



THE
JERE BEASLEY REPORT

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I. CAPITOL OBSERVATIONS

A SLOW SUMMER

There hasn't been much activity around either the Alabama State Capitol or the Statehouse during the hot summer months. I suppose that's mainly because the Legislature hasn't been in session. Some may believe that is a good thing. Because there is still talk of a special session, however, the level of activity will likely increase greatly. A session could be called very soon according to several sources. In fact, the expected session could have been called by the Governor by the time this issue is received. If so, I just hope that the preliminary planning and related work required has been done and agreements made that are necessary for a special session to be productive. Otherwise, a special session would be a mistake. In any event one thing is certain and that is Governor Riley shouldn't call a session that would be bound to fail. In that regard, I don't believe he will. If a session is called it will be a pretty good indication that some basic agreements were reached by the competing interests.

GOOD STATE EMPLOYEES ARE NEEDED

I get the impression that the dedication of the overwhelming majority of state employees is sometimes taken for granted by most Alabamians. Unfortunately, the perception among some folks around the state is that state employees as a whole don't work very hard and are overpaid. Nothing could be further from the truth. As in most all business operations, there will always be a few employees who don't perform in an efficient manner. I suspect that has been true in state government over the years. However, the overwhelming majority of state employees are dedicated to their job and are hard workers. Nevertheless, state employees have always been the target of criticism by some politicians,

and I believe that is most unfortunate. The demands on state government are enormous, and because of the current fiscal problems, things have gotten extremely tough for persons employed by the state. Personally, I appreciate the efforts by our state employees and would like to see them get the credit they are due.

A GOOD MOVE BY THE GOVERNOR

I was glad to see Governor Riley appoint The Black Belt Action Commission. In my opinion, that was a good move. Senator Hank Sanders and State Treasurer Kay Ivey will co-chair the commission. I understand that the first meeting was held on August 24th. The Commission will look at manufacturing, health care, education, skills training and infrastructure needs for the 13 counties making up the Black Belt of Alabama. All Alabamians should be most pleased to see something really positive happen for an area of our state that has been sorely neglected for all too long. I am convinced that progress in the Black Belt will benefit all of Alabama. Congressman Artur Davis is working with the Commission and that's a definite plus.

UPDATE ON EXXON MEDIATION

We are still in mediation with Exxon in the State of Alabama's fraud case against the giant oil company. We held our second session with the mediator in Atlanta on July 31st. Since the mediation sessions are confidential, I can't discuss any part of what took place at any of the sessions. The confidentiality order from the Supreme Court applies to both the State and Exxon. If the mediation fails and the case is not settled, the issues will go before the Alabama Supreme Court. The case is presently stayed pending completion of the court-ordered mediation. Fortunately for the state, interest is running on the reduced jury verdict. To date, the interest amounts to well over \$300 million. We hope that the case will be resolved between the parties. If that doesn't happen, however, we will do

our best to win the case on appeal. There is no doubt in my mind that the State's case is extremely strong. If the justices follow the law and apply it to the facts that were clearly established at trial—and I believe they will—the Supreme Court will have no choice but to affirm the jury's verdict. The well-established law and the evidence in the trial transcript clearly support the State's position. For that reason, I am confident that help is on the way for the people of Alabama and the State's coffers.

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JUDGE MOORE APPEALS TO SUPREME COURT

Former Chief Justice Roy Moore has filed an appeal to the U.S. Supreme Court to reclaim his job as Alabama's chief justice. I doubt there are many folks around the country who don't have at least a casual interest in this case. In a news conference last month, Judge Moore again claimed he was ousted for "professing a belief in God" when he refused a federal order to move the Ten Commandments monument from the Alabama Judicial Building. The lawyers representing Judge Moore argued that a state judicial ethics panel imposed an "unconstitutional religious test" on the former chief justice when the panel removed him from office. Thus far all courts have rejected that argument. The U.S. Supreme Court will now have the final say on the issue. It will be interesting to see how the Justices respond.

Recently, the much-discussed monument was moved out of a **closet** in the Judicial Building by a veterans' group. It will be taken on a tour slated to end in mid-October in Washington, D.C. Clearly, the ouster of Judge Moore and the controversy over the Ten Commandments has **polarized** most folks in Alabama. It has been my observation that folks seem to either **love** Roy Moore or **intensely dislike** him. There appears to be little **middle** ground on the man and his issues in our state, and that may well be the case around the country.

It will be interesting to see whether the U.S. Supreme Court will accept the Moore appeal. If the case does go before the highest court in the land, the country will get an opportunity to see all of the references to **religion** that are present in and around The Supreme Court Building. In fact, I believe the High Court still starts its sessions with prayer. It might prove to be more than a little embarrassing to the Justices when folks see Moses and the **Ten Commandments** engraved in stone as they enter the U.S. Supreme Court building. There are several other locations in the building where the Ten Commandments are prominently displayed. Regardless of how one feels

about Roy Moore, it is a sad commentary on our times that our country is moving further and further away from a dependence on God.

As for Judge Moore, I am convinced that the man is totally sincere in his beliefs. It is quite apparent that Roy Moore is willing to take the consequences of his actions. The man lost his job and his retirement, and that has to hurt him and his family. Now efforts are now underway to take away his law license, which I believe is totally inappropriate. Nevertheless, Roy Moore remains extremely popular with a tremendous number of people both in Alabama and around the country. It is rather ironic that the harshest criticism of the Judge has come from two directions—the ACLU and the "chiefs" in the GOP—and that is most interesting. If nothing else, the controversy over the Ten Commandments has caused many of us to reexamine our own beliefs and commitment. I am firmly convinced that, unless our people return to an obedience to God and a dependence on his promises, our nation will continue its slide downhill from a morality perspective.

THE OFFICE OF LT. GOVERNOR

Under the Alabama Constitution, the office of the Lieutenant Governor is in the executive branch of government. Interestingly, however, is the fact that the only official duty of this office is to preside over the state Senate. There are no other designated duties, and I have always felt that was a major mistake. As a few of you may know, I had the high privilege of serving as Lt. Governor from 1971 through 1978. Based on my service and subsequent observations, I have some strong feelings about how this office should work in the future.

When I took office in 1971, the Lt. Governor's staff consisted of one secretary and the office had no budget. During my tenure, the staffing was increased, and when I left state government, there were an administrative assistant, a personal secretary, a receptionist and three clerical assistants

assigned to the office. Two state troopers were also assigned to the Lt. Governor and served as a security detail. Things have changed greatly since those days. The office is now adequately staffed and funded.

The time I spent as Lt. Governor was interesting to say the least. The fact that Governor Wallace was the victim of an assassination attempt while running for President—leaving him paralyzed—greatly changed everything for me and for the office while I was there. From that fateful date in 1972, the overall demands on the Lt. Governor's office increased significantly and never really let up. I left office convinced that the office needed to be changed insofar as how it was set up and functioned. I had felt all along that the Lt. Governor needed to be a full-time official in the executive branch with no legislative duties.

I am firmly convinced that the Lt. Governor should be in the executive branch and have no duties of any kind that involve the Senate. I also believe that persons running for Governor and Lt. Governor should be required to run as a team in the political primaries and in the general election. This would mean the two offices would be filled by persons elected from the same political party. The Lt. Governor should be more like an assistant to the Governor and could serve much like the Vice-President does on the national level. This could be accomplished in part without a constitutional amendment, but it would be much better to do it the right way, by an amendment to the Alabama Constitution of 1901. Otherwise, the temptation to preside over the Senate and influence key Senate votes would always be there. I am convinced that the Senate would be better served by having its presiding officer coming from the body. The President of the Senate would be elected by the 35 Senators and would have such duties and authority as granted by the members of the Senate. I hope that one of these days my recommendations will become a reality. However, I am a realist and doubt that it will happen unless it comes with a **new** constitution.

A LOOK AHEAD

Obviously, I have no reason to believe there will be any change in the make-up of the Lt. Governor's office before the 2006 election. However, even with the reduced responsibilities given to the current Lt. Governor, there is still considerable interest in the office. There are a number of persons being mentioned as possible candidates. From the Senate, I understand that Lowell Barron, Zeb Little, Jeff Enfinger, Wendell Mitchell, Ted Little and Vivian Figures are being discussed as potential candidates. According to capitol insiders, there are also several House members who may be considering the race. Those include Mike Hubbard, John Knight, Ken Guin and Billy Beasley (who happens to be my "little brother"). All of the above would change overnight if Lucy Baxley decided to seek reelection, rather than go for the big office. I doubt seriously if anybody would run against Lucy if she sought a second term. She is extremely popular and is a good campaigner. If Lucy elects to go a different route, however, the field will become very crowded. In any event, I hope one of these days the concept of the office is changed for good. I believe the state would benefit greatly when and if that ever happens.

DEADLINE PASSES WITH NO DEAL IN INTERSTATE WATER DISPUTE

The July 31st deadline passed with no water-sharing agreement between the states of Georgia and Alabama. A provision that would allow metropolitan Atlanta to triple its consumption of water from Lake Allatoona in northwest Georgia has been the major stumbling block between the two states. The dispute apparently is bound for a return to federal court. Most observers agree that Alabama can't afford to sacrifice our water future just to satisfy Atlanta's water needs. A tentative agreement over the Alabama-Coosa-Tallapoosa River Basin, which includes Allatoona Lake and is the drinking water source for Cartersville and Rome, was signed in April 2003. Lawsuits over

sharing water from the Chattahoochee River came back to the forefront after a similar agreement among Georgia, Alabama and Florida expired last August. I suspect the courts will have to resolve the water issues, and it won't be easy.

The Alabama-Coosa-Tallapoosa agreement would allow metropolitan Atlanta to draw three times more water out of Allatoona over the next 30 years, and send nearly half down the Chattahoochee River rather than keeping it in the Coosa River Basin. This would be a tremendous amount, estimated to be in the neighborhood of 100 million gallons each day. That would mean a net loss of water flowing past Rome and on into Weiss Lake in Alabama. I understand that Alabama officials were willing to accept that in return for a guaranteed minimum amount of water, including during times of droughts.

I also understand that Florida is working on a case to take to the U.S. Supreme Court. Negotiators for Georgia and Alabama were trying to avoid the same fate for the Coosa River basin. Negotiators simply weren't able to reach an agreement. Admittedly, this issue is a most difficult one. To put it in easy to understand language—it's a tough nut to crack! The dispute over the Coosa River was considered by most observers to be easier to solve than the Chattahoochee. That problem involves three states and supplies most of the water for metropolitan Atlanta. The renewed fight over the Chattahoochee obviously affected the Coosa River talks. Georgia wanted Alabama to let metropolitan Atlanta take more water out of the Chattahoochee as part of the deal for the Coosa. Georgia also wanted to be able to send Alabama less water than the guaranteed minimum amount in case of a severe drought. Everybody agrees that this is a most serious matter with long-range ramifications. Few people appear to comprehend how important the rights to water usage are in this country. I am not alone in believing that the problems will intensify over the next few years. Water has become a precious commodity and will become even more valuable in years to come.

VOCAL HAS NEEDS

Victims of Crime and Leniency, better known as VOCAL, does a tremendous job of assisting survivors of homicide victims. Since opening Angel House in 1999, VOCAL has assisted over 200,000 survivors. Due to severe cuts in their grant funding, however, the organization now has to raise 50% of their total budget, which is now approximately \$85,000. They badly need financial assistance. The service this organization provides to our state is invaluable. Please make a donation—if you believe that VOCAL has a place in our criminal justice system—and mail it to VOCAL, P.O. Box 4449, Montgomery, AL 36103. VOCAL is a non-profit organization.

II. COURT WATCH

VERDICT IN FEDERAL COURT IN POLLUTION CASE

A federal court jury in Opelika awarded \$20,709,000 to the City of Columbus, Georgia, Action Marine, Inc., and two individuals in an air pollution lawsuit filed against Continental Carbon and its parent company, China Synthetic Rubber Corporation. The jury verdict consisted of \$1.9 million in compensatory damages, \$1.294 million in attorneys' fees and expenses and \$17.5 million in punitive damages. The case was tried under Georgia law since all of the damages occurred in Georgia even though the polluting emissions came from the plant located in Phenix City.

Air emissions of carbon black from the Phenix City plant damaged property owned by individuals and businesses in the Columbus area. The businesses also lost significant income, property values were greatly damaged and individuals suffered physical and emotional damages. In addition to the City of Columbus, only one business owner and two individuals were involved in this case. Other suits will be filed now that the first trial is over. The case had started as a potential

class action, but because damages suffered varied the trial judge properly denied class certification. All claims will be handled on an individual basis.

The manager of the Phenix City plant had requested numerous pollution control improvements at the plant, all of which were rejected by the parent company. Documents presented at trial revealed severe environmental problems at the plant relating to the release of carbon black, which were known by the defendants. Carbon black is a powder-like substance manufactured at the Continental Carbon plant in Phenix City. The jury found that Continental Carbon and China Synthetic Rubber Corporation had acted in bad faith, which allowed the award of punitive damages under Georgia law.

David Byrne, III and Rhon Jones, from our firm along with co-counsel Eddie Jackson of Jasper and Jeff Friedman of Birmingham tried the case, which lasted for over two weeks. This case was a prime example of a large corporation ignoring the safety and welfare of citizens in the area and refusing to install needed pollution controls. The conduct by both corporations was extremely bad and the jurors recognized it. We will ask for court to force the defendants to make the necessary improvements and clean up their operations. This can be done very easily and is long overdue.

After three years of cover-up, lying to regulatory agencies and deception, a judge and jury heard the whole story. Hundreds of folks, including business owners in Columbus, have been severely damaged as a result of some extremely bad corporate conduct. This case was a prime example of why we must keep our courts open and preserve the jury system. No regulatory body—state or federal—had been able to get anything done to stop the massive pollution problems at the Phenix City plant.

TRIAL SECRECY IS NOT GOOD

On numerous occasions I have expressed my views concerning confidential settlements and protective

orders in litigation. All of our readers should know by now that I don't like secrecy in lawsuits. Unfortunately, all too many courts are allowing corporations to keep their "dirty secrets" hidden from public view and I believe that is wrong. Despite the potentially deadly consequences, these courts have allowed vital information revealed during lawsuits to be kept secret and away from public view and scrutiny. As a result, consumers are paying the price for that secrecy with their lives in many instances. In many instances, corporate defendants will agree to settle cases only if confidentiality is a part of the settlement agreement. This obviously puts the victim, who in most cases simply needs the money to survive, in an untenable position. They simply have little choice and generally agree to the defendant's demands. In cases dealing with severe disability of a plaintiff or the death of a breadwinner, it allows the defendant to achieve its goal, and that's keeping hazards and dangerous conditions a secret. In some cases, defendants are actually able to get the court to enter very strict protective orders, the effect of which keeps bad information and bad documents from the public.

Fortunately, some courts are beginning to take action favorable to the public on the secrecy issue. The legislatures in several states have also stepped into this arena with good results. Currently, 20 states either ban or limit secrecy orders. The states which have legislation on the books at present are: Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Nevada, North Carolina, New Jersey, Oregon, Texas, Virginia and Washington. Unfortunately, Alabama is not on the list. I hope there will be an effort to put anti-secrecy legislation on the books in Alabama and other states that will protect the public from secret settlements and oppressive protection orders. The public in each of the states that haven't taken action should contact their Governors and legislators and demand that they get involved.

COURT "SPANKED" FOR RELEASING SETTLEMENT INFORMATION

A judge's decision to reveal that a sex discrimination case ended in a "multi-million dollar settlement" has been criticized by the U.S. Court of Appeals for the Second Circuit. The appeals court called the trial judge's public revelation on the settlement between a female plaintiff and Deutsche Bank AG a "serious abuse of discretion." But, the court also said nothing could be done to remedy the error. The plaintiff had been a partner in the Deutsche Bank Capital partners unit and filed suit in 2002. The claim was that she was passed over for promotion because she is a woman and that the bank maintained a work environment hostile to women.

The parties entered into a confidential settlement in 2003. The trial judge ordered the unsealing of several documents in the case, including a study of gender diversity in the bank. The documents did not disclose the settlement amount, but the court's order revealed that the parties had "agreed to a multi-million dollar settlement." The order was promptly published on the databases of Westlaw and Lexis and an appeal was taken by the bank. The appeals court remanded the case with instructions to the trial judge to take some steps to redact from the record other confidential information relating to the settlement between the parties.

THE PRESIDENT HAS AN ANTI-CONSUMER AGENDA

I doubt that many of our readers will be surprised to learn that the Bush Administration is working hard to pay back the pharmaceutical industry and manufacturers of medical devices, at the expense of consumers, for their political support. In fact, I fully expected that very thing to take place. The Administration has now gone to court to block lawsuits by consumers who have been injured by prescription drugs and badly designed medical devices. The Bush Administration—at the direction of **Field Marshal** Karl Rove—contends that consumers can't

recover damages for such injuries if the products have been **approved** by the Food and Drug Administration. This is a most significant and dangerous **change** in governmental policy. It is shocking that the Justice Department has already persuaded a few judges to accept its arguments. Most recently, the Bush Administration achieved what it claims is a major victory in a federal appeals court in Philadelphia.

Back in 2002, the Bush Administration outlined plans at a legal symposium for “FDA involvement in product liability lawsuits.” At that time few—if any—legal scholars really took them seriously. But, since that time the Bush lawyers have been methodically pursuing that very strategy. Their actions are extremely bad for consumers and with good reason. For example, anybody who has followed the federal Food and Drug Administration closely knows that the agency has allowed a number of bad drugs to be put on the market. Many believe the FDA is pretty much an extension of the pharmaceutical industry and as a result doesn’t adequately protect the public interest. That is a view I share. Our firm’s experience in litigation against the drug companies convinces me that I am correct in my thinking on this subject.

As usual, in his latest anti-consumer action, the President attacks trial lawyers, claiming that lawsuits impose a huge burden on the economy and drive up health costs. You may recall that when running, the President claimed to be a compassionate conservative. But, since taking office Bush’s compassion hasn’t extended to victims of corporate wrongdoing or abuse. In this latest payback effort, the Bush Administration is taking the FDA in a new and most radical direction. Seeking to protect drug companies at the expense of the public has come to be expected from the Rove-run White House. So, I really believe we should have anticipated that which has now become a reality. But, the American people should never accept it, and simply put, that’s because it’s not in their best interest.

The Bush tactics have also been applied in product liability cases filed

against the manufacturers of medical devices. In the Pennsylvania ruling, the appeals court threw out a lawsuit filed by a lady whose husband died because of alleged defects in the design and manufacture of his heart pump. The Bush Administration argued that federal law barred such claims because the device had been manufactured according to federal specifications. The Administration conceded, however, that its present views differ from the views that the government had advanced in 1997. At that time the Justice Department had taken a totally different position in a case before the United States Supreme Court. The government then said that FDA approval of a medical device set the minimum standard and that states could provide “additional protection to consumers.” Now the Bush Administration argues that the agency’s approval of a device sets a **ceiling** as well as a **floor**.

The Administration said its position, holding that individual consumers have no right to sue, actually benefited consumers, which is totally absurd. For example, there have been a tremendous number of drugs that were approved by the FDA, but subsequently withdrawn from the market. Under the Rove–Bush logic, there could never be a lawsuit against any manufacturer, that knowingly puts a dangerous drug—approved by the FDA—on the market. That is totally illogical and also immoral since people will be badly hurt as a result.

Allison M. Zieve, a lawyer at the Public Citizen Litigation Group who represented the plaintiff in the Pennsylvania case, correctly says that “the government has done an about-face on this issue.” If courts accept the Bush Administration’s position, it will be nothing more than a **back-door** type of **tort reform** that would totally **shield** manufacturers from damage suits. In the Pennsylvania case, the federal appeals court quoted extensively from the Administration’s brief and said the views of the FDA were entitled to great deference because the agency was “uniquely qualified” to determine when federal law should take precedence over state law. Patients and their fami-

lies have been betrayed by the President on this issue. Unfortunately, few folks even know what is happening on this most important issue and won’t until it directly affects them.

The Bush Administration will attempt to extend this rationale to any product that has to be approved by a federal agency. Can you imagine what the auto industry would do if it received a blanket immunity from lawsuits? Some of the NHTSA standards for automobiles are extremely weak and are meant to be only the most minimum of standards. For example, a frail aluminum lawn chair put in a car as a front seat will meet the federal standard for automobile seatbacks. That’s how weak that standard is. Consumers need to be alerted to this latest effort to keep victims from filing meritorious lawsuits against Corporate America and to protect corporate wrongdoings.

BLOCKING MEDICAL PRODUCT SUITS IS WRONG

The New York Times had an excellent editorial on the attack on consumers by the Bush White House in its August 1st edition. It tells a compelling story and one that should be heard by consumers nationwide. For that reason, I have set out the editorial in its entirety.

It is disheartening that the Bush Administration has been intervening in court to block lawsuits filed by people seeking compensation from manufacturers for harm allegedly caused by drugs or medical devices. As described by Robert Pear in last Sunday’s Times, the Administration has argued in several cases that individual consumers have no right to sue for such injuries if the products have been approved by the Food and Drug Administration. If the Bush Administration’s campaign proves broadly successful, people injured by drugs or medical devices may be left without legal recourse, no matter how just their complaints.

In a recent ruling, a federal appeals panel in Philadelphia,

after seeking the Administration's views, threw out a lawsuit filed by the widow of a man whose heart pump failed. Whatever the legal merits of this close two-to-one decision, which turned on the degree to which the FDA can pre-empt state laws and court decisions, most fair-minded Americans would probably think that the widow got a bum deal. The facts of the case as alleged in court documents suggest that the heart pump, though approved by the agency, was designed poorly.

The device had several components connected to each other by screw rings or other threaded connections that were vulnerable to loosening because of motions within the body. The model inserted into the Pennsylvania man used a factory-installed suture to prevent such loosening, but that suture apparently broke because it rubbed against the breastbone, allowing the joint to separate and an air bubble to travel to the brain. The precise role of the heart pump in causing the man's death may never be known because the case was aborted before it went to trial. But the manufacturer subsequently designed a self-locking screw ring that required no sutures and would very likely have prevented this accident.

The Administration argues that allowing consumers to sue the manufacturers would undermine federal regulation of drugs and devices by encouraging lay judges and juries to second-guess the experts at the FDA. The result could be a hodgepodge of conflicting judgments around the country as to the safety of a product and the need to change warning labels. Skittish manufacturers might then remove good products from the market or issue scary warnings that would discourage their use.

These concerns seem overblown and are offset by other considerations. The FDA is not infallible. It

seems poor policy to assume that once the agency has judged a product safe enough to use, the manufacturer should be insulated forever from lawsuits that could force improvements. Simple justice suggests that victims harmed by a product should be able to seek compensation. If a manufacturer has acted in good faith and received the agency's approval, the likelihood of huge punitive damages - the real bêtes noires of the tort reformers - seems slight.

Angered by the FDA's intervention on the side of manufacturers against consumers in several cases, Representative Maurice Hinchey, Democrat of New York, persuaded the House to amend an appropriations bill to strip \$500,000 from the agency's legal budget as a penalty and use it instead to police the accuracy of drug advertising. If the Senate finds that approach too punitive, it might forgo the financial penalty and simply direct the agency not to intervene in product liability cases unless it is asked to do so by the courts. Or perhaps Congress should devise a new compensation fund so that victims who are blocked from suing can nevertheless be compensated for any damage they have suffered. Meanwhile, if the Administration wants to "reform" the tort system it should tackle the problem broadly, not piecemeal through individual suits.

WHISTLE-BLOWERS PERFORM A VALUABLE PUBLIC SERVICE

In my opinion, corporate whistle-blowers are doing the public a great service. For example, without Enron's Sherron Watkins, we may never have known about the Enron scandals. It was significant that Time magazine named this lady in 2002 as one of its "People of the Year." Whistle-blowers, who speak out against corporate misdeeds and start the ball rolling against the company and its executives, are to be commended. I believe that they should be considered heroes by folks

in this country who are sick and tired of the tremendous number of scandals that have swept through Corporate America. Nobody knew how really bad Corporate America was when the Enron scandal first broke.

Over two years ago an Enron-inspired law was passed by Congress that gave whistle-blowers who come from public companies the right to sue for wrongdoing that could adversely affect shareholders. Since the Sarbanes-Oxley Act was passed, corporate whistle-blowers have filed about 100 cases under the law against companies that were violating the law and cheating both their own employees and stockholders. The wrongful actions and their ramifications also affect the general public and our nation's economy.

While potential whistle-blowers may be hesitate to speak up for those who can't do so themselves, I believe it's their moral and civic duty. Unfortunately, many persons who have blown the whistle on corporate corruption found themselves being targeted by the very corporation they reported as a result of their actions. Many whistle-blowers say that once their complaints become public, the workplace often becomes hostile and threatening. I sincerely believe that the judicial system and the U.S. government have joint obligations to protect men and women who have the courage to step forward and expose corporate wrongdoing. A significant section of the new Federal Act provides federal protection to would-be whistle-blowers. Obviously, that is badly needed and should protect the whistle-blowers from retaliation.

Source: USA Today

LAWSUITS AGAINST NON-PROFIT HOSPITALS

A number of lawsuits have been filed around the country against non-profit hospitals. Over the past several months, there has been a growing debate over charity care provided by the nation's non-profit hospitals, which incidentally represent 85% of the industry. Many believe the non-profits act more like profit operations. In fact, the claim is that the 300 facilities sued act

more like for-profit entities than tax-exempt charities. As you probably know, the industry has been under attack on several fronts, and it doesn't appear things will get better any time soon. The non-profit facilities apparently charge uninsured patients more than what insurers would pay for the same services. Additionally, their prices have increased tremendously, with no end in sight. Aggressive collection practices by the facilities are also well known and have caused a great deal of controversy. Some of their practices have included placing liens on homes, attaching wages and even arresting some debt-owing patients.

The lawsuits are attempting to make the hospitals refund money to uninsured patients who were overcharged for services, stop hounding low-income patients for payments, and stop signing exclusive agreements with groups of doctors in which the physicians get free use of the facilities, while other doctors are being shut out. To their credit, some hospitals have recently changed their billing and collection programs by offering sliding-scale discounts to low-income uninsured patients. The debate over the legal and ethical responsibility of the nation's non-profit hospitals to provide charity care will be addressed in the lawsuits. The IRS has never been really clear about what the grant of tax-exempt status really means. These cases will give the courts an opportunity to clear up that confusion. Obviously, the non-profit hospitals will fight these cases.

You may recall that in late June, hospital CEOs were called before Congress for a hearing. During the hearing, House Ways and Means Committee Chairman Bill Thomas (R-Calif.), challenged the non-profit side of the industry and questioned their tax-exempt status. Representative Thomas made the following comment during the hearing: "If in fact there are as many for-profits that can be shown to give a break to low-income (patients) as not-for-profits, then that's not really a difference for receiving the tax benefit." These cases will be watched with interest and I predict they will be successful.

JEWISH CLAIMS CONFERENCE FINALLY PAYING OFF

The Jewish Claims Conference is paying out \$401 million in compensation to Nazi-era slave laborers, completing payments to Jewish survivors from a German government-industry fund that started work three years ago. More than 130,000 people worldwide are receiving up to \$3,000 each in the second and final round of payments, according to a report from the organization. Since June 2001, the claims conference has paid a total of \$703 million in first installments to survivors. The \$6.17 billion fund to compensate people forced to work for the Nazi war machine was set up by the German government and industry under pressure from lawsuits in the United States.

The Claims Conference has handled claims for Jewish applicants worldwide. National organizations in the Czech Republic, Poland, Russia and elsewhere have handled claims for their countries. Claims Conference President Israel Singer told *Associated Press* that the payments "are a small measure of justice, for which survivors have waited for more than 60 years." The German fund has said it expects to make payments to as many as 1.9 million victims in total, the majority of them in central and eastern Europe. These payments are long overdue and are certainly justified. I only wish the amounts could have been larger.

Source: *Associated Press*

DOCTORS WIN \$5.5 MILLION AWARD AGAINST YALE

A Connecticut jury has awarded \$5.5 million to three physicians who accused Yale University of retaliating against them over complaints about poor patient care and mismanagement in its radiology department. The jury deliberated for 15 hours over three days before reaching a verdict. The decision capped six weeks of testimony. Arthur Rosenfield, Morton Burrell and Robert Smith were doctors who also taught at Yale's medical school. They complained to administrators and the president of Yale that cost-cutting measures were

putting patients at Yale-New Haven Medical Center at risk.

The three doctors alleged that non-specialists were involved in diagnostic studies and teaching physicians approved studies interpreted by residents without checking their accuracy, a violation of Medicare rules and patient care principles. The doctors say Yale failed to address their concerns, but instead cut their pay and removed them from their leadership positions. The doctors sued in January 2000, accusing Yale of violating their right to freedom of speech and academic freedom by retaliating against them. During the trial, Yale portrayed the doctors as disgruntled employees worried about protecting their turf and maintaining a comfortable workload. Yale claimed the doctors used patient care as a cover to air their grievances. The trial also focused on health care industry changes in the mid-1990s. Federal cost cutting for CT scans, MRI tests and other exams forced Yale to continue its work with less money. I don't guess these three will have any problem paying their malpractice premiums if they collect.

III. THE NATIONAL SCENE

PRESIDENT BUSH WAS ON TARGET

President Bush was absolutely right in his views about why we shouldn't have gone to war against Iraq and wound up being bogged down in a long-range occupation of that country. In fact, the President made his feelings known long before the current invasion of Iraq began and was very clear in explaining his views. However, this was President George H. W. Bush—not his son, our current President. In his memoirs, "A World Transformed," written five years ago, George H. W. Bush explained why he didn't go after Saddam Hussein at the end of the Gulf War, and this is what he said:

Trying to eliminate Saddam... would have incurred incalculable human and political costs. Apprehending him was probably impossible... We would have been forced to occupy Baghdad and, in effect, rule Iraq.... There was no viable 'exit strategy' we could see, violating another of our principles. Furthermore, we had been consciously trying to set a pattern for handling aggression in the post-Cold War world. Going in and occupying Iraq, thus unilaterally exceeding the United Nations' mandate, would have destroyed the precedent of international response to aggression that we hoped to establish. Had we gone the invasion route, the United States could conceivably still be an occupying power in a bitterly hostile land.

It sure does appear that the elder Bush was right on target. We are finding out the hard way that he was correct in his views. I just wish the current President had read and listened to his father's advice. Maybe the failure by George W. Bush to understand what we were getting into in Iraq is why so many retired generals are backing John Kerry to be the next Commander-in-Chief. In any event, the elder Bush was pretty much a prophet on how the occupation of Iraq would turn out. I sincerely wish he had been wrong!

SENATOR MCCAIN DEFENDS JOHN KERRY

Senator John McCain called the ad criticizing John Kerry's military service "dishonest and dishonorable." The Senator urged the White House to condemn the ad and stated in an interview with *The Associated Press*, "It was the same kind of deal that was pulled on me." Senator McCain was referring to his bitter Republican primary fight in 2000 with then-candidate Bush. The 60-second ad features Vietnam veterans who accuse John Kerry of lying about his decorated Vietnam War record and betraying his fellow veterans by later opposing the conflict. I believe the ad was used in Ohio, West Virginia and Wisconsin—all states critically impor-

tant to the Bush campaign.

You may recall that in 2000 Karl Rove and the Bush campaign started an effective rumor campaign against John McCain in the South Carolina primary. At that time McCain, like Kerry now, had the momentum and the Bush campaign was on the ropes. The Rove attack on Senator McCain most probably allowed Bush to win the primary and ultimately the nomination. Senator McCain's supporters have never forgiven the Bush team and I can't blame them—the rumors were both false and vicious. Senator McCain told *The Associated Press*:

I deplore this kind of politics. I think the ad is dishonest and dishonorable. As it is, none of these individuals served on the boat (Kerry) commanded. Many of his crew have testified to his courage under fire. I think John Kerry served honorably in Vietnam.

I believe the American people are sick and tired of the Karl Rove brand of politics. He is a master of the smear-type campaign tactics that have become his trademark. This is part of what is so badly wrong with politics in this country. The President should tell Rove enough is enough and to put a stop to his brand of politics. Personally, I find it distasteful for any political boss to attack any combat veteran's military record during a political campaign. It is especially bad when none of the persons behind the attacks have even worn a military uniform—much less fought in combat.

GRAND JURIES INVESTIGATE HALLIBURTON SUBSIDIARIES

A Houston, Texas grand jury has been investigating Halliburton Co.'s business dealings with Iran, a country long suspected of sponsoring terrorism. A federal grand jury for the Southern District of Texas subpoenaed documents related to Iran. While federal law prohibits U.S. companies from trading directly with Iran, foreign subsidiaries are allowed to do business with **rogue states**, as long as the foreign entity is

truly independent of the U.S. operation. I have great difficulty in understanding how Halliburton—with its close ties to the Bush Administration—could even think about doing business with a country like Iran. This is true even though it used a subsidiary in the deals.

I believe that the Iranian investigation centers on a Cayman Islands-registered oil-field service operation called Halliburton Products & Services Ltd. That entity, which is headquartered in Dubai, United Arab Emirates, sells about \$30 million to \$40 million worth of oil-field equipment and services to customers in Iran annually. Halliburton also owns a British oil tool company and three engineering outfits based in the United Kingdom and Sweden, all of which make sales to Iran. The Treasury Department's Office of Foreign Assets Control began to inquire about the operation registered in the Cayman Islands three years ago. The federal agency that enforces commercial trade bans, however, took no other known action until CBS News' *60 Minutes* visited Halliburton Products & Services' address in the Caymans and questioned whether any business was actually being conducted there. In January, the Office of Foreign Assets Control followed up and demanded additional information.

After the CBS piece aired, the Senate Finance Committee launched its own probe. Lawmakers wanted to know when these subsidiaries were created, how long they've been conducting business in Iran, how much they've made there and how much they've paid the government of Iran in taxes and other fees. Committee members asked the companies to address media reports that said mail sent to Halliburton Products & Services is forwarded to Halliburton's offices in Houston, suggesting that decision-making authority resided in the United States rather than in the Caymans or Dubai.

A separate grand jury in Illinois is examining another issue that has long plagued Halliburton, problems of over billing for providing logistical support for U.S. troops in Iraq. The grand jury is examining two former employees

who are suspected of receiving improper payments from a Kuwaiti subcontractor as part of a scheme to overcharge the Army Materiel Command. Halliburton had overcharged on that project to the tune of \$4 million.

According to an SEC filing, Halliburton concluded its business dealings with Iran were “in full compliance with applicable sanction regulations.” Frankly, I can see no justification for any U.S. company—and especially one with ties to the Vice-President—being allowed to do business with a country such as Iran. Even if it didn’t have its obvious political ties to the Bush Administration, Halliburton should put a stop to such activity at once. In fact, the Vice-President should call his old buddies back at the company and get them to stop this highly questionable conduct. After all, Iran is an enemy of this country—according to our President.

9/11 PANEL SUGGESTS INTELLIGENCE OVERHAUL

A few weeks ago, the American people finally got to see and read the final report issued by the September 11th Commission. This report recommended, among other things, the creation of a new intelligence center and high-level intelligence director to improve the nation’s ability to disrupt future terrorist attacks. The panel also determined the “most important failure” leading to the September 11th attacks “was one of imagination.” It pointed out that our leaders failed to understand “the gravity of the threat” and ignored a series of warnings. Commission Chairman Tom Kean, the former Republican Governor of New Jersey, stated at a news conference:

*The 9/11 attacks were a shock, but should not have come as a surprise. By September 2001, the executive branch of the U.S. government, the Congress, the news media, and the American public had received **clear warning** that Islamist terrorists meant to kill Americans in high numbers.*

The report, which is the culmination of a 20-month investigation into the plot that killed nearly 3,000 people in New York, Washington and Pennsylvania, describes the meticulous planning and determination of hijackers who sought to exploit weaknesses in airline and border procedures by taking test flights. The report emphasizes that the United States and its allies must embark on a global strategy of diplomacy and public relations to dismantle the terror network led by Osama bin Laden and defeat the militant Islamic ideology that feeds such terror groups. This report has a number of recommendations that should be enacted without delay. While most of the recommendations will require Congressional action, some of them can be carried out by the President. Clearly, a non-partisan effort is needed to bring about the needed changes. Neither party can afford to play **political games** with this matter.

At the outset, President Bush did all he could to keep the Commission from being created and tried even harder to keep key government figures from testifying. Nevertheless, the President now has an obligation to carry out the Commission’s recommendations without delay. Because Karl Rove reads the **polls** and keeps his finger on the **pulse** of the public, the President will most likely act promptly. In any event, I believe that Congress should be called into special session and all steps taken that are necessary to carry out all of the Commission’s recommendations. Simply put, a partial fix won’t get the job done. A political fix would be the worst thing that could happen. The fight against **terror** must be made a top priority for the federal government. Anything less won’t be accepted by the public.

SOFT MONEY SHOULD BE REMOVED FROM NATIONAL PARTY CONVENTIONS

Public Citizen and the U.S. Public Interest Research Group (PIRG) have called on the Federal Election Commission (FEC) to ban soft money from the national party conventions based on the abuses that are occurring at the conventions this year. The conventions

have more money, donated by corporations, labor unions and special interest groups seeking favors from the parties, than they can ever spend. More than \$100 million in soft money has been contributed to the conventions this year. \$39.5 million of the total went to the Democrats and \$64 million to the Republicans. This information comes from the Campaign Finance Institute. Soft money is now the primary funding source for national party conventions, putting party leaders and politicians in the position of owing favors to the big-money donors.

Neither political party should be allowed to take soft money and especially not for their respective conventions. The FEC should abide by the spirit and letter of federal campaign finance laws, and prohibit these abuses. The funding of this year’s conventions is a prime example of a system that is out of control. FEC’s regulatory regime governing convention financing is a travesty. Congress worked long and hard to purge unlimited and corrupting soft money from the system. The FEC should do its part in implementing the law and get soft money out of federal elections. The next President and the new Congress should make campaign finance reform a top priority and finish the job started in 2003.

YOU WILL HEAR MORE ON FREEDOMWORKS THIS FALL

I doubt that few American citizens have ever heard of a group called FreedomWorks. There is a good reason since the group was just formed. I strongly recommend that you check out this group, which has a catchy name. Citizens for a Sound Economy (CSE) and Empower America have merged to form a grass-roots political group to bolster their fight for what they refer to as “lower taxes, less government and more economic freedom.” They named their new group FreedomWorks and that was to garner attention. But, it’s nothing but a political organization that will operate under the radar and work to elect Republican candidates. The identities of some of the

former chairmen of CSE and Empower America tell us lots. CSE had been most recently chaired by Dick Armev (R-Tex.), the former House Majority Leader; C. Boyden Gray, White House counsel for President George H. W. Bush, was a former chairman of CSE. At Empower America, former New York representative Jack Kemp and William Bennett, former education secretary in the Reagan Administration, chaired the group. Armev, Gray and Kemp will co-chair the new group, and Bennett will be a senior fellow focusing on school choice. Matt Kibbe is the new president and chief executive. While the group claims it's nonpartisan, I will be shocked if it doesn't have a political agenda.

FreedomWorks claims more than 360,000 members and is organized in a way that will allow for lobbying, political fundraising and political activities, including voter education and get-out-the-vote efforts in key campaigns. The group also claims to have a political database with more than 600,000 conservative activists. This group will be a big time player in this fall's elections and won't have to account for how much they spend or where their money comes from. Their agenda is to take care of the super-rich and to destroy the American middle class in the process. They will have hundreds of millions to spend, and that's a dangerous thing for the health and well-being of our nation.

MILKING THE FARM PROGRAM

When Congress passed the latest farm bill in 2002, the stated goal was to help struggling family farmers. That was clearly a worthwhile mission. As you may know, the bill carried a \$180 billion price tag. I suspect most Americans believe the program was designed to help farmers who were having a hard time making ends meet. But, a new study from the Heritage Foundation finds that family farmers haven't been the beneficiaries. Instead, most farm subsidies are distributed to large farms, agribusinesses, politicians and celebrity "hobby farmers," according to

Heritage. The report says that: "Farm subsidies have evolved from a safety net for poor farmers to America's largest corporate welfare program." Heritage gives a number of examples. Here are a few:

- **Riceland Foods**, in Stuttgart, Arkansas, was paid \$110 million in 2002, the latest year for which figures are available;
- **Producers Rice Mill**, another private company in Stuttgart, received \$83.9 million;
- **Cargill**, located in Minneapolis, Minnesota, was paid \$10.9 million;
- **John Hancock Life Insurance**, a division of **Manulife Financial**, collected \$2.3 million in 2002;
- **MeadWestvaco** received \$637,000 since 1995;
- **ChevronTexaco** collected \$428,000; and
- **Caterpillar** received \$320,000.

The numbers in the Heritage report come from the Environmental Working Group, which has gone through the federal figures to come up with the names of farm subsidy recipients. You are probably wondering how do rich corporations manage to collect so much? The answer is simple. Eligibility for farm subsidies is determined by crop, not by income or poverty standards. Heritage says "the amount of subsidies increases as a farmer plants more crops. Thus, large farms and agribusinesses... receive the largest subsidies."

While big businesses pull down the taxpayer subsidies, so do a lot of wealthy individuals, including some members of Congress. Let's take a look at some of the big hitters:

- Leading the way in the House of Representatives is Representative Cal Dooley (D-Calif.), who collected \$105,000 in 2002 and has received \$626,000 since 1995.
- Not far behind is Representative Doug Ose (R-Calif.), who has collected \$604,000 since 1995.

- Third on the list is Representative Tom Latham (R-Iowa), who has collected \$438,000.
- Senator Mike DeWine (R-Ohio) received \$177,000 since 1995;
- Senator Charles Grassley (R-Iowa) received \$162,000; and
- Senator Richard Lugar (R-Ind.) received \$86,000.

Celebrity gentleman farmers have also done very well. Even high-paid sports stars are on the list. A few beneficiaries of taxpayers' gifts include:

- Ted Turner, the TV mogul, who has received \$207,000;
- The former chairman of Chase Manhattan (now part of **J.P. Morgan Chase**) who collected \$518,000 since 1995; and
- Scottie Pippen, a star player in the National Basketball Association, who received \$211,000.

I believe the next President and the new Congress should put a stop to the **milking** of the farm program by the rich and powerful, and shift that money to **real** farmers. We have thousands of family farms that are in dire straits and these are the folks who should be helped. I hope enough pressure will come to bear on our political leaders so that this **mess** gets a non-political fix.

DISABILITY PAY SHOULD BE GIVEN TO THE MILITARY

We should be doing everything in our power to make life better for our men and women returning from the war zones in Iraq and Afghanistan. But, it doesn't appear that we are doing it. For example, nearly one-third of the National Guard and Reserve troops returning from war with illnesses or injuries are forced to wait more than four months to learn whether they'll be compensated under the military's current disability system. Fewer than one in 10 applicants receive the long-term disability payments they request.

Top military officials claim that soldiers don't understand that their disability system measures fitness for duty, not the degree of one's sacrifice. Most soldiers applying for disability pay—56% in the Army's case—are leaving service with a one-time, lump-sum payment, which clearly appears to be inadequate.

The military's disability system resembles workers' compensation and long-term disability in the private sector. It pays people when they have illnesses and injuries that are job-related. But, the military looks at a much narrower set of circumstances than do insurers or the Department of Veterans Affairs. The disability system only evaluates ailments that make a soldier unfit for duty in his or her specialty. According to media reports, the department recently was averaging 171 days to make initial disability decisions. When the VA's disability compensation kicks in, it normally replaces military pay. Recipients can't benefit from both systems at the same time. Under the current military system, pain by itself won't win compensation for a soldier who is suffering. The Army does not keep statistics on the dollar amounts of disability payouts because they are based on a formula that includes a percentage assigned to each soldier's disability. But it does maintain records on how many applicants for long-term disability receive compensation. The majority (56.1%) was given a one-time, lump-sum payment in 2003. Seventeen percent received nothing because they either were declared fit for duty or determined to suffer injuries unrelated to their service or due to negligence. An additional 17.1% received temporary disability payments that can be reviewed within five years. And only 9.8% won long-term disability pay that lasts for life.

Soldiers, particularly National Guard and Reserve members, have the right to complain about the long delays in medical diagnosis and treatment before they can receive a determination of disability. As of late June, 32% of the activated Guard and Reserve members were left in a medical holdover status for more than 120 days. The delay had actually been at 41% in November. We

are sending young men and women, and nowadays even older citizens, into a very tough war in a foreign land. We should take care of their needs when they return. That is our obligation. A system that is broken must be fixed and without delay. We must support our military and take care of those who serve us to the best of our ability. We owe it to our military personnel to treat them like first-class citizens—because they are!

CRUDE OIL PRICES SOAR TO NEW RECORD HIGH

Over the past few months, crude oil prices have soared to new record highs. The rises in prices are said to have been caused by fears of terrorist attacks in the United States, disruptions to Iraqi crude exports, and uncertainty over the fate of troubled Russian oil giant Yukos. Since June, oil prices have jumped to record levels. Last month was the first time prices went over the \$49-a-barrel barrier. Prices are projected to reach well over \$50-a-barrel. I am not smart enough to figure out exactly what is going on in the oil industry, but there are a few things that are most apparent. I do know that the giant oil companies are making record profits and ordinary citizens are paying record prices for gasoline in the U.S. With the close ties between the Bush Administration and the oil industry, I don't see things getting better any time soon. As usual, little folks subsidize the big folks, and this time at the gas pumps around the country.

CHEVRONTEXACO'S PROFIT MORE THAN DOUBLES

A prime example of how the public is suffering and the oil industry prospering is ChevronTexaco Corp.'s earnings. That company's second-quarter profits more than doubled as high-energy prices extended a recent roll that is shaping into the most prosperous stretch in the oil giant's 125-year history. The giant oil company earned \$4.13 billion (\$3.88 per share) for the three months ending in June. That

compared with net income of \$1.6 billion (\$1.50 per share) for the same period last year. The results went well past estimates. Revenue for the period totaled \$38.3 billion, a 31% increase from \$29.3 billion last year.

Through the first half of the year, ChevronTexaco had earned \$6.69 billion (\$6.28 per share), a 90% improvement from the same time in 2003—a year that culminated in a \$7.2 billion profit. If ChevronTexaco were to continue its current earnings pace for the rest of this year, the company will finish with a profit of about \$13.5 billion. The huge profits being raked in by ChevronTexaco and other major oil companies have fueled consumer complaints about price gouging—charges that industry executives have denied. If you have any doubt, take a look at the earnings picture for each of the major oil companies. You will find that ChevronTexaco isn't the exception.

IV. THE CORPORATE WORLD

HALLIBURTON TO PAY \$7.5 MILLION TO SETTLE PROBE

Halliburton Co. will pay \$7.5 million to settle a Securities and Exchange Commission (SEC) probe that it failed to disclose a change in its accounting procedures in 1998 when the oil services conglomerate was run by Vice-President Dick Cheney. Besides the company's fine, a former Halliburton controller, will pay a \$50,000 penalty. The SEC found that the company didn't properly disclose the accounting change, which recognized revenue from unapproved claims on long-term construction projects. The SEC has filed a complaint in U.S. District Court against Halliburton's former chief financial officer. The Commission says the undisclosed accounting change caused Halliburton's public statements regarding its income in 1998 and 1999 to be materially misleading.

During its investigation, which began in 2002, the SEC said it reviewed 340,000

documents and took sworn testimony from 23 individuals. Vice-President Cheney was among those who provided testimony, according to the SEC. As you know, Cheney was Halliburton's CEO from 1995 to 2000. Many believe the penalty imposed against Halliburton is much too small and avoids addressing Cheney's responsibility for the fraud. It was alleged that Halliburton improperly altered its accounting during Cheney's tenure as CEO. It's pretty obvious that the company's settlement was because of that wrongdoing. It is also very clear that Halliburton's agreement to pay just \$7.5 million pales in comparison to the estimated \$120 million by which accounting tricks boosted Halliburton's profits during Cheney's stewardship. I would say that was a pretty good rate of return.

Let's take a brief look at what Halliburton did. Beginning in 1997, crude oil prices began a sharp decline, falling 50% from January 1997 to March 1998. This drop in the price of a commodity upon which Halliburton was dependent rocked the company's bottom line. In April 1998, under financial pressure, the company embarked on a radical change in its accounting practices: It began booking cost overruns in its construction business as income, rather than as expenses, and did not adequately disclose this change in practice until a year later. As a direct result of not properly reporting this accounting change, Halliburton was able to boost its reported profits by more than \$120 million, misleading investors in the process. Isn't that pretty much what Enron was accused of?

The failure of the SEC to address the responsibility of Cheney, who was in charge when the accounting irregularities occurred, and instead focus upon the company's chief financial officer and controller at the time, indicates that politics may have spared the Vice-President from necessary enforcement action. Clearly, the CFO and controller at Halliburton both reported to Cheney. It's difficult to understand why the boss, who was in charge, shouldn't ultimately be held responsible. On second thought, maybe it's not so hard to figure that out.

CONSPIRACY AND CORRUPTION CHARGES INVOLVING FORMER TYCO EXECUTIVES

A Judge in the trial of Dennis Kozlowski and Mark Swartz, former top Tyco executives, has decided that the two executives will stand trial for conspiracy charges in their second criminal trial. The Judge rejected motions by the executives' lawyers to dismiss the charges. Kozlowski and Swartz are scheduled to go back to trial for the second time on January 18th. You will recall that the first trial ended in a mistrial in May after a juror reported receiving a letter questioning her reluctance to find the executives guilty and a phone call urging her to convict the executives. The juror had caused a stir several days prior to the mistrial by allegedly flashing an "OK" sign to the defense team. Other jurors accused her of refusing to deliberate with an open mind. A mistrial was declared by the trial Judge after the reported contact with the juror.

Kozlowski and Swartz were charged with grand larceny, falsifying business records, conspiracy and securities fraud. The former executives are accused of rewarding themselves with giant bonuses and other unauthorized compensation from Tyco. This resulted in the two men looting the company of \$600 million. The effect of the Judge's ruling is that Kozlowski and Swartz will essentially face the same criminal charges as they did in the first case. The men will be tried together because the Judge also denied a motion by Swartz for a separate trial. During a court hearing prosecutors announced that they intend to pursue an enterprise-corruption charge against the former executives. During the first trial, the Judge decided against allowing the jury to deliberate on the enterprise-corruption charge because the prosecution failed to provide sufficient evidence to sustain the charge.

ENRON TO PAY \$32 MILLION

Federal energy regulators from the Federal Energy Regulatory Commission (FERC) have ordered Enron Corporation to give up \$32 million in ill-gotten

profits from the western energy crisis. You may recall reading about some of the comments made by Enron energy traders in earlier Reports. I believe the most important news from this announcement is that it will open the door to much larger payments from Enron as the energy regulators have now ordered a review of the company's profits from 1997 to 2003. Obviously, the amount of this order is small compared with the billions of dollars western states believe Enron and other companies owe them from overcharges in 2000 and 2001.

In upholding an administrative law Judge's finding that Enron did not properly inform the FERC of a business relationship with El Paso Electric Company, the Commission made clear that Enron could be required to pay more money. In this regard, the Commission wrote, "We note that based on the evidence in this docket... Enron potentially could be required to disgorge profits for all of its wholesale power sales in the western Interconnect for the period January 16, 1997 to June 25, 2003." California officials estimate those profits to be approximately \$3 billion dollars and that figure is not a misprint.

I hope this order is a sign of progress. I believe that FERC should have acted much more aggressively against Enron than it has to date. I am convinced that the heat and pressure of the public attention was brought to bear on FERC and caused the Commission to act. Otherwise, they would have done little. But at least FERC is finally doing their job. Pressure on FERC to take action against Enron grew more intense after the release of tape recordings in June (referred to in last month's issue), showing Enron traders openly gloating about manipulating California's power market, and boasting they would bring the state to its knees. I hope FERC will do its job and return the profits that have been taken by Enron Corporation to its victims. That money should be returned to the western states that were cheated.

EXECUTIVES AT ROYAL AHOLD UNIT ARE INDICTED

As we went to the printer with this issue, the investigations into food industry scandals were moving ahead. Recently, four executives of U.S. Foodservice were indicted on charges of inflating the company's earnings by more than \$800 million. An investigation is still ongoing at this time. The Securities and Exchange Commission filed a separate civil complaint against the four executives of U.S. Foodservice. This company is a food distribution company that is a unit of the Dutch supermarket conglomerate Royal Ahold. It accused the executives of overstating income by a smaller amount - \$700 million - and of forcing many suppliers to help conceal their fraud. One of the executives and a supplier to U.S. Foodservice were also charged with securities fraud and lying to investigators about a plan to trade on advance knowledge of the sale of U.S. Foodservice in April 2000, a \$3.5 billion transaction. They were also sued by the SEC on accusations of insider trading. Prosecutors and regulators announced that they would continue to investigate U.S. Foodservice, the parent company, and its American suppliers. A number of companies, including Kraft Foods, General Mills, Tyson Foods, ConAgra Foods, Sara Lee and H. J. Heinz admit to having been contacted by regulators and prosecutors. At press time, it wasn't clear, however, whether these companies are targets of the probe or merely possess needed evidence.

The indictments came after a lengthy investigation, which started when a supplier complained to its auditors about being forced into schemes by U.S. Foodservice. The auditors then informed government officials. The investigations soon followed. Two former officials with the corporation have now pleaded guilty and are expected to cooperate with federal investigators. Distributors such as U.S. Foodservice typically receive promotional rebates from suppliers tied to specific placement or sales of particular products. According to reports, U.S.

Foodservice overstated its earnings from 2000 to February 2003 by more than \$800 million by booking revenue from promotional rebates that had never been earned. As a result of the overstatement, the executives were able to personally profit by meeting performance-based earnings targets they would not have qualified for otherwise. This case presents another example of how many top executives in Corporate America believe they have to lie, cheat and literally steal in order to continue to make money.

MARTHA STEWART'S FALL

As we all know, Martha Stewart was sentenced to five months in prison, five months probation and fined \$3,000 in her criminal case. I must confess that I have mixed emotions about the outcome of this matter and especially the prison time assessed. The more I think about her case, the more I am convinced that Martha Stewart really doesn't deserve any time in prison. Certainly, she failed to be truthful after being contacted by the Justice Department during the investigation of her stock-trading episode and that was wrong. It doesn't appear, however, that she had actually violated the law on the insider trading charge. Obviously, it was a major mistake for her to talk with prosecutors in the first place, and not telling the truth was an even greater mistake. My mama told me when I was a small child that it never pays to lie regardless of the circumstances. She was right—as usual. Unfortunately for Martha Stewart, her lying in this instance was a criminal offense.

Martha Stewart appears to have been guilty of a cover-up and apparently nothing more. When you compare her offense with that of hundreds of corporate executives who did much worse and to date have not seen the jailhouse doors lock behind them, you have to wonder about the sentencing phase of her case. I suspect most Americans will now be watching closely at how Kenny Boy Lay comes out in his trial and sentencing. In the meanwhile, I am begin-

ning to wonder why Martha Stewart was targeted in what appears to have been a relatively minor offense. As they say back where I come from, surely the government had bigger fish to fry!

DRUG MANAGER ACCUSED OF CHEATING NEW YORK

New York Attorney General Eliot Spitzer, who is becoming known as **America's Attorney General**, has filed a lawsuit against Express Scripts, the nation's third-largest Pharmacy Benefit Manager (PBM), alleging the firm defrauded the state of up to \$100 million over five years. Until recently, most Americans had never even heard of a PBM and those who had probably didn't really know what they did. Now we have heard lots about PBMs and how they will prosper under the new Medicare law. As you probably know by now, these are firms that **negotiate** prescription prices for insurers or employers.

The civil case, filed in a New York state court, alleges that Express Scripts pocketed millions in rebates from drug companies that were meant for the state, inflated the cost of generic drugs, and sometimes switched patients to drugs that had higher co-payments or resulted in more doctor visits. Express Scripts handles pharmacy benefits for about 1 million New York state employees, retirees and dependents. Nationwide, the firm handles benefits for 52 million people on behalf of insurers and employers. The New York case is the latest in a series of lawsuits and investigations involving PBMs. In fact, Express Scripts admitted it had received investigative demands from attorneys general in 19 other states. This is one of the first governmental enforcement agencies to bring a specific action based on laws that have been on the books for years.

Express Scripts is not the only PBM to cheat folks who have to deal with them. Caremark, the nation's second-largest PBM, is also being investigated by Attorneys General from 19 states. In April, Medco Health Solutions, the nation's largest PBM, agreed to pay

\$29.3 million to settle charges from regulators in 20 states that it encouraged doctors to switch patients' drugs and sometimes failed to pass along resulting savings to clients. Express Scripts was to refund to the state any drug rebates it negotiated with pharmaceutical companies. Instead, it is alleged that the PBM classified the rebates as "administrative fees" or "management fees" and wrongfully retained them. It is also alleged that Express Scripts accepted money from drug companies to switch patients from one brand-name drug to another when the first was threatened with lower-cost generic competition. Such switches often cost patients more and may have led to additional doctor visits.

Source: *USA Today*

THE TITAN CORPORATION IS UNDER INVESTIGATION

Public Citizen has called for an investigation into the lobbying records of the Titan Corporation, a defense contractor, for underreporting its lobbying expenses in excess of \$1.24 million from 2000 through 2003. In a letter sent to the Secretary of the U.S. Senate and the Clerk of the U.S. House of Representatives, Public Citizen asserted that Titan violated the Lobbying Disclosure Act because the company and its subsidiaries failed to report accurate lobbying expenses for nearly four years. Section 5 (B) (4) of the Lobbying Disclosure Act requires organizations to report not only in-house lobbying expenses, but also the expenses the organization incurs when it retains outside entities to represent it before the executive and legislative branches.

Since the last half of 2000, when Titan first registered under the Lobbying Disclosure Act, the company has consistently failed to include in its lobbying reports the payments it has made to outside lobbying firms that represented it on a variety of issues. Some of the areas where help was sought included defense, mail safety, transportation, homeland security, aviation, government contracting and e-government initiatives. Clearly, all corporations and their lobbyists should be

required to comply with existing laws—as weak as they are—and shouldn't be allowed to ignore them. We badly need to clamp down on lobbyists and their benefactors. This will require legislation. Ordinary folks don't have high-paid lobbyists to represent their interests in Washington or at state capitols. The rich and powerful do, however, and that is generally not good for taxpayers.

SCHERING-PLOUGH TO PAY \$346 MILLION SETTLEMENT

We reported last month that Schering-Plough Corp. would pay \$346 million in fines and damages to settle charges that it overcharged for drugs sold through Medicaid. Now that settlement has actually happened. The pharmaceutical company will also plead guilty to a federal criminal charge concerning a payment to a managed care customer. Federal law requires drug makers to give their lowest prices to Medicaid, but a group of whistleblowers accused the company of giving some private health care providers better deals on its drugs by offering them kickbacks. Federal prosecutors in Philadelphia began investigating the allegations in 1999 as part of a broad inquiry into pharmaceutical marketing practices. The drug company, as part of the settlement, will pay a criminal fine of \$52.5 million and civil damages of \$293 million. Some of those damages, however, will be offset by credit the company will receive for \$53.6 million in Medicaid rebates that it has previously paid.

The criminal charge stemmed from a \$1.8 million kickback Schering-Plough offered to a health maintenance organization that was threatening to drop Schering's drug Claritin because of its high cost. The company offered to pay a false "data fee" amounting to 2% of the annual gross sales of Schering drugs to the HMO. The office of the U.S. Attorney for eastern Pennsylvania believes the pursuit of Schering-Plough will serve as an example that **illegal** marketing practices can be **costly**. Schering allegedly used terms like "data fee" and "value added" as camouflage

for what was nothing more than an old-fashioned kickback. It was a marketing strategy that eventually backfired. The result was that programs created to provide health care to the poorest among us were actually paying more for drugs than those who have private health insurance.

The settlement was first reported on July 16th by *The New York Times*. Federal investigations in Philadelphia, Boston and Washington have resulted in subpoenas to almost every big drug maker. Bayer has paid \$257 million and GlaxoSmithKline has paid \$86.7 million to settle similar allegations. Prosecutors in Boston and Washington are also investigating whether Schering-Plough paid medical doctors to prescribe its drugs, and whether it reported inflated wholesale prices to the Medicare program that led government health officials to pay more than necessary for its drugs. Over the last two years, the company has set aside \$500 million to pay fines expected in those cases and the Philadelphia inquiry.

DRUG COMPANIES DODGE FEDERAL BAN

I am extremely disappointed that the federal government has failed to use its power to bar major drug companies that commit fraud from doing business with federal programs such as Medicaid and Medicare. We wrote on the massive nature of this problem last month. A 1996 law mandates exclusion from federal health care programs for those who plead guilty to, or are convicted of, felony health care fraud after August 21, 1996. But since 2001, at least four major drug companies have avoided that penalty under settlements with prosecutors. Consider the following and decide whether the government should enforce the ban law.

- In July, the government reached a \$345 million settlement with Schering-Plough over charges that private insurers were charged much lower prices on Claritin than the government was. The guilty plea was entered by an inactive Schering-Plough sales subsidiary with no employees where the fraud occurred.

It's excluded from federal programs, but the parent company's products are not.

- In May, Pfizer's Warner-Lambert division agreed to \$430 million in fines and pleaded guilty to illegally marketing the drug Neurontin "through at least August 20, 1996."
- TAP Pharmaceuticals in 2001 and Bayer in 2003 pleaded guilty to illegal acts that took place before August 1996, although prosecutors also alleged later misconduct.

Obviously, the drug companies have figured out how to be creative and avoid the federal ban. In my opinion, any corporation that knowingly commits fraud against the government should be excluded from all federal programs. The exclusion law has largely been used against direct providers of health care, such as doctors and nurses, since its adoption in 1977. It was amended in 1996. The exclusion penalty may now be harder to avoid. Hopefully, that will prove to be true.

V. CAMPAIGN FINANCE REFORM

FUNDRAISING BY THE BUSH AND KERRY CAMPAIGNS

The Bush and Kerry campaigns raised over \$500 million during the primary season, which is unprecedented. Both campaigns relied to a significant extent on the efforts of more than 1,000 corporate executives, lawyers, lobbyists and wealthy special interests who have maximized their political influence by bundling a large number of individual contributions for the candidate of their choice. A new analysis by Public Citizen, posted at WhiteHouseForSale.org, offers a side-by-side comparison of the minimum amounts bundled by key industries for each candidate.

The Web site, created to track contributors to the 2004 presidential campaigns, features a searchable database

of the major fundraisers for both Bush and Kerry, listing their home states, employers, occupations and industries. The Web site also offers charts showing the number of fundraisers per state for each candidate. The states with the most big-money Bush backers are Texas, Florida, New York, California and Ohio. Two-thirds of all of Senator Kerry's bundlers come from California, New York, Massachusetts and Washington, D.C.

Clearly, we must **fix** the way we **finance** elections in this country. Until that happens, special interests will keep ordinary citizens on the sideline in every election. We can't let that continue to happen. I recommend that all persons who are interested in cleaning up politics in our country take a look at this website.

THE NEXT PRESIDENT AND CONGRESS HAVE A DUTY TO CHANGE THINGS

The next President and Congress must make Campaign Finance Reform a top priority and actually make it happen. If reform does happen many of the short-comings of the federal government can then be remedied. I am convinced that **political money** and **powerful lobbyists** are the **root cause** of many of our current economic and safety problems. A completion of what started last year in Congress must be accomplished. There is no question but that it will take the full power of the White House to make it happen. It is extremely difficult—if not impossible—for a public official to take special interest money and then push hard to reform a broken system. Our current system of financing political campaigns must be fixed and soon. As long as Karl Rove is running the White House, there will be no meaningful campaign finance reform.

VI. CONGRESSIONAL UPDATE

NO DEFENSE OF SENATOR SHELBY NEEDED

Senator Richard Shelby has been accused of leaking classified information to the media outlets. Personally, I don't believe Richard Shelby would ever do anything improper and certainly would never jeopardize his position in the Senate. I have known the Senator for years, having practiced law in Tuscaloosa when we were both **young** lawyers there. I can say without hesitation or reservation that Dick Shelby is one of the finest men I have ever known. He is an honorable person with the highest integrity. I will never believe that the senior senator from Alabama has done anything wrong! I know him well enough to be totally convinced that he would never compromise classified information. I suspect some of the folks who dropped the ball prior to 9/11 would like to embarrass the Senator because of his post-9/11 criticisms. In any event, I don't believe there is anything to the rumors that have been circulated.

PROMPT ACTION ESSENTIAL

As I mentioned in a prior section, I believe that prompt action on the 9/11 Commission's recommendations is essential. This is one time for the President and legislative leaders from both parties to declare a moratorium on politics and do what is best for our country and its people. All of the recommendations appear to be needed and should be implemented without delay. This Commission has acted responsibly and in a non-partisan manner and has done an outstanding job for America. The threat of terror was largely ignored the detriment of the American public. Now we have an opportunity to take action that will make America safer once again. This is no time for either **delay** or **political grandstanding**.

PATIENTS' BILL OF RIGHTS BADLY NEEDED

The insurance industry and the HMO industry have taken over a major role in the practice of medicine in this country. As a result, we are now seeing bean-counters with no medical training making medical decisions that should be made by medical doctors. This is a major reason we badly need a Patient's Bill of Rights in this country. With all of the abuses in the healthcare system, including fraudulent conduct by many healthcare providers, **patients** in the system badly need **protection**. The HMOs and insurance companies have pretty well taken over the decision-making in health care provided by managed care plans. I sincerely believe this is an issue that should resonate with the voters in the fall election. All attempts to pass Patient's Bill of Rights legislation have been beaten down by the Republican leadership in Congress at the insistence of the powerful HMOs and insurance industries. It is not surprising that the President has taken his usual anti-consumer stance on this important issue.

As you will recall, the issue had been very hot in the 2000 presidential election. People all over the country were outraged by the abuses they had suffered from the HMOs and insurance companies. I thought it might be well to do a little research on this important issue. I also figured it would be a good idea to check out things in the state of Texas and the fight over the Patient's Rights back when George W. Bush was Governor. Then-Governor Bush grabbed this "people's issue" in 2000 and ran hard with it. When running for President, he touted his **record** on the issue while serving as Governor of Texas. During his presidential run you may recall the following ad, which was aired all over the country by the Bush campaign: "While Washington deadlocked, He (Bush) delivered a Patient's Bill of Rights that's a model for America." That was a most effective ad and Governor Bush assured the nation repeatedly that he would fight hard for the **rights** of patient's against their HMOs and insurance companies.

It is most revealing when you take a

look at what actually happened in Texas. In fact, a Patient's Bill of Rights Bill did pass the Texas Legislature. But, Governor Bush **vetoed** the measure. A major campaign funder, who incidentally owned the biggest HMO in the country, Columbia/HCA, reportedly convinced Bush that the bill should be vetoed. Not to be denied, consumer advocates and consumer-friendly legislators passed another version of a Patient's Rights Bill. This was accomplished even though Governor Bush **opposed** the legislation. The legislature passed what was referred to by the news media as a "veto-proof margin," which meant the margin was too large for a veto. Even so, Governor Bush **refused** to sign it and let the bill become law without his gubernatorial signature. That was the Bush **record** in Texas.

Throughout the 2000 presidential campaign, however, Bush claimed to be on the side of consumers on this issue and promised, if elected President, to fight for a national Patient's Bill of Rights. He stated in several campaign speeches that "It's time for our nation to come together and do what's right for the people." Four years have passed and we still don't have a Patient's Bill of Rights. The Republican leadership has successfully kept the legislation tied up in Congress. President Bush has opposed passage of such a law even though polls show that 4 out of 5 Americans still want such a law. The insurance industry and the HMOs have the money and influence, and that has gotten the job done for them thus far. All consumers have is their vote and that may make the difference in the final analysis.

DRUG SAFETY LEFT BEHIND

A Republican Congressman from Pennsylvania announced recently that he won't seek re-election. Ordinarily, that might not be noteworthy. Interestingly, however, James Greenwood will take a job as President of the Biotechnology Industry Organization (BIO), which is the biotechnology industry's major trade group with over 1,000

members. The following are some of the group's members: Abbott Laboratories, Bayer Corporation, Bristol-Myers Squibb Company, Eli Lilly and Company, Pfizer Inc., and Wyeth Pharmaceuticals.

While in Congress, Greenwood was known as a dogged pursuer of corporate wrongdoers in his role as Chairman of the Energy and Commercial Subcommittee on Oversight and Investigations. It is interesting, to say the least, that Representative Greenwood will have an undoubtedly significant amount of influence over those who will now be overseeing the industry for which he will be working and lobbying. The Congressman will serve out his term and join BIO in January of 2005. He will earn a salary of \$800,000 per year, which is a significant increase over his current salary. As a pro-consumer member of congress, he made \$158,000 per year. Greenwood is going from **working on** an industry to **working for** them.

The Center for Political Integrity, a political watchdog group, has voiced concern over the Greenwood situation and rightfully so. The Center stated that companies and trade groups often seek a person who has clout with Congress, but that Greenwood taking a job in the industry he is supposed to be overseeing is a definite conflict of interest. Bill Allison of the Center stated:

The public has a right to be cynical whenever a committee is putting too much pressure on an industry and they pull something out of their hat—jobs or campaign contributions—to reduce that pressure.

There is a growing membership in the club created by the revolving door relationship between regulators and the industries that they are charged with regulating. The Edmonds Institute is a non-profit, public interest organization focused on the health and sustainability of ecosystems and their inhabitants. The institute has released a list of individuals they consider to be a part of the revolving door relationship, including:

- Michael Taylor has served as legal advisor to the FDA's Bureau of Medical Devices and the Bureau of Foods, executive assistant to the Commissioner of the FDA, and as Deputy Commissioner for Policy at the FDA. During times that Taylor was not employed by the FDA, he was a partner at King and Spalding law firm, where he supervised a group whose client base included Monsanto Agricultural Company. This is interesting because after representing Monsanto, while serving as executive assistant to the Commissioner, Taylor was given the authority to develop the labeling guidelines for milk products regarding the Monsanto recombinant bovine growth hormone rBGH. These guidelines prohibited the dairy industry from labeling their products as "free from" rBGH or "contains" rBGH, thus preventing the public from knowing whether they have chosen a product that contains a higher level of a potent cancer tumor promoter known as IGF-1.
- L. Val Giddins served as biotechnology regulator and (biosafety) negotiator for the United States Department of Agriculture and later became President of Food and Agriculture of the Biotechnology Industry Organization.
- Margaret Miller is a former chemical laboratory supervisor for Monsanto who later served as Deputy Director of Human Food Safety and Consultative Services, New Animal Drug Evaluation Office, Center for Veterinary Medicine in the FDA.
- William D. Ruckelshaus, former Chief Administrator of the Environmental Protection Agency later served as a member of the Board of Directors of Monsanto Corporation.
- Michael A. Friedman, M.D., is a former Acting Commissioner of the FDA Department of Health and Human Services, who later became Senior Vice-President for Clinical Affairs at G.D. Searle & Co., a pharmaceutical division of Monsanto.

This **revolving door** phenomenon is yet another glaring example of why the right to trial by jury is so vital. The **jury box** is the one place that cannot be influenced by political contributions or lucrative job offers. In Washington, if an industry doesn't like what a senator or member of Congress is doing to them, it makes good sense (to them) to simply hire the person. Frankly, I believe that has been part of our problem in Washington and is why the government has done such a poor job of regulating Corporate America.

VII. PRODUCT LIABILITY UPDATE

PUNITIVE DAMAGES UPHeld IN EXPLORER ROLLOVER CASE

The trial judge in the California case that was reported on recently has upheld the jury verdict against Ford Motor Co. You will recall that Ford was held responsible for an accident that left a woman paralyzed when her Explorer rolled over. However, the judge reduced the damages against Ford from \$369 million to \$150 million. In the Judge's ruling he stated that the evidence presented at trial showed Ford "acted with malice and that Ford acted with a conscious disregard for the safety of others."

The following language from the court's order tells how Ford operates:

Ford cannot protect itself by arguing the vehicle meets all applicable safety standards when there is evidence Ford knew of potentially fatal defects during the development and manufacture of the vehicle not addressed by the safety standards and chose not to remedy those problems. Such acts constitute despicable conduct and expose Ford to the prospect of punitive damages.

The jury had awarded \$246 million in punitive damages following its award of \$122.6 million in compensatory damages. The judge did find the

damages awarded to be excessive. He lowered the compensatory damages to \$70 million for the injured lady and \$5 million for her husband, who has become her caretaker. The husband had been awarded \$13 million by the jury. Punitive damages were lowered to \$75 million. For more information on the trial of this case, refer to the July issue of the Report. The story can be found on page 16.

NINE OUT OF TEN AMERICAN CITIZENS SUPPORT TOUGHER AUTO SAFETY STANDARDS

Nine out of ten Americans support tougher federal auto safety standards, according to a recently released Lou Harris poll. The Harris poll also found that 84% of the American public, including eight of ten SUV owners, favor the U.S. government requiring automobile companies to make all motor vehicles, including SUVs, more stable and less likely to rollover in crashes. An estimated 43,000 people died in traffic crashes in the United States in 2003, the highest since 1990 and the fourth consecutive year that traffic deaths have risen. As we have pointed out, deaths from vehicle rollover crashes are also on the rise. There was a ten percent jump in fatalities resulting from SUV rollover crashes last year. The survey was released by Advocates for Highway and Auto Safety. As you know, Congress will be voting on a \$318 million transportation bill very soon. Vehicle safety provisions in the law passed the Senate in February, but were not included in the House bill. House and Senate conferees have been meeting to work out differences in the two versions. The consumer group, Advocates for Highway Safety is urging passage of the Senate version of the bill, which would impose safety standards that would reduce rollover crashes, occupant ejection, and vehicle roof crush.

The auto industry has refused to act on the knowledge and facts they have long had about the insufficient roof strength standard they currently use for their SUVs and pick-up trucks. If a vehicle's gross weight is more than

6,000 pounds, it doesn't have to meet any roof crush standard. For example, Ford owns Volvo and the Volvo XC90, which has a roof that can hold well over three times the vehicle's weight and exceeds the United States' roof crush standard by more than 100%. Ford could have certainly designed SUVs and pickup trucks with a similar roof structure. It had both the knowledge and capacity to do that, but refused to do so. Joan Claybrook, President of Public Citizen, has accused the government of delaying the promulgation of strong and effective safety standards on the auto industry for decades. Joan, who headed NHTSA during the Jimmy Carter Administration, stated recently:

For roof crush, the government issued a weak standard in 1971 that is failing to protect rollover occupants against deadly and debilitating brain and spinal cord injuries. Similarly, the government has thoroughly studied how and why people are ejected from vehicles during crashes but has done nothing to stop it.

Clearly, it's time for the federal government to take strong action to require the automobile industry to design motor vehicles, including SUVs and pickup trucks, safely. It can be done and folks are demanding that it happen. Congress and NHTSA must do their job and make our highway safer.

ANOTHER FORD EXPLORER ROLLOVER VERDICT

On August 18th, a jury in Florida found Ford Motor Co. liable for another rollover accident involving a Ford Explorer. The family of Bob Miller, a safety officer for a roofing company, who died in March 2001, filed the suit. In the accident-giving rise to the lawsuit, the right-rear tire on Miller's 1996 Explorer failed and caused him to lose control of the vehicle. The vehicle went off the road, rolled over, and Miller, 57, was killed. Internal company documents disclosed during the trial revealed that Ford was

aware of a stability problem with Explorers manufactured through the 2001 model year that make them far more difficult than other vehicles to control when they experience de-treading, or catastrophic tire failure. In addition to finding Ford negligent and strictly liable under the applicable product liability law, the jury found that Ford was wanton and willful in its disregard for public safety. To find a defendant guilty of wanton and willful conduct in Florida, the proof has to be very strong. It's pretty much the same thing as finding the company guilty of manslaughter.

This was the second major setback for the carmaker so far this year. The federal court jury in Ft. Myers, Florida, ordered Ford to pay compensatory damages in the amount of \$5.3 million. The jury then started deliberations for the amount of punitive damages to be awarded. Ford quickly settled the case the next day while the jurors were still deliberating. The final settlement, which included all recovery damages, is confidential.

ROLLOVER RATING INFORMATION PROGRAM STILL FATALLY FLAWED

The new rollover scores and revised presentation released last month by the National Highway Traffic Safety Administration can be helpful to drivers and car buyers. While the agency should be commended for improving its presentation of data to consumers, many safety groups believe significant flaws remain in the government's program. Let's take a closer look at what has been done so far and what else is needed.

First, the rating information—which lists the chance of rollover in a single-vehicle crash and reveals whether the vehicle tipped during the test—is posted only on the Web when it should be posted by manufacturers on the vehicle's window sticker at the point of sale. This would ensure that prospective buyers see at the point of sale that the tests are conducted before the vehicles are sold and that every vehicle is tested rather than putting the onus on buyers to research the ratings themselves.

Second, the rating system, in which vehicles are given between one and five stars, creates categories so broad that two vehicles can receive the same rating but have widely varying rollover risks, and even the most rollover-prone vehicles are awarded an inflated score. Some vehicles whose wheels lifted off the ground during the latest round of tests (the Ford Escape, the Mercury Mariner) received three stars, and one model of the Toyota Tacoma received four stars. Further, the on-road ("dynamic") test counts for very little of a vehicle's score and may enhance a score but not downgrade it. A better system would grade vehicles A to F.

NHTSA's tests can be useful. It was during these tests that the government discovered a potential defect in the Saturn VUE prompting the company to recall the vehicles earlier this month. More will be said on that vehicle below. It is troubling, however, that NHTSA omitted any mention of the VUE in the information it released. This would have been a great opportunity to publicize the problem. Certainly provides consumer information is always helpful and is a good step. It must be pointed out however, that it's not enough. NHTSA should issue a minimum rollover safety standard to ensure that vehicles do not roll over as they do now. Manufacturers, under the current system, can make vehicles as top-heavy and unstable as they want to because NHTSA safety standards are silent on rollover propensity. The public deserves a better deal and NHTSA has an obligation to bring about needed changes. We must keep the pressure on our political leaders if that is to happen any time soon.

SUSPENSION FAILURE ON SATURN SUVs IN ROLLOVER TESTS

General Motors is now facing an inquiry relating to the Saturn Vue sport utility vehicle mentioned above. The suspensions on two of the Vues broke during rollover tests performed by the government, causing the left rear wheels of the vehicles to collapse. The suspension failures occurred in separate tests of the two- and four-wheel-

drive versions of the Vue. The National Highway Traffic Safety Administration is investigating why the failures occurred, according to information posted on the agency's Web site. This process will take months and must be completed before NHTSA can order a recall. Consumer advocates have called on General Motors to voluntarily recall the vehicles since the test results suggested a flaw in their design. Clarence Ditlow, director of the Center for Auto Safety, a leading consumer advocacy group, stated:

I can't think of a government test in recent memory that resulted in such a catastrophic failure. It's truly amazing that both vehicles had the same failures.

Clearly, there is enough evidence to indicate a design problem. As you know, Public Citizen has backed a Senate proposal to create minimum rollover performance standards for all cars and trucks. More than 200,000 Saturn Vues have been sold in the United States since the models went on sale in 2001. General Motors must fix this problem immediately. This vehicle has its own tripping mechanism. General Motors should immediately recall these vehicles.

The public is now fully aware that rollovers have been an area of increasing scrutiny because of the tremendous amount of media attention to the problem in recent months. Folks have come to realize that SUVs are more prone to roll over than passenger cars because of their higher ground clearance. In fact, it appears now that some people believe that you drive an SUV at your peril because of the known hazards of rollover. The industry has done a most effective marketing campaign for SUVs. They should now make the vehicles safer and that can be done by widening the track and lowering the engine.

This year, as we have mentioned several times, NHTSA has been conducting its first rollover tests on a track. Previously, the agency used a mathematical formula, factoring in a vehicle's specifications, to predict rollover risk. Congress ordered the agency to devise

a track test after nearly 300 people died in rollovers of Ford Explorers equipped with Firestone tires in the late 1990s. In the new tests, conducted at speeds of 35 to 50 mph, vehicles are driven through as many as 10 maneuvers known as fishhooks. That maneuver simulates the kind of jarring swerve that might happen when vehicles drift off the road and then the drivers overcompensate while trying to recover. These are routine maneuvers that occur in the real world.

The suspension of the four-wheel-drive Vue failed at 45 mph, according to the summary from NHTSA. The summary said the two-wheel-drive Vue had "a similar rear suspension failure" but did not say at what speed. As previously reported, several SUVs and pickup trucks have tipped up on two wheels during the new tests, indicating an imminent rollover risk. Test drivers are protected from rollovers during the test runs. Vehicles do not actually roll over on the test track because they are equipped with metal outriggers. The test drivers realize the hazards associated with SUVs and rollovers and use the outriggers for their own protection.

FORD SUVs MAY GET SOME NEEDED ROLLOVER HELP

As we all know, from the very beginning, the Ford Explorer has been plagued with rollover problems. It has gotten so bad, that the public now knows fact that the Explorer is likely to rollover. In an effort to remedy a known problem, Ford Motor Co. is now adding anti-rollover technology to the Explorer and three other sport utility vehicles for the 2005 model year. Ford is putting a new stability system in all versions of the 2005 Explorer, Mercury Mountaineer, Lincoln Aviator and Lincoln Navigator. It will be optional on the 2005 Ford Expedition. The system, which is called roll stability control, reacts automatically when a vehicle begins to tilt. It seeks to right the vehicle by automatically slowing the engine and gently activating the brakes. Ford has sold more than 5 million Explorers—going through several design changes—since the

vehicle was first introduced in 1990.

It is undisputed that the Explorer has had serious rollover problems. In fact, the problem has become so widely known that it has been difficult to win even the **best** of cases with clear liability and the most serious injuries and even deaths. Jurors may be saying that you drive an SUV—and especially the Explorer—at your own risk. We do know that Ford actually uses the propensity of SUVs to rollover to its advantage when defending Explorer rollover cases. There have been hundreds of lawsuits alleging that the Explorer is prone to roll over. I hope the new technology will help curb the problem and reduce the need for lawsuits.

THE PUBLIC IS STILL AT RISK

A recent decision by the U.S. Circuit Court of Appeals for the District of Columbia on airbags was clearly a blow to the public. In sustaining the federal government's rule setting a 25 mph airbag crash test standard rather than a 30 mph, high-speed test - a test that was in effect for many years—the court did a bad thing. Clearly, the ruling was a major disappointment. The 30 mph test is 44% more stringent than the 25 mph test. The 25 mph standard set by the National Highway Traffic Safety Administration (NHTSA) will not adequately protect occupants against injuries sustained in high-speed crashes. After all, that is exactly what airbags are designed to do. NHTSA's new standard weakens protection for vehicle occupants in high-speed crashes, contrary to Congress's mandate in the Transportation Equity Act for the 21st Century that the agency improve occupant protection.

NHTSA's new 25 mph standard gives auto manufacturers a green light to reduce the protection of people in high-speed crashes. By NHTSA's own estimates, the standard will result in the annual loss of 400 lives that would otherwise have been saved by airbags. NHTSA and the court assumed that manufacturers will not take advantage of this green light to reduce occupant

protection. In fact, manufacturers have stated publicly they will not. Public Citizen has called on the manufacturers to live up to their promises—although without the 30 mph standard the public can't be assured they will. The American people have little faith in the car manufacturers to do all they can to protect the public. The industry keeps an eye on the bottom line when designing cars and has cut back on safety to save a few dollars for years. "Profits over safety" has been the rule rather than the exception in the industry.

Unfortunately, manufacturers have an incentive to reduce protection because it is cheaper to depower an airbag than to employ advanced airbag technology, which would improve occupant protection while minimizing risk to children and small adults. NHTSA's standard now does less than it should to promote the use of advanced technology. Another problem is that NHTSA adopted the 25 mph standard on an "interim" basis only through August 2006. The court assumed that NHTSA would evaluate data on airbag performance and issue a permanent standard in 2006. It is too late to issue a rule by 2006, though, because the agency has taken no public steps toward enacting a permanent rule. NHTSA should immediately begin the process to issue a permanent airbag standard that protects occupants in higher-speed crashes while minimizing risk, and to publish the data it gathers about airbag performance - data that so far has not been made available to the public.

DATA RECORDERS IN CARS

The National Highway Traffic Safety Administration proposed a rule in June relating to "black boxes" in passenger cars. By 2008, both the kinds of information they collect and the date must be disclosed to those who own or lease the vehicles. The black boxes are known by the auto industry and regulators as "event data recorders" or EDRs. These devices are connected to a vehicle's airbag system and are capable of detecting many things,

including the speed of the vehicle, whether the driver was wearing a seat belt at the time of a crash and how the brakes were applied.

Consumer groups, medical professionals and the National Transportation Safety Board have been pushing to make the boxes mandatory for a long time. The NHTSA proposal is limited to requiring automakers who install the devices to collect the same data in the same format—18 pieces of information in all. According to NHTSA, says there are 30 million of the devices now on the road. Up to 90% of new models will have the recorders. Under the proposal, carmakers would have to disclose in owners' manuals that the recorders have been installed and that they will record what happens in the seconds before and during a crash. The companies would have to make it easier for researchers and crash investigators to access the recorded data, and that is most significant.

The leader in EDR technology has been General Motors Corp. GM, which has used the technology in a limited way since the 1970s, now equips all its models with the feature. Ford Motor Co. and Toyota have some of the capability. Chrysler has only a few of its models with the recorders collecting crash data. Supporters of collecting the data believe that safety research, car design and accident investigations would be enhanced by standardized information that one day could be centrally collected and analyzed.

BRAIN INJURIES TIED TO LACK OF SIDE AIRBAGS

A new study says in order to prevent serious brain injury in a broadside crash, cars need to have side bags that protect occupants' heads. An analysis of car crashes reported to the National Highway Traffic Safety Administration found that broadside crashes cause more brain injuries than do other accidents. The study, designed to show that the sides of cars are virtually unprotected, revealed that if you are the occupant of a car that gets hit on the side, you are three times more likely to suffer a head injury than if

your car gets hit in the front or the back. Not only are you more likely to get a head injury, but the head injury you get will be more severe than if your car got hit in the front or the back, according to the study.

The study found that there is a very high probability of traumatic brain injury resulting in death in both single-car side collisions and in multiple car side-impact crashes. Side crashes also cause more injury than other crashes because of vehicle mismatch. For example, when large SUVs hit smaller cars, there is no doubt which vehicle wins that matchup. The best existing safety equipment available is side-impact airbags that protect the head. Side airbags should be standard equipment in all motor vehicles. When that happens, the traveling public will be much safer than is presently the case. The referenced report can be found in the August issue of the *Annals of Emergency Medicine*.

FAMILIES SUE FORD AND ENTERPRISE OVER VAN CRASH

The families of five people killed when the Ford van they rented rolled over last year have sued the automaker and Enterprise Rent-A-Car. The lawsuit alleges that the companies knew the 2002 Ford Econoline E-350 van was unsafe and failed to warn a group that was taking a trip to a religious retreat. The group rented three vans to carry people to an annual retreat at a monastery. One of the vans, which can carry 15 people each, rolled over on an interstate highway in California in March 2003, after the driver lost control. In the accident five people died and nine others were seriously injured. According to the lawsuit, Ford and Enterprise had been warned by two federal safety agencies that the vans, when occupied by at least 10 people, had a higher rollover rate than those carrying fewer passengers. It is most significant that Enterprise now requires customers renting 15-passenger vans to sign a statement advising them of the risk. But, before a company requires customers to sign

any such document, the warning must be strong, in order to be effective.

DEFECTIVE AND HIGHLY DANGEROUS SEAT BELT BUCKLES

Recently, we settled a lawsuit against DaimlerChrysler involving a 2001 Chrysler Voyager minivan equipped with seat belts, that use the Generation (GEN-3) buckle. In the case, our client was in the middle row seat of the minivan wearing her seat belt. The minivan was involved in a rollover accident. During the accident, our client's seat belt unlatched, causing her to be ejected from the minivan. She was rendered a paraplegic as a result of the ejection. The failure of the seat belt to hold our client in the van is the result of a defectively designed seat belt buckle known as the GEN-3 buckle. The GEN-3 buckle is distinguished by a button that protrudes significantly beyond the button cover, enough so that a loose object or a flailing arm during a rollover crash can unlatch the buckle by striking it. Other buckles are designed so that the release buttons are flusher with the button cover and must be depressed below the cover before the buckle will unlatch. Because the GEN-3 buckle protrudes significantly above the button cover, these buckles are prone to release inadvertently during a crash.

Unfortunately, most folks who buy a new car believe that the seat belts will function properly if ever they are needed. That design should clearly include a properly designed buckle. DaimlerChrysler has known for years that the GEN-3 buckles are prone to release and thus are unsafe. Routine crash tests conducted by DaimlerChrysler showed GEN-3 buckles unlatching. In later crash tests conducted by the U.S. and Canadian governments, GEN-3 buckles were shown to unlatch. In fact, after viewing these crash tests, Chrysler engineers recommended that the seat belt buckles in the 1998 Dodge Durango and Dodge Dakota be upgraded to the newer GEN-4 seat belt buckles. In 1992, when it was developing the GEN-3 buckle, DaimlerChrysler stopped using a stan-

dard auto industry test for seat belt safety known as the ball test. This standard industry test checks on the tendency of a seat belt to accidentally unlatch. The test, which is meant to simulate hitting the release button with an elbow, is conducted by using a metal ball of a specific diameter and pressing it against the seat belt button while the belt is in a latched position. If the belt comes undone, the buckle has failed the test.

General Motors Corporation uses a 30 mm ball test. Ford Motor Company uses a 32 mm ball test. Chrysler previously used GM's 30 mm ball test, but eliminated that test when designing the GEN-3 buckle. Chrysler knew that the GEN-3 buckle would not pass the 30 mm ball test. Chrysler claimed to have used a 40 mm ball test for the GEN-3 buckle. The 40 mm ball test is a less stringent test than the 30 mm ball test. But, testing by an independent engineering firm showed that the GEN-3 buckle failed both the 30 mm and the 40 mm ball test 100% of the time. The GEN-4 buckle did not unlatch during these ball tests. ABC's news magazine, Prime Time Live, aired an investigative report on the dangers of these buckles. In response to ABC's story, a voice recording at Chrysler's toll-free number simply claimed that these buckles were safe and that they met all of the "appropriate" safety requirements for seat belts. To this day, even in the face of overwhelming evidence, Chrysler continues to deny that there is a problem with the GEN-3 buckle. According to Clarence Ditlow, head of the Washington, D.C.-based Center for Auto Safety, the defect can be deadly and escapes detection because, after the crash, it appears that the occupant was not wearing a seat belt. Ditlow states:

In terms of seat belt defects, this is one of the worst that I have ever seen. Seat belts are your last line of defense in a crash and never should fail. Yet, Chrysler's GEN-3 seat belt buckles are like a perfect crime because dead men tell no tales. After a fatal crash, the occupant is not alive to say the buckle came apart.

About 16 million Chrysler, Dodge, and Jeep vehicles are equipped with GEN-3 buckles. This includes all minivans produced between 1994 and 2003. But, on certain model year Chrysler minivans, the front seat occupants have a different seat belt buckle than the middle and rear seat occupants. In other words, Chrysler installed GEN-3 seat belt buckles in the middle and rear seats of minivans where children typically sit, whereas belts in the front seats of these minivans have a differently designed buckle. Numerous complaints have been filed with Chrysler and the government over the years by parents who report that the seat belts in their Chrysler vehicles unlatched around infant and baby car seats. It was not until January 2003 that the GEN-3 buckles were replaced with the GEN-4 buckles in the Chrysler minivans, even though the GEN-4 buckles had been in the Dodge Durangos and Dakotas since the model year 1999. These GEN-3 buckles are dangerous and defective and should be recalled. The Center for Automotive Safety began calling on DaimlerChrysler to recall all GEN-3 seat belt buckles and to replace them with the safer GEN-4 buckles. To date, Chrysler has refused to do so, allowing more and more people to be injured or killed as a result of their seat belts unlatching during an accident.

GENERAL MOTORS MINIVANS ARE UNSAFE

Over the past decade, minivans have become increasingly more popular. Families use minivans across our country to go to church, take family outings, and drive to soccer games. The vehicles are marketed and sold as family vehicles. The truth of the matter is, however, they are nothing more than truck frames with a van body. Our experience with General Motor's minivans is clear and convincing proof that they can be unsafe in foreseeable collisions.

General Motors sells the Pontiac Transport, Oldsmobile Silhouette and Chevrolet Venture. Last year, we settled a case for a family from northeast

Alabama involving a General Motors' minivan. The family lost a loved one when their 1997 Pontiac Transport minivan was struck by a sports car. A devoted wife and mother of two young children were fatally injured in what was a moderate collision. The occupant compartment of the minivan totally collapsed in the accident. Since that time, we have investigated and researched other collisions involving 2004 models of the Venture and Silhouette. Unfortunately, it is quite apparent that General Motors has done absolutely nothing to improve the safety of their minivans. Based on what we have learned, the occupant compartment in General Motor's minivans doesn't protect occupants from severe injury or death in what should be survivable collisions.

These minivans are defective and not crashworthy. This is because they are designed without adequate and proper bracing and other internal reinforcements necessary to maintain occupant survival space. The occupant compartment or "occupant safety cage," the term used by the Institute for Highway Safety, should be designed and manufactured to maintain occupant survival space in foreseeable and survivable collisions. Unfortunately, because of cost-cutting programs, General Motors designed the safety cage of these minivans without adequate support and structure. These safety reductions greatly affect the crashworthiness of these minivans. As a result, occupants of the Pontiac Transport, Oldsmobile Silhouette and Chevrolet Venture minivans are subjected to an unreasonable risk of injury even when they are properly using their seat belts.

General Motors was aware of their minivans' lack of crashworthiness or problems with its occupant area at least as early as 1996. In reality it was probably even earlier. In 1996, the Insurance Institute for Highway Safety conducted several crash tests on various manufacturers' minivans to determine their crashworthiness and the performance of the occupant compartment in impacts almost identical to the collision in our client's case. In the Institute's tests, for example, the Pontiac Transport, Oldsmobile Silhouette and

Chevrolet Venture, were the lowest rated of all minivans in terms of safety. In its tests, the Institute awarded grades of good, acceptable, marginal, and poor. The Pontiac Transport, Oldsmobile Silhouette and Chevrolet Venture minivans received the Institute's lowest overall safety rating - "poor." Most significantly, the Institute's crash test showed that the structure or safety cage of the GM minivans subjected the driver or occupants to potentially fatal head and neck injuries.

LAWSUIT CLAIMS REPAIR SECRECY IN DEFECTIVE BMW SUV AIRBAGS

A lawsuit has been filed in a Florida state court claiming that BMW X5 sport utility vehicles have defective airbags that deploy for no reason. The suit alleges that the German carmaker's U.S. subsidiary signs owners to **secrecy** before performing free repairs. The lawsuit is seeking national class action status. The plaintiff says she suffered a chemical burn on her left arm when the driver's side bag exploded with a blinding puff of white powder as she was driving on a busy thoroughfare. Her 2001 SUV was still under warranty, but the dealer who sold her mother the \$58,000 vehicle planned to charge her \$3,840 for repairs if she refused to sign the confidentiality agreement. Instead of agreeing, the plaintiff took the X5 to another dealership for less expensive repairs. The lawsuit covers the 2001-2004 model years.

Florida's 1990 Sunshine in Litigation Act bars secrecy about public hazards. BMW ordered two recalls to reprogram side airbag controllers on its 3-Series cars built between 1998 and 2001. Federal regulators opened an investigation in 2002 after reports of 41 injuries, 265 complaints and 212 warranty claims. The lawsuit seeks money for the cost of repairs, towing, depreciation, lost use of the vehicle and lost personal time. It also seeks court orders to force BMW to honor its warranties, inspect airbags, perform any needed repairs, ban the confidentiality agreements and cancel any signed agreements. The lawsuit could potentially cover thousands of BMWs nationally. BMW

markets the X5, which is equipped with five airbags, as a safe SUV.

TASER GUNS LINKED TO FIVE DEATHS

Medical examiners have found that Taser electric stun guns may have played a role in at least five deaths, contradicting the manufacturer's claim that the weapons never killed or injured anyone. Medical examiners in three cases involving suspects who died in police custody cited Tasers as a cause or a contributing factor in the deaths. In those cases, Tasers could not be ruled out as a cause of death. Taser International has defended its product, which thousands of law enforcement agencies have issued to their officers to help subdue people who refuse to obey commands. The Scottsdale, Arizona-based company created a report detailing 42 cases of people who died after being shot by a Taser. The company claims the stun guns were cleared every time. But, the company didn't have the autopsy reports at the time and apparently relied on media accounts and anecdotal information from police for most of its analysis.

BULLETPROOF VEST MANUFACTURER FACES SUIT

The nation's largest manufacturer of bulletproof vests for police has been sued by Pennsylvania's Attorney General for allegedly failing to disclose for years that the material in some models deteriorates with exposure to fluorescent light, heat and humidity. Attorney General Jerry Pappert blamed the vests for the death of a police officer in California and the wounding of an officer in Pittsburgh. The state of Pennsylvania is demanding Second Chance Body Armor Inc. of Central Lake, Michigan, pay hundreds of thousands of dollars in civil penalties and give refunds to Pennsylvania law enforcement agencies that bought the lightweight vests.

Pennsylvania is the sixth state to file such a lawsuit against Second Chance. That company sold more than 7,200 of the lightweight vests worth nearly \$5

million to 200 law enforcement agencies around the state, including the Pennsylvania State Police. Second Chance discontinued production of the lightweight vests last September. The vests used Zylon fibers — a material produced by Toyobo Co. of Japan — that made the body armor lighter and more comfortable. But in December 1998, Toyobo informed Second Chance that the material significantly deteriorated with exposure to fluorescent light. And in August 2001 Toyobo officials told Second Chance that heat and humidity tests resulted in more problems. The Attorney General stated when filing the suit: “It’s our position that Second Chance made a conscious decision to hold off warning our law enforcement officials that degradation problems with Zylon in bulletproof vests could seriously compromise their effectiveness.” If this proves to be accurate, the company should be punished to the fullest extent of the law.

IT’S THE POLITICAL SEASON

I am afraid that the federal government’s treatment of the latest highway fatality rate statistics may well be an example of election-year spin over public health and safety. The release highlights the fact that the highway death rate is at an “historic low” but fails to point out that a downward trend has been going on for years. In fact, the death rate has been in a steady march downward for years, declining 46% between 1982 and 2002. The National Highway Traffic Safety Administration’s latest spin downplays the real news in the numbers— that 42,643 people lost their lives on the road last year. Also, much of the report focuses on year-to-year comparisons that can be misleading because small percentage changes must be analyzed as part of longer-term trends to be meaningful. Dr. Jeffrey Runge, Administrator of the NHTSA, speaking at a 2004 Society of Automotive Engineers meeting, made it clear that declining death rates were no cause for celebration, considering the high number of people still being killed on the

highway. That was only one of Dr. Runge’s many public statements to the effect that far too many folks are being needlessly killed on our highways.

Now, a few months before **Election Day**, the emphasis has shifted to death rates rather than real numbers. It is important to note that SUV rollover fatalities actually jumped 6.8% from 2002 to 2003. Those numbers are proof that there is a need for a rollover prevention standard and a tougher roof crush standard. As you may recall, both are required in legislation now pending before Congress, which also contains an array of other critical safety measures. Much important work has yet to be done to make the highways safer in our country. We are a long way from being able to declare victory.

RESEARCH REPORT REGARDING CRANE SAFETY

The Hazard Information Foundation Incorporated (HIFI), located in Sierra Vista, Arizona, was established to identify and publicize engineering improvements that can control hazardous conditions. HIFI brings a new look to safety by informing management leadership and the public of design modifications or accessories that can effectively make machines, systems and services safer. By reducing the time lag between these innovative engineering developments and the time for universal use, countless lives can be saved and economic losses avoided. HIFI does a very good job in this important area of concern.

HIFI has now released its research report “Safety Interventions to Control Hazards Related to Power Line Contacts by Mobile Cranes and Other Boomed Equipment.” The report, funded by the Center to Protect Workers’ Rights, addresses hazards of crane safety relating to power line contact and contains 30 recommendations to either eliminate or minimize hazards. The report, which has been peer reviewed by safety experts, is now available on CD-ROM or hard copy for \$150. To obtain the report, please contact HIFI at **besafe@hazardinfo.com** or (520) 458-6700. The report is another

example of HIFI’s commitment to inform the public regarding hazards and providing safety-engineering alternatives to either eliminate or minimize hazards. HIFI is a tax-free organization.

AUTO SAFETY GLOSSARY

I have had several requests to explain some of the terminology we use in the products section of the report. I realize some of the terms are not commonly used in the everyday lives of most folks. Also, I thought it might be helpful to explain a little more about some of the groups and entities that are involved in product liability litigation. I have gone to several sources and put together the following, which I hope will be helpful to our readers.

- **Advanced Notice of Proposed Rule Making (ANPRM)** – Proposed rules in NPRM or ANPRM form are submitted by federal agencies in public dockets so that interested parties can comment on the rules agencies are formulating before a final rule is passed. ANPRMs generally precede NPRMs.
- **Anton’s Law** – A law requiring NHTSA to strengthen child safety in passenger vehicles. This law was named after Anton Skeen, a four-year-old killed after a seat belt failed to retain him in a rollover crash. Anton’s mother, Autumn Skeen, has been an invaluable advocate on the issue. For more information see: http://www.citizen.org/autosafety/booster_seat/
- **Corporate Average Fuel Economy (CAFE)** – Corporate Average Fuel Economy (CAFE) is the sales weighted average fuel economy, expressed in mpg, of a manufacturer’s fleet of passenger cars or light trucks with a gross vehicle weight rating (GVWR-see below) of 8,500 lbs. or less, manufactured for sale in the United States, for any given model year. For more information see: <http://www.citizen.org/autosafety/fuelecon>

- **Citizens for Reliable and Safe Highways (CRASH)** – This organization works to reduce the number of injuries and fatalities caused by truck-related crashes, to provide compassionate support to truck crash survivors and families, to freeze truck size and weight limits at current levels, to raise public awareness of important safety issues, to educate legislators on issues related to truck safety regulation and to reduce the problem of truck driver fatigue. For more information see: <http://www.trucksafety.org/>
- **Crashworthiness** – Crashworthiness refers to how well a vehicle protects its occupants in a crash. From an engineering perspective, crashworthiness is the ability of the vehicle to prevent occupant injuries in the event of an accident. The cause of the accident is technically irrelevant in crashworthiness cases even if the severity of the accident is an issue.
- **Department of Transportation (DOT)**– The Secretary of Transportation is the principal adviser to the President in all matters relating to federal transportation programs. The Office of the Secretary (OST) oversees the formulation of national transportation policy and promotes intermodal transportation. Other responsibilities range from negotiation and implementation of international transportation agreements, assuring the fitness of US airlines, enforcing airline consumer protection regulations, issuance of regulations to prevent alcohol and illegal drug misuse in transportation systems and preparing transportation legislation. For more information see: <http://www.dot.gov/>
- **Early Warning System** – The Early Warning database, which will contain up-to-date defect-related information submitted by auto manufacturers on a quarterly basis, will prove to be the most significant provision of the TREAD Act (see below) and will assure that information collected and maintained by manufacturers about defective vehicles is made public.
- **The Fatality Analysis Reporting System (FARS)** – Government-sponsored recording system that tracks fatal motor vehicle crashes on U.S. public roads. For more information see: <http://www-fars.nhtsa.dot.gov/>
- **Federal Motor Carrier Safety Administration (FMCSA)** – Agency within the DOT that regulates commercial motor vehicles. The primary mission of FMCSA is to prevent commercial motor vehicle-related fatalities and injuries. For more information see: <http://www.fmcsa.dot.gov/>
- **Freedom of Information Act (FOIA)** – A FOIA is a written request to view the records of federal agencies. Although a FOIA request does not give access to records held by Congress, the courts, or by state or local government agencies, it opens the federal regulatory process to public inspection. For more information see: <http://www.usdoj.gov/04foia/>
- **Fuel Economy** – The average mileage traveled by an automobile per gallon of gasoline (or equivalent amount of other fuel) consumed as measured in accordance with the testing and evaluation protocol set forth by Environmental Protection Agency (EPA). For more information see: <http://www.fueleconomy.gov>
- **Gross Vehicle Weight Rating (GVWR)** – Value specified by the manufacturer as the weight of a fully loaded vehicle.
- **North American Free Trade Agreement (NAFTA)** – An unprecedented trade and investment agreement with Canada and Mexico that furthered corporate plans to integrate the three economies at the expense of jobs, wages, public health, food safety, the environment, highway safety and labor standards. For more information see: <http://www.citizen.org/trade/nafta/>
- **NAFTA Trucks** – A provision in NAFTA, which took effect in 1994, required the United States to allow Mexican trucks to cross the border and access all border-state roads starting in 1995, and to drive anywhere in the country by January 2000. For more information see: http://www.citizen.org/autosafety/Truck_Safety/mex_trucks/
- **New Car Assessment Program (NCAP)** – Publication of NHTSA's crash test program, with results of crash test and rollover ratings for most new vehicles manufactured since 1990. For more information see: <http://www.nhtsa.dot.gov/cars/testing/ncap/>
- **National Highway Traffic Safety Administration (NHTSA)** – This is the federal agency responsible for establishing automotive safety standards and making manufacturers recall defective products. For more information see: <http://www.nhtsa.dot.gov/>
- **Notice of Proposed Rulemaking (NPRM)** – Proposed rules in NPRM or ANPRM form are submitted by federal agencies in public dockets so that interested parties can comment on the rules agencies are formulating before a final rule is passed.
- **Parents Against Tired Truckers (P.A.T.T.)** – This organization has been successful in bringing the truck driver fatigue issue to the forefront at National events though out the United States. They work towards hours-of-Service rules, driver's pay for all hours worked, on-board computers, availability of sufficient and safe rest areas, and public education on fatigued driving. For more information see: <http://www.patt.org/frames.html>
- **Point of Sale Labeling** – Warning or information labels available on products that are for sale (e.g., the fuel economy labels placed in the window of all cars on a dealer's lot). For more information see: <http://www.citizen.org/autosafety/defectovers/pointofsale/>
- **Rollover** – Vehicle crashes where one or more of the vehicles involved tips off its wheels and onto its side, roof or back onto its wheels again. Although the forces of a crash impact

are dispersed in a rollover crash, making rollovers hypothetically less dangerous than other crashes, vehicles are not designed with rollover safety in mind. Therefore, rollovers are highly devastating crashes: about one-third of all crash fatalities occur in rollovers. For more information see: <http://www.citizen.org/autosafety/rollover/>

- **Research Safety Vehicle (RSV)** – Experimental vehicle developed by NHTSA in the 1970s that weighed only 2,450 lbs., achieved 32 miles to the gallon in 1978 and was able to protect its occupants in a full frontal barrier impact at 50 mph and in side impact and rollover crashes at 40 mph without significant risk of occupant injury. The RSV created by NHTSA was destroyed by the government. For more information see: <http://www.autosafety.org/article.php?did=314&scid=37>
- **Shield Booster** – Basic booster seats with a padded shield guard that rests in front of a child’s chest area. These booster seats are dangerous for children and both NHTSA and the American Academy of Pediatrics have warned parents not to use them. For more information see: http://www.citizen.org/autosafety/booster_seat/
- **Tire Pressure Monitoring System (TPMS)** – Systems that alert drivers if their tires are underinflated. TREAD directed NHTSA to issue a tire pressure-monitoring rule after the much-publicized deaths and injuries caused in crashes involving shred-prone Firestone tires. A direct TPMS monitors the pressure in each tire and is preferable to an indirect TPMS that only measure a tire’s pressure in relation to the other tires on the vehicle. For more information see: <http://www.citizen.org/autosafety/tread/tpms/>
- **Transportation Recall Enhancement, Accountability and Documentation Act (TREAD)** – The TREAD Act was passed in the wake of the Ford Firestone debacle in the

late 1990’s with the intent of increasing consumer protection through a series of auto safety mandates, including instructions to NHTSA regarding tires, TPMS, early warning disclosure and rollover testing. For more information see: <http://www.citizen.org/autosafety/tread/>

SETTLEMENT IN CASE INVOLVING DEATH OF BABY

A wrongful-death case was settled last month involving the death of a baby. Graco Children’s Products Inc., the manufacturer of children’s products, settled with a couple whose baby died in a two-car collision as the result of a faulty car seat. The suit was filed in June 2002, about six months after the baby died of injuries she suffered in a traffic accident. The baby was less than a month old at the time of the accident. Under the terms of the agreement, the settlement amount was confidential and the record sealed.

In addition to the settlement with Graco, the family also received a non-confidential \$75,000 settlement from the liability insurance carrier which had the policy on the vehicle that rear-ended the car in which the baby and her family were riding. The impact caused the baby seat, which was in the back seat, to slam into the seat in front. The baby was stuck in the seat when it clam-shelled. As a result, she couldn’t breathe. The baby suffered severe brain damage and survived for about 13 months after the accident. Her death was caused by the brain damage suffered in the accident. Graco issued a recall of the baby seats about a month after the accident, but the defects cited by the company were said to be not related to the defect in this case.

VIII. MASS TORTS UPDATE

REQUEST FOR CRIMINAL INVESTIGATION OF ASTRAZENECA

Public Citizen has called on the U.S. Food and Drug Administration to investigate AstraZeneca for illegally delaying the submission of reports of serious adverse reactions to the cholesterol drug Crestor. The company delayed the submission to the FDA of 23 such reports, with some delays being as long as 97 days beyond the 15-day reporting limit, according to Dr. Sidney Wolfe, director of Public Citizen’s Health Research Group. In a letter sent to FDA’s Acting Commissioner, Dr. Wolfe stated:

The delay hampered the FDA’s ability to assess the safety of what is a uniquely dangerous drug. For months the FDA did not have an accurate count of reported cases. Such apparently criminal behavior by a major drug company severely impairs the FDA’s ability to promptly and accurately evaluate the safety of marketed drugs.

Since Crestor went on the market in September 2003, some patients taking it have suffered severe muscle deterioration, kidney failure or kidney insufficiency. In 20 of the 23 cases that AstraZeneca delayed reporting, patients taking the drug were hospitalized. Nineteen of the 23 cases involved muscle deterioration and four involved renal failure. Public Citizen has petitioned the FDA to remove Crestor from the market. The Food, Drug and Cosmetic Act requires drug companies to report these kinds of adverse reactions “as soon as possible” but not later than 15 calendar days after the initial receipt of the information. Criminal penalties for violating the act with the intent to mislead include up to three years in prison and a \$10,000 fine. AstraZeneca reported these 23 cases to the FDA only in quarterly reports filed on March 5th and July 2nd. But, quarterly reports are supposed to be used for adverse reac-

tions that don't fall into the 15-day category, which covers adverse reactions that are both serious and unexpected. Public Citizen believes the prompt removal of this uniquely dangerous drug from the market is needed. If FDA does its job in its investigation, Dr. Wolfe believes further reasons to pull the drug will be uncovered. I strongly suspect he will be right.

BRISTOL-MYERS TO PAY \$150 MILLION IN SETTLEMENT

Bristol-Myers Squibb Co. will pay \$150 million to settle a major accounting fraud. Federal regulators had accused the company of manipulating its inventory of drugs to inflate earnings and meet Wall Street targets. The pharmaceutical giant, which also recently settled a lawsuit by shareholders for \$300 million, still faces a criminal investigation by the Justice Department. In its settlement of the civil case with the Securities and Exchange Commission, Bristol-Myers agreed to pay a \$100 million civil fine and an additional \$50 million. The full \$200 million will go into a fund for shareholders. Bristol-Myers also agreed to abide by a permanent injunction against future violations. This is one of the largest SEC penalties in recent years for alleged accounting violations against a company that continues to operate. For example, compare the \$150 million Bristol-Myers is paying to the \$10 million fine levied on Xerox Corp. in 2002. The Xerox payment was the largest accounting fraud settlement at the time.

Bristol-Myers, the maker of Excedrin, Plavix and Pravachol, disclosed in March 2003 that it had overstated revenue for 1999-2001 by \$2.5 billion as a result of discounts to wholesalers. As a matter of interest, Bristol-Myers had revenue of \$20.7 billion last year. The SEC sued Bristol-Myers in a New Jersey federal court, alleging that the company sold excessive quantities of drugs to wholesalers and improperly booked revenue from \$1.5 billion of those sales to its two biggest wholesalers. Bristol-Myers covered the wholesalers' carrying costs and guaran-

teed them a return on investment until they sold the products, according to allegations by the SEC in the suit. It is alleged that, in booking the \$1.5 billion in revenue at the point of shipment, the company violated generally accepted accounting principles.

Bristol-Myers was also accused of using so-called "cookie-jar" reserves in a drive to meet its internal sales and earnings targets as well as Wall Street analysts' earnings forecasts. The SEC maintains that the use of such reserves — overstating income in some quarters and understating it in others — gives investors an inaccurate picture of a company's financial performance. Bristol-Myers also agreed in the settlement to appoint an independent adviser to monitor its accounting practices, financial reporting and internal controls.

The SEC, the Justice Department and the U.S. Attorney's Office in New Jersey also have been investigating a Bristol-Myers program that offered wholesalers huge discounts to buy more prescription medicines than they could sell. A federal grand jury convened in Newark early this year to pursue a criminal investigation. I understand that inquiry is still active. The inventory manipulation is known as "channel stuffing" — packing distribution channels with excess inventory—which Bristol-Myers is alleged to have done near the end of quarters. The practice is not illegal, but some industry observers have called the level at Bristol-Myers clearly excessive. It occurred during a period when the company was trying to keep pace with rivals posting double-digit growth in profits.

The July settlement, where Bristol-Myers paid \$300 million to settle a class-action lawsuit by shareholders that accused the company of lying about accounting and its investment in ImClone Systems Inc., was separate and apart from the criminal charges. The civil suit stemmed from a 2001 announcement in which Bristol-Myers said it would invest \$2 billion in ImClone to gain marketing rights for the ImClone colon-cancer drug Erbitux. The shareholders contended that

Bristol-Myers made overly optimistic statements about the drug's chances for approval by the Food and Drug Administration.

BOSTON SCIENTIFIC DECLARES A THIRD STENT RECALL

Boston Scientific Inc. has issued the third recall of its Taxus stents, coming on the heels of its second recall. Patients may well have been put at risk after a manufacturing change designed to ensure safety appears to have created more problems. The company recalled 3,000 possibly defective stents that were produced at one facility in Ireland as it was implementing changes to its manufacturing process. These stents were not included in the first two recalls because the company believed those changes had taken care of the problem. The defects were discovered when the company received a recent complaint about a malfunction, and it traced that stent to a batch made over the last three days in April. The new recall eroded the trust of some doctors who had gone back to using Taxus after a recall of 85,000 units just a few weeks ago. It also has aroused the scrutiny of regulators, who said they want answers from Boston Scientific. The US Food and Drug Administration, which oversees recalls of stents, appears to be quite concerned.

Stents are wire mesh devices placed in arteries that are blocked by fatty deposits. Doctors thread a tiny balloon into the artery and inflate it to clear the blockage. Then, a stent is inserted into the artery, and a second balloon expands the stent to keep the newly cleared blood vessel wide open. The newest stents are coated with drugs to prevent tissue buildup within the arteries, which can create fresh blockages after the stent is in place. Soon after the stents hit the U.S. market, Boston Scientific began receiving complaints that some of the balloons that open the stents were not deflating properly. The inflated balloons block blood flow in the expanded artery and can become lodged there, turning the delicate-but-routine stent implant into a life-threatening medical emergency. Balloons

that didn't properly deflate have so far been linked to three deaths and 47 serious injuries in drug-coated and bare metal stents made by Boston Scientific.

After receiving the initial reports, the company began instituting changes in the manufacturing process. It said the defective stents were part of a bad batch and recalled 200. As more reports of defective devices came in, however, the firm declared a wider recall. The firm said then that the improperly deflating balloons were caused by a manufacturing flaw that left the diameter of the catheter that attaches to the balloon too narrow. To fix the problem, the company changed the way it attached the balloons to the catheter shaft, and put in place a new inspection system to ensure the connection of the balloon to its catheter is wide enough. After the second recall, reports of malfunctions continued to come in. The firm traced the bad devices to a plant in Galway, Ireland, triggering the most recent recall. Apparently, the questionable stents were produced at a time when only part of the manufacturing changes had been implemented.

LITIGATION UPDATE ON EPHEDRA

On April 13, 2004, the Judicial Panel on Multidistrict Litigation formed the Ephedra MDL (*In re: Ephedra Products Liability Litigation* No. 04 MDL 1598—JSR) in the United States District Court for the Southern District of New York. The Panel found that the coordination and consolidation of all Ephedra pre-trial proceedings would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. According to the Panel, consolidation was appropriate as common questions of fact predominate the numerous cases. The Judicial Panel chose Judge Jed S. Rakoff to oversee the MDL proceedings. Judge Rakoff was chosen because of his role as presiding judge in the personal injury/wrongful death actions pending against Twinlabs in connection with the Twinlabs bankruptcy proceedings. Twinlabs, a dietary sup-

plement manufacturer, sought bankruptcy protection early on for the numerous Ephedra-related claims that had been filed against it.

Actions pending against Nutraquest, which, like Twinlabs, sought bankruptcy protection after numerous ephedra-related injury claims had been filed against it, were not consolidated in the Ephedra MDL. Nutraquest personal injury/wrongful death actions were previously consolidated in the United States District Court for the District of New Jersey, under the direction of the Nutraquest bankruptcy court. Proofs of Claims in the Nutraquest bankruptcy action were due February 18, 2004. The bankruptcy court later ordered that those Proofs of Claims be converted to formal complaints, and Plaintiffs were required to submit Fact Sheets no later than July 1, 2004. Counsel representing Nutraquest claimants are in the process of selecting test cases to proceed to trial. Test case selections are due to Nutraquest by the end of the month; test case trials will be set starting next spring. Proofs of Claims in the Twinlabs bankruptcy action were due June 28, 2004. The Court has scheduled pre-trial hearings on May 2, 2005, with the first trial scheduled for May 9, 2005.

Although the Ephedra MDL was only recently created, it appears Judge Rakoff intends to aggressively push the litigation forward. There are cut-off dates set by the court that indicate litigation will move promptly through the system. Generic expert reports were due in mid-July. Case specific expert reports are due by October 15, 2004. A brief opposing the October deadline is expected in the immediate future. At this time, cases are pending in the MDL against numerous manufacturers and retailers of ephedra-containing dietary supplements, including: Twin Lab Corporation, Wyeth Pharmaceuticals, Vita Quest International, Inc., Richardson Labs, Inc., Rexall-Sundown, Inc., Phoenix Laboratories, Inc., NVE Pharmaceuticals, Metabolife International, and General Nutrition Corporation. The Dexatrim Class Settlement has been divided into two groups: the first group, which includes those who were

injured prior to December 21, 1998, falls under the Delaco Company settlement matrix; and, the second group, those injured after December 21, 1998, falls under the Chattem settlement matrix. A fairness hearing regarding the Chattem settlement was set for August 26, 2004. Questionnaires are due for Delaco Plaintiffs on September 15, 2004. We continue to investigate claims involving Ephedra-related injuries.

EPHEDRA MAKER CHARGED WITH LYING TO FDA

Recently, Metabolife and Michael J. Ellis, who founded the company making ephedra products, were charged with six counts of making false statements to the FDA and two counts of trying to obstruct the agency's attempt to regulate supplements containing ephedra. The Internal Revenue Service was the lead agency in the investigation. IRS agents raided company headquarters in July 2002, removing documents as part of an income tax investigation. Sales of ephedra were halted earlier this year. As you know, Metabolife had been one of the nation's biggest sellers of dietary supplements. This was based largely on sales of its ephedra-based Metabolife 356. The company's sales peaked in the 1990s at nearly \$1 billion. Ellis is accused of lying when he told the FDA in 1998 and again in 1999 that his company had "never received one notice from a consumer that any serious adverse health event has occurred because of the ingestion of Metabolife 356," according to the indictment. Ellis is also said to have lied to the FDA that Metabolife 356 had a "claims-free history." Obviously, that was false.

Researchers studying ephedra at the University of California, San Francisco, reported that people who take ephedra products are 200 times more likely to suffer a complication than are users of other herbal supplements. Ephedra is responsible for 64% of all adverse reactions from the use of herbal supplements, although ephedra products make up less than 1% of all herbal supplements sold in the United States.

Public Citizen links more than 150 deaths since 1995 to ephedra. It had been two years since the FDA asked the Justice Department to pursue a criminal investigation into Metabolife. According to my information, it appears that Metabolife resisted the FDA's probe of ephedra at every step of the way.

EPHEDRA-FREE WEIGHT-LOSS SUPPLEMENTS SCRUTINIZED

Now that ephedra-based products have been banned, government regulators and scientists have become increasingly alarmed about a new generation of herbal weight-loss products — specifically those containing bitter orange. Like ephedra, the stimulant is used by people seeking to lose weight. Even though products containing the ingredient only have been widely available for a little more than a year, bitter orange has already been linked to 169 reactions in people who took it. This is according to information from the Food and Drug Administration (FDA). The agency is monitoring reports of problems with such ephedra-free products closely and is planning studies to explore their safety. I understand that industry observers are also watching the issue with special interest.

According to the *Nutrition Business Journal*, an industry publication, about two-thirds of ephedra users switched to an ephedra-free product after the FDA crackdown. Since ephedra sales totaled well over \$1 billion a year in the United States, it is natural to assume that something would be found to fill the void. In any event, supplement makers should work with the FDA on safety concerns. We can't afford to have dangerous products on the market in this country and the government must clamp down on the industry.

JANSSEN CLARIFIES RISKS OF DRUG

Janssen Pharmaceutica Products, the maker of a popular medicine for schizophrenia, has notified doctors that it minimized potentially fatal safety risks and made misleading claims about the

drug in promotional materials. Janssen sent a two-page letter to the health care community to clarify the risks of Risperdal. The letter stems from a directive issued last year by the Food and Drug Administration. The directive told several makers of anti-psychotic drugs to update their product labels. Janssen complied in November 2003, but the FDA determined that the company's promotional materials still minimized the risk of strokes, diabetes and other potentially fatal complications. The agency also said Janssen made misleading claims that the medication was safer in treating mental illness than similar drugs.

The drug, which is prescribed to more than 10 million people worldwide, was cited in a federal lawsuit filed by a doctor who claims children have been harmed and even killed by the misuse of drugs he blames on aggressive marketing by drug manufacturers. Risperdal, which was first marketed about eight years ago, is the leading drug used to combat schizophrenia and other types of psychotic disorders. Janssen earns about \$2.1 billion in annual sales.

RESULTS ON WYETH DIET DRUG SUITS

A Pennsylvania jury has decided two lawsuits filed against a New Jersey drug maker by two former users of the diet drug Pondimin. The jury ruled in Wyeth's favor in one case and awarded \$48,000 in compensatory damages to the plaintiff in the other case. Both plaintiffs had claimed they suffered heart valve damage from using the drug, which was part of the once wildly popular fen-phen combination. Pondimin and Redux, the other drug, were pulled from the market in September 1997 amid reports they had caused heart valve damage and, in a smaller number of users, a potentially deadly lung condition.

The Pennsylvania verdict came just days after Wyeth and lawyers for former fen-phen users seeking compensation under a national class action settlement announced a settlement in which users would get payments from

a settlement trust fund sooner but would receive less money. That agreement has to be approved by a federal judge. Wyeth will add \$1.275 billion to the \$3.75 billion trust fund it set up to cover the total settlement. Wyeth had reserved \$16.6 billion to cover the trust fund, legal fees, jury awards and out-of-court settlements, as well as the lung damage cases, but only \$3.3 billion remained in the fund. It will now have a total of \$5.02 billion with which to pay claims. There are a tremendously high number of claimants at present.

IX. BUSINESS LITIGATION

HONDA AUTO LOAN PROBLEMS

A report has found that American Honda Finance Corporation (AHFC) has been guilty of discriminating against African-Americans. The report, prepared by Mark Cohen of Vanderbilt University, was based on examination of records of 383,652 AHFC customers over the period from June 1999 to April 2003. The report concludes that African-Americans borrowers consistently paid higher finance mark-up charges over average than white customers when they financed their cars at dealerships through AHFC. The study controlled for factors such as term of loan, type of vehicle, creditworthiness of borrower and geographic area. Auto loan mark-ups occur when lenders allow car dealers to mark up auto loans above the "buy rate" reflecting the actual creditworthiness of borrowers. Another report, which was released by CFA, the National Council of La Raza, and the Rainbow-PUSH Coalition earlier this year, estimated that these overcharges cost consumers at least \$1 billion annually. The Vanderbilt report found:

- 43.3% of African-American Honda Finance borrowers were charged a mark-up, compared to only 22.2% of white borrowers.

- African-American borrowers on average paid more than two times the amount in subjective mark-ups compared to whites—\$557 versus \$227, a difference of \$330.
- Honda used a unique practice in which customers from different credit tiers were charged different mark-ups. While most new car buyers were limited to either a zero or two-percentage point markup, those from the least creditworthy tier could be charged a 3.5% point increase. There appears to be no business justification for this differential mark-up policy because differences in creditworthiness are reflected in the “buy rates.”
- Honda does not prohibit the practice of “tier bumping,” where dealers can arbitrarily assign customers a higher credit risk rating when arranging financing.

Because of the credit tier pricing policy, customers who were given this higher rating were effectively subjected to two loan markups reflecting piggy-backed discriminatory policies. It appears that Honda is not the only car-maker that has been discriminating against African-American customers through their respective credit arms.

CITIGROUP, MERRILL LYNCH AND MORGAN STANLEY FINED \$750,000

The National Association of Securities Dealers has censured and fined CitiGroup Global Markets, Inc., formerly Salomon-Smith Barney, Merrill Lynch, and Morgan Stanley D.W., Inc. The companies will pay \$250,000 each for failing to comply with the discovery obligations in twenty arbitration cases during the period 2002 through 2004. The three firms will also be required to implement written procedures designed to ensure that future discovery violations that lead to sanctions are elevated to senior officers for review and appropriate corrective action. The cases arose from arbitrations conducted before NASD Dispute Resolution, Inc. arbitration panels, as well as arbitration panels sponsored by other regulatory

forums. CitiGroup was a party in six of the arbitrations. Merrill Lynch and Morgan Stanley were parties in seven arbitrations each. The arbitration panels cited these three firms for failing to produce documents to the claimants as required by rules involving document discovery. After finding in each of the arbitrations that the firms had failed to fully comply with their discovery obligations to produce documents, even after the arbitration panels had issued orders compelling that production, the panels sanctioned the firms.

This is a specific example of why disputes with brokerage firms should be in court and not in arbitration. Despite the obvious advantage the brokerage houses have when you are arbitrating in a system they have created, the fact that these firms would not produce documents, even after being ordered to do so, clearly shows the need for court-imposed sanctions and not merely fines. When you consider that the arbitration rules for securities disputes are better than in other consumer disputes, you can imagine how consumers get the **shaft** in those arbitrations. The fact that these firms would pay \$250,000 each is also another signal regarding the amount of money that must have been made during the recent scandals over unsuitable investments. If you are interested in more information about any NASD-registered broker or brokerage firm, you may use NASD’s “broker check,” which is available at no charge to the public. You can find it by linking to their site at the web at www.nasdbrokercheck.com.

X. INSURANCE AND FINANCE UPDATE

IMPORTANT DECISION ON DISCOVERY REQUESTS

A federal judge has ordered four insurance companies to comply with some most significant discovery requests related to their “business practices, procedures and policies.” The judge concluded that the inquiries by

the plaintiff’s lawyers were relevant on the s relating to long-term disability payments that were cut off. This information was considered part of a “pattern and practice” of terminating valid claims in order to improve profits. The U.S. District Court judge sided with the plaintiff on dozens of specific requests and rejected arguments from defense lawyers who insisted that the plaintiff was on a “fishing expedition.” The four insurers — Paul Revere; Provident Cos. Inc.; Provident Life and Accident Insurance Co. of America; and UnumProvident Corp.—will have to turn over hundreds of documents relating to the plaintiff’s claim that he was a victim of a nationally implemented plan to begin denying disability claims because the insurers had discovered that they were proving to be unprofitable.

In a detailed opinion that addressed the insurers’ objections, the judge ordered the defendants to turn over numerous categories of documents, including the following:

- Any “profitability analyses” relating to the type of policy purchased, as well as other information regarding “cash flow underwriting,” interest rate projections or the relationship between investment income and premiums charged for individual policies.
- Any documents that show the insurers “had knowledge of the lack of profitability of the own-occupation disability policies.”
- Any documents relating to the insurers’ alleged goal to “terminate as many own-occupation claims as possible in order to improve their financial status.”
- Training materials used to train the employees who handled the plaintiff’s claim.
- Studies commissioned by the insurers—including one done by a law firm—to “analyze their claims management strategies and help them improve corporate profits.”
- Internal company manuals on “procedures, ethics, training and claims

handling.” Depositions or affidavits of the employees who handled Saldi’s (the plaintiff) claim or their supervisors in other cases involving allegations of bad faith.

It had been claimed by the plaintiff that the decision to terminate his disability benefits stemmed from a company wide practice of routinely denying claims for trumped-up reasons. When the plaintiff applied for long-term disability benefits, Paul Revere at first decided that he was entitled and began making payments. But after 17 months of payments, he was told that his benefits were terminated because the insurers had conducted an investigation and determined that he was no longer unable to work. The suit alleges that the termination came soon on the heels of a pair of corporate mergers in which Provident acquired Paul Revere in March 1997, and was in turn acquired by Unum in 1998 to create a new company called UnumProvident Corp.

It was alleged that the insurers’ profits were suffering in the late 1990s due to poor management decisions in their past pricing and structuring of insurance policies. From the mid-1980s to the early 1990s, the plaintiff contends that Provident and Paul Revere were involved in an intense competition for the sale of individual disability policies and had “poorly underwritten and underpriced” their non-cancelable, guaranteed renewable, own occupation policies, such as the plaintiff’s.

After a peak in 1990, the insurers saw their profits begin to fall because claims were being made and depleting their reserves. As a result, the insurers started redesigning and repricing their policies, as well as changing their claims processes. Provident, went from a “claim payment” orientation to a “claim management” orientation, meaning that it set a budget for claim payments and focused on terminating claims in order to keep payments within the budget. Provident attempted to increase claim terminations by brainstorming grounds for termination at “roundtables” and by shifting its use of independent medical examinations, or

IMEs, from their previous role of fairly evaluating claims to a new role as part of the claim termination process. The suit alleges that Provident attempted to justify the termination of the plaintiff’s benefits by “redefining” his occupation to an occupation he was still capable of performing. In this case, the trial judge stated in his decision:

Courts have consistently held that when a bad faith policy or practice of an insurance company is applied to the specific plaintiff, the plaintiff is entitled to discover and ultimately present evidence of that policy or practice at trial in order to prove that the insurer intentionally injured the plaintiff and to show the insurer’s reprehensibility and recidivism in order to assist the jury in calculating appropriate punitive damages.

U.S. SOLDIERS ARE BEING DUPED

It has come to my attention that several financial service companies and insurance agents are taking advantage of military personnel. It appears that compulsory classroom briefings on personal finance for new soldiers are nothing more than a life insurance sales pitch in disguise. *The New York Times* did an investigation, which revealed some disturbing facts. One example given by the *Times* involved a 19-year-old soldier who went through basic training at Fort Benning, Georgia. Before shipping out for Iraq, the young man was sold a pretty bad insurance policy with a premium of \$100 per month. He thought that he was arranging to have \$100 a month deducted from his pay for some sort of Army-endorsed saving plan or mutual fund. The insurance policy the young soldier purchased promised some cash value far down the road and a death benefit that was less than \$44,000. A comparable life insurance policy with a death benefit of \$250,000 would cost the same soldier only \$16.25 per month. That plan was sponsored by the military and appears to be a good value. The other policy—sold under false pretenses—appears to be a rip-off.

According to *The New York Times*, this soldier’s experience is not uncommon. A six-month examination by the *Times* found that several financial services companies are using questionable tactics on military bases to sell insurance and investments that do not fit the needs of military personnel. Apparently, Insurance agents have made misleading sales pitches to “captive audiences” like the ones at Fort Benning. They appeared, claiming to be counselors on veteran’s benefits and independent financial advisers, when they were actually selling insurance. They have solicited soldiers in barracks and even while they were on duty. These are clear violations of Defense Department regulations and can’t be tolerated.

CONSUMERS SHOULD BEWARE OF INSURANCE SCAMS

Alabama insurance regulators have joined a campaign to help consumers avoid being scammed by companies selling fake insurance policies. The National Association of Insurance Commissioners’ “Stop. Call. Confirm.” campaign kicked off a few weeks ago. According to Alabama Insurance Commissioner Walter Bell, insurance policies designed to defraud consumers and businesses are on the rise in every line of insurance. State consumers wind up footing the bills for unpaid claims. The new campaign urges consumers to call before giving a premium check to an agent. Consumers should make sure an insurer is licensed with the state before buying coverage. Consumers can call the Alabama Department of Insurance at 1-800-433-3966 and confirm whether a company is legitimate and licensed to do business in the state. Under Alabama law, with very few exceptions, no insurance product can be sold by individual agents, brokers or companies without approval of the state’s insurance department.

A study by the General Accounting Office has found that 144 fake health insurers nationwide sold bogus policies to more than 200,000 customers between 2000 and 2002, resulting in

\$252 million in unpaid claims. Victims targeted by fake policies include older adults, small businesses and associations looking to reduce health insurance costs. The Insurance Department says to make sure you aren't dealing with a disreputable insurance provider. Consumers should look for these warning signs:

- Aggressive marketing and high-pressure "you must sign today" sales approaches with lots of fine print and disclaimers.
- Premiums that are 15% or more under the average price for comparable insurance products on the market.
- Few coverage limitations.

GEORGIA INSURANCE COMMISSIONER WORKS FOR CONSUMERS

John Oxendine, who serves as Georgia Insurance Commissioner, has proved to be a real friend to Georgia consumers. The Commissioner's Consumer Services Division has helped more than 43,000 Georgia residents settle disputes with their insurance companies, returning \$7,900,840 in insurance claims to these residents. This is money they might not have received without the help of the Georgia Department of Insurance. It was reported that investigators in the Consumer Services Division work hard every day to help Georgians, both individual citizens and businesses, when they have problems on insurance claims. The Department provides invaluable expert advice to consumers who have disputes over claims or have a question about insurance. The Consumer Services Division will respond to phone calls, letters, and email requests, according to the Commissioner. In the first six months of this year, 5,469 Georgia residents have made their initial contact via the Internet. The Georgia Commissioner is to be commended for helping Georgia citizens who have problems with the insurance industry. This should be a top priority for the insurance departments in every state.

ALLSTATE NEW JERSEY AND ENCOMPASS INSURANCE TO RECEIVE \$6.65 MILLION AWARD IN FRAUD CASE

Complaints of fraud are not made just by individuals who have been victimized by fraudulent conduct. A case in point comes out of New Jersey. The United States Bankruptcy Court in Newark, New Jersey, has ordered a former New Jersey chiropractor to pay Allstate New Jersey Insurance Company and Encompass Insurance more than \$6.6 million dollars. The Bankruptcy Court Judge said Mathew E. Lister, D.C.'s undisclosed ownership in multiple medical facilities and his self-referral of patients among those facilities constituted a pattern and practice of fraud under the New Jersey Insurance Fraud Prevention Statute.

In November 2000, Encompass and Allstate New Jersey filed suit against the chiropractor, accusing him of creating and using sham companies to defraud the insurance companies and their policyholders. The complaint that named Lister along with 38 other defendants cited violations of the New Jersey RICO statute and several sections of the New Jersey Administrative Code. Allstate New Jersey claimed that the defendants would "buy" claimants through cash payments to a network of "runners" or "cappers." In turn, the chiropractor's fraud ring would "sell" those patients to health care providers either in exchange for payments, or through a form of bartering, according to the insurers' lawsuit. The court order awarded Allstate and Encompass \$6,655,668.75. I have to wonder whether Allstate still believes that all lawsuits are frivolous and that tort reform is the cure all for America's problems.

RACE-BASED PREMIUM SETTLEMENTS IN NORTH CAROLINA

The North Carolina Insurance Commissioner has reached three settlement agreements with companies that allegedly participated in discriminatory rating practices in North Carolina. The settlements with the three companies, Cincinnati Life Insurance Company,

American National Life Insurance Company and New York Life Insurance Company, could affect up to 1,300 North Carolina policyholders. Citizens who believe they may benefit from the settlements should contact the companies at the numbers that are listed below. According to the Commissioner:

All three companies charged minority policyholders higher premiums based solely on their races. This abominable practice took place during the 1920s, 1930s and 1940s. Now, finally, those who were taken advantage of all those years ago will be able to receive repayment.

Cincinnati Life Insurance Company, based in Ohio, is required to pay affected African-American policyholders who had coverage from 1947 to 1968 through Inter-Ocean Insurance Company. Under the settlement, which could reach \$1.9 million nationwide, the company will pay policyholders or beneficiaries \$75 or the amount they were reportedly overcharged for their policies plus interest. Consumers should call 1-800-841-0536 to get additional details about the settlement. American National Life Insurance Company, which is based in Texas, reportedly sold policies commonly known as industrial life or burial policies at a higher cost to African-Americans and Hispanics.

The multi-state settlement, estimated at up to \$3.5 million, applies to policies with a face amount of \$1,000 or less issued by American National between 1936 and 1939 to African-Americans and Hispanics and policies issued to African-Americans between 1948 and 1964, and where a surrender or death benefit was paid since December 31, 1959. An estimated 1,100 North Carolinians could be eligible for settlement benefits. Consumers should call 1-800-229-9685 or visit www.regulatorysettlement.com to get additional details about the settlement.

New York Life Insurance Company reportedly issued endowment policies to African-Americans between 1920 and 1948. These endowment policies matured after a term of 10, 15 or 20 years or paid a death benefit to the

beneficiary if the insured died prior to the maturity date. The settlement could reach \$10 million, and an estimated 168 North Carolina policyholders may be eligible for cash refunds. Consumers should call 1-866-891-0614 or 1-800-420-8141 or visit www.outreachprogram.info to get additional details about the settlement.

These three settlement agreements signed in North Carolina are reciprocal agreements that mirror the original settlements reached in the home states of each company. The sales practices giving rise to the claims appear to have been all too common. There can be no justification for taking advantage of people who because of the times and circumstances, were at a social and economic disadvantage in this country.

USING CREDIT HISTORY SCORES TO DETERMINE INSURANCE PREMIUM RATES

Insurance companies are always exploring methods to reduce their expenses by minimizing their exposure to risks, or potential claims made for losses suffered by their insured's. Some insurance companies are now using credit history scores—the numerical grade of a proposed insured's credit reports—in their underwriting process to reduce the amount of their exposure to risks. Underwriting is simply the process used to decide whether coverage will be issued and at what premium rate. When insurance companies use credit history scores in their underwriting process, individuals with poor credit histories are invariably required to pay higher premiums for the same coverage as individuals with good credit histories.

Many studies have indicated that this practice produces excessive and unfairly discriminatory results because it only affects the young, low-income and minority consumers. The unfairness of this practice is compounded by the fact that there have been no intuitive connections between an individual's credit history and the likelihood that the individual will suffer a loss and file a claim for benefits. In other words, the young, low-income and minority consumers are required by the insur-

ance companies to pay higher premiums for alleged risks that do not exist, which is unfairly discriminatory. This practice needs to be more thoroughly investigated and closely watched.

FEDERAL LAWSUIT FILED OVER LIFE INSURANCE CLAIM FOR STILLBORN FETUS

In April 2002, an Indiana woman delivered a stillborn fetus, which was at 38 weeks gestation. The State of Indiana requires that a proper burial be conducted for any "child" who dies after 20 weeks gestation. Michael Warnock, the father of the deceased child, has filed a lawsuit in the U.S. District Court of Indianapolis seeking to force Prudential Life Insurance Company to pay a \$10,000.00 claim for the stillborn fetus his wife delivered. The father, who is enrolled in the military Service Members Group Life Insurance Program (which covers members of the armed forces and their spouse and children) filed a life insurance claim for the fetus. Prudential refused to pay the claim, stating that no claim would be paid for a stillborn fetus.

The lawyer for the father is seeking class action status for the case, which would cover any military family in which the mother delivered a stillborn infant after 20 weeks of gestation. Prudential argues that it was correct in denying the claim because the stillborn fetus "wasn't a dependant child because it was stillborn". But, this argument seems to directly conflict with the Indiana law that requires a burial for any "child" who dies after 20 weeks gestation. This is obviously a very interesting case that will deal with a combination of both legal and moral issues.

COURT APPROVES ST. PAUL TRAVELERS ASBESTOS-RELATED SETTLEMENT

A New York bankruptcy court has approved a \$500 million settlement of almost all of the Johns Manville Corp. asbestos-related suits pending against the Travelers property casualty subsidiaries of St. Paul Travelers Companies, Inc. The settlement, as approved by the court ruling, resolves all

pending asbestos-related statutory direct actions against Travelers and apparently bars all future asbestos-related statutory direct actions against the company. I am not sure how broad the ban will actually turn out to be. The court-approved settlements will make aggregate funds of up to \$445 million available to the more than 600,000 claimants. Legal fees will be paid in addition to the stated amount. Travelers, which merged with St. Paul Cos. in April, insured Manville while it made and sold asbestos from the 1940s to the 1970s.

XI. PREMISES LIABILITY UPDATE

NIGHTCLUB FIRE LAWSUIT FILED

More than 200 families of victims and survivors of last year's nightclub fire in Rhode Island have filed a lawsuit. Dozens of defendants, including the state of Rhode Island, club owners, a former band tour manager and a fire inspector, are being sued. The lawsuit was filed in Providence, Rhode Island by the majority of those who survived the fire or had family members who died. This is the largest group of plaintiffs to file suit thus far for the deadly blaze. The fire was sparked by onstage fireworks during a performance of the rock band Great White. The blaze killed 100 people and injured more than 200 others.

The suit accuses the club owners of negligently failing to obtain a license for pyrotechnics and for failing to install safe soundproofing material. It also claims the fire inspector is liable for failing to note the presence of the foam used as soundproofing during a series of routine fire inspections conducted after the club was bought in March 2000. The highly flammable foam is blamed for spreading the fire quickly through the one-story wooden nightclub. The lawsuit also alleges that some members of Great White and the band's former tour manager were negligent for igniting the pyrotechnics.

Several other lawsuits on behalf of families and survivors have been filed in U.S. District Court in Providence.

ASBESTOS DEATHS HAVE SKYROCKETED

The Centers for Disease Control and Prevention (CDC) has reported that asbestos deaths in the United States have skyrocketed since the late 1960s. The federal agency predicts the numbers will probably keep on climbing through the next decade because of long-ago exposure to the substance. As you know, asbestos was once widely used for insulation and fire-proofing. Seventy-seven people have died from asbestos in 1968. About 1,500 people died from asbestos-related cases in 2000. In 1998, asbestos-related deaths overtook those from the coal miners' black lung disease, reflecting in part the decline of the coal industry. The CDC reached its findings by reviewing the death certificates of nearly 125,000 people who had lung conditions linked to inhaling dust or fibers from minerals such as coal or asbestos. As you probably know, asbestos use in buildings increased substantially after World War II and peaked in the late 1970s and early 1980s. Because asbestos-related illnesses are slow in developing — it can take up to 40 years between the time someone is exposed to the material and dies from it — asbestos deaths are projected to increase substantially over the next decade.

Government regulations in the 1980s helped curb the use of asbestos. While it is still being used, it is under heavy regulation. Asbestos is found in more than 3,000 products, including brake linings, engine gaskets and roof coatings, and is still present as insulation in older buildings. Exposure to asbestos can cause asbestosis. Asbestos fibers get into the lungs and scar them. The lungs get stiff and it becomes difficult for them to take in air or to transfer oxygen to the blood. This can lead to frequent lung infections and heart or respiratory failure. Unfortunately, there is no effective treatment. Whether someone will develop asbestosis

depends on such factors as the intensity and duration of exposure and the person's age when exposed. It is sad to report that asbestos deaths are on the increase with no end in sight.

Source: *Associated Press*

JURY AWARDS FAMILY \$6.6 MILLION IN CHILD'S DROWNING

A Pennsylvania jury has found Camp Sunshine and Woodrock Inc., a city management firm, liable for \$6.6 million in compensatory damages in the drowning death of an 8-year-old boy two years ago. The child drowned in an unattended pool at the camp in 2002. The child's mother had dropped him and his 12-year-old brother at the camp the day before. At the time of the drowning, there were 15 boys whose ages ranged from 8 to 11 at the pool. It was the unfortunate child's first time away from home. The jury found Camp Sunshine 90% responsible and Woodrock Inc. 10% liable for the boy's death. Woodrock Inc. of Philadelphia had provided the services of the camp director.

Testimony at the trial indicated that the camp director had failed to adequately communicate a two-lifeguard policy as well as a proper rotation schedule to the lifeguards. On the day of the drowning there had been two lifeguards, an 18-year-old and a 15-year-old. The 22-year-old pool director was not at the pool at the time of the incident. The 18-year-old lifeguard allowed the younger lifeguard to take a break and then vacated his post to go to the bathroom. Sadly, the pool was left unattended. There was no lifeguard supervision, in violation of Pennsylvania law, which requires a lifeguard present at any public bathing facility with adults or children. According to the Public Swimming and Bathing Places General Safety Regulation of the Pennsylvania Administrative Code, "one or more competent lifeguards in adequate number shall be on duty at the waterside at all times the public bathing place is open to use by bathers." This is for the protection of both adults and children. The duty to have adequate lifeguards on duty is

even stronger when young children are in the pool. Unguarded children of tender age can never be left in the pool without adequate supervision.

XII. WORKPLACE HAZARDS

EMPLOYERS IGNORING WORKPLACE VIOLENCE

Workplace violence in the U.S. has become a most serious matter. But, a recent follow-up survey by the American Society of Safety Engineers (ASSE) has found that many companies and organizations in all industries have yet to address the problem. In 1999, the ASSE Risk Management/Insurance Practice Specialty group surveyed ASSE members on what was being done to address violence in their workplaces. The survey found that, although the number of violent incidents in the respondents' workplaces remained the same, 70% of employers said their organization had not undergone a formal risk assessment of the potential for violent acts. The follow-up survey of ASSE members, done this past spring and titled "ASSE 2004 Workplace Violence Survey & White Paper," found that very little has changed. In response to a question in the survey, the following was indicated concerning actions taken since the 9/11 terrorist attacks and the anthrax scare:

- 56% of employers said they have established or revised their security policy;
- 44% changed emergency procedures;
- 34% increased employee contact, training and discussions on the topic, while
- 18% made no changes in their organization.

According to 2002 U.S. Bureau of Labor Statistics, homicides are the third highest cause of on-the-job deaths. Before 9/11, when terrorists killed more than 3,000 workers, violence in the workplace resulting in homicides

were still one of the top causes of on-the-job fatalities. This was a statistic that went largely unreported.

The 2004 ASSE survey also found that there was no change from the 1999 survey in response to whether companies had provided training on how to identify the warning signs of violent behavior—58% said yes, and 42% said no. The 2004 survey also revealed that almost no workplace violence training has been provided. There was an increase in the number of respondents from the earlier survey who said their company had not done a formal risk assessment. The number was a very large 74%. In 2004, only one percent of respondents said their company had a written policy addressing violence in the workplace. But, 90% of those responding said their company has a policy addressing weapons in the workplace. JoAnn M. Sullivan, an ASSE member and co-author of the survey, noted in the ASSE white paper:

Employers must realize that under federal and state OSHA regulations they have a general duty to furnish to each employee, employment and a place of employment that is free from recognized hazards that are causing, or likely to cause, death or serious harm to the employee. Employers, under the theory of respondent superior, are vicariously liable for any actions committed by its employees within the scope of their employment. The employer is liable for actions of the employee when the employee is working, even if the employee is not acting within company policy.

Workplace violence includes homicides, physical attacks, rapes, aggravated and other assaults, all forms of harassment and any other act that creates a hostile work environment. Some of the suggested recommendations contained in the White paper designed to help employers address workplace violence include:

- Officers and directors should establish a workplace violence prevention policy. Upper management must

promote a clear anti-violence corporate policy and establish and maintain security policies.

- Human resource managers must examine and improve hiring practices; implement prescreening techniques; utilize background checks; encourage employees to report threats or violent behavior; establish termination policies; and provide post-termination counseling.
- Risk management and safety, health and environmental departments must train all employees in the warning signs of aggressive or violent behavior; train management in threat assessment and de-escalation techniques; conduct a formal workplace violence risk assessment; increase security as needed; develop and communicate a contingency plan to all employees that includes crisis management and media relations; review insurance coverage and verify coverage and exclusions; and identify a defensive strategy.

A full copy of the “ASSE 2004 Workplace Violence Survey & White Paper,” which also includes a list of resources, can be found on the ASSE Web site by going to <http://www.asse.org> and to ASSE News. You can request a copy by contacting ASSE directly at customerservice@asse.org. ASSE, located in Des Plaines, Illinois, is a professional safety organization with 30,000 members. For more information on ASSE, check <http://www.asse.org>.

OSHA ORDERED TO RELEASE SAFETY DATA

A federal judge in New York has ordered the Occupational Safety and Health Administration to release voluminous safety statistics for thousands of U.S. companies. This will allow companies to be ranked by the rate of accidents in their workplaces. OSHA currently tracks workplace injuries and lists of safety data, but the agency doesn't formally release injury and illness rates for specific work sites. Safety advocates and labor unions have been after OSHA to make this needed move. They have been able to compile

piecemeal statistics for certain industries from available data, but have had no access to a comprehensive list. The U.S. District Judge sided with the safety advocates. Approving a Freedom of Information Act request in October 2002 by *The New York Times*, the judge ordered the agency to release injury and illness rates for 13,000 worksites that had been notified by OSHA of exceptionally grievous records.

You will recall, the *Times* ran an investigative series of articles last year on workplace deaths. These articles were excellent and helped raise awareness of how badly we need to improve safety in the workplace in the country. OSHA says it is reviewing their options to determine what approach best advances the agency's mission of protecting workers. At present, the names and addresses of the 13,000 workplaces with high injury and illness rates are publicly available, but it isn't possible to tell which are the most unsafe, or even which companies have which injury rates. OSHA has argued that since some of the information that would be used to calculate and rank company accident rates—employee hours worked—is confidential, the rates should be confidential too. I totally disagree and believe the information should be made available.

Source: *The Wall Street Journal*

FEDERAL AGENCY FINDS COMPANY NEGLIGENT IN BROOKWOOD MINER'S DEATH

A federal agency has found Jim Walter Resources negligent in the death of an Alabama coal miner who died while working on a conveyor belt at Mine Number 7 in Brookwood, Alabama. The Mine Safety and Health Administration (MSHA) issued a report saying the company was **guilty** of a safety violation and **moderately** negligent in the April 23rd death of the miner. The report concluded the miner either died on contact with the conveyor belt or by being pulled 1,990 feet through transfers and a rock breaker to the surface refuse pile. MSHA said Jim Walter Resources violated a federal code prohibiting machinery repair unless power is off and movement is

blocked. The agency issued a citation to the company. It is significant that Mine Number 7 has about \$39,000 in proposed fines so far this year. The agency said the company has taken steps to prevent future accidents and I hope that's true. Another fatality occurred at the mine in June when another miner was crushed between a steel channel and a coalbunker car.

XIII. TRANSPORTATION

MOTOR VEHICLE SAFETY SHOULD BE A PRIORITY

We are experiencing a tremendous increase in the number of serious motor vehicle accidents on our nation's highways. Unfortunately, Alabama is getting its share of the bad news and that's not good. Statistics reveal that every 12 minutes someone is killed in a motor vehicle crash in this country. Although these crashes are the leading cause of death and injury for Americans under the age of 35 years, and caused over 95% of transportation-related death and injuries each year, our national safety agency receives only 1% of the Department of Transportation budget. This can't be justified by any standard. The death and injuries on our highways must be curtailed through stronger vehicle safety standards, improved driver awareness and other key safety measures. This is something that can be accomplished, but it will require Congress providing adequate funding.

There are a number of consumer groups that work hard to improve highway safety. Some of them do a tremendous job of lobbying Congress in attempts to pass critical legislation to make a bad situation on our highways better. Groups such as Public Citizen do a very good job of monitoring the activities of the Department of Transportation in an effort to make sure it carries out the will and intent of Congress. Public Citizen's public awareness campaigns on critical issues are extremely important and absolutely

necessary. We are fortunate to have them working hard to make our highways safer.

Over the years Congress has passed laws for new standards and programs in automobile and truck safety. These are the basis for regulations by the National Highway Traffic Safety Administration and the Federal Motor Carrier Safety Administration. Unfortunately, on all too many occasions, NHTSA and FMCSA do not carry out their mandated responsibilities. Issue-specific automobile safety bills are passed when omissions in current regulations are brought to the public's attention by avoidable tragedies on our highways. An example is the case of the TREAD-ACT that was passed by Congress following automobile safety debacles such as the Ford Explorer and Firestone Tire problems. It is most unfortunate that it takes tragic circumstances—resulting in the loss of life and disabling injuries—to make Congress take needed actions. The public has to demand that when Congress does act, regulatory agencies such as NHTSA must follow orders and get the job done.

SAFETY RISKS ON OUR HIGHWAYS

I believe that part of the reason for the increase in highway deaths and serious injuries results from crashes involving 18-wheelers. There are lots of dangerous trucks on the road that shouldn't be there. Only a fraction of the millions of large trucks rolling down the highways in our country are subjected to spot inspections on the road. When inspectors get a look at the trucks, the failure rate is high. For example, in Texas one out of three is taken out of service for serious problems with the equipment or the driver. Only 14% of trucks examined in 2002 were free of safety violations, according to the Federal Motor Carrier Safety Administration.

As you know, we are experiencing an influx of Mexican trucks coming across our border. Since these trucks will get lots of enforcement attention, the odds that a U.S. trucker will be caught breaking the rules in a border

state have gotten slimmer. Truckers are supposed to limit the number of hours they drive in a day. They're also supposed to check their rigs for mechanical problems and get them fixed before they return to the road. However, when the operators know they won't get checked, some will violate the rules and run the risk.

ENTERPRISE RENT-A-CAR LAWSUIT SETTLED

Enterprise Rent-A-Car has settled a wrongful death lawsuit in Texas over its failure to inspect and maintain a safe depth of tire tread on its vehicles. This was the second worn tire case filed against Enterprise. In this case, a 34-year-old man was killed on June 26, 2003, when the 2002 Chevy Silverado truck he had rented from an Enterprise agency spun out of control on a rain-slicked highway and struck another vehicle. A passenger in the Enterprise vehicle was also killed. Five persons in the second vehicle were injured, one child seriously. An investigation showed the tires to be nearly threadbare, a condition that contributed to the accident, according to the investigating officer. In deposition testimony, Enterprise officials acknowledged they don't train or equip vehicle attendants to check for unsafe tire wear. Instead, the company relies on outside vendors to conduct routine maintenance based on warranty schedules.

The family of the deceased victim has offered to provide each of the 1,330 Enterprise offices in Texas with a \$2.50 tire tread gauge using proceeds from the settlement. The offer was made in a letter to Enterprise Chairman and Chief Executive Officer Andrew C. Taylor. The victim had been chief diesel mechanic for a local car dealership at the time of his death. Enterprise is the largest car rental company in North America. I hope, these lawsuits will make the company implement the needed safety changes. It won't take much. All they have to do is check the tires regularly and keep good tires on their vehicles.

FAMILY OF DWI VICTIM AWARDED \$24.7 MILLION

A Texas jury has awarded \$24.7 million to the family of a woman killed by a drunken driver who had rented a car despite having multiple citations and a suspended license. Jurors held the driver responsible, as well as his car insurance company and the rental car agency. A 56-year-old female died after the car driven by the drunk driver hit her pickup from behind back in 2000. The driver was intoxicated and driving at a high rate of speed. The truck struck a light pole and burst into flames. Tate pleaded guilty to a charge of intoxication manslaughter with a vehicle and is currently serving a 13-year sentence. His insurance company, Progressive County Mutual Insurance, had arranged for him to rent a car from Enterprise Leasing Co. the day before the crash. Just days earlier, the man had been released from Jail after being cited on a charge of driving while intoxicated. The drunk driver, who had a suspended license, had two prior DWIs and could not drive legally. With this background, they arranged for the rental car. Enterprise had reached a confidential settlement with the victim's family prior to trial.

STATES SHOULD MAKE RAIL CROSSINGS SAFER

Since schools have started opening in Alabama and I am sure that's the case in other states, I thought it would be helpful to write on a subject that should get the attention of parents with children in school. Many children will be riding school buses and many of those buses will be crossing railroad tracks. We badly need more protection at those crossings.

A collision in Tennessee between a 33-car CSX freight train and a loaded school bus that occurred in 2000 resulted in multiple deaths and injuries. The National Transportation Safety Board investigated the crash and in 2002 recommended that all states make it a high priority to improve safety at ungated railroad crossings — those without barrier arms that lower to

block traffic—used by school buses. Since that time, however, only 12 states have made satisfactory progress, according to the NTSB. Seven of the 10 states with the most collisions between trains and all kinds of vehicles at grade crossings have largely ignored the Board's recommendations. Those states are: Alabama, California, Georgia, Illinois, Louisiana, Mississippi and Ohio. NTSB Chairman Ellen Engleman told the *Associated Press* in a recent interview:

Children continue to be unnecessarily killed in school bus accidents at grade crossings. Children's lives can and will be saved if state authorities adopt the simple safety measures that the board recommended. With the school year beginning, action is needed.

Statistics reveal that vehicles and trains collide an average of nine times a day. More than 1,000 people have been killed in the four years since the Tennessee crash. In the first five months of this year, there were 1,205 crashes, including four involving school buses. Tragically, there were 155 deaths during that relatively short span of time. The 82,000 crossings—where there are no gates—pose the greatest danger. The accident rate at those crossings is seven times than for crossings with gates that block vehicles. A key NTSB recommendation for such crossings was installation of stop signs. While the stop signs are not the best choice for railroad crossing safety measures, it is cheaper than others. For example, installing gates at a cost of \$150,000 per gate, building bridges or rerouting tracks or roads are considered cost-prohibitive by both the railroads and the government.

Every state, including Alabama, requires school buses to stop, turn off noisy equipment, open the doors and look both ways before crossing railroad tracks, according to the National Association of State Directors of Pupil Transportation Services. This group strongly supports the NTSB's safety recommendations. An NTSB investigator reports that research reveals that while some persons know to **stop, look** and **listen** when they see a crossbuck,

many drivers think the sign simply means **slow down** or doesn't require any special action. Since there is no such confusion with a stop sign, or at least there shouldn't be, it makes sense to install them at crossings.

The NTSB also recommends equipping school buses with option **kill switches**, which enable drivers to turn off noisy devices such as fans and radios when a bus approaches a rail crossing. Presently, only Florida and Kentucky require these switches. Better training and oversight of bus drivers is needed. Using video cameras to help monitor performance is also needed and recommended by the NTSB. You can get more information from the Website of the National Transportation Safety Board: www.ntsb.gov.

Source: *Associated Press*

XIV. ARBITRATION UPDATE

CONSUMER GROUP STUDYING EFFECTS OF ARBITRATION

Alabama Watch, the Montgomery-based consumer advocacy group, is currently examining the effects of arbitration in Alabama. Alabama Watch's new "Arbitration Project" is seeking feedback from consumers and workers about arbitration clauses in purchase agreements and employment contracts. As we all know, arbitration clauses have the effect of taking away a consumer's right to a jury trial by mandating that disputes be carried to a third-party arbitrator for resolution. Barbara Evans, Alabama Watch executive director, says:

There are now arbitration clauses in everything from car loans to nursing homes. We want to hear from consumers about how arbitration is working or not working for them.

Alabama Watch plans to issue a report on its findings within a year. The consumer group's goal is to have consumers become aware of the ramifica-

tions of arbitration. There is still a great deal of confusion over arbitration. Many folks don't know the difference between binding arbitration and non-binding mediation. Depending on the language, arbitration clauses usually mean that consumers can't go to court, but instead must use a process described in the contract they sign. Ms. Evans noted in a recent written interview with Roy Williams of the *Birmingham News*:

We have heard from some consumers who have had a bad experience because they were forced to pay high costs upfront rather than the relatively small cost to file a lawsuit. We have heard from others who just gave up. Now we want to hear all the stories, good and bad.

Alabama Watch is trying to make a real difference for consumers in our state. It is refreshing to have a group that doesn't mind "rocking the boat" when dealing with consumer issues. Barbara Evans and her small staff should be commended and supported by folks who want consumers to be adequately protected by government and treated decently and fairly by Corporate America. Anyone wanting to participate in the Arbitration Project should call Alabama Watch at 800-449-7515. For more information, go to www.alabamawatch.org.

A NEW APPROACH BY CORPORATE AMERICA

We have learned that more and more corporations are using what is referred to as a jury waiver in their consumer contracts. This type clause is used to avoid the high cost of arbitration and instead uses the existing court system at a much lower cost. However, using this tactic, the disputes would be heard by judges and would take jurors totally out of the system. In other words, the case would be tried by a single judge without a jury. Consumers are being required to sign agreements that have specific clauses giving up the right to trial by jury. Courts in some states, including California and Georgia, have said that these jury waivers can't be

enforced. We have had no experience thus far with this new approach being used to avoid having jurors involved in the resolution of civil disputes. I don't believe the Alabama courts will allow the jury waivers since they don't involve the Federal Arbitration Act or case law interpreting arbitration agents. However, this might explain why the tort reform groups are spending so much money to elect judges around the country. We will have more to say on this latest attack on the jury system next month.

Source: *The Wall Street Journal*

XV. NURSING HOME UPDATE

ALABAMA ATTORNEY GENERAL TO HOLD ELDER ABUSE CONFERENCE

It is most encouraging that Alabama Attorney General Troy King and the Alabama Department of Senior Services (ADSS) are holding a statewide conference entitled "Combating Elder Exploitation and Abuse." The conference was scheduled for early this month in Montgomery and will have been completed by the time this issue is received. The conference was to provide insight on collaborative ways to successfully identify, investigate and prosecute cases of elder abuse and exploitation. I commend the Attorney General and the ADSS for providing this conference. Hopefully, as a result there will be a follow-up action. Too many cases of elder abuse and neglect, which could justify criminal charges, go unnoticed in the State of Alabama. This interest by persons in authority, who have the ability to get something done to protect seniors, is most encouraging.

NURSING HOME PENALTIES HAVE DROPPED SIGNIFICANTLY DURING THE BUSH ADMINISTRATION

The New York Times recently reported that new government statistics show a significant decline in the

number of penalties being imposed on nursing homes for violations of federal health and safety standards in the last four years. Federal officials and independent experts, however, all agree that serious deficiencies in the quality of care in nursing homes still exist. The Bush Administration claims that nursing homes have been improved, but experts outside the government contend there has been less vigorous enforcement of standards and that nursing home inspectors are overworked. Charlene Harrington, a professor at the School of Nursing of the University of California, San Francisco, attributed the situation to the fact that Bush Administration officials "have not been vigorous in enforcing federal standards."

Toby Edelman, a lawyer at the Center for Medicare Advocacy, said, "The Administration is placing less emphasis on direct enforcement of standards of care. Its basic approach is to collaborate with the industry and give information to consumers, in the hope that market forces will produce improvements in quality." For example, in Oklahoma, Ronald D. Osterhout, a member of the State Board of Health, said inspectors had told him that they were "asked to lighten up and not to find so many serious deficiencies." At the same time, the Government Accountability Office, the investigative arm of Congress, found recently that one-fifth of all nursing homes in the United States had been cited for "serious deficiencies involving actual harm or immediate jeopardy to residents." Our firm's experience with nursing homes, and the care provided in all too many of them, reveals that stricter enforcement of nursing home regulations and standards is needed. We certainly don't need less enforcement.

U.S. SENATE COMMITTEE HOLDS NURSING HOME TORT REFORM HEARING

The U.S. Senate Special Committee on Aging, chaired by Senator Larry Craig (R-ID), who appears to be pretty friendly with the nursing home industry, recently held a hearing on tort reform in the nursing home industry.

The announcement of the hearing said the committee would examine a “potential crisis for nursing home patients” as a result of rising liability insurance costs for doctors and nursing homes. Several witnesses from the nursing home industry, including a nursing home owner and other industry insiders, testified at the hearing. Unfortunately, not one witness was slated to speak on behalf of nursing home residents. The National Consumer Coalition for Nursing Home Reform (NCCNHR) contacted the committee and asked to have the opportunity to have a representative speak at the hearing on behalf of nursing home residents. This legitimate request was denied. NCCNHR issued a press release stating that “the treatment of these [nursing home] residents speaks volumes to the nursing home industry’s claim that rising insurance rates are taking away from quality care: Quality care was never provided to residents who are victims of abuse or neglect, and **that** is the issue that the committee should address.” It is inconceivable that a hearing on an issue of this magnitude could exclude the residents and refuse to give them a voice.

A FLORIDA LADY IS RAPED BY SEXUAL PREDATOR

The family of an elderly woman who was allegedly **raped** in her Florida nursing home by a fellow resident is asking for **accountability** from the people who were charged with her care. In 2002, a 77-year-old resident was raped in her bed at the Southwood Nursing Home. Another resident, who had a lengthy criminal record, was charged with the crime. He was found incompetent to stand trial and placed in a state mental hospital. The victim’s daughter is suing the nursing home. Since being raped, the unfortunate lady has died. The man who committed the rape was placed in the nursing home on a court order from a Florida judge who declared him not competent to care for himself. He was reportedly homeless and diagnosed with dementia at the time. The man had a criminal record of 59 arrests

dating back to the 1940s, including past sexual assaults. According to a nursing home advocacy group, Florida currently has 30 sex offenders living in nursing homes.

NURSING HOMES CITED FOR FIRE RISKS

There has been a great deal of activity in the nursing home industry relating to the risk of fires in facilities. Fortunately, a number of states, including Alabama, have taken action. However, a look at the situation in Texas is pretty revealing. Recent inspections show about 84% of Texas nursing homes have been cited for fire safety deficiencies, according to a federal report. The federal Government Accountability Office (GAO) issued a report recently showing that nearly 60% of nursing homes in the nation were cited for fire safety problems in their last inspections. Texas was ninth in the nation, with 84% being cited. Safety concerns have grown since nursing home fires killed 15 people in Tennessee in September and 16 people in Connecticut in February 2003. Neither facility had fire sprinklers. A spokeswoman for the Texas Department of Human Services, which regulates nursing homes, says the report’s findings do not mean Texas facilities are less safe than others nationwide. If that is true, it doesn’t sound too good for the other states.

The resident protection group, Texas Advocates for Nursing Home Residents believes the number of homes in Texas with deficiencies is unacceptable. The findings of the study reveal lax standards nationwide, according to the GAO. The homes that didn’t have sprinklers also don’t have basic things most folks have in their own homes, such as a smoke detector. The Centers for Medicare & Medicaid Service, which enforces federal fire safety, has said it plans to strengthen fire-protection standards for nursing homes and make other improvements.

LAWSUIT FILED OVER DEADLY NURSING HOME FIRE

The family of one of 16 people killed in last year’s fire at a Connecticut nursing home has filed a lawsuit alleging the facility was severely understaffed and failed to provide emergency training to its workers. The February 26, 2003, fire at the Greenwood Health Center located in Hartford killed 10 nursing home patients and residents. Many of the residents were too old or incapacitated to save themselves. Six hospitalized patients died in the weeks following the fire. Authorities report the fire was set by a mentally disturbed patient, who was flicking a cigarette lighter, igniting her bedding. The lawsuit was filed on behalf of the family of a 64-year-old resident against Lexington Highgreen Holding Inc., the management company that operated the facility at the time of the fire. The suit, which seeks damages for pain and suffering, alleges that the facility was severely understaffed and did not provide emergency training to respond appropriately to the fire. No sprinkler system was in place at the time of the fire.

The Connecticut General Assembly has since enacted legislation requiring all nursing homes to install sprinklers. A report issued by the U.S. Government Accountability Office faulted the staff at Greenwood for failing to properly apply the nursing home’s fire response plan. One violation involved not shutting doors to patients’ rooms after the fire started. The report indicated that “Inadequate staff response contributed to the loss of life in the Hartford fire.” The investigation conducted by the Government Accountability Office (Congress’ investigative branch formerly known as the General Accounting Office) said Greenwood staff members provided “inaccurate information” to fire inspectors about how often fire drills were conducted among the night staff.

CRIMINAL CHARGES AGAINST EMPLOYEES FOR NEGLECTING RESIDENTS

After being cited each year by the State of Florida for providing poor care

at a South Florida nursing home, a supervisor, a nurse and a former owner of the home have been charged criminally with neglecting their patients. Documents filed in court indicated that two residents at the nursing home died as a result of questionable care, the facility ran short of food at times, employees of the facility did not give patients their medication, doctor's orders were not followed, the facility was filthy and that employees paychecks bounced. Following these charges, the Florida Attorney General, Charlie Crist, said in a statement "it is outrageous that some of Florida's most needy citizens have been put in such danger." The Collonade Medical Center of Lauderdale Lakes, a 120-bed facility, had been in trouble with Florida's Agency for Health Care Administration since 1996 and was cited for dozens of violations yearly. They were regularly given a one star rating, which is the state's lowest score for nursing homes.

NURSING HOME MUST PAY \$10 MILLION AWARD

Last month, a jury in Mississippi awarded \$10 million to the family of an elderly woman, who had been a resident in a Clinton nursing home, whose leg was amputated. The jurors found the facility negligent in the woman's care. The two-week trial ended with a \$2 million compensatory judgment and \$8 million in punitive damages against Atlanta-based Mariner Post-Acute Network Inc., the then-owners of the Clinton Health & Rehabilitation Center. The 72-year-old lady was a resident from June 15, 1999 to September 26, 2000. She had her left leg amputated at the knee after developing pressure sores because the nursing home staff didn't provide proper care, such as turning her in bed, according to trial evidence. It was proved that the poor lady would be allowed to lie in her own waste. It was alleged that most of the abuse occurred when the nursing home was short-staffed and that records of the resident's care were falsified.

XVI. HEALTHCARE ISSUES

FDA LABELING RULES ARE INADEQUATE

Many consumer groups believe that the labeling rules promulgated by the federal Food and Drug Administration leave a great deal to be desired. For a drug's government-approved uses, the label is supposed to give doctors important data from clinical tests involving those treatments while spelling out the drug's risks and providing directions for administering it to patients. Unfortunately, labels are often allowed to remain silent about adverse test results. It is important for all doctors to know that trials with negative or equivocal outcomes have been conducted when considering the benefits and risks of a medication before prescribing it.

Drug companies and medical device producers should voluntarily disclose test results - regardless of what FDA rules may require. They shouldn't be allowed to bury information. There shouldn't be an information gap between test findings and label information. FDA officials are aware that doctors are increasingly using medications off label. Off-label use is when the drug was manufactured for a specific problem and labeled for that use, but prescribed by doctors for other uses. This has become very common. The FDA badly needs to retool its labeling regulations.

HOSPITAL ACCREDITING GROUP MISSES HEALTH AND SAFETY PROBLEMS

Most folks expect all hospitals in this country to be properly staffed, efficient and capable of taking care of patient needs. Congressional investigators say the Joint Commission on Accreditation of Healthcare Organizations, a key health care regulator, misses most problems in hospitals it inspects. If true, this poses potential risks to patient safety nationwide. The Commission is the private group that clears hospitals to receive Medicare pay-

ments. A report released recently by the Government Accountability Office says the group failed to find hundreds of "serious deficiencies" in hospitals reviewed between 2000 and 2002. Many of the overlooked problems related to fire safety, while others involved sanitary conditions and substandard care. For example, in one Texas hospital, the report found a patient died after receiving a double dose of narcotics in the emergency room.

The Commission's president says his group is making sweeping changes to the accreditation process. There can be no legitimate excuse for failing to insure that our nation's hospitals are being properly and adequately inspected. The entity doing the inspections should do its job properly. That is absolutely essential and nothing less should be tolerated. This appears to be a most serious problem and one that has to be resolved.

XVII. ENVIRONMENTAL CONCERNS

EXPOSURE RISK AT SOME TOXIC SITES MAY INCREASE

Almost one in 10 of the nation's 1,230 Superfund toxic waste sites lack adequate safety controls to ensure people and drinking water won't be contaminated, according to data from the Environmental Protection Agency. Another 13% of the sites lack enough data for officials to assess the safeguards. The agency began using a new measure in 2002—called "human exposure under control"—to assess risk at the sites. The last complete tally was in September 2003, although the agency's web site offers more recent data on certain sites. Environmentalists believe the figures released show the Bush Administration is failing to protect public health. They further contend Congress and the White House should reinstate a special tax on polluters to help fund the Superfund program. Without an effective funding mecha-

nism for Superfund cleanups, dangerous chemicals will continue to seep into our air, water and soil.

I agree with the environmental groups that Congress and the White House should reinstate the tax, the revenues from which went into a Superfund trust fund and were used to pay for cleanups at about 30% of the sites. Congress let the tax expire in 1995. Since that time Congress has been appropriating about \$1.3 billion yearly in general tax revenues to make up for it. That money goes into the trust fund, which has used up the money from the tax. The trust fund had received about \$1.5 billion a year from an excise tax on the sale of petroleum and some chemical feedstocks and from a corporate environmental income tax, all of which expired. The cleanup of the other 70% of the sites typically is paid for by polluters under orders from EPA to clean up messes they made. Those commitments plus the tax revenues have kept the program at about \$3 billion yearly, according to EPA officials. The federal government has an obligation to protect public health, and with that obligation comes a price tag.

GREENHOUSE GAS LAWSUIT

Eight states and New York City have launched the first major attack on emitters of global warming gases in a lawsuit that demands big cuts in the climate-altering exhausts from the nation's five largest power suppliers. This action opens a new legal frontier in combating global climate change that scientists say poses a serious threat to the economy and environment, from wiping out East Coast wetlands to diminishing the Sierra Nevada snowpack—the drinking water source for millions of Californians. Named as defendants are American Electric Power Co. of Columbus, Ohio, Cinergy Corp. of Cincinnati, Southern Company of Atlanta, Xcel Energy Inc. of Minneapolis, and the Tennessee Valley Authority. Together, the five power companies own about 200 power plants in the United States, emitting from combustion of coal or natural gas

a combined 646 tons of carbon dioxide each year—almost a quarter of the electrical industry's annual carbon dioxide emissions.

The industry emits about 40% of the carbon dioxide emissions from human activity in the United States, according to the federal Environmental Protection Agency.

The states filing the lawsuit are California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont and Wisconsin. The chief attorney for New York City joined in the action. The multistate lawsuit is unusual in that it targets emissions that are not hazardous to breathe but are believed by most scientists to trap the Earth's heat, like the panels of a greenhouse. This "greenhouse effect" raises the atmospheric temperature, which can lead to changes in sea levels, water supplies and crop production.

A press release from the Attorneys General that we received said the solutions to curbing greenhouse gases from power plants are "readily available." These cures include switching from coal to cleaner-burning fuels, improving combustion efficiency, and increasing use of wind and solar power. The attorneys general are suing under the federal common law of public nuisance, which provides a right of action to curb air and water pollution emanating from sources in other states. But, electrical industry representatives argue that the greenhouse gases are not "pollutants" as defined in the federal Clean Air Act. If the Attorneys General are successful in this lawsuit, the American people will be the winners.

ADEM ESTABLISHES NEW WATER QUALITY STANDARD FOR ALABAMA COAST

The Alabama Department of Environmental Management has established a new water quality standard for monitoring coastal waters in Mobile and Baldwin Counties to keep up with federal standards. The U.S. Environmental Protection Agency set a new standard for testing that required measuring levels of enterococcus bacteria instead of fecal coliform in saltwater areas. The standard uses enterococci —

bacteria associated with the intestinal tracts of humans and animals—to identify where disease-causing microbes might be present. The EPA has found from testing that it is a very good indicator of bacteria in marine waters. Recent EPA standards showed a stronger relationship between higher concentrations of E. coli and enterococci in the water and swimming-related illnesses, rather than elevated levels of fecal coliform. I am hopeful, the new ADEM standards will provide for better protection for coastal waters.

THE ASBESTOS COMPANIES CONTINUE TO KEEP US IN THE DARK

Companies that manufacture asbestos or that have done work with this deadly product have successfully kept statistics from the Centers for Disease Control and Prevention away from the public. These companies have aggressively tried to limit their exposure through federal legislation claiming it would be more "efficient" to do so. The harm from exposure to asbestos, even decades ago, is now tragically affecting many Americans and that's what these companies want to keep under wraps. Asbestos-related deaths in the United States have skyrocketed since the late 1960s and will probably continue to climb through the next decade because of long-ago exposure to the material. The Centers for Disease Control and Prevention says that 1,493 people died from asbestos-related causes in the year 2000, compared with only 77 in 1968.

Asbestos use in buildings increased substantially after World War II and peaked in the late 1970s and early 1980s. Many people are not aware that asbestos-related illnesses are slow in developing. It can take up to 40 years between someone's exposure to the material and his or her death from that exposure. While government regulations in the 1970s helped curb the use of asbestos, it is still used today. Although there is more regulation, it is surprising that asbestos is still found in more than 3,000 products, including brake linings, engine gaskets and roof coatings. Also, it is still present as insula-

tion in older buildings. Exposure to asbestos can cause asbestosis, in which asbestos fibers get into the lungs and then scar them. The lungs get stiff and it becomes difficult to take in air or to transfer oxygen to the blood. This can lead to frequent lung infections and heart or respiratory failure. There is no effective treatment for the invariable terminal cancer most commonly associated with asbestos exposure, mesothelioma.

WILDLAW WORKS TO PROTECT OUR NATURAL RESOURCES

WildLaw, a non-profit environmental law firm based in Montgomery, Alabama, works hard in an effort to protect our environment. They started a new Environmental Justice (EJ) program in June 2004. WildLaw's ACES Project (Assisting Communities with Environmental Solutions) is designed to better coordinate and increase their effectiveness in communities dealing with significant environmental problems. Since its inception, WildLaw has maintained a commitment to providing all people, regardless of race, color, ethnicity or socioeconomic status, a clean and healthy environment. In my opinion, this firm provides a needed service.

XVIII. PREDATORY LENDING UPDATE

CLASS ACTION LAWSUITS FILED AGAINST LARGEST PAYDAY LENDERS

Consumers have filed a series of lawsuits against three of North Carolina's largest payday lenders—Advance America, Check into Cash, and Check 'N Go—alleging that the lenders exploit poor people by luring them into quick loans that carry exorbitantly high interest rates of up to 500%. The three lawsuits were filed by a team of consumer advocates, including three public interest organizations—North Carolina Justice Center (NCJC) in Raleigh, NC, Financial Protection Law

Center (FPLC) in Wilmington, NC, and Trial Lawyers for Public Justice (TLPJ) in Washington, D.C.,—as well as a number of private lawyers. The consumer complaints allege that since 1997, these companies have been targeting low-income and moderate-income North Carolina families by offering a check cashing service known as “deferred-deposit” or “payday” loans. As you know, these loans are marketed as a quick, easy way to obtain cash without undergoing a credit check. Companies like Advance America prey on consumers with offers of quick cash, but the exorbitant interest rates trap people in a cycle of long-term debt. Information on the three cases is posted on TLPJ's Web site, www.tlpj.org.

PAYDAY LENDERS SUED

Former Georgia Governor Roy Barnes has sued 135 payday lenders in the peach state. It is alleged that they have continued to push already-illegal payday loans despite a tougher state law that took effect three months ago. The seven suits in four counties are believed to be the first test of the new Georgia law, described as the nation's toughest. The three lawsuits, filed in separate courts, accuse the lenders of continuing to offer loans with high interest but describing the added costs as an “insurance” or “maintenance” fee. The suits are requesting that the lenders repay three times the excessive interest rates they charged. They are also seeking punitive damages to punish the defendants for intentionally ignoring the new law.

XIX. TOBACCO LITIGATION UPDATE

TOBACCO LEGISLATION MAY BE IN TROUBLE

The bill to give the U.S. Food and Drug Administration oversight of tobacco, which if enacted, would limit

the tobacco industry's ability to market all cigarettes and create strict new rules for lower-tar, reduced-risk and sweet-flavored cigarettes, may be in trouble. You will recall that the bill passed the U.S. Senate. But, the bill now faces obstacles in getting through the House of Representatives. The current version of the House tobacco legislation contains no provisions for FDA regulation at all. Sweet-flavored cigarettes, one of the hottest new products in the tobacco industry, would be banned entirely under the Senate bill. Tobacco companies would need FDA approval to call lower-tar cigarettes “light” or “ultra light,” as is now common practice. Similarly, companies would need regulatory preapproval for marketing of reduced-harm cigarettes.

FDA regulation is backed by anti-smoking advocates, who formed an alliance with U.S. tobacco-state senators to combine new regulation of tobacco with a separate plan. That plan, known as a “buyout,” would pay tobacco farmers as much as \$13 billion to give up federal quotas propping up prices for tobacco crops. The buyout would be financed by cigarette makers. Part of a corporate tax bill, the combined legislation will eventually be written in its final form by a conference committee, where House members will have the opportunity to change, approve or quash it. I hope, that last option won't happen.

The Bush Administration has sent mixed signals on the issue. While President Bush has said the emphasis ought to be on preventing young people from smoking—not regulation—U.S. Health and Human Services Secretary Tommy Thompson has said he favors giving the FDA the ability to regulate tobacco. The legislation also would create new hurdles for companies marketing reduced-harm cigarettes. These cigarettes generally position themselves as safer or less addictive than traditional smokes. Under the bill, products making such claims today would have to stop, or come off the market. Matthew L. Myers, president of the Campaign for Tobacco-Free Kids stated: “Before they could claim to reduce risk of disease or exposure to

toxic substances, they would have to seek approval from FDA.”

XX. THE CONSUMER CORNER

MARKETING TEENAGERS

Young people in today’s world are facing more temptations than most adults could ever imagine. In my opinion, all of us have a strong obligation to protect our children and we must do everything in our power to do so. Marketing aimed at children is something that the federal government should take a careful look at. Much of it is extremely dangerous. Parents must also be aware of what their children are watching. Rebecca Hagelin, a nationally known columnist, wrote the following piece that I consider a warning to all parents.

As I wrote in my column two weeks ago, marketers are out to get America’s youth, and they’ll stop at nothing in the name of “entertainment” to do it. Parents take note: The only thing that stands between your kids and those who seek to exploit them for the sake of the almighty dollar, is you. In order for you to be successful at protecting your kids in today’s media-saturated culture, you must never, ever underestimate the power of the forces arrayed against you. An episode of the PBS program “Frontline” titled, “The Merchants of Cool,” spells out the lengths to which marketers will and do go to manipulate our children into buying their products. This amazing documentary should be required viewing for any parent who believes that MTV is just plain ol’ entertainment for today’s teens.

As the host of “Merchants of Cool” says, the way to get money from today’s teens is to create programming that, “grabs them below the belt and reaches for their wallet.”

The competition for our teens’ wallets is fierce. Five companies—News Corp, Disney, Viacom, Universal Vivendi and Time-Warner—fight continuously for the space in teens’ brains and the \$100 billion they spend every year. These five companies control all the major film studios, all the TV networks, most of the stations in the top TV markets, much of the radio we hear and all or part of every major cable network. The master at feeding crass images of sexuality and rebellion to our children is Viacom. If the name of this media giant sounds familiar, it’s because they are the same folks who brought 90 million Americans Janet “Flashing” Jackson during Super Bowl 2004. While CBS whined it had no idea MTV was going to produce a show that included what amounted to a strip-tease act, the execs of the parent company of both broadcast outlets, Viacom, were laughing all the way to the bank.

When it comes to creating programming for teens, the “Merchants of Cool” explains how MTV controls much of the culture in which America’s teens now live. Through all the focus groups, all the grilling of teens about their interests, all the study done of today’s youth—including visits by MTV executives to the homes of typical teen viewers—all the “culture spies” it dispatches to see how successfully they are impacting their target audience, the corporation has figured out not what teens want, but how they think. This most insidious use of marketing doesn’t seek to satisfy the needs and desires of a mature customer—it seeks to manipulate young, impressionable minds and influence their values and lifestyle.

One result of the MTV market research is the creation of a female and male character that are now seen in various forms in all MTV programming. The male image is known as a “Mook” to industry

execs, and the female is referred to as a “Midriff.” Mooks are caricatures of modern teen boys. Sort of. They are models for them to aspire to. Sort of. They are wilder and bolder and ruder and cruder than the average teen boy, but they are designed to keep our sons hyper and addicted to watching the aberrant behavior so that ever more ads can be pushed their way. They are the obnoxious pro wrestlers, the death-defying stars of the “Jackass” TV show, and the guys on MTV’s Spring Break specials belching and dancing crazily with scantily clad women they met 10 minutes earlier. They exemplify perpetual adolescence living on the edge. They seem to say: We get away with it—do what we do, look as we look—and you can, too.

“Midriff” is the name given to the female icon created by MTV. The character is personified by the sexual bad-girl Britney Spears and dozens of other Britney look-alikes who dominate the airwaves. The “role-model” teaches even preteen girls it’s time they embrace their sexuality and learn how to use it to their advantage; the message is that girls are sexual objects and their sexuality is their power. That’s why America’s little girls are now baring their bellies and strutting an attitude in malls and in schools around the country.

If you’ve fallen into the trap of letting Susie or Johnnie go to their room to watch MTV for hours on end, it’s time to set your kids free from the machine that is using them. I urge you to start by ordering the “Merchants of Cool” and watching it with your kids. Showing them exactly how they are being manipulated is a powerful tool.

A final warning: You may be shocked by some of the images in “Merchants,” but if your kids watch MTV, they won’t be. Things have really gotten that bad.

CHINESE STOCK TAKING BACK ROAD TO USA

In today's world, consumers have to be extremely careful in making investment choices. For example, Chinese companies with unreliable financial statements are seeking out unsuspecting U.S. investors, according to federal securities regulators. The schemes rely on penny stock "shell" companies that trade on the OTC bulletin board or pink sheets, often years after the original business for which the securities were issued failed or was sold. As you may know, a penny stock typically sells for less than \$5 a share.

Under one scheme known as a "reverse merger" — because the acquired company survives the shell it is merged into — the shares trade on little more than hype. According to the Securities and Exchange Commission (SEC), reverse-merger companies can sell stock for up to 71 days before issuing audited financial statements. This makes the scheme harder to detect. In a related scheme, shell company promoters receive large blocks of stock through a loophole intended for employee-benefit plans, even though shell companies have few employees and in many cases none. The SEC says that "contractors" are able to resell the stock to the public without registering it with regulators or providing buyers with a prospectus. The SEC wants to tighten reporting rules because of the obvious potential for abuse. In a proposal out for public comment, the SEC would require reverse-merger companies to disclose full financial information within four days of a deal and end shell-company stock sales through the employee-benefit plan loophole.

Source: USA Today

TELEMARKETING STOCK SCAM

Joseph P. Borg, Director of the Alabama Securities Commission, has warned Alabama citizens to be cautious about telephone calls soliciting the opportunity to purchase over the counter (OTC) stock. An OTC stock is usually valued at less than five dollars per share and may be referred to as a

penny stock or pink slip. Since the value of the stock is so small it can double in value or lose value quickly makes the purchase of their stocks a high-risk investment. Alabamians should beware of telephone calls from people acting like they know you in a prerecorded or scripted message offering you a great inside deal on the purchase of OTC's. The Commission offers the following advice to protect you from this type of scam.

- Don't be a "courtesy victim." You may be from a generation that was taught to be courteous at all times to phone callers, as well as people who visit you at home. Con artists will not hesitate to exploit the good manners of a potential victim. **When a stranger asks for your money, you should proceed with the utmost caution.** You are under absolutely no obligation to stay on the telephone with a stranger or allow them in your home. In these circumstances, it is not impolite to explain that you are not interested and hang up the phone or ask a stranger to leave your premises. If you are lonely and in need of companionship, don't make the mistake of seeking it from someone whose only real interest is to get his or her hands on your money.
- Say "no" to any investment professional or con artists who presses you to make an immediate decision. **Before investing check out the salesperson, firm and the investment opportunity itself.** Extensive background information on investment salespeople and firms is available by contacting the Alabama Securities Commission. Almost all investment opportunities must be registered for sale in the state in which you live. Your state securities agency can tell you if the investment opportunity is properly registered. Before you part with your hard-earned savings, get written information about the investment opportunity, review it carefully, and make sure that you understand all the risks involved.

Potential investors can contact the Alabama Securities Commission for inquiries regarding securities broker-dealers, agents, investment advisors, investment advisor representatives, financial planners, the registration status of securities, to report suspected fraud, or obtain consumer information: Alabama Securities Commission; 770 Washington Ave, Suite 570; Montgomery, Alabama 36130-4700; Telephone (334) 242-2984 or 1-800-222-1253; Fax: (334) 242-0240; Email: asc@asc.alabama.gov; Website: www.asc.state.al.us.

FDA WARNS OF FAKE MEDICINES FROM MEXICO

Buying drugs in foreign countries can be risky. For example, the Food and Drug Administration (FDA) reports that several U.S. citizens who have bought medication in Mexico have come back with counterfeit versions of the cholesterol drug Zocor and a generic painkiller. The FDA says the fake Zocor didn't contain any of the actual cholesterol-lowering ingredient, and the counterfeit carisoprodol was far less potent than real versions of the painkiller. The agency warned that patients who use the counterfeit Zocor face serious health risks from their untreated cholesterol, and those taking the fake painkiller will get insufficient relief. The FDA advised anyone who may have recently purchased the fakes, sold at Mexican border-town pharmacies, to contact their doctor and their nearest FDA office immediately. Information can be found at the agency's Web site, www.fda.gov.

While such fakes sometimes will wind up in U.S. drugstores, those instances are very rare. However, the FDA has warned that medicine sold from abroad or over the Internet is more likely to be fraudulent. Sales of foreign and Internet-shipped drugs are increasing as Americans search for cheaper medications, which is certainly understandable. However, no person should take a chance when taking prescription drugs. The federal government had better wake up on this issue and go straight to the source. The drug industry, which is making record

profits and overcharging folks in this country for their prescription drugs, must be controlled. That is why campaign finance reform and the control of lobbyists are so badly needed.

SHREDDING DOCUMENTS IS NOT ALWAYS BAD

Identity theft provisions in federal laws outlining the storing and handling of personal records have made businesses more aware of the importance of destroying old records. Individuals are now destroying documents that have personal information such as credit card numbers, social security numbers and the like. All this has combined to give the shredding business industry a real boost. It's estimated that shredding is a \$1.2 billion industry in this country. There are currently 1,700 businesses offering shredding services. In fact, the industry has its own trade group, called The National Association for Information Destruction.

Two federal laws have had the greatest impact on the shredding companies' business. The Heath Insurance Portability and Accountability Act cleared new guidelines for the handling of medical records and the protection of personal information. The Gramm-Leach-Bliley Act established similar guidelines for banks and other financial institutions handling records with personal information. People are also aware of how personal information can be used to steal a person's identity to obtain loans and make purchases—on the victim's tab.

DRIVING TIPS

It goes without saying that American citizens spend much of their time driving a motor vehicle. Most of us drive either a passenger car, a pick-up or an SUV, with much of the driving being on interstates and multi-lane highways. AAA offers advice for those of us who drive on highways that are filled with 18-wheelers. Those tips include:

- Never change lanes abruptly around a truck.

- Slow down to let trucks have the right of way.
- Use turn signals.
- Avoid driving alongside or immediately behind a truck.

- Never cut in front of a truck, especially when it may need to stop.

Source: AAA Foundation for Traffic Safety

XXI. RECALLS UPDATE

TOYOTA RECALLING 128,316 CAMRY SEDANS

Toyota Motor Co. is recalling 128,316 Camry sedans because the side airbags may not inflate properly. Involved in the recall are Camry sedans from model years 2002-2004 that have optional side airbags. To date, the defect hasn't been blamed for any deaths or injuries. A supplier apparently discovered the defect. Toyota said improper assembly caused some bags to become twisted. If that happens, not enough gas will be released to inflate the airbag in a crash. Dealers will inspect the airbags for free and replace them if necessary. The company is notifying customers about the recall. Toyota sold 410,000 Camry's in the United States in 2003.

CHRYSLER RECALLS 831,000 MINIVANS BECAUSE OF FIRE DANGERS

Chrysler is recalling 831,000 minivans in the U.S. and Canada that may have weak power steering hoses and could be a fire danger. DaimlerChrysler will notify owners of the 2002-2004 minivans in September. The recall applies to V-6 models of the Dodge Caravan, Grand Caravan and Chrysler's Voyager and Town & Country models. A Chrysler spokesman says 23 fires have been reported, mostly in Canada, but says there have not been any injuries or accidents. The company is also recalling 2,000 Dodge Rams from 2004 with 4.7 liter engines. A Chrysler spokesman says those trucks have an

alternator problem that also could cause a fire. No fires have been reported in the trucks.

KMART RECALLS POOL PUMP WATER GUNS

Kmart Corp. is recalling some 38,600 pool pump water guns because the nozzle can unexpectedly come off and can be propelled, which could lead to injury. There have been four reports of injuries to children, including cuts and bruises to the head and face, according to the Consumer Product Safety Commission. The water guns, made in Hong Kong, are 15 inches long and are shaped like large syringes with a cone-shaped nozzle and either have an orange tube with green handle and nozzle or a yellow tube with blue handle and nozzle. When placed in a pool, they fill with water when the handle at the top is pulled, and they shoot water when pushed. There are no inscriptions on the guns. The guns, which sold for about \$2, were available at Kmart stores nationwide from January 2004 through June 2004. Consumers should stop using the water guns and can return them to a Kmart store for full refund. Consumers can call 1-866-KMART4U anytime.

COMPANY RECALLS 1.2 MILLION DUMBBELLS

A Texas company is recalling about 1.2 million Reebok and NordicTrack dumbbells because the weights can fall off the handles. Jumping Inc. of Mesquite, Texas, has received nine reports of weights slipping off handles. Five reports involved injuries, including bruising, a broken nose and a broken toe, according to the Consumer Product Safety Commission. Gart Sports, Sears, Target and other retail stores sold the chrome dumbbells nationwide from June 2000 to May 14, 2004, for between \$4 and \$45. Ranging from 2 to 50 pounds, the recalled dumbbells have the Reebok or NordicTrack trademarks printed on them. The government advises consumers to check their dumbbells and, if weights are loose, to contact the company to find out how to receive a free repair kit. Jumping can

be reached at 800-322-2211, weekdays 9 a.m. to 6 p.m. EDT.

RECALL RELATING TO E. COLI

Marjon Specialty Foods of Plant City, Florida, is recalling two types of sprouts sold in much of the South because they might be contaminated with the dangerous food-poisoning germ E. coli. Recalled are "Marjon Living Alfalfa Sprouts," which are sold in six-ounce plastic containers, and "Brassica Broccoli Sprouts Salad Blend," sold in four-ounce plastic containers. Both have a use-by date of August 2, 2004. The recalled sprouts were sold in supermarkets in Alabama, Florida, Georgia, North Carolina, South Carolina, Kentucky and Tennessee.

POTTERY BARN RUGS RECALLED AS FIRE HAZARD

Pottery Barn Bailey is recalling about 960 chenille rugs. The U.S. Consumer Product Safety Commission said the recalled rugs violate the federal Flammable Fabrics Act and could ignite, presenting a risk of burn injuries. Thus far there have been no reported injuries. The recalled Pottery Barn Bailey Chenille Rugs are "periwinkle blue" color only. Two models/sizes are recalled: 4479028 (8 feet by 10 feet) and 4479036 (5 feet by 8 feet). These rugs are 65% rayon and 35% cotton. Pottery Barn retail stores nationwide sold the rugs from November 11, 2002 to August 27, 2003, for \$199 to \$399. Consumers should stop using the rugs and contact Classic Concepts to arrange for the rug to be picked up and shipped back to Classic Concepts. Consumers will receive a full refund when the recalled rugs are returned. You can call Classic Concepts at (800) 254-1927 during working hours or go to www.potterybarn.com for more information.

COMPANIES RECALL BICYCLE HELMETS

Mackarl Enterprises Inc. and KHS Bicycles Inc. are recalling 4,600 bicycle

helmets because they may not meet federal safety standards. The recalled helmets include the DBX Engage, the DBX Ravage and the Geartec ESPY. The U.S. Consumer Product Safety Commission says the helmets may not meet federal safety regulations, and may pose a risk of a rider sustaining a serious head injury if he/she falls from a bicycle. To date no injuries have been reported. The recalled Geartec ESPY and FX-2 (DBX Ravage) model helmets come in carbon yellow, silver, or blue and have a carbon fiber graphic on the front to middle part of the helmet. The helmets have 15 vent holes, a removable visor, and the logo ("Geartec" or "DBX") printed on both sides of helmet.

The recalled VT-3 (DBX Engage) model helmets come in either blue/silver/black, red/yellow/black, or silver and black. The helmets also have 15 vent holes, a removable visor, and the "DBX" logo printed on both sides of helmet. Dick's Sporting Goods stores nationwide sold the DBX Engage (VT-3) and Ravage (FX-2) model helmets from June 2003 through June 2004 for between \$40 and \$60. Consumers should stop using these helmets immediately and return them to the place of purchase for a full refund or replacement. For more information, consumers can call Mackarl Enterprises at (866) 432-7832.

COMPANY RECALLS LAWN TRACTORS AND RIDING MOWERS

A Wisconsin company is recalling about 6,000 lawn tractors and riding mowers because of a faulty safety switch. Simplicity Manufacturing Inc. says the safety switch under the seat of the lawn tractors and riding mowers is supposed to stop the blade turning within 5 seconds of the operator leaving the tractor seat. The company says the recalled mowers' blades can continue to turn longer than 5 seconds, posing a laceration and amputation hazard. The recalled products—sold under the Simplicity, AGCO and Massey Ferguson brand names—were sold at independent lawn mower dealers nationwide

from June 2003 through May 2004 for between \$2,000 and \$3,750. Consumers should contact the dealership where the lawn tractor or riding mower was purchased to have a free replacement seat safety switch installed. For more information, contact Simplicity at (800) 357-8244 or visit the company's website, www.simplicitymfg.com.

ONE MILLION ELECTRIC HEATERS RECALLED

According to the Consumer Product Safety Commission (CPSC), a Kansas company is recalling 1 million electric heaters after receiving two-dozen reports of fires caused by overheating. Vornado Air Circulation Systems Inc. of Andover, Kansas, says it is not aware of any injuries caused by the portable electric room heaters. A faulty electrical connection can make the indoor heater overheat and stop working, posing a fire hazard, the Commission said. Standing about a foot tall and weighing about 6 pounds, the recalled product bears model numbers 180VH, VH, Intellitemp, EVH or DVH, located on the bottom of the heater. Retailers, distributors and the company's Web site sold the heaters nationwide from July 1991 through January 2004 for between \$50 and \$120. The CPSC advises consumers to stop using the heaters and contact the company for free shipping and repair at (888) 221-5431, weekdays from 9 a.m. to 6 p.m. EDT.

5.6 MILLION LIGHT BULBS RECALLED

OSRAM Sylvania is recalling 5.6 million light bulbs after receiving more than two-dozen reports of cuts or burns caused by bulbs that broke during use. The Danvers, Mass., company, part of one of the world's largest lighting manufacturers, has received 119 reports of bulbs breaking, including the 29 injury reports, the Consumer Product Safety Commission said Wednesday. The 60-watt B10 Decor light bulb can detach from its base, cutting or burning consumers who try to touch it. An exposed filament can shock if touched while

power is turned on. The clear bulbs, sold in packages of two or four, were labeled as "ceiling fan" and "double life." UPC bar codes on the back of the package end with 13323, 13329, 13333, 13442, 13445, 13454, 13565, 13650 or 13721. Home improvement centers, grocery, drug and discount department stores sold them from September 2002 to June 2004 for \$2 to \$4. The Commission advises consumers to unplug light fixtures or to turn off the main circuit breaker before removing a broken bulb. Wearing gloves prevents cuts while removing the bulb. Free replacements are available by contacting OSRAM Sylvania at (877) 423-3772, weekdays from 8 a.m. to 6 p.m. EDT.

XXII. FIRM ACTIVITIES

EMPLOYEE SPOTLIGHTS

Gibson Vance

Gibson Vance works in our Consumer Fraud Section. Gibson, who is a native of Pike County, Alabama, concentrates mostly on actions against insurance companies and other entities within the insurance industry. He attended Jones School of Law, and was elected president of the Student Bar Association. After graduating, Gibson helped form the Jones School of Law Future Trial Lawyers Association. Gibson has served a number of organizations in the following capacities: president of the Young Lawyer's section of the Montgomery County Bar Association; a member of the Board of Directors of the Montgomery County Bar Association; president of the Montgomery Trial Lawyer's Association in 2003; Chairman of the Executive Committee for the Alabama Trial Lawyers Association for 2002-2003; vice-president of the Montgomery County Bar Association; and Treasurer of the Alabama Trial Lawyers Association.

Gibson has successfully handled numerous consumer and insurance fraud cases for clients of the firm. He and Chris Sanspree recently handled a

case where their clients received a \$2.9 million verdict in a securities fraud case in Henry County, Alabama. Gibson has worked in several political campaigns for candidates on the local, state and national level. He is currently involved in the Kerry-Edwards campaign and will be actively involved in the southeastern states. Gibson is helping to make sure that our clients and all other consumers around the country have their legal rights protected. Being involved in the political arena helps make that happen. Gibson does a very good job for the firm.

Susan Baker

Susan Baker, who has been with our firm for eight and a half years, currently works as a Legal Assistant to Steve Drinkard in our Product Liability Section. Since moving to Product Liability in the fall of 2000, Susan has been involved in cases dealing with Firestone tires and Ford Explorers. She is currently working on cases involving Ford Explorer rollovers and tire failure accidents. In her job, Susan assists in all aspects of case preparation.

Susan and Phil Baker have been married for 17 years and have three children. Jessica is a senior softball scholarship athlete at the University of West Alabama, majoring in Environmental Science. Callie is a freshman at Macon-East Montgomery Academy. Joshua is in the 8th grade at Macon-East Montgomery Academy. Susan has served as Treasurer of the Montgomery County Bar Association Legal Assistant Section for the past five years. Susan, who is a paralegal member of The Alabama Trial Lawyers Association, has been a guest speaker for Paralegal Education Classes at Auburn University in Montgomery. Susan is a valuable employee with the firm.

Wendy Thornton

Wendy Thornton, who has been with the firm for 7 years, currently serves as Legal Assistant to Kendall C. Dunson in our Personal Injury/Product Liability Section. Wendy mainly works on product liability cases regarding industrial accidents, workplace accidents

and defective machinery. She is involved in all aspects of trial preparation. Wendy and her husband Jeff have been married for 8 years. We are most fortunate to have Wendy with the firm. She is a hard worker and does outstanding work.

Scott Barton

Scott Barton has worked for the firm since March of 1995. The firm created an Information Technology Department in 1997. Scott was then transferred to his current position as Computer Operations Supervisor. In this position, Scott is responsible for overseeing the day-to-day operations of the Information Technologies Department. This includes server functionality and maintenance as well as assisting the Hardware Technicians and Network Administrators. He has had a great deal of computer training and is currently going through self-study for MSCE on the Windows 2000 track. Scott, who has a five-year-old daughter who attends Coosada Elementary, is a dedicated employee and is a valuable member of the Beasley Allen team.

Kimberly Vaughn

Kimberly Vaughn works for Ben Baker in our Personal Injury/Product liability Section. She also does work for Ben's legal assistant. Prior to her current assignment, Kimberly worked in the Nursing Home Section. She is married to Stuart Vaughn and has one son, Aaron, who is eleven years old. Kimberly and her family are originally from Gainesville, Florida, but have lived in Prattville for a little over a year. Kimberly received a Bachelor of Science in Paralegal/Legal Assisting from Santa Fe Community College in Gainesville, Florida. She is a very good employee and contributes greatly to the firm's success.

82 RACING TEAM

You may recall that our firm has been sponsoring a race car for a good while. The BeasleyAllen.com car, driven by 19-year-old University of South Alabama student Grant Enfinger,

has raced this summer in selected “long distance” stock car races in Mobile, Pensacola and Opp. The race car features the BeasleyAllen website, along with support for our military troops and opposition to the NAFTA agreement, which has led to the loss of thousands of jobs in Alabama and throughout the South. During the past month, our race car has shown its support for the re-election of Baldwin County Circuit Judge Bob Wilters. Judge Wilters, a Republican, is a lay speaker in the United Methodist Church and is a fine judge. We were pleased to give him this recognition. Grant also likes John Edwards very much and has displayed **Kerry-Edwards** on the 82 Racing Car.

Grant, who is entering his sophomore year at the University of South Alabama, is pursuing a business degree and hopes to break in to the “big time” of stock car racing soon. Grant and his crew will continue to race the Super Late Model stock car (600 horsepower with speeds in excess of 100 miles per hour) throughout the southeast during the next few months. The most prestigious “short track” stock car race in the country, The Snowball Derby, takes place at Pensacola, FL., in December. Grant’s goal is to win that race, although he knows that famous NASCAR racers such as Rusty Wallace, Kyle Petty and others have tried unsuccessfully to win that big race. Our firm is proud to be a part of this venture. Greg Allen and Bobby Mazingo have been to a good number of Grant’s races and keep all of us informed on what’s going on. We expect Grant to go on to the highest levels of stock car racing. He is a real competitor and has earned the respect of his fellow-drivers on the circuit.

CUTTING HORSE COMPETITION

The firm helps to sponsor the Heart Of Dixie Cutting Horse Association, which puts on cutting horse shows in Montgomery each month at the Crawford Arena behind Garrett Coliseum. Julia Beasley, one of our shareholders, is very active in cutting horse competi-

tion around the country. For those of you who may not be familiar with cutting horses, you should go out and watch one of the shows. It is a fascinating sport with some great riders and horses. Cutting horses have to be highly trained and it takes lots of skill on the part of the rider to successfully compete. Julia has competed in Alabama, Tennessee, Mississippi and Texas so far and usually rides her favorite, “Snicker Bar,” a great horse and a tremendous competitor. Julia is part owner of Double B. Ranch in Montgomery, which raises cutting horses.

XXIII. A SPECIAL MESSAGE

LOSING A CHILD IS TOUGH

One of our lawyers and his wife lost a baby a few years ago. Most of us haven’t had to go through that type experience and can only imagine how difficult it must be. Mike and Marla Crow are two of the finest people you would ever want to meet. The manner in which this couple handled a personal tragedy in their lives was an inspiration for all of us at the firm. I asked Marla to write a piece for this issue on how they were able to get through their ordeal. I believe it will help you to know where the Crow family found their strength and how the Lord carried them through some tough times.

Losing a child is the hardest thing a parent can ever experience. Mike and I lost our firstborn child in January of 1999. I thought I had an uneventful pregnancy until 33 weeks. I have always been a very outgoing, athletic person. Therefore, the doctor said I could continue to teach step aerobics with a heart monitor, and I continued to walk every day.

One rainy Friday afternoon I sat at my computer editing a deposition. I began to feel uneasy, so I went

home and sat in Peyton’s nursery and cried pretty much the whole night. The next morning I was not feeling any movement, so Mike and I went to the Emergency Room. I knew in the back of my mind something was wrong, but I did not know what was wrong. It is so hard to face something so tragic as the loss of a child. It felt like it took hours and hours for the ultrasound technician and on-call doctor to tell me what was wrong with my baby and me. The words, “Sorry, there is no heartbeat, Mrs. Crow” almost killed me. My heart was broken. I was devastated!!!! My heart literally ached all over. How was I going to get through this? “This has got to be a nightmare,” I kept telling myself.

Mike and I went home, and we called our parents. They came rushing over. They were wonderful and I greatly appreciate them. They will never know how much their love and support has helped me. I just hope I am half the parent to our children as they are to us. We all prayed and cried for the rest of the night.

The next evening I delivered Peyton Taylor Crow. He was 1 pound 10 ounces 13 inches. I cannot describe to you what it is like to deliver your baby and not be able to take him home with you. I watched Mike sleep as I just lay there in my bed and wept. I looked up at the clock and it was 2:00 p.m. I said, “Mike, wake up, it is okay. I have to tell you something. It is going to be okay. God has given me a peace about this.”

It is truly remarkable how our Mighty God works. He works in mysterious ways. I had an incredible peace about it...Not to say that I did not grieve or have a very hard time because I did, but God allowed me to go through this, I believe, so that I could help others in similar situations. He is so good.

I had a wonderful support system via family and friends, and I do not know what I would have done without them. They were so good to me. I will never forget all the prayers, cards, flowers, meals, encouragement, scripture, and the like, given to me during this sad and lonely time.

Mike was my rock. He was so very good to me, and I will always cherish that for as long as I live!!!

I prayed about getting pregnant again and within 3 months I was pregnant with our son, Cade Russell. There were so many questions posed to me about getting pregnant so soon. My answer was simply that I had prayed about it, and if it was God's will, then I would be pregnant; if not, then that was okay too. I prayed that God would take away my fear and that I would have an uneventful pregnancy, and it was. I would not say that at 33 weeks I did not think about the "what ifs", but God is faithful. Cade was born at 37 weeks and he was beautiful and healthy. I just remember Mike saying, "10 fingers and 10 toes," and I just lost it. All I could do was cry. I was so happy and relieved all at the same time.

When Cade was 4 months old, I got pregnant with Carson Ann. This pregnancy was a little different in the fact that it started off somewhat shaky. I was in and out of the hospital pretty much the whole pregnancy. She was delivered C-section at 37 weeks. She was beautiful and a very healthy baby. Mike would then repeat the phrase, "10 fingers and 10 toes." That's all we cared about was for our children to be healthy. We are so blessed!

If it were not for my faith, there would be no way I could have gone through this horrible ordeal. I have been blessed by being able to share with others about our loss. There is not a day that goes by that I do not think of Peyton.

Grief is a very emotional roller coaster. You experience so many different emotions and feelings. I know that I have changed in so many ways. I asked God to use me as a vessel in some way after we lost Peyton because I knew that something good had to come out of the misery. God has opened so many doors for me.

The Compassionate Friends (TCF) is an organization here in town that is available if you need a support system or just someone with whom to talk. You can call 284-2721 for general information on TCF. Mike and I attend a candlelight service in Peyton's memory every year in December at Eastmont Baptist Church.

I just want to thank you for allowing me to share with you, our little angel, Peyton Taylor Crow.

Praise be to the God and Father of our Lord Jesus Christ, the Father of compassion and the God of all comfort, who comforts us in all our troubles, so that we can comfort those in any trouble with the comfort we ourselves have received from God
(2 Cor. 1:3-4)

- Marla Taylor Crow

XXIV. A PERSONAL PERSPECTIVE

My wife tells me I am too prone to let folks know how I feel about most any subject, and I suppose she is right. Sara even says I am sort of "opinionated" and real "hard-headed" on occasion. I must confess that I am most likely guilty on both charges. I guess that's partially the reason I was such a **bad** politician, when I gave the politic game a try. I must also admit that I have strong opinions on politics and on political figures and I don't apolo-

gize for that. I have never been able to tolerate **phonies** very well and unfortunately far too many politicians fall in that category. I sincerely hope those aren't in the majority. In any event, I would rather deal with folks who have strong convictions and tell the truth, even though I might disagree with them.

Since a few of our readers have asked me why I don't **like** our President, I guess that a response on that subject is in order. First, I don't really **dislike** George W. Bush. Even though I have never officially met him, I have to admit that he appears to be a likeable person. In fact, I probably wouldn't mind taking off on a fishing or hunting trip with him. Looking back a few years, I believe that the two of us may have had a rather casual contact back in the 1970s when a much younger George Bush was in Alabama campaigning for Red Blount in his unsuccessful race for the U.S. Senate. When I was in Clanton for the annual Peach Festival in 1972, I vaguely recall meeting and shaking hands with a young man from Texas who was on the Blount campaign staff. I am reasonably sure that person was the man who is now our current President. However, that brief encounter—if that was in fact Bush—told me little about Governor W. Bush. I have formed my political opinions of the President based strictly on what he says and on his job performance in Texas and as President over the past three years.

I can't really say I **like** President Bush because I don't know him—but I can say without hesitation that I don't **dislike** the man. I can also say that I do have great respect for the presidency as an institution and that will never change. Like many of you, I still pray earnestly for the President and for our nation daily, but that doesn't mean I will vote for him. In all honestly, in good conscience, I just can't do it. I could never vote for a person in high office who lets the likes of Karl Rove direct every political move he makes. I am firmly convinced that Mr. Rove is **not** good for America. His agenda doesn't include anything good for ordi-

nary folks and his brand of politics is scary, to put it mildly. We don't need folks like Rove **running** our country. His **control** over the President does give me a great deal of concern—with good reason—and that's one of the main reasons I could never be a Bush man.

I am firmly convinced that this fall's presidential election will be one of the most important national elections in my lifetime. Never before has the country been so divided on so many fronts. We have a man in the Oval Office who told us in the 2000 campaign that he would be a **unifier**, but instead, because of the influence of Karl Rove, Dick Cheney and some of the big bosses of Corporate America, the President has turned out to be the **great divider**. Clearly, the present Administration is controlled by the giants of Corporate America. In my opinion, that's not good for our country. It has become most apparent that no important decision is made in the Bush Administration that doesn't first meet with the approval of the corporate bosses. Their direct link with the White House is none other than the powerful Mr. Rove and that tells the whole story.

While it's not very smart to criticize the war effort, I am now convinced that the war in Iraq will prove to be a major mistake and one for which we will pay dearly in lives and money for years to come. It has become quite evident that the Rove crowd will quickly label anybody who differs with them on the war and occupation as being **unpatriotic**. Nevertheless, while we are in Iraq, our nation must give the **military** our full and complete support. Anything less is not acceptable. But at the same time we must also make sure that decisions of a **military** nature are made for military and national defense reasons. Instead, it appears too many military decisions have been **politically** motivated ones—made by persons who have **never** worn the uniform. In my opinion, that can't be justified. As a result, our ongoing fight against terrorism has been greatly diluted and we are still

bogged down in Iraq. I am convinced that our nation is much weaker today because of misplaced priorities. It really concerns me that giant corporations, such as Halliburton, have profited greatly in a war that appears to have been politically motivated and fought for the wrong reasons.

The American people can't sit back and let our Republic be destroyed. A Republican President, who had a fear of what can happen when we allow the corporate kings to become too powerful in this country, gave a pretty strong warning a few years ago that should be heeded by our current crop of national politicians. The following is what that President had to say during his administration.

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my Country; corporations have been enthroned, an era of corruption in high places will follow, and the money power of the Country will endeavor to prolong it's reign by working on the prejudices of the People, until the wealth is aggregated in a few hands, and the Republic will be destroyed.

- Abraham Lincoln, 1864

The warning by President Lincoln, who was one of our most respected and admired Presidents, seem most applicable to our current situation. That is why I am convinced that the upcoming election is critically important. I believe that this campaign will turn on how voters feel about the war in Iraq and our nation's economy. I am somewhat amused when I hear our President on the campaign trail trying to sell his economic record. I have a hard time believing that working men and women and retirees feel very good about what's happened to them since Bill Clinton left office three years ago. A national poll released last month reveals that the President continues to get low marks on the economy. Two-thirds of American citizens rate the economy as "only fair" or "poor." Fifty-five percent said that jobs are very hard

to find. Significantly, 52% disapprove of Bush's handling of the economy, which comes as no surprise, and has to be extremely bad news for the President at this crucial stage of his campaign for reelection. Let's take a brief look at some of what has happened to the country since Karl Rove and his subordinates took over the federal government.

- The government's budget deficit is at a record level and is still growing at a record pace.
- We have a record trade deficit, which is also growing steadily each year.
- The Bush White House has pushed through \$2 trillion dollars in tax cuts, almost all for the wealthiest people in the country. Unfortunately, ordinary citizens were left out.
- Citizens with largest incomes have prospered, while middle and low-income citizens are really hurting.
- The jobs of 2,272,000 Americans have been lost.
- Sending good American jobs to foreign countries has become the policy of our government.
- Many major corporations are not paying any federal taxes.
- There are 43.5 million Americans without health insurance.

More than half of the Bush benefits are going to the wealthiest one percent. It could be called trickle-down economics, except that the only thing that trickled down has been a sea of **red ink** in our state and local governments. This has forced them to cut services for middle class working America and to increase their already high tax burden. In addition, the U.S. trade deficit hit a record \$56 billion in June. Now the Congressional Budget Office forecasts budget deficits totaling \$2.75 trillion over the next ten years. These deficits have apparently been part of the strategy by the Bush advisors.

Grover Norquist, who dubs himself the leading **right wing political strategist**, has stated publicly that the

goal is to “starve the beast,” with trillions of dollars in deficits resulting from trillions of dollars in tax cuts. This will continue until the federal government is so weak it will be totally ineffective in controlling Corporate America. That which has happened over the past three years surely doesn’t sound like progress to me and shouldn’t to any American citizen who works hard, pays his or her taxes and expects the government to do its job. President Bush is telling prospective voters in his campaign speeches that the economy is booming. Unfortunately for the President, there is little evidence to back up his rhetoric.

I also have a few words of constructive advice for my friends who run the Democratic Party. We must remember that the Democratic Party traditionally was the **party of the people** and was a party that cared deeply about **moral-ity, fair play, equality** and **justice**. We should take a careful look at some of the wrong directions the national party has taken in recent years. Fortunately, any false steps that may have occurred can still be corrected. In fact, that can be done very easily. Ordinary citizens in America are desperate for leadership, and it’s up to those of us who understand the wants and needs of American citizens to provide it. That’s why I was so very glad to see John Edwards join the Democratic ticket. John hasn’t forgotten his **roots** and that’s a plus for him in my book. He knows there really are **two** Americas and that the gap between the two is getting wider.

If we are to bring about the changes that are so badly needed in our

country, ordinary folks must take a much more active interest in who we elect to public office. I believe that all citizens should get actively involved in politics at every level. I have heard so many people say, “What can I do?—I’m only one person and nobody really listens to me. I have no influence.” I agree that many of us will never have the opportunity to do anything really big or important in the scheme of things in this world. Nevertheless, that should never cause a person to sit on the sidelines and not try his or her **best** to make a **difference**. Individual contributions—in **concert** with the efforts of others—can assist greatly in the **fight** to preserve individual rights and liberties. A man, whose life was cut short before his work on this earth was fully completed, said it much better than I ever could.

Few will have the greatness to bend history itself, but each one of us can work to change a small portion of events, and in the total of all those acts will be written the history of this generation.

- Robert F. Kennedy

We are dealing with some real tough times in America and nobody really disputes that. Many of our citizens, with all of our problems, say they don’t know how they can make it. There is a way and I will close with this few observations on how I have learned to deal with the trials and tribulations that are very much a part of life for each of us. For many years, I was convinced that I could handle anything that came my way. But, like most all of us, my

travel down life’s path has been filled with ups and downs. I finally came to realize that I could do nothing of consequence on my own, depending on my own abilities and devices. When I finally came to grips with the realization that by putting my complete trust in God and being obedient to Him, I could deal with anything that came my way. I found, from that point forward that things always seemed to work out. All of a sudden, I was then able to handle this roller coaster ride we call life. Fortunately, God is able to handle both the good and bad times for me, my family, my law practice and even my politics. I now know that the following is so very true, and has been proven to be so, time and time again.

And we know that all things work together for good to those who love God, to those who are the called according to His purpose.

- Romans 8:28

This simple truth enables a true believer to face life’s trials and tribulations without fear, apprehension, or uncertainty. Simply lay everything at the altar—including ego, pride and personal wants and plans—and things will always eventually work out. With that assurance, we are then able to patiently trust God to work everything together for good. It is great to know that God loves each of us and has a wonderful plan for our lives. We simply have to trust and obey Him! That may be too simple for some folks—but it’s absolutely true and has met the test of time.

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