dampness is a widespread problem that warrants action at the local, state and national levels.”

The Institute of Medicine, an arm of the National Academy of Sciences, said mold and building dampness do constitute a problem and urged it be corrected through a range of steps, including changes in how buildings are designed, constructed and maintained. Concerning the study and the mold problems, Dean Clark stated: “An exhaustive review of the scientific literature made it clear to us that it can be very hard to tease apart the health effects of exposure to mold from all the other factors that may be influencing health in the typical indoor environment. That said, we were able to find sufficient evidence that certain respiratory problems, including symptoms in asthmatics who are sensitive to mold, are associated with exposure to mold and damp conditions.” Excessive dampness influences whether mold, as well as bacteria, dust mites and other such agents, are present and thrive indoors, the committee noted. In addition, the wetness may cause chemicals and particles to be released from building materials.

A rare ailment known as hypersensitivity pneumonitis also was associated with indoor mold exposure in susceptible people. But the committee said it was unable to find evidence that mold is associated with fatigue, neuropsychiatric disorders or other health problems that some people have attributed to fungal infestations of buildings. The committee concluded that the little evidence that is available does not support an association. It added, however, that because there are so few studies, it cannot rule out a connection. The report noted that molds that are capable of producing toxins do grow indoors, and toxic and inflammatory effects also can be caused by bacteria that flourish in damp conditions.

The committee said information exists on how to control dampness but architects, engineers, building contractors, facility managers and maintenance staff do not always apply this knowl-

edge. The members called for development of guidelines for preventing indoor dampness and said they should be promoted nationally. The committee also said that building codes and regulations should be reviewed and modified as necessary to reduce moisture problems. Lawsuits claiming illnesses from mold in buildings that were not properly built or cleaned up have multiplied in recent years. Changes in building codes in the 1970s to make homes more energy efficient and airtight had the effect of allowing less ventilation through a house that would dry out a wet wall or floor, which in turn may have led to more mold damage claims. The National Academy of Sciences is a private institution chartered by Congress to advise the government on scientific matters. The study was funded by the federal Centers for Disease Control and Prevention.

### **XIII. WORKPLACE HAZARDS**

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#### ***PROTECTING AMERICA’S WORKERS***

My good friend Ron Hayes, who is one of our country’s leading advocates for workplace safety, contacted me recently concerning a bill that is currently pending in the U.S. Senate. The Occupational Safety and Health Act needs a complete overhaul in my opinion, and the pending bill is a step in the right direction. The original Act was passed in 1970 and I can see that we have come a long way toward the goal of providing every worker a safe working environment. However, there is still a great deal of work to be done. Too many workers are being injured and killed on the job in this country. An average of 15 workers are killed and 12,877 workers are injured or become ill every single day. This totals over 5,500 worker deaths each year, and 4.7 million worker injuries or ill-

nesses annually. These numbers are much too high and improvements must be made.

The bill, entitled the “Protecting America’s Workers Act,” is being handled in the U.S. Senate by Senator Ted Kennedy (D-MA), assisted by other Democratic senators. If passed, the Act would provide OSHA protections to millions of public and private sector employees who currently are not protected. Meaningful penalties will be added to give OSHA the necessary tools it needs to assure workplace safety. If you would like to get additional information on this needed legislation, you can contact Ron Hayes at 251-990-8644.

#### ***MORE PROBLEMS FOR WAL-MART***

A federal judge in San Francisco has granted class action status to a sex-discrimination lawsuit against Wal-Mart Stores. As you know, the retail giant is the nation’s largest employer. The case, which now covers as many as 1.6 million current and former female Wal-Mart employees, can be decided en masse because it is based on a statistical analysis that shows Wal-Mart paid female workers less and gave them fewer promotions than men. A federal judge found that lawyers for the 6 named class representatives, in a case that started three years ago, “present largely uncontested, descriptive statistics which show that women working in Wal-Mart stores are paid less than men in every region, that pay disparities exist in most job categories, that the salary gap widens over time even for men and women hired into the same jobs at the same time, that women take longer to enter into management positions, and that the higher one looks in the organization, the lower the percentage of women.” It has been reported that women make up more than 70% of Wal-Mart’s hourly workforce, but less than one-third of its store management.

Wal-Mart reported sales of \$256 billion for 2003. It owns and operates more than 3,500 stores in the United States, with that number increasing by

more than one store per day. It employs more than 1.2 million employees in the United States, two-thirds of them women. As we reported last month, Wal-Mart made \$9 billion in profits last year. If the plaintiffs in this case are successful, it will set a recovery record for a sexual discrimination case.

#### **OSHA PROPOSES OVER \$113,000 IN FINES FOR IRBY STEEL**

Irby Steel, a division of Gulfport-based Struthers Industries Inc., has been cited for almost 40 safety and health violations at its Gulfport, Mississippi, steel-fabricating plant. The company now faces \$113,750 in federal penalties. The Occupational Safety and Health Administration outlined its findings in a statement released last month, citing Irby Steel for 30 serious safety violations and nine health violations. The OSHA citations included claims the company had exposed workers to possible injuries from defective forklifts, cranes, tools, machinery and electrical equipment. OSHA also said Irby Steel used unapproved material as a gas line, which exposed workers to hazards of fire and explosion. Other complaints were that the company failed to label and properly store chemicals and to provide safety training for employees. OSHA must take all steps necessary to see that worker injuries and fatalities decline. Employers must protect their employees from workplace hazards. Protecting the health and safety of America's workers must be a top priority for government at every level and to industry, and the place to start is in Washington, D.C.

#### **WOMAN'S FAMILY AWARDED \$10 MILLION IN ASBESTOS CASE AGAINST FORD**

A Texas jury awarded \$10 million in damages recently to the family of a woman who died of a lung disease after being exposed to asbestos dust in her father's clothing. The jury deliber-

ated about eight hours before ordering Ford Motor Co. to pay \$4.5 million to the estate of Carolyn Miller, who died of mesothelioma in 2000 at the age of 54. Jurors also ordered the automaker to pay the victim's father \$500,000, while her mother was awarded \$750,000. Her husband was awarded \$2.75 million, and her daughter was awarded \$1.5 million. The victim was exposed to asbestos dust when she washed the clothes her father wore to work at Ford's Rouge plant in Dearborn, Michigan. The victim's father had been a contract worker, who relined and demolished blast furnaces at the Ford plant off and on between 1953 and 1964. He is still alive, but has been diagnosed with pleural plaques, or scarring on the surface of the lungs.

## **XIV. TRANSPORTATION**

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### **ALABAMA'S HIGHWAY FATALITIES UP 30 PERCENT**

The number of fatalities along Alabama's highways is already up 30% this year. The number of people killed on highways dropped in 2003 for the first time in four years, but 2004 is a different story. As of May 31st of this year, the Department of Public Safety counted 327 deaths on state highways — an increase of 76 compared to the same period in 2003. But, the figures don't include fatality statistics from individual municipalities. While the number of deaths is most disturbing, this doesn't come as a big surprise. Our firm is seeing a large increase in the number of fatality cases, mostly on interstate highways.

The number of highway crashes is also up 3% this year. Clearly, the Alabama Department of Transportation needs more troopers and that should be a priority with the Governor and Legislature. I understand that military deployments and low recruitment rates have caused serious personnel prob-

lems for the troopers. Presently, some 30 highway patrol employees are on active duty, and this is the division that has enforcement and patrol responsibilities. Safety on our state's highways should be a top priority for state government. It is sad to say, but I am afraid it hasn't been lately and likely won't be in the near future. Citizens should contact the Governor and their local legislators and request that the Department of Public Safety be adequately funded. A continued failure to do so makes our highways unsafe and puts people at risk. We need enough troopers on the highways to insure — to the extent possible — that they can do their job properly.

## **XV. ARBITRATION UPDATE**

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### **AUTO DEALERS IN ALABAMA**

I have been asked on a number of occasions, "are there any auto dealers in Alabama that don't require me to sign an arbitration agreement?" My answer has generally been, "there are very few." Beatty Motor Co. in Clayton, Brewbaker Motors in Montgomery, and Victory Motors in Prattville are the only ones I know of that don't require their customers to sign arbitration agreements. But, one customer told me recently that Brewbaker had required her to be videotaped during a sales presentation and document signing, which she deeply resented. I hope that was an isolated case. Lamar Wagner, who owns Victory, actually called in during one of our radio shows last month and let us know his dealership in Autauga County trusted their customers and doesn't require them to sign for arbitration. Having known Lamar for several years, that didn't surprise me. If you know of other dealers in Alabama, let us know and we will pass that information on to our readers.

## XVI. NURSING HOME UPDATE

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### **FEDERAL AGENCY CALLS FOR BETTER CHECKS ON NURSING HOME ABUSE**

A federal agency has found that allegations of physical and sexual abuse at Alabama's nursing homes were at times not investigated promptly enough, and some violators weren't included in a registry designed to keep them from getting similar jobs. The inspector general's office of the U.S. Department of Health and Human Services released a report on June 21st that was pretty bad. The study, based on studies of 35 abuse complaints at 6 Alabama nursing homes from 2002, found that three cases were not investigated by state public health officials within the required 10 working days. In another case, a complaint of abuse against an employee was substantiated in August of 2002, but the employee had not been flagged by the Alabama Certified Nurse Aide Registry as of mid-January of 2004. As a result, the employee was free to seek similar employment at other nursing homes.

If an employee is found to be abusive, the registry is supposed to be updated within 10 working days. The report found only two instances in which the state Department of Public Health cited facilities for not meeting the established time limits for reporting complaints. The state agency blamed a **backlog** of abuse complaints on a lack of staff to meet the requirements of the Centers for Medicare & Medicaid Services. A total of 64 complaints had been lodged at the six nursing homes in 2002. For some reason, 34 complaints were dropped without any record of their disposition.

The inspector general's survey focused on 35 complaints – 30 that were reported by the six homes, plus three reported by a news reporter, one by an ombudsman and one by a resident's relative. The report said there

were 311 complaints from 141 nursing facilities in 2002, but only 131 had been investigated and closed at the audit's conclusion. The survey focused on the sample of 35 complaints from six nursing homes. There are serious problems in Alabama nursing homes and this report gives rise for more concern. I hope the Governor and Legislature will address these problems and act to protect Alabama citizens who deserve more than they are currently getting from the nursing home industry.

### **GAO REPORTS SELF-DEALING BY NURSING HOMES**

Congressional investigators have reported that the costs for services in nursing homes are being driven up by nursing home operators who make "sweet-heart deals" with companies owned by relatives of the nursing home operators or with companies affiliated with the nursing home owner. Senator Charles Grassley (R-IA), past chairman of the Senate Committee on Aging, was quoted in a recent *US News* report as saying that these findings "give new meaning to the phrase, 'keeping it in the family.'" *US News* had previously reported finding billions of dollars in self-dealing in the nursing home industry, and this recent congressional probe has confirmed those findings. The non-partisan General Accounting Office states that 80% of the homes in Washington and Texas, two states that it studied, were involved in self-dealing in areas such as administrative salaries, therapies, insurance and management fees. The report further indicated that the costs related to this self-dealing were as much as two-thirds higher than at other nursing homes. Of course, since state and federal governments are paying these bills, which the report indicated could amount to billions, you know who is ultimately responsible – taxpayers.

In our dealings with the nationwide nursing home chains, we have become well aware of the fact that their "bean-counters" are experts at

"hiding the ball" when it comes to profits in financial statements. During the recent legislative fight here in Alabama over nursing home tort reform, I believe that legislators were surprised to see how devious some nursing home owners are in this area. The findings of this congressional report came as no surprise to us, however. I call on our elected officials to remember this the next time the nursing homes cry "poverty" and ask for legislation that would strip away the rights of the residents they have promised to protect.

### **FULL SPRINKLER SYSTEMS NOW REQUIRED**

The State Committee of Public Health will require all Alabama nursing homes to have full sprinkler systems installed by 2007. The nationally recognized Life Safety Code, which currently regulates state and federal sprinkler systems, permits some facilities to operate without sprinkler systems in certain situations. Under the amendment's first phase, seven nursing homes without systems and nine nursing homes in multistory buildings with partial coverage will be required to install full systems by January 1, 2006. The second phase involves 30 facilities in one-story buildings with partial systems. They will be required to install full systems by September 1, 2006. The 24 facilities with isolated rooms or closets not covered by systems will be required to install systems by February 1, 2007 in the final phase. I understand Alabama is one of only three states to adopt the new rules.

In making the announcement, state health officer Dr. Donald Williamson said, "Deadly fires in other states have shown that we must offer adequate safety plans, including full sprinkler systems, to protect Alabama's nursing home occupants." In my opinion, nobody should say that nursing homes shouldn't have these systems in place. Every nursing home in our state should have already put sprinkler systems in place. I am disappointed that it takes

state action to accomplish what should have been done voluntarily. I also have to question why there won't be full compliance until 2007. There have been a number of deadly fires around the country with a significant loss of life. Since most residents in nursing homes require at least limited assistance because of either age or physical condition, it is essential that all necessary safety features be put in place. I consider a functional sprinkler system part of a good safety program. If my information is correct, a good number of facilities already had sprinkler systems in place. While I would have preferred a faster pace on what the State did, at least the Health Department took action.

### **PUBLIC OPINION FORCES A CHANGE BY THE STATE**

As reported last month, a legislative subcommittee has been looking into the status of the three state veterans' nursing homes in Alabama. Recently, public hearings were held where folks could voice their views. You will recall that USA Healthcare of Alabama had the contract to provide care at the state veteran nursing homes in Alexander City, Bay Minette and Huntsville. Family members with loved ones at the Bill Nichols Nursing Home in Alexander City spoke out at one of the public hearings and told stories of understaffing and inadequate care that they said led to staph infections, pneumonia, Medicare fraud and even worse. Channel 8 in Montgomery covered the hearing and reported that one woman whose husband has been a resident at the facility for six years said, "they went through hell in Korea, but they're going through it worse here." Other public hearings revealed similar views from family members. An overflow crowd appeared at the Bay Minette hearing and likewise cited numerous examples of inadequate staffing and bad conditions at the Baldwin County facility.

If these reports are accurate, it is a sad state of affairs. These veterans,

many of whom fought in World War II and Korea, have been called "America's Greatest Generation" and they deserve the very best we can give them. Any healthcare company running the nursing homes must give good care to the veterans who served our country and now deserve to be treated properly in the facilities.

On many occasions, I have believed that the politicians simply don't listen to folks. I have also felt that as a result ordinary folks have little voice in government. As a result of the action by people directly affected, however, a change in the contract to operate the three nursing homes for veterans was announced on June 25th.

The new managers — Health Management Resources of Easley, South Carolina — now have the contract, which is worth more than \$100 million over five years, and will be expected to make all necessary changes. Governor Riley signed the contract against the recommendation of the legislative committee that had been investigating the problems. That committee wanted the Governor to override the state Board of Veterans Affairs' decision to switch management at the homes. Based on our experience and knowledge and on reports from the public hearings, I believe a change was definitely needed. Apparently, the homes will retain all current employees, and I hope that is the right thing to do.

Clearly, the public hearings at the three homes, which prompted testimony about poorly trained workers, insufficient staff, inadequate medical care, bad food and unsanitary conditions were the reason a change took place. In addition, *The Birmingham News* had acquired hundreds of pages of federal inspection reports from the past four years that showed a pattern of serious problems in the homes. That information was most helpful. My hope and prayer is that the new company will correct all problems that have existed and make the three facilities a "show place" for other nursing home operators to use as a model. Our veterans appear to have won another battle and that is good!

### **DO ASSISTED LIVING FACILITIES NEED FEDERAL REGULATION?**

The U.S. Census Bureau projects that more than 62 million Americans will be 65 or older in 2025, up 78% from 2001. The number of Americans 85 or older is expected to top 7.4 million, up nearly 68%. The assisted living industry has grown by about 48% since 1998, according to a 2002 report by the National Academy for State Health Policy. As of 2002 there were about 36,399 assisted living facilities in the country, with an estimated 910,408 beds. Some are large centers run by major chains. However, most of the facilities are small facilities run by individual owners or local businesses.

In the late 1980s the United States Congress passed the Omnibus Budget Reconciliation Act (OBRA), which included comprehensive regulations designed to heighten the standard of care in nursing homes. Although the nursing home industry continues to have serious problems, I cannot imagine how much worse the care would be without the OBRA regulations. These regulations must be complied with by nursing homes in order to receive their federal funding. Many elderly citizens — by choice — wind up in assisted living facilities. In fact, assisted living is the nation's fastest growing long-term care option for the elderly. The assisted living industry has no such federal regulation and they have fought against federal oversight. The need for federal protection of residents in assisted living facilities was made clear in a recent series of articles in *USA Today*. These articles documented a pattern of health care mistakes, injuries and death in assisted living facilities. The articles were based on two years of facility inspection data for assisted living facilities in seven states: Alabama, Arizona, Colorado, Florida, Indiana, New York and Texas. Anyone with a loved one in an assisted living facility, or considering placing someone in such a facility, needs to read these sobering articles.

Assisted living facilities are state-regulated, and they are largely private-

pay residences that help elderly residents with medications and other activities of daily life. Most people believe these are extremely safe facilities, but the inspection results indicate that may not be so. In the seven states that were reviewed in the *USA Today* articles it was found that almost 1 in 5 facilities was cited for staffing violations, including situations where residents were left alone with no caregivers at the facility, and 1 in 4 was cited for training violations. The articles noted that actual violations are probably higher because some facilities don't report all problems to state regulators, and inspectors do not always find every problem.

State regulation of this growing industry is typically very lax. Lawyers in our firm have handled cases against assisted living facilities and have found the regulations here in Alabama and many other southeastern states very inadequate. Some states allow almost anyone over the age of 18 to become a caregiver in an assisted living facility after receiving a few hours in training. AARP policy director John Rother has said, "There is not a single state that you can point to that is doing a great job". Perhaps it was said best by Rick Harris, head of Alabama's regulation of assisted living facilities and past president of the Association of Health Facilities Survey Agencies: "Sooner or later the feds are going to have to get involved... the residents would be better off." I predict that this subject will receive much attention. The sad state of nursing homes across this country is causing many families to look to assisted living facilities as an alternative to nursing home placement.

#### **JURY AWARDS \$5 MILLION IN NURSING HOME DEATH**

A Superior Court jury in Georgia returned a \$5 million award last month to the family of a 90-year-old woman who died at a Georgia nursing home. The judge is now being asked to invoke a \$250,000 cap on punitive damages. The jury previously had

awarded \$362,500 in compensatory damages to the lady's family. But on their verdict form on punitive damages, jurors indicated they did not find "specific intent to harm" by Columbus Regional Healthcare System, which operated Marion Memorial nursing home. Without a finding of such intent, Georgia law caps punitive damages at \$250,000. Testimony at trial indicated that in about 27 months in the nursing home, the elderly lady became malnourished and developed pressure sores so severe her leg had to be amputated in February 2000. She died five months later. Testimony also indicated the nursing home was under state orders to improve patient care.

#### **ELDERLY WOMAN AWARDED \$1.2 MILLION FOR ANT ATTACK AT NURSING HOME**

A jury has awarded \$1.2 million to a 93-year-old Florida woman who was stung by fire ants in her nursing home bed two years ago. Pearl Smith was attacked at the Surrey Place nursing home in April 2002. Photos of the then 90-year-old woman showed her arm, neck, back and upper torso covered in blisters from the stings. Consulting Management and Education Inc., the company operating the facility, had no liability insurance and their debts now exceed all assets. This means that the family will likely collect no part of the judgment.

The company, which is no longer in business, owes millions of dollars of uncollected judgments to numerous people. Jurors awarded Pearl Smith \$600,000 for the pain and anguish she suffered and \$600,000 for future pain and suffering. The lady lived at the nursing home from December 2001 until June 2002. She could not get out of her bed and get away from the fire ants. The facility was woefully understaffed. The poor lady lay in her bed in severe pain for a long time before staff checked on her.

In 2000, an 87-year-old woman, Mary Gay, died after being stung more than 1,600 times by fire ants in a

Northport nursing home. The nursing home was closed for a month after the attack. It is inexcusable for any nursing home to be so understaffed that fire ants could attack a resident. No nursing home should be allowed to operate without adequate liability insurance, proper staffing, good management – and a caring attitude.

#### **NEW MEXICO GOVERNOR TAKES ACTION**

I commend the New Mexico Aging and Long-Term Services Department and Governor Bill Richardson for the work done recently in an undercover investigation of nursing homes in that state. An undercover investigator posed as a resident in several nursing homes and his experiences were shocking. At one nursing home he posed as someone with Alzheimer's disease. The investigator reported that the door to the Alzheimer's unit in the facility was not locked, and he left twice and walked outside the facility at night. He described unsanitary conditions in a bathroom that he shared with two wheelchair-bound female residents, and reported that he was never prompted to change clothes during the entire 5 days he was in the facility. The undercover agent found that one of the supposedly registered nurses in the facility who was dispensing medication had no nursing license. At another facility this investigator accompanied a woman who posed undercover as someone with an alcohol-related problem. He said that the woman was allowed to drink alcohol while she stayed at the nursing home and was allowed to leave the facility. On one occasion she was gone from the facility for two hours before the police were notified. The investigation findings included incidents of residents not being bathed, dressed, fed, toileted or monitored.

New Mexico Governor Bill Richardson held a news conference to announce the findings of the investigation and stated, "My administration has zero tolerance for elderly abuse and it appears that elderly abuse is happening

in New Mexico's nursing homes." Governor Richardson ordered a broad examination of the nursing home industry in that state. These findings may be shocking to some, but to many people who have family members in nursing homes, and to lawyers who have handled nursing home cases, they are not. If the terrible conditions in many nursing homes are to be discovered, these types of aggressive investigations must be undertaken. We have consistently found in the cases we have handled that state inspections here in Alabama and other states, which are required by law to be unannounced, are rarely a "surprise" to the staff at the nursing home. One way or another the nursing home finds out when the state is going to arrive for inspection, and management brings in extra staff and supplies to make the place "presentable." Therefore, when you read an inspection report for a nursing home that you may be considering you should be aware that the facility probably knew when the state was going to be there and that was their "best day." Numerous witnesses that we have deposed have indicated that once the state inspectors leave the facility, the staffing and supplies go back to the normal, low levels. More states should aggressively investigate nursing homes like New Mexico has done so that the true conditions nursing home residents must endure day in and day out become public knowledge.

## XVII. HEALTHCARE ISSUES

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### ***THE POWERFUL PHARMACEUTICAL INDUSTRY***

It should be no surprise to any person in this country that the pharmaceutical industry is one of the most – if not the most – profitable businesses in the country. American citizens pay far more for their prescription drugs than do citizens located any place else on earth. It will also come as no real sur-

prise that, as a political issue, the high price of drugs – has united both political parties. At least they are giving the issue "lip service" and I suppose that is progress. More than a million Americans now buy their prescription drugs in Canada. It makes absolutely no sense for Americans to be in the business of subsidizing the citizens of foreign lands when it comes to the pharmaceutical industry and the price of prescription drugs. Yet, that's exactly what we are doing.

The high prices that we allow the pharmaceutical companies to charge retail outlets, which in turn have to make a small profit on these sales, makes up for the fact that citizens in foreign countries pay substantially less for the same identical drug. Our political leaders must step up to the plate and take on the pharmaceutical industry. Consumers deserve to be protected. I predict that the next President will be the man who decides to "take on" the powerful pharmaceutical industry – rather than "taking their money." Health issues – insurance and the costs involved – are big time political issues, and never doubt it. At least, I hope and pray that happens. One of the candidates will get involved on the side of people. George Bush can't do it and that leaves only John Kerry.

### ***BRAND-NAME DRUG PRICES RISE FAST***

Let's take a closer look at the high prices of prescription drugs being paid in this country. According to a recent study, brand-name prescription drug prices rose at more than three times the rate of overall inflation last year. The reports by the AARP and the consumer group Families USA said the gap between prices for prescription medicines and general inflation has widened in recent years. The purchasing power of older Americans, who receive increases in Social Security based on the Consumer Price Index, has been greatly reduced. The index is the government's most closely watched inflation measure. Since the price of

drugs keeps going up faster than inflation, it is extremely difficult for consumers to be able to afford them. It is especially tough on senior citizens.

It is high time that our politicians start looking out for consumers and especially senior citizens – for a change. The insurance companies and HMOs have far too much clout in our nation's capitol and that's not good. The increases referred to above negate the value of the discounts available through Medicare's new drug cards. Families USA has been a persistent critic of last year's Medicare prescription drug law. Ron Pollack, president of that group says: "Over time, base prices have increased by a higher percentage than the discounts the [Bush] Administration is claiming." The Bush Administration has said the Medicare drug cards are offering savings of 10% to 17% on brand-name drugs. The card was available for use beginning June 1st, but at this writing few people were signing up. The average price increase for the top 30 brand-name drugs used by older Americans was 6.5% last year, the Families USA report said. AARP's study showed an average 6.9% price increase for nearly 200 drugs. Inflation in general was 1.9%.

According to AARP, since 2000, the drug prices have risen 27.6%. General inflation was 9.3% for the same period. Prices increased between 6.9% and 9.9% last year for the five leading drugs in terms of sales — cholesterol-reducing Lipitor, the blood thinner Plavix, Fosamax for osteoporosis, the blood pressure drug Norvasc and Celebrex, a pain reliever, the Families USA study said. Pfizer makes Celebrex, Lipitor and Norvasc, while Bristol-Myers Squibb produces Plavix and Merck & Co. manufactures Fosamax. Both studies looked at wholesale prices, reasoning that changes in those prices were reflected in costs at the retail level.

Left unchecked, the prices of brand-name drugs could undermine the Medicare prescription drug benefit that begins in 2006. After the first year, insurance premiums, deductibles and the gap in coverage that lawmakers

built into the program all will rise in line with the increase in Medicare's drug costs. It is most unfortunate that retail drug stores are caught in the middle of a very tough economic and social situation. Consumers are paying unreasonably high prices for prescription drugs – the retail pharmacies are making very small profits, but the pharmaceutical industry is making record profits – and that is troubling. So, the question is, how can this be? Why does our government allow U.S. citizens to subsidize the rest of the world when it comes to the cost of prescription drugs? There isn't another country that allows the drug industry to charge exorbitant prices for prescription drugs. Simply put, the companies are making their excessive profits right here in the USA. The question is, now what are we going to do about it?

#### **REPORT CITES LAX OVERSIGHT OF PERSONAL-CARE PRODUCTS**

All families in the United States purchase cosmetics and personal-care products on at least a weekly basis. Most Americans have never considered these products, while costly, to present health problems. Now, a report released last month is most disturbing. Weak government oversight has allowed an industry to market cosmetics and personal-care products with ingredients the safety of which is unclear or that are known to pose health risks. Some upsetting information comes from a study by the Environmental Working Group, the Breast Cancer Fund and other public-interest groups. The following comes out of the report from that study:

- The Food and Drug Administration doesn't require safety data on ingredients used in beauty and personal care products such as shampoos, cosmetics and hair dyes before they are put on the market.
- A self-policing industry committee, the Cosmetic Ingredient Review,

has tested some ingredients, but the testing is **voluntary** and **controlled** by manufacturers.

- Neither the FDA nor the industry safety panel has evaluated 89% of the 10,500 ingredients used in personal-care products for safety.
- An examination of ingredients listed on the labels of 7,500 such products found that one-third contain one or more ingredients classified by the government as possibly cancer causing, the report said. The FDA estimates there are about 25,000 personal-care products on the market.
- Seventy-seven products examined in the report – primarily hair dyes and shampoos – contain ingredients classified as known or probable human carcinogens.
- Some products contain ingredients that are considered safe in part because it is assumed they will not be easily absorbed through the skin. However, more than half of the products examined also contain “penetration enhancers” – ingredients that can increase chemical penetration through the skin and into the bloodstream.
- Fifty of the products that contain penetration enhancers also contain known or suspected human carcinogens.
- Few individual ingredients pose excessive risks, but most people use many products in the course of a day, so it well may be that these risks are adding up.
- A survey of 2,300 people conducted in conjunction with the report found that the average adult uses 10 personal-care products each day, exposing themselves to 146 chemical ingredients. A quarter of all women and one of every six men use at least 15 products daily.

- Little research is available to document the safety or health risks of low-dose repeated exposures to chemical mixtures like those in personal-care products, but the absence of data should never be mistaken for proof of safety. The more we study low-dose exposures, the more we understand that they can cause adverse effects ranging from the subtle and reversible to effects that are more serious and permanent.
- Nearly 10% of all moisturizers and 6% of all sunscreens contain alpha and beta hydroxy acids, which can increase the risk of skin cancer.
- At least four ingredients known to interfere, or suspected of interfering, with fetal development and causing declines in sperm counts are used in nail-care products.
- Petroleum jelly, which can contain impurities that are listed by the State of California as carcinogens and have been linked to breast cancer, is used in 7% of personal-care products.
- Fifty-four products contain ingredients that the industry safety panel recommends against using, including diaper creams with ingredients deemed unsafe for use in baby products.

The Cosmetic, Toiletry and Fragrance Association reportedly said that the FDA has authority to remove unsafe products from the market and that an FDA regulation “requires manufacturers to substantiate the safety of cosmetic ingredients and products before they are marketed.” However, the study referenced above pretty well tells me that the FDA does little in this area and that the industry fairly well operates under the radar and on a voluntary compliance basis to the extent that the FDA regulates them at all. To view the study, go to [www.ewg.org/reports/skindeep](http://www.ewg.org/reports/skindeep).

## **A LOOK AT THE ATKINS DIET**

A Florida businessman has filed a lawsuit against Atkins Nutritionals, Inc. and the Estate of Dr. Robert C. Atkins. The basis for the claim is that the controversial high-fat, low-carbohydrate regimen, that many Americans are on, caused severe heart disease. The plaintiff is seeking a court injunction banning Atkins Nutritionals from marketing its products without a warning of potential health risks and also asks for compensatory damages only. Interestingly, the suit is filed under Florida's Deceptive and Unfair Trade Practices Act. The plaintiff stated publicly that if he receives any money from the lawsuit, he will donate it to a charity.

About 30% of individuals on the Atkins diet experienced increases in LDL ("bad") cholesterol of at least 10% in a study published recently in the *Annals of Internal Medicine*. Two study participants dropped out because of elevated cholesterol levels and a third developed chest pain and was subsequently diagnosed with coronary heart disease. The investigators reported, "Perhaps the biggest concern about the low-carbohydrate diet is that the increase in fat intake will have detrimental effects on serum lipid levels." Many people do not realize it, but low-carbohydrate, high-protein diets have been criticized by major health organizations, including the American Heart Association, the American Dietetic Association, and the American Kidney Fund.

## **XVIII. ENVIRONMENTAL CONCERNS**

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### **McWANE, INC. CHARGED WITH POLLUTION CRIMES**

McWane Inc. is back in the news, and again, the news is all bad. Federal prosecutors have charged the pipe company and four of its employees

with polluting a creek and concealing the contamination from authorities. The 25-count indictment claims the company discharged contaminated water every month over a period of time in 2000 and 2001 into Avondale Creek. This creek runs near the McWane Cast Iron Pipe plant in North Birmingham. The company and the four people indicted will apparently plead not guilty. However, the fifth employee pleaded guilty and will assist the government's case. McWane flooded Avondale Creek with millions of gallons of water poisoned by heavy metals over a period of years. A former plant manager has told prosecutors that the company escaped detection by discharging the contaminants under the cover of darkness. Don Harbin, the former manager of the company's northern Birmingham plant, acknowledges that he directed workers to discharge contaminated water at night. Harbin has agreed to plead guilty to environmental crimes and is assisting the government's prosecution of McWane.

U.S. Attorney Alice Martin told the Associated Press: "This indictment charges a conspiracy between McWane Inc. and its highest positioned employees at the McWane Cast Iron Pipe Co. to violate the Clean Water Act, to make false statements to the Environmental Protection Agency and to obstruct justice." These indictments are the second in six months against McWane. In December, federal prosecutors in New Jersey indicted McWane and five managers of its plant there on charges of polluting the Delaware River.

McWane is accused of discharging wastewater contaminated with oil and grease into storm drains and Avondale Creek, which flows into a tributary of the Black Warrior River. That river provides more than half of the drinking water processed for use in Birmingham. Adam Snyder, executive director for the Alabama Rivers Alliance, a nonprofit group representing 70 statewide watershed advocacy organizations, made this observation: "For more than a century, urban streams in Birmingham have been used

by industry as drainage ditches. Now we are seeing again with McWane, these streams are being used and abused."

McWane, based in Birmingham, is a \$1.9 billion-a-year company that makes pipes, valves and fire hydrants. It has come under fire in published reports for having nine worker fatalities since 1995 and more than 4,000 injuries. McWane could face maximum penalties of more than \$1 million in fines plus probation. The maximum sentences against each of the four men total eight years in prison and more than \$250,000 in fines.

### **ILLNESSES LINKED TO POWER PLANTS IN STUDY**

A consultant used by the Environmental Protection Agency says health problems linked to power plant pollution shorten nearly 24,000 lives a year, including 2,800 from lung cancer. The report by Cambridge, Mass.-based Abt Associates Inc., commissioned by environmental advocacy groups, found that 22,000 of those deaths are preventable with currently available technology. The report, which was released last month, found that people dying prematurely from problems associated with exposure to fine particle pollution, or soot, lost an average of 14 years. Power plant pollution also is responsible for 38,200 nonfatal heart attacks each year, according to the study commissioned by groups including the National Environmental Trust, U.S. Public Interest Research Group and the Clean Air Task Force.

The groups said the study shows that enforcing current law would result in 4,000 fewer preventable deaths a year. The study relied on computer modeling to compare EPA data on power plant emission levels and dispersal patterns with results of epidemiological studies by Harvard University in 1993 and the American Cancer Society in 1995. The data came from 2002 for soot — microscopic particles linked to asthma, heart disease and

other health problems, along with acid rain-causing sulfur dioxide and smog-forming nitrogen oxides.

### **BUSH ADMINISTRATION SPENDS YOUR TAX DOLLARS**

A decision by the Bush Administration in 2002 is costing taxpayers a great deal of money that corporations should be paying. Let me give you a classic example. Recently, federal investigators were cleaning up an illegal hazardous waste dump operation in Mobile when they found a much larger one near a residential area just south of downtown Mobile. Regulators have uncovered more than sixty hundred and fifty 55-gallon barrels, forty 200-gallon containers, and eight above-ground storage tanks, ranging in size from 250 to 6,000 gallons, all containing potentially toxic materials.

The U.S. Environmental Protection Agency has now begun sorting and removing the hazardous waste. It can take the EPA two or more months just to remove the barrels, which contain a wide variety of chemicals including banned pesticides, cyanide, lead, chromium, benzene, pentachlorophenol, and unusually powerful acid compounds. While EPA on-site coordinators are not certain how much of the chemicals have escaped into soil or groundwater, thereby affecting residents and property owners, the agency is certain that it will be very expensive to remove all of this waste. I believe that the companies that dumped the chemicals should be responsible for paying for all phases of the removal, including remediation. In fact, in the past, industries that produced hazardous waste helped pay for such clean-ups through a special federal fund. But in 2002, the Bush Administration announced it would not re-authorize the clean-up taxes once paid by those industries. As a result, clean-ups are supported almost entirely by general taxes. Early estimates are that it will cost approximately \$2 million dollars to clean up this area in

Mobile County. This will be paid by all of us who are taxpayers, and that's just plain wrong.

## **XIX. TOBACCO LITIGATION UPDATE**

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### **CANDY CIGARETTES ARE STILL AROUND – UNFORTUNATELY**

Many of us grew up in times when smoking was accepted and folks simply didn't realize that cigarettes would kill you eventually if you smoked them. Sometimes it is good to hear some real life stories about the evils of tobacco. I received the following information, which I found to be most interesting and quite true, from my friend Max Cassady, a very good lawyer who practices in Evergreen, Alabama. With Max's permission, I am printing his story in its entirety. The message is good, to the point, and tells the story in a manner that is easily understood.

*I was in a gas station in Evergreen last week when I noticed that "candy cigarettes" are still being sold to children. This "candy" was invented back in the 1930s, when candy companies began writing tobacco companies to ask for permission to use actual name brands on the candy cigarette boxes. The candy companies knew that children would pretend to be grown-ups. I remember buying the candy cigarettes as a child and pretending to smoke them. The candy cigarettes even had a red "fire tip" so children could correctly pretend to smoke. I became a smoker in my teens. Evergreen High School had a "student smoking zone" in 1980 directly behind the gym. During*

*morning break, many students would stand behind the gym and smoke away. My parents were also smokers, and my grandparents were smokers. We were all young and would live forever. I played first-string football my 10th, 11th, and 12th grade—cigarettes seemed harmless. It took me 20 years to quit. To me, quitting smoking was much, much harder than law school at the University of Alabama.*

*My granddaddy, Abner Powell, looked like the Marlboro Man until he started dying of emphysema, which was joined a few years later by its twin brother, lung cancer. Granddaddy died a long, slow, painful death that reduced a mountain of a man—he was 6 feet, 4 inches, and broad shouldered—to a living skeleton gasping for breath. He lived in Andalusia and I drove over to see him often, but not often enough. One time I found some old home movies in his attic and played them for him. He smiled as he watched reel after reel of his life roll behind him. But one part of the old film showed him smiling at the camera, his hand coming up and down with a smoky cigarette to his mouth. As a frail man in the end stage of the cigarette dying process, watching this old movie of himself, his head dropped and he just muttered "stupid." I was in the hospital room when my granddaddy died a few months later. He was 70 years old in 1987. His brother, who never smoked, is still alive and healthy and is nearly 90 years old. His sister died well into her 80s. "Brand recognition" among children—children have always been targets of advertising executives—we all know Ronald McDonald. Advertisers*

know that the kids screaming in the back seat of a car often make the real decision about where to eat. The tobacco industry carefully cultivated brand recognition of "Old Joe The Camel," and here is an amazing fact: When 270 six year old children were asked what the logo "Old Joe The Camel" meant, 51% of them said "cigarette." ([www.legacy.library.ucsf.edu/tid/](http://www.legacy.library.ucsf.edu/tid/))

When my granddaddy was a teenager in the 1930s, cigarette companies advertised cigarettes as "smooth" on the throat, and doctors were paid to endorse the products. In the 1940s, cigarette advertising was directed at overweight women with a slogan that said, "Reach for a Lucky-instead of a Sweet." The advertisement contrasted a slim woman reaching for a cigarette after a meal and an overweight woman reaching for a piece of candy after a meal. Female smokers increased by the millions based on that advertising campaign. I wonder how many died the slow, painful death my grandfather did.

The U.S. Government is now the "trial lawyer" suing the tobacco industry. The United States Justice Department has filed a lawsuit claiming \$280 billion dollars against the tobacco industry, claiming that the tobacco companies focused their advertising on children and then lied about it. (*Kansas City Star*, 5/24/04). No trial lawyers getting rich here. Instead, it's our own government, under a conservative Republican Administration, that has taken aim at Fortune 500 tobacco companies for trying to poison children with marketing campaigns. Any reader interested in studying tobacco industry records at ([www.legacy.library.ucsf.edu/tid/](http://www.legacy.library.ucsf.edu/tid/))

*will be shocked and angry at how these industries calculated and profited from the death of millions of American mothers and grandmothers, fathers and grandfathers. I sure miss mine.*

#### **LIST OF DISEASES LINKED TO SMOKING EXPANDS**

The list of diseases linked to smoking has grown much longer. You can now add acute myeloid leukemia, cancers of the cervix, kidney, pancreas and stomach, abdominal aortic aneurysms, cataracts, periodontitis and pneumonia. Surgeon General Richard Carmona, announcing his first official assessment of the effects of tobacco, says the problems are much worse than previously believed. The report said current evidence is not conclusive enough to say smoking absolutely causes colorectal cancer, liver cancer, prostate cancer or erectile dysfunction. Some research has associated those diseases with smoking, but Carmona said more proof is needed. The report concludes that the evidence suggests smoking may not cause breast cancer in women but that some women, depending on genetics, may increase their risk of getting it by smoking.

Diseases previously linked to smoking include cancer of the bladder, esophagus, larynx, lung and mouth. Also tied to smoking were chronic lung disease, chronic heart and cardiovascular disease, osteoporosis, peptic ulcers and reproductive problems. About 440,000 Americans die of smoking-related diseases each year. The report said more than 12 million people have died from smoking-related diseases in the 40 years since the first Surgeon General's report on smoking and health was released in 1964. That report linked smoking to lung and larynx cancer and chronic bronchitis. Subsequent reports, such as the one released Thursday, have expanded the list of diseases linked to smoking. Carmona's report said treating smok-

ing-related diseases costs the nation \$75 billion annually. The loss of productivity from smoking is estimated to be \$82 billion annually. The following information is found in the report:

*On average, the Surgeon General said, smokers die 13 years to 14 years before non-smokers. The number of adults who smoke has dropped from about 42% in 1965 to about 22% in 2002, the last year for which such data is available, according to the surgeon general. The government has set a goal of 12% by 2010, but is having trouble getting the rate to come down as quickly as sought. The smoking rate is declining by less than one-half of a percentage point annually.*

Cheryl Heaton, president of the anti-smoking American Legacy Foundation, said officials have failed to act on recommendations made by a government-appointed scientific panel last year. Among its proposals was raising the federal tax on cigarettes from 39 cents per pack to \$2.39. Matthew Myers, president of the Campaign for Tobacco-Free Kids, said the Surgeon General's report demonstrates the need for the Food and Drug Administration to regulate cigarettes. That has been proposed in Congress. Carmona said he was briefed on the legislation, which would set strict rules for marketing and manufacturing cigarettes. It appears that the Surgeon General should endorse the bill. However, to date, Carmona hasn't gone that far. Health and Human Services Secretary Tommy Thompson claims that he believes tobacco ought to be regulated. However, his boss apparently doesn't agree. President Bush could make regulation happen and I hope he will do so. Bush's current position appears to be that the emphasis ought to be on preventing teenagers from smoking. The Administration recently signed a treaty that would put new restrictions on cigarette manufacturers worldwide. Public health officials complain, however, that

the Administration has not yet submitted the treaty to the Senate for ratification. With all of the tobacco company money flowing into the campaign, don't expect the President to do anything to hurt the industry too badly.

### **U.S. GOVERNMENT CAN GO AFTER TOBACCO MONEY**

A federal judge has now ruled that the U.S. Justice Department can seek \$280 billion in tobacco industry money as part of the government's case against cigarette manufacturers, clearing the way for the biggest civil racketeering suit in history. The tobacco industry had claimed that the government shouldn't be allowed to seek the money. U.S. District Court Judge Gladys Kessler said in a written ruling that whether the government had sought the correct amount should be weighed at trial. Judge Kessler said the companies could be ordered to hand over the money sought by the government as long as Justice lawyers demonstrate a reasonable likelihood the industry will violate racketeering laws in the future.

Bill Corr, executive director of the Campaign for Tobacco-Free Kids commented on this latest ruling: "It's a critical victory for the government because it allows the government to seek the full range of remedies that are available under RICO." The Justice Department alleges in the suit that the companies deceived the public about the dangers of tobacco and the addictive nature of nicotine. The government also claims the companies targeted children through advertising and then lied about it. Government lawyers are pursuing the civil case under the Racketeer Influenced and Corrupt Organizations Act, known as RICO. The government's claim is the largest amount ever sought under the racketeering statute. In addition to seeking the money, the government wants the judge to impose new restrictions on the industry, including banning vending machines, forbidding certain marketing terms and limiting in-store promotions. The defendants are Philip Morris USA

Inc. and its parent, Altria Group Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Co.; British American Tobacco Ltd.; Lorillard Tobacco Co.; Liggett Group Inc.; Counsel for Tobacco Research-U.S.A.; and The Tobacco Institute. The trial is scheduled to begin in September in the U.S. District Court for the District of Columbia.

### **TOBACCO INDUSTRY MUST PAY \$500 MILLION TO SMOKERS**

A Louisiana jury has ordered the tobacco industry to pay \$590 million for nicotine patches, telephone hot lines, advertising and other programs to help smokers in that state kick the habit. The class action lawsuit is the first case in which a jury has found that tobacco companies should pay for such programs. The lawsuit had wanted the smoking cessation programs to last up to 25 years, but jurors set them at 10 years. The verdict came in the second phase of a lengthy trial. In July, the same jury found that cigarette makers had deceived the public with an addictive product and schemed to market cigarettes to children. But, the jurors rejected calls for medical monitoring for present and former smokers. It did say that the industry should provide free smoking cessation programs. The current phase was to determine how much the industry should spend on the programs and exactly what those programs should consist of. A third phase in front of the trial judge, without the jury, will be used to determine how the programs are run. The jury heard about two months of testimony and deliberated for three days before returning the verdict.

The \$590 million will also go toward supplies of nicotine gum and grants for anti-smoking programs in church groups and other organizations. None of the smokers in the lawsuit will receive individual damages. The plaintiffs include any Louisiana resident who smoked before the mid-1990s, when the suit was filed. The defendants are R.J. Reynolds, Lorillard, Philip Morris USA and Brown & Williamson.

## **XX. THE CONSUMER CORNER**

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### **PREVENTING CRIME AND VIOLENCE INVOLVING CHILDREN**

On almost a daily basis in this country, we read or hear about a child who has been kidnapped, abused, or molested in some manner. Unfortunately, some of the incidents result in the death of a child. We all must do what we can in this area of concern. Children need to know how to stay safe and protect themselves from kidnapping and other crimes. Small children especially need guidance on making safe choices and decisions. The following are some general guidelines and useful tips that parents can share with their children. It is also important to give children specific examples that they will understand. I hope these will be of assistance to parents:

- First and foremost, explain that strangers should NEVER ask a child for assistance. They should never ask children for directions or for help with something they can do themselves, such as finding a lost puppy or kitten. Discuss the issue of strangers. Simply put, a stranger is someone that a child does not know. Unfortunately, children conjure up the image of a "scary monster" when parents mention the word "stranger." Explain that a stranger may look, act, and dress nicely, or even wear a uniform.
- A child may be in a situation that requires interaction with a stranger, and this may be confusing. For example, if a child gets lost in a grocery store, the child should immediately go to the checkout counter or security office even though that may mean talking to a stranger. Instruct your child not to wander around looking for you.

The child should seek help from someone who works in the store.

- Role-play in various settings such as a park, a grocery store, your home and your neighborhood. Pose “what if?” scenarios and guide your children through the scenarios safely. Correct any unsafe choices and re-enforce safe choices.

You should take time to teach your children to:

- Never take anything like candy, ice cream or money from a stranger.
- Never take a ride from a stranger; check with parents or a trusted adult before accepting a ride even from someone they know.
- Never give their name or address to a stranger.
- Never say that they are home alone when answering the telephone.
- Check with a parent or an adult guardian before leaving the yard or play area. Always try to take a friend when playing outside.
- Create a commotion by yelling and screaming if a stranger tries to take them by force. Try to get away and immediately tell a parent or trusted adult what happened.

These simple tips can help our children stay safe. Additional information can be found in the Attorney General’s Child Safety brochure; the National Center for Missing and Exploited Children, [www.missingkids.com](http://www.missingkids.com); and the Federal Bureau of Investigation, [www.fbi.gov/kids/crimepre/abduct/abdrules.htm](http://www.fbi.gov/kids/crimepre/abduct/abdrules.htm). Take the time to go over this critical information with your children. This simple act could help prevent your child, your grandchild, or a child under your supervision, from becoming a victim of a heinous crime.

### **CAR SEATS SHOULDN’T BE USED FOR MORE THAN SIX YEARS**

The National SafeKids Campaign is warning parents not to use the same car seat with your second or third child. The SafeKids Campaign recommends that car seats shouldn’t be used for more than six years because the safety standards are constantly changing and improving. For more information about keeping your children safe, visit the SafeKids website at [www.safekids.org](http://www.safekids.org).

### **CREDIT CARD DEBT CAN REALLY HURT**

A consumer group’s annual survey shows credit cards are stiffening the penalties for customers who go over the limit, pay late or even fall behind on other bills. So what can you do about it? Consumer Action’s executive director Ken McEldowney says his best advice for consumers is to be careful. When you get your credit card statement, open it immediately, and check the due date. McEldowney says in most cases, you should probably send off a check or electronic payment immediately. He says card companies now give you a shorter amount of time for getting your payment in, and if you miss the deadline, they’re ready to slap you with a late fee that can be as high as \$39. Oftentimes, your interest rate will also be increased.

It is most important to keep all of your accounts in good standing. Consumer Action says the credit card industry, to a large extent, now will increase your interest rate on credit card “A” if you make a late payment on card “B.” And, card issuers tend to check up on you by reviewing your credit report two or even four times a year. My advice is to have as few credit cards as possible and to use them as infrequently as fits your situation. This is especially good advice for young people who are just getting started on a job or in a marriage. The interest rates are extremely high, and with all of the other add-ons now, it makes no sense to use a card as a credit vehicle for extended periods of time.

### **WE SHOULD BEWARE OF TERMITES**

While the billions of cicadas that are currently invading the eastern and southern parts of the country have been grabbing the headlines, entomologists have issued a warning that an insect plague with potentially far more serious consequences may be in the offering. Favorable weather patterns could make it a banner year for termites. The results of a recent survey of entomologists at the Entomological Society of America found that 95% of these insect experts believe that weather patterns have a direct effect on insect populations, with 85% agreeing that termites are the most affected. Because insatiable termites thrive in warm, moist conditions, elevated temperatures over the last few years and this season’s unusually warm and damp weather have created an ideal environment for wood-boring insects to wreak havoc nationwide.

Termites are silent destroyers and can be at work within the structure of a house. That’s why it’s so important to have a trained pest management professional inspect your home. The experts are convinced that the increased moisture plays a pivotal role in increasing termite populations. The top termite markets are in the southern and northern parts of the country. According to the survey the wood boring insects cause more than \$2.5 billion in structural damage every year, and that rate is accelerating. You should note that, while homeowner’s insurance protects against damage caused by storms, floods and fires, this insurance rarely covers damage caused by termites. The bulletin noted that “homeowners can protect their greatest financial investment and reduce the chance of a termite infestation by scheduling an annual termite inspection.” It also warned that for “homeowners considering a move this spring, termite inspections are critical prior to the sale. Depending on the amount of structural damage from a previous termite infestation, costs can be prohibitive for the seller to fix, which may jeopardize the sale – especially considering the fact that homeowner’s insurance does

not cover termites.” The bulletin listed the following steps homeowners should take to insure protection:

- Limit the supply of moisture to the foundation.
- Prevent shrubs, bushes and vines from growing over vents or touching the house. Keep gutters and vents free of clutter and debris. Rake, bag or burn leaves immediately. Any wood source, including mulch, is an invitation for termites to feast.
- Wood mulch can also attract termites. When using wood mulch in a flowerbed or garden, avoid contact with siding or frames of doors and windows.
- Schedule an annual “check-up” or inspection at least once a year from a Premise-certified pest management professional, trained in detecting and destroying termites. Many companies conduct an initial inspection free of charge.

For more information about protecting your home from termites, or to locate a PMP in your region, call 1-800-843-1702. For more information on weather and its impact in your area, visit [www.noaa.gov](http://www.noaa.gov).

## **XXI. RECALLS UPDATE**

### ***PORSCHE, VOLKSWAGEN RECALL SUVs***

Porsche is recalling more than 40,000 Cayenne sport utility vehicles worldwide, and rival Volkswagen recalled some 60,000 of its Touareg SUVs to check for potential faults in rear seatbelts. The German automakers jointly developed the Cayenne and Touareg models, and the vehicles share some parts. The recall is to check for bolts anchoring the seatbelts to the

frame that were improperly welded and could come loose. Porsche said it became aware of the problem through quality tests, but that no incidents had been reported.

It was reported that about 1,000 of the faulty parts were installed in the Cayenne and Touareg vehicles. According to Porsche, the seatbelts in the driver and front passenger seats are not affected by the fault. Both companies said the fault lies with an unidentified supplier. Porsche said its recall affects Cayenne, Cayenne S and Cayenne Turbo models manufactured between October 1, 2002 and December 17, 2003. A total of 40,848 vehicles are involved. The Cayenne has been a big seller for Porsche. The worldwide Volkswagen recall affected all Touareg models made during the same period.

### ***MITSUBISHI TRUCK COMPANY RECALLS 450,000 AUTOS***

The truck company spun off from Japanese automaker Mitsubishi Motors Corp. is recalling 450,000 trucks and buses for defects it had failed to report four years ago when a defect cover-up scandal surfaced. Mitsubishi Fuso Truck and Bus Corp., 65% owned by DaimlerChrysler AG of Germany, has announced recalls of thousands of vehicles this year after acknowledging hub and clutch defects suspected in two fatal accidents. The latest list of 47 recalls announced by Mitsubishi Fuso dates back to models produced as far back as 1983. These are linked to 13 accidents resulting in injury, 26 accidents resulting in property damage and 74 fires in vehicles. The defects disclosed span a wide range, including brakes, hub bearings, oil hoses and emergency doors.

### ***HONDA RECALLS SUVs FOR AIRBAG REPAIRS***

Honda Motor Co. is recalling about 130,000 Honda CRV sport utility vehi-

cles because of a problem with their airbags. The National Highway Traffic Safety Administration reported that the Tokyo-based company is recalling 2002-2004 models of the SUV because of a wiring problem that affects the rate of inflation on the airbags. The airbags could inflate incorrectly and harm drivers. Honda is also recalling almost 20,000 2000 and 2001 Accords because of a lighting problem. A heat buildup could affect the dimmer control on the instrument panel, causing the instrument panel lights to fail at night. The SUV recall began in June. The automaker will start notifying customers of the lighting issue in later this month.

### ***DAIMLERCHRYSLER RECALLS MORE THAN 430,000 PT CRUISERS***

DaimlerChrysler is recalling 438,391 PT Cruisers because of a flaw that could cause a fire under the hood. Nine fires have been reported but no injuries or deaths, according to the automaker. The recall covers PT Cruisers from model years 2001 to 2005. The National Highway Traffic Safety Administration said Friday that a high-pressure power steering hose can loosen and come into contact with other parts of the vehicle. If the hose is punctured and power steering fuel leaks out, a fire can start. The company will inspect the hoses for free, make sure they are routed correctly and replace them if necessary. At press time, the company hadn't determined when it will begin notifying consumers about the recall.

### ***HAIRDRYER RECALL***

The Consumer Product Safety Commission has recalled 12 models of Turbo Power electric hand-held hair dryers. About 359,000 of the hairdryers were sold nationwide. They are not equipped with a mandatory immersion protection device to prevent electrocution if the hair dryer falls into water. This creates a most serious hazard.

These hair dryers can be returned to the retail store where purchased or sent back to the company.

### **CHILDREN'S SHOES RECALLED OVER LACE HOLDER**

Payless ShoeSource Inc., of Topeka, Kansas, has recalled two types of pre-walk and toddler-size athletic shoes because the metal eyelet lace holder can come off and pose a choking hazard to young children. About 441,000 Smart Fit and Teeny Toes shoes are being recalled in cooperation with the Consumer Product Safety Commission, the commission said Wednesday. Payless has received one report of a child who started to choke on an eyelet that had come off a shoe. Thus far, no injuries have been reported.

The shoes, sold at Payless ShoeSource stores and on the company's website from December 2003 through April 2004, cost about \$10. They were manufactured in China in sizes 0 to 10 and are white with trims in various colors. The name Smart Fit or Teeny Toes is written on the sole and insole. On the underside of the shoe's tongue is a five-digit number: 31056, 31057, 31219, 32264, 32265, 33060 or 33061. Consumers should take the shoes away from children immediately and return them to a Payless store for a cash refund or exchange.

### **CPSC RECALLS ABOUT 20,000 BABY WALKERS**

The U.S. Consumer Product Safety Commission has announced a voluntary recall of Dream On Me baby walkers. CPSC said about 20,000 Dream On Me baby walkers, manufactured by Dream On Me Industries, are hazardous to children because the walkers will fit through a standard doorway and are not designed to stop at the edge of a step. Babies using these walkers can be seriously injured or killed if they fall down stairs. No injuries have been reported, thus far,

and the recall is being conducted to prevent the possibility of injury.

The recalled baby walkers have model number 408 or 423 written on a label sewn into the seats. Model 408 has a white and black tray and a black printed fabric base and seat, measuring about 25 inches by 28 inches. Model 423 has a red tray and a purple plastic base measuring about 25 inches by 28 inches. Both models have eight snaps in wheels and a label sewn into the seat that reads "DREAM ON ME IND INC. BROOKLYN, NY 112321, MADE IN CHINA." The baby walkers were sold in small toy and juvenile product stores in the metropolitan New York area from April 2002 through March 2004. For additional information on returning the product, contact Dream On Me Industries representatives at (877) 768-5500.

## **XXII. SPECIAL PROJECTS**

### **THE KING'S RANCH – HANNAH HOMES – BETHANY HOME**

Last month we were blessed to have Lew Burdette speak at our firm's weekly devotion. Lew is the executive director of King's Ranch and Hannah Homes. We were all very interested to learn what is going on with this organization. For over 30 years, The King's Ranch, Hannah Homes, and Bethany Home have been home to hundreds of youth, women, and children seeking refuge, hope, and help from abuse, neglect, abandonment, homelessness, and other difficult circumstances. They provide residential group home services in 16 Christ-centered homes, located in 4 different counties. Their first priority is to share the gospel of Jesus Christ and the unconditional love of God with every youth, woman, and child they serve. Along with the opportunity for spiritual development, they teach the necessary skills and provide tangible services to help residents heal from

their devastating past, break the cycle of abuse, build healthy relationships, and become independent, productive members of society. The organization's mission is "To serve God by providing Christ-centered homes and services in which compassion and competence combine to meet the needs of youth, women, children, and families."

Occasionally, we recommend that certain groups, organizations, and causes are good places where folks can help. I sincerely believe that The King's Ranch and Hannah Homes is a good place to send a donation. If you agree, and want to help, send a tax-deductible donation to: P.O. Box 162, Chelsea, Alabama 35043.

## **XXIII. FIRM ACTIVITIES**

### **SHAREHOLDER ELECTED TO AIEG BOARD OF DIRECTORS**

Greg Allen, one of the leading product liability lawyers in the country, was recently elected to the Attorneys Information Exchange Group, Inc. Board of Directors. AIEG is a national litigation group specializing in automotive and other product defect cases. Greg, who has been involved in many cases that have resulted in substantial verdicts and settlements for his clients, has been profiled in many national publications, including the National Law Journal and Lawyers Weekly USA. He has also been named litigator of the month in the National Law Journal.

Greg is currently the editor of the *Alabama Trial Lawyers Association Journal*. He is the past president of the Montgomery Trial Lawyers Association and has been on the executive committee for the Alabama Trial Lawyers Association for a number of years. Greg really works hard for folks who have been seriously injured and for families who have lost loved ones because of defective products. The results in his cases have had a real

impact in the automobile industry. Greg especially enjoys difficult and technical cases, and it's good that he does because all product liability cases fall in that category. The powerful automobile industry has unlimited resources and uses them in every case involving one of their vehicles. That's what makes every case—regardless of how strong it may be—a challenge.

### **EMPLOYEE SPOTLIGHTS**

#### **JOSEPH H. AUGHTMAN**

Jay Aughtman is a shareholder in our Consumer Fraud Section. Prior to coming to work at Beasley Allen, Jay served as law clerk to Justice H. Mark Kennedy who then was on the Supreme Court of Alabama. Jay, who joined the firm in March of 1997, focused his practice in the area of consumer fraud litigation. He has represented thousands of clients in fraud cases, focusing on mainly market conduct and sales practices litigation. Jay has been involved in bringing a national reputation to our firm in consumer fraud litigation. Jay has been involved in a number of trials, each with jury verdicts in excess of \$1,000,000. The majority of the cases Jay handles involve vanishing premium claims, universal life policies, and bad faith. Recently, Jay helped bring suit on behalf of the Insurance Commissioner of Tennessee in a complex case involving the failure of three malpractice carriers domiciled in Tennessee.

Jay currently serves on the Alabama Trial Lawyers Association Executive Committee. He is also a board member of the Dr. William O. Nowell Scholarship Fund at Auburn University - Montgomery. Jay is married to the former Jennifer Woodman and they have two children, Josey and Graves. Jay and his family attend church at St. James United Methodist Church in Montgomery, where Jay has held numerous leadership positions. He is also an active member in fundraising for the Montgomery Young Life Christian Organization. Jay has developed into a very good lawyer.

#### **DAVID MICELI**

David Miceli is a Shareholder in our Mass Torts Section. Since joining Beasley Allen, David has helped the Mass Torts Section build a national reputation for its involvement in cutting-edge pharmaceutical and dietary supplement litigation. David concentrates his efforts in litigating against manufacturers of defective drugs, medical devices and dietary supplements. He is admitted to practice in Florida, Alabama and Georgia. David has spoken at many legal education seminars. He has also presented on the areas of mass torts for the Alabama Institute for Continuing Legal Education and the Association of Trial Lawyers of America. In addition to speaking on legal topics, David has led presentations in support of fundraising for the American Heart Association. David and his wife, Suzanne, have two children, Hannah and Joshua. David will be leaving the firm soon to return to his hometown of Carrollton, Georgia. We will miss him and certainly wish him well.

#### **LINDA REYNOLDS**

Linda Reynolds started with the firm in November of 2000 as a legal assistant to Roger Smith in our Mass Torts Section. She currently oversees approximately 8,000 Rezulin files. Another major challenge involves claims relating to the drug Serzone. Linda, who previously worked in the Montgomery County Circuit Clerk's office for 13 years as a supervisor, has a paralegal certificate and is currently enrolled at AUM, working on her Bachelor's Degree in Justice and Public Safety with an emphasis in Pre-Law. Linda plans to attend Jones School of Law once she completes her undergraduate degree. Linda has been married to Denver Reynolds for 20 years. They have an 11-year-old daughter, Mandy, and an 8-year-old son, Terry. Linda and her family are members of Liberty Church of Christ in Pintlala. Linda is a most valuable employee and does very good work.

#### **SUSAN HARDING**

Susan Harding, who has been with

our firm for three years, started out as a clerical in the Business Litigation Section, now known as the Toxic Torts Section. She currently works as legal secretary to David Byrne and Scarlett Tuley. Her work is primarily in environmental and business litigation. Susan and her husband, Jack, have three children: Erik, 26; Ryan, 19; and Sarah, 17. The Hardings attend New Horizons Church in Prattville. Susan is a hard-working employee who is dedicated to her work. She is a very good employee and we are pleased to have her with us.

#### **MARTHA TAYLOR**

Martha Taylor has been with us for three years as a receptionist. She handles all the receptionist duties for our main building, which is located at 218 Commerce Street. Martha is the first person to greet our visitors and always makes them feel at home. She also handles keeping our building manager, Jim Craft, operational by making sure he gets work orders, faxes and e-mails from the employees. Martha is married to Butch Taylor and has two children. Her daughter Angela is married to Jason Hughes and they have a five-year-old son, Cole, and a one-year-old daughter, Meagan. Martha's son Jeremy attends Troy University. When not at work, Martha enjoys spoiling her two grandchildren, reading, browsing through flea markets and antique shops and sitting on the front porch watching the horses graze. Martha has one of the most challenging jobs at the firm. The contacts she handles are tremendous in number and quite varied. She does an outstanding job and her work is greatly appreciated.

#### **OUR MAINTENANCE DEPARTMENT**

One of the best things we have done in our firm is to create our own maintenance department. This unit is made up of three of the hardest working employees we have. Jim Craft, who heads up this department, holds the title of Building Manager. Jim is responsible for the upkeep of all our buildings. He has helped the firm tremendously by saving money on

repairs and purchases. Jim is retired from the Postal Service and is an ordained evangelist. He currently travels with a southern gospel quartet as a soloist. Jim also enjoys playing the piano and guitar and going fishing in his spare time. Jim is married to Patricia and has 5 children, 10 grandchildren and 3 great-grandchildren.

Mike Bailey, who is Jim's right-hand man, has a variety of duties and does most of the repair work for the firm. Mike is married to Cindy Bailey, who serves as our housekeeper. Mike and Cindy have three children: Laura, 21; Johnny, 16; and Kellie, 12. They are also enjoying their first grandchild, two-month old Alyssa. Cindy is in charge of stocking the kitchens and other parts of our 4 buildings. She makes sure supplies are delivered to employees on a timely basis. Cindy is always ready with a smile when asked to help and is an inspiration for all of us. She never seems to have a bad day.

Jim, Mike, and Cindy are extremely hard workers and are most valuable to our firm. We are pleased to have them on our team. Not only are they good workers, they are real good folks!

## XXIV. CLOSING REMARKS

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I will make a confession that may come as a surprise to some folks. I really don't like politics and actually don't like all politicians. There are some people in the political world who have no real core beliefs and who operate strictly on poll results and instructions from their consultants. Of course, there are many public officials who really want to do the right thing and try hard to do their jobs. I just wish there were more. I suspect if we could cut out all of the wild spending in political campaigns – which means limiting contributions, there would be more **good** public officials.

Because of the nature of my work, and the folks I represent, however, I

have an obligation to get involved in politics, both on the state and national levels. I don't see that I have any real choice in the matter. Most of our clients have no political influence other than their vote and depend on folks like me to stand up for them. Our law firm believes we owe it to our clients and to other consumers to get involved and try to make a difference. We have tried to do that and don't apologize for at least trying. Unfortunately, some lawyers simply don't want to get involved in the political arena, and that is true even when they have to know involvement is needed and is their responsibility.

There are thousands of well-paid lobbyists who work for the powerful special interest groups. On the other hand, it is sad to say that there aren't many consumer advocates around today or at least not as many as there should be. Actually, you can count on your fingers consumer groups today that are really involved and are actually effective. Their numbers are getting smaller as time passes. Certainly, Public Citizen is one such group that warrants special mention. They do a great job in my opinion. In fact, I can think of no organization or group that is more dedicated to working for the public interest and to fighting the special interests. Joan Claybrook, who heads up Public Citizen, works harder for consumers and the average citizen in our country than anybody I know. We need more folks like her.

Some of my trial lawyer friends tell me they are tired of being attacked for what they do. Anybody who has been around during the past few years knows that Corporate America, at the direction of Karl Rove, has targeted trial lawyers for attack and labeled us as "Public Enemy Number One." That's no longer news. Some of our number have become intimidated because of these relentless attacks and are now hesitant to stand up for the rights of ordinary people. Consumers, over the years, have been relegated to second-class citizenship status and now are seeing their basic rights being stripped away. We all know that the combina-

tion of tort reform and arbitration have really taken a toll on the rights of victims of corporate wrongdoing.

All of us who call ourselves "trial lawyers" must get involved in the fight for consumer rights and individual liberties. From personal experience, I can tell you that it is a tough and ongoing fight. We could all take a cue from a former President of this country who wasn't afraid to take a stand for "little folks" and who would take on the "bad guys" when necessary. The following is a pretty good example to follow for any person who calls himself or herself a **trial lawyer** or a **consumer advocate**.

*It is not the critic who counts, not the man who points out how the strong man stumbled, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena; whose face is marred by dust and sweat and blood; who strives valiantly; who errs and comes short again and again; who knows the great enthusiasms, the great devotions, and spends himself in a worthy cause; who, at the best, knows in the end the triumph of high achievement; and who, at worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.*

— Teddy Roosevelt

This is certainly good instruction for me and I hope for many of my brothers and sisters in the legal profession, and especially for those of us who represent victims of corporate abuses and wrongdoing. Looking back in history, I realize that lawyers have actually been under attack for centuries. In fact, those attacks weren't limited just to trial lawyers, but actually were aimed at the legal profession as a whole. I recall something in my very limited reading of Shakespeare's works that lawyers have not always been the most popular

folks in town. I remember one of his characters saying something about first **killing** all of the lawyers. I also recall another statement, made over 60 years ago, by a madman who had a master plan designed to stamp out anything and everybody that stood in his way. His goal was to take over an entire country and its government and then the world:

*I shall not rest until every German sees that it is a shameful thing to be a lawyer.*

— Adolph Hitler

While no person attacking lawyers today is in the same league as Hitler, and I would never say that, it is quite obvious that abolishing the courts and doing away with a class of lawyers who fight to defend the judicial system is critical to a complete take-over of government and the abolishing of individual rights and liberties. We can't let that happen, and in that regard, we simply can't let our judicial system be destroyed. Our forefathers preserved the right to trial by jury in our constitution and did it for a purpose. They had the foresight and wisdom necessary to look far ahead of their day and make sure no future despot could ever take over our government. Of course, those men could never have foreseen a time when good folks would remain on the

sidelines and sit out the fight. It is critically important today for good men and women, who really care about our republic, to join the fray and guarantee for future generations that everything good our nation has stood for over the years isn't destroyed. Unless held in check now, that's exactly what some have in mind. For example, Karl Rove is obsessed with power and political influence and has a history of destroying those who stand up to him. If you doubt this, simply ask Senator John McCain about his Rove experiences a few years back. Unfortunately, Rove has complete control of the Bush White House at present and that is scary.

Finally, I firmly believe that the moral decline in our country is far more dangerous to the future of our country than the military might of any foreign power. No nation can survive over the long haul that has forgotten the moral foundation upon which our nation was based. We now see in our country a widespread drug problem affecting folks from all walks of life and all age groups. We have young children taking guns into their schools. We are experiencing a moral decline in all facets of our society, especially in the entertainment world. We no longer have dignity, discipline, and order in many of our classrooms around the country. Drive-by shootings have been all too common. Our children and grandchildren can't

watch television in our homes without being subjected to programming during prime time filled with violence, explicit sexual content, and downright filth. I have to wonder where some of our churches stand on the moral crisis facing our nation. I would think there is some real fertile ground for church folks in these areas of concern.

I have real difficulty in comprehending how we have fallen so far away from the morality that was so much a part of our government in the very beginning. The fact that placing the Ten Commandments in a judicial building in Alabama has become such a divisive issue in our country speaks volumes on how far we have fallen. Many believe we need a dose of some "old time religion" in our country. I have heard it reported that a spiritual revival in America will start in Alabama and some say in the City of Montgomery. I hope and pray that will be the case. I will close with the following which is a reminder for me each day:

*O what a wonderful God we have! How great are His wisdom and knowledge and riches! How impossible it is for us to understand His decisions and His methods! Everything comes from God alone. To Him be glory forevermore.*

—Romans 11:33-36

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