THE JERE BEASLEY REPORT

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A NATIONAL LAW FIRM LOCATED IN MONTGOMERY, ALABAMA

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I. CAPITOL OBSERVATIONS

State Sues Drug Industry For Fraud

The State of Alabama has filed a civil lawsuit alleging fraud against 79 pharmaceutical companies for overcharging the Alabama Medicaid Agency for drugs. Alabama Medicaid Agency Commissioner Carol Herrmann has told us that the inflated pricing scheme has cost her agency hundreds of millions of dollars over the last ten years. The lawsuit was filed in Montgomery County Circuit Court by our firm along with the Mobile firm of Hand, Arendall, L.L.C. Lawyers in each firm have been appointed as special Deputy Attorneys General for the State of Alabama by Attorney General Troy King to handle this most important pharmaceutical industry litigation. We expect to prove that the defendants intentionally cheated the state in a fraudulent scheme that has cost the state at least $300 million. It is obvious that each company knew what the others were doing. We will ask for both compensatory and punitive damages.

Alabama is now one of 18 states that have filed lawsuits such as this one accusing the drug industry of unfair and deceptive acts and practices in the pricing and marketing of prescription drugs. Our firm is presently pursuing similar claims for other states.

The thrust of the state's claim concerns the drug industry's reporting services. Pricing schemes, known as the AWP (average wholesale price), WAC (wholesale acquisition costs), and Direct Price, are reported to industry reporting services for the purpose of establishing a base price. This base price must be used to reimburse doctors, hospitals, pharmacists and others for the cost of drugs purchased for Medicaid recipients. The information concerning the self-reported prices was intentionally manipulated by the drug companies, resulting in grossly inflated prices being used to reimburse the healthcare providers. The system provided an incentive for doctors and hospitals to prescribe those certain drugs that had the higher reimbursed drug price. This fraudulent scheme in the pharmaceutical industry was designed to sell more drugs made by certain drug companies. As a result of the defendant's conduct, state Medicaid agencies, all over this country, have been left financially destitute. The drug industry, on the other hand, has reaped billions of dollars from this fraudulent scheme.

Troy King, our Attorney General, has demonstrated great courage in standing up for Alabama citizens against the powerful drug industry. Folks are beginning to see how the drug industry really operates and it's not a pretty sight. In the Vioxx litigation, for example, we have seen how the drug industry has misrepresented the safety of a number of drugs they market and how hundreds of thousands of people have been hurt. Now we learn how these companies fraudulently inflate the price of drugs, hurting all taxpayers in Alabama, as well as those in other states. We are pleased to have the opportunity to represent the State in this case. Dee miles, Clint Carter, and I will be involved in the case for our firm. Roger Bates, Cane O'Rear and Windy Bitzer will be involved for the Mobile Firm. Hopefully, we will be successful. If so, our state's taxpayers will be the real winners.

The Firm Is Appointed Lead Counsel

Our firm has been appointed by Tennessee Federal District Court Judge J. Daniel Breen to serve as Co-Lead Counsel, along with Cantilo & Bennett, L.L.P., a very good Texas law firm, in the Multi-District Litigation involving the Reciprocal of America Sales Practices Litigation. Judge Breen selected our firm and the Texas firm from a panel of national law firms to lead the charge for the Plaintiffs against some eighteen Defendants who were sued in this litigation. Under this appointment as lead counsel, the two firms will be responsible for directing the litigation. We will be responsible for coordinating all aspects of the case. A management team of lawyers will be put together who will aggressively pursue all avenues of recovery for the Plaintiffs in this case. We are honored to have been selected by the court and will do our best to justify the confidence placed in our firm. The task at hand is tremen-

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dous, but our clients are counting on us to uncover evidence to prove this egregious fraud in court and to obtain an adequate recovery for all policyholders who were victimized. The case is pending in Memphis, Tennessee.

Our firm is representing Tennessee Commissioner Paula Flowers in her capacity as Receiver for all policyholders who held insurance policies with three Reciprocal companies domiciled in the State of Tennessee. We have alleged and will prove a series of fraudulent transactions that deceived policyholders and regulators over a period of time. The resulting damage was very large and affected a tremendous number of doctors, lawyers and hospitals. The trial judge has not yet set a trial date for this case, but it is believed that the case will be tried in 2006. Dee Miles, Jay Aughtman, Clint Carter and I will be working on this most interesting and challenging case.

Alabama's New Environmental Director Selected

Onis "Trey" Glenn, III, has been selected as the new environmental director for the State of Alabama. The Alabama Environmental Management Commission hired Glenn, who has directed the state's Office of Water Resources for ADEM since 2001. Everything I hear about Trey has been good. In addition to his regular duties, he has been the state's negotiator in water allocation talks with Georgia and Florida. The new director was one of four finalists for the director's job. Commission member Pat Byington of Birmingham said the commission had formed a stakeholders' committee with representatives of business, environmental groups, government and the public to review applicants. Trey was the top choice of that group and was selected to head up a most important function of state government.

Trey, who started his new job on February 1st, plans "to develop a plan to move ADEM forward." Before going to work for the state in 2001, he worked as a hydrologic engineer helping manage hydroelectric dams and reservoirs for Alabama Power Co. Trey holds a bachelor's degree in engineering from Auburn University and a master's degree in business administration from the University of Alabama at Birmingham. I hope this selection will prove to be a good one. Many had hoped for some "new blood" and a person with a proven record of fighting to protect the environment. I have to believe that Trey Glenn will take advantage of his opportunity and do an outstanding job. I wish him well and will be praying for his success.

Settlement Reached In RSA Suit Against Bear Stearns

The Retirement Systems of Alabama was able to settle the lawsuit against Bear Stearns Cos. in the WorldCom accounting scandal. While the settlement amount is confidential for now, the terms eventually will be made public in financial statements. The suit filed by RSA against Bear Stearns had been scheduled for a retrial on January 10th, but the two sides reached a settlement and avoided a retrial. Serious negotiations had began in late December and were wrapped up prior to the trial date. Bear Stearns says it has had a long, valued relationship with RSA and wants to maintain it.

RSA sought $16.2 million to recoup losses from the purchase in October 2001 from Bear Stearns of Intermedia Communications Inc. bonds. As previously reported, the litigation against Bear Stearns was part of a larger lawsuit filed by RSA over $124.7 million in losses connected to the WorldCom bankruptcy. Three investment firms and the Arthur Anderson accounting firm settled with RSA in September for $111 million. Bear Stearns represented Intermedia Communications when it was sold in July 2001 to WorldCom, but it didn't underwrite any WorldCom bonds bought by RSA. The pension fund maintained that the New York investment firm knew about financial concerns at WorldCom, but failed to disclose them. WorldCom filed for bankruptcy in July 2002, citing massive accounting irregularities that allowed the company to claim a profit when it was losing money. RSA sued two former WorldCom executives, four investment firms, and World Com's accountant, blaming them for $124.7 million in losses from WorldCom securities. Litigation is still pending against former WorldCom CEO Bernie Ebbers and former chief financial officer Scott Sullivan, but that portion of the suit was put on hold by Alabama courts because of criminal investigations and prosecutions.

Alabama Gets $2 Million From Bristol-Myers Settlement

Alabama government agencies and consumers received $2 million from Bristol-Myers Squibb's settlement of a lawsuit alleging antitrust violations involving the anti-anxiety drug BuSpar. Attorney General Troy King joined state Medicaid Commissioner Carol Herrmann at a news conference to make the announcement concerning the settlement. The Medicaid program received $1.07 million and the Department of Mental Health received $58,144 from the nationwide settlement. In addition, 1,399 Alabama consumers, who had purchased BuSpar, will share a total of $960,377. In 2003, Bristol-Myers agreed to pay $535 million to resolve claims that it kept generic versions of BuSpar from the market. The recent payments to Alabama came from that settlement. Keeping generic drugs from the market hurts the Medicaid program because generic drugs are cheaper to purchase than name-brand drugs. This money comes to the state at a very good time given the money crunch that faces state government.

Alabama Schools Will Receive Up To $41 Million From Settlement

Alabama schools will receive up to $41 million from the settlement of a lawsuit involving school land deals. A lawsuit was filed by the Covington County school board in 2002 seeking to prevent the state from using the money, which had accumulated over the years through sales, leases, timber-cutting and mineral income on land designated for local schools. The class action lawsuit was against then-Governor Don Siegelman and other state officials and contended the money didn't belong to the state and couldn't be used to ease state school budget cuts. A court ruling in the fall of 2002 froze the assets and promised the school systems $24.7 million.

Fortunately, further research by court-appointed auditors found that there was actually between $36 million and $41 million available to the schools. The money will now go to 98 of Alabama's school systems that are owed money from land leases or interest earned on land sales, based on a 1785 federal land ordinance that forced states to set aside money for education spending. The ordinance required each township in the state to reserve a one-square-mile plot of what was known as the "16th section" of their land as schoolhouse property.

For some school systems, valuable stretches either contained mineral veins or were better suited for farming or timber. Those properties were leased or extracted, and over the years some counties sold their land and deposited the money into accounts that paid interest. Information came from documents from the Department of Education and Department of Conservation and Resources that identified which land produced the money. The next step was to determine which township the money belonged to. The school systems that will do the best under the settlement are: Covington County, $4.01 million; Jefferson County, $3.98 million; Colbert County, $2.59 million; Calhoun County, $1.7 million; and Marion County, $1.03 million. Interestingly, the smallest amount, only 72 cents, goes to Mobile County Schools.

The Governor Appears To Be Running Again

Daily newspapers across Alabama carried about 400,000 advertising inserts on January 25th setting out Governor Bob Riley's record for his first two years in office. Even though the governor hasn't said he is running for a second term, this should put an end to the speculation on whether he will seek reelection. Leftover campaign funds from the 2002 race were used to pay for the costs for distribution of the newspaper insert. A spokesman told the Associated Press that Governor Riley will wait until after the upcoming legislative session, which ends in May, to announce whether he will run for reelection. Personally, I hope the governor will run. In my opinion, he has done a very good job under extremely difficult circumstances. It is rather interesting that some groups don't like him because they can't control him.

The field in the Governor's race will be very large. The very popular Lucy Baxley has said she intends to run. She will be a factor for sure. Don Siegelman, Judge Roy Moore and Tim James are also very likely to run. Both Lucy and Judge Moore are very well liked throughout the state. While Don Siegelman is a political animal, who has never held down a "real job," it appears that he still has some support in all sections of the state. In a recent poll, Lucy led Don by a substantial margin and that's what I would have expected. Tim is a good guy who will be a stronger candidate this time. He will be in the Republican primary. There are some who say Dr. David Bronner and Dr. Paul Hubbert are being encouraged to make the race. I would doubt seriously that either of these men would run, but both would be very good governors. In any event, the 2006 election year may be one of the most interesting in years. I wouldn't want to predict a winner in either primary and certainly not in the general election at this stage. Lot's can change before the time for officially getting into the race. As I have said before, there is nothing like Alabama politics.

II. LEGISLATIVE HAPPENINGS

The Regular Session Of The Alabama Legislature

By the time this issue is received, the regular session of the Alabama Legislature will be well underway. There appears to be a consensus of opinion—at least among the public—that the legislators need to come in with a plan and then get down to work carrying out their plan. The joint budget hearings, held as required by law before the session, revealed that the lack of available money will again be a major problem. Clearly, the prospects of any new taxes passing are not good. In my opinion, passing any taxes will be next to impossible, regardless of the state's needs. Putting a tax on soft drinks—without first addressing real tax reform across the board—makes no sense. I will be shocked if that tax passes. We need to address our money woes during this session, but I doubt seriously that this will happen.

The Democratic Agenda

Democrats, who control the Alabama House of Representatives, unveiled their 2005 legislative agenda in late January. Their agenda includes making another attempt to remove segregation-era language from Alabama's constitu-

tion. House Speaker Seth Hammett (D-Andalusia) and House Majority Leader Ken Guin (D-Carbon Hill) say the House Democratic Caucus will be back with a proposed constitutional amendment exactly like Amendment Two, which Alabama citizens defeated by a narrow margin on November 2nd. The proposed amendment would have removed language in Alabama's 1901 constitution that mandated segregated schools and poll taxes. It also would have removed a 1956 constitutional amendment—added in the wake of the U.S. Supreme Court ruling ending segregated schools—that said there is no right to an education at public expense in Alabama.

Other items on the House Democratic agenda for the legislative session are:

- A constitutional amendment to ban same-sex marriages;
- $250,000 life insurance policies for Alabamians who are killed while serving with the National Guard overseas;
- Restricting contributions between political action committees;
- Giving limited home rule to counties;
- Banning pass-through pork projects; and
- Taking the state's industrial recruitment agency out from under the governor and putting it under an appointed commission.

I would have liked to see more consumer protection measures on the Democratic agenda. The Democratic Party must work hard to regain its position as a protector of ordinary citizens. This session would be an ideal time for all Democrats in the House and Senate to work tirelessly for Alabama consumers who badly need their help. There are plenty of areas where help is needed. We have the weakest consumer protection laws in the country and the bad guys in Corporate America know it. Our state doesn't have a law guaranteeing patients' rights and that's most unfortunate. Better regulation of insurance and financial companies is long overdue and badly needed. Curbing the spread of arbitration should also be a top priority. Hopefully, some real champions who will stand up and fight for consumers will emerge in the session. In order for that to happen those legislators will have to overcome the power and influence of the tremendous number of lobbyists who control the legislative process. It would help greatly if folks back home would talk to their legislators and urge them to get involved in the fight to protect consumers.

III. COURT WATCH

Class Action Securities Fraud Lawsuits Increase In 2004

Even though there has been a great deal reported about corporate fraud and corruption, I am convinced many people still don't really realize how bad things have been. The results from a recent survey should be of interest to our readers. While the number of federal securities fraud class actions filed in 2004 increased only moderately from 2003 levels, rising to 212 companies sued from 181, the decline in stock market capitalization corresponding to these actions increased dramatically. The report released by the Stanford Law School Securities Class Action Clearinghouse in cooperation with Cornerstone Research is most interesting. The total decline in the market capitalization of the defendant firms from the trading day just before the end of the class period to the trading day immediately after the end of the class period—or the "Disclosure Dollar Loss (DDL)"—nearly tripled from $58 billion in 2003 to $169 billion for cases filed in 2004. This 192% increase in the DDL index is attributable entirely to eight lawsuit filings. In those cases each defendant firm experienced disclosure dollar losses in excess of $5 billion. In sharp contrast, there was only one other case with losses that large in all of 2003. Cases in that range had consistently been about 200 filings a year over the past eight years. The Dollar Disclosure Loss for this period tripled to approach the levels seen after the dramatic market decline in 2000.

The number of lawsuits alleging violations of Generally Accepted Accounting Principles remained relatively constant in 2004, declining to 102 (48%) of the total in 2004 from 107 (59%) of the total in 2003. Further, several of the large dollar losses observed in 2004 arose as a consequence of product market developments that had material adverse stock market price effects. Allegations relating to insurance industry sales practices at companies, such as American International Group and Marsh & McLennan gave rise to some of the year's largest lawsuits. Concerns about the safety of COX-2 inhibitors marketed by Merck and Pfizer also played a significant part. These lawsuits do not allege the traditional form of misrepresentation that are normally seen in this type litigation. According to the study, those cases accounted for approximately 35% of 2004's Dollar Disclosure Losses.

As in previous years, the median 2004 maximum dollar loss and disclosure dollar loss for NYSE and Amex firms were significantly higher than the medians for NASDAQ firms. This finding is not surprising because the firms listed on the NYSE are typically larger than the firms listed on the NASDAQ. The top three industry sectors in 2004 in terms of number of issuers sued were Consumer Non-Cyclical, Technology, and Communications. The number of issuers sued in the technology sector nearly doubled over 2003 (19 versus 37 in 2004—a 95% increase). Energy sector filings almost tripled, increasing from three to

eight. Of note, while the Communications sector was one of the three most-frequently sued in 2004, maximum dollar losses in the industry dropped nearly 80% from $240 million in 2003 to $51 million in 2004, reflecting a lower market capitalization decrease for the average communication company sued in 2004.

The report also found that the most active federal circuits, as measured by the number of issuers sued in 2004 were: the Ninth Circuit (including California) with 64 filings, an increase of 83% over 2003; the Second Circuit (including New York) with 45 filings; and the Eleventh Circuit (Alabama, Florida, and Georgia) with 20 filings. The Securities Class Action Clearinghouse is an authoritative source of data and analysis regarding the financial and economic characteristics of federal securities fraud class action litigation. The full text of the new report can be found on the Clearinghouse site, http://securities.stanford.edu.

Source: *The Insurance Journal*

President Bush Is Putting Out Some Bad Information On Lawsuits

President Bush argues that weakening our legal system will strengthen the economy and improve access to health care. A casual investigation reveals that the President's understanding of economics is faulty. His factual assertions are also grossly incorrect. The tort system in this country ensures that the costs of injuries are borne by those who actually cause them. This has the dual purpose of compensating victims and deterring unsafe and wrongful conduct. President Bush in his speeches is quite often dead wrong on his facts. The quotes set out below are typical of the statements being made by the President. These have been reported widely by the news media. Each quote by the President is followed by a rendition of the true facts, as determined by government agencies or other authorities, that refute his statement.

- President Bush says: "Lawsuits are driving docs out of business."

  The facts: Doctors are not leaving states with high malpractice insurance premiums. Only two months before he made that comment, the Allentown Morning Call reported that the number of doctors in Pennsylvania had increased during the malpractice "crisis." In the summer of 2003, the Government Accountability Office, formerly the General Accounting Office, reported that the volume of medical care delivered in Pennsylvania had increased during the crisis. Statistics from state medical boards in every other so-called "crisis" state show the same—doctors are not being driven from practice.

- The President says "All these junk lawsuits are running up the cost of medicine."

  The facts: Malpractice costs are .62% of the nation's health care expenditures. According to the Department of Health and Human Services actuaries' most recent report on growth in health care expenditures, in 2002 health care expenditures rose 9.3% to $1.553 trillion. Expenditures on malpractice premiums reported to the National Association of Insurance Commissioners that year were $9.6 billion, making malpractice costs about .62% of national health care expenditures. Malpractice costs rated only an eleven-word mention in the actuaries' 13-page report.

- President Bush said that "Docs and hospitals practice what's called 'defensive medicine' in order to protect themselves in a court of law."

  The facts: Independent researchers reject the "defensive medicine" theory. The only study ever attaching a price tag to defensive medicine — extra medical tests given to avoid lawsuits—was one conducted by the Bush Administration's own Mark McClellan. No other independent researcher has been able to replicate his findings. The contention that doctors practice defensive medicine is crucial to the Bush Administration's claim of high tort costs because the cost of malpractice insurance is relatively minor. Using McClellan's article to project $25 billion in "defensive medicine" costs allows Bush to attach an artificially inflated legal cost to the federal budget. But both the Congressional Budget Office and the Government Accountability Office dismiss the theory and thus refuse to make cost estimates.

- He says "Too many frivolous lawsuits …are being filed."

  The facts: Businesses and their attorneys are sanctioned much more often for frivolous suits. In a survey of the 100 most recent cases of federal judges imposing sanctions for the filing of frivolous claims or defenses, businesses and their attorneys were 69% more likely than individual tort plaintiffs and their attorneys to be sanctioned. Only individuals representing themselves without counsel were sanctioned more often than businesses.

  The facts: So-called "frivolous" suits have little impact on health care costs. Doctors define as "frivolous" any lawsuit in which no payment is made to the victim. But they fail to mention that nearly all of those claims are withdrawn voluntarily by patients and their lawyers, after thoroughly investigating the cause of the injury, usually at great expense to the lawyer. Cases that are taken to trial and rejected by a jury constitute only 5% of all claims. Lawyers have no incentive to file frivolous cases because they are not paid unless they win a case. Only about 12% of malpractice premium dollars are spent defending claims that are

closed without payment. If attorneys never filed an unsuccessful suit, the savings would constitute less than one-tenth of one percent of national health expenditures.

- Our President says "Lawsuits threaten to close the doors of too many small businesses and factories."

  The facts: U.S. businesses file four times as many lawsuits as private citizens. A survey of case filings in two states (Arkansas and Mississippi) and two local jurisdictions (Cook County, Illinois, and Philadelphia, Pennsylvania) in 2001 found that businesses were 3.3 to 5.8 times more likely to file lawsuits than were individuals. These locations appear to be the only jurisdictions that require attorneys to provide sufficient detail to distinguish business-initiated suits from trial attorney-initiated suits.

  A lawsuit can't wipe out a business, unless the business depends upon unsafe or illegal activities to make a profit. Sometimes a business that is capable of earning a profit through lawful means will try to earn extra income by cutting corners. If court judgments awarded to those harmed by the unsafe or illegal practices exceed the value of the business (i.e., its plants, equipment, customer relationships, etc.), the company could be liquidated; but often the plants and equipment are not scrapped, nor are innocent employees fired. For instance, Johns-Manville continues to manufacture non-asbestos insulation; its bankruptcy simply led to much of its stock being held in trust for people injured by asbestos.

- President Bush claims "Industry estimates show that litigation is a $200 billion a year burden on the U.S. economy."

  The facts: The $200 billion "lawsuit burden" figure (so-called "tort tax") has been repudiated by the Congressional Budget Office. This highly misleading figure was calculated by Tillinghast-Towers Perrin, a private actuarial firm. It represents the total cost of liability insurance purchased in the United States, including insurance company administrative costs. But these costs would not disappear if there were no tort system. The costs of liability insurance represent the costs of injuries that would take place with or without a tort system, such as the estimated $230 billion annual cost of automobile crashes. Even if the tort system were abolished, the overall cost of automobile injuries would remain the same, as would the amount Americans pay for automobile insurance, since everyone would have to insure themselves.

  - The non-partisan CBO explained that most of the $200 billion in payments "merely shift money from injurers to victims and thus are not true costs to society as a whole." In economic terms, payments that do not involve any use of resources to produce goods or services are called 'transfer payments.' Those that do involve using resources for production are known as 'real resource costs' (also 'social costs' or simply 'costs'). Specifically, the portion of a settlement or judgment that goes to the plaintiffs is a transfer payment."

  - Forty-six percent of the tort cost estimate is for payments made to injured victims for lost wages, medical care, and pain and suffering, according to Tillinghast. These costs are the result of injuries caused by defendants and would be borne by society anyway, through private health insurance, government programs, charities or absorbed by the victims and their families.

  - Twenty-one percent of the tort cost estimate is for insurance industry overhead, according to Tillinghast. Much of this insurance overhead would exist even in the absence of lawsuits because administering first party insurance would also require underwriting, claims adjusting, marketing, profit and other costs.

- In his typical stump speech, the President frequently says: "See, everybody is getting sued."

  The facts: Tort lawsuit filings have decreased since 1992, according to the Court Statistics Project. The period 1992 through 2001 saw an overall 9% decline in the number of tort filings, according to a joint tracking project of the Conference of State Court Administrators, the Bureau of Justice Statistics and National Center for State Courts. The filing data from 30 states in their sample, including three of the four most populous states, California, Texas and Florida, represents a total of 77% of the U.S. population. When adjusted for population growth, tort filings declined by 15%, from 269 to 228 per 100,000. Population adjusted filings dropped 25% or more in 11 of the 30 states. The largest decreases occurred in Texas and Massachusetts, where tort filings fell by 41%.

- President Bush claims "It's like a giant lottery."

  The facts: The median jury award for personal injury cases fell 30% in 2002. The median jury verdict in personal injury cases peaked in 2000 at $45,000 declined to $42,945 in 2001, and dropped to $30,000 in 2002. Overall this represents a decline of 33% in two years.

- The President says "There needs to be a cap on non-economic damages at $250,000."

  The facts: A $250,000 cap on non-economic damages only amounts to 1% in insurance savings. One of the nation's top writers of medical malpractice insurance recently was

asked to justify how its rates reflected the potential impact of recent tort law changes in Texas. Among other things, the new law caps non-economic damages at $250,000. The company responded, "Non-economic damages are a small percentage of total losses paid. Capping non-economic damages will show loss savings of 1.0 %." The bottom line: Bush mis-underestimates the importance of the legal system. Tort law not only compensates and deters; it prevents injury by removing dangerous products and practices from the market; spurs safety and health innovations; forces public disclosure of information about dangers consumers face in the marketplace; serves as an early warning of the need for government action to prevent harm; and protects responsible companies by punishing the wrongdoers.

It is extremely disturbing that a person in high office would intentionally mislead folks on any issue. That is especially true when important consumer and safety issues that affect all citizens are involved. I really don't believe President Bush really understands how people around the country feel about the court system. Neither do I believe that he has been given the full truth on this issue by his advisors. In any event, if you want to read more of what President Bush has said on the subject of tort reform go to http://www.whitehouse.gov/news/releases.

Source: Public Citizen

There Is No Litigation Explosion

Since the early 1980s, the number of civil trials in federal courts nationwide has dropped drastically. A new study shows these suits have had a 60% decline. In addition, there's also been a sharp redirection in criminal trials, bankruptcy trials and civil trials in state courts. There is a very good article on the subject in the November edition of the Journal of Empirical Legal Studies. The number of civil trials in federal courts dropped almost 60% between 1982 and 2002. Over the same time period civil trials in state courts dropped 28%. These reductions are due in part to the complexity and costs of litigation. The length of time spent in the courtroom per case increased greatly and that is due in part to the complex issues being litigated. The decline in trials has also come about because of mass settlements in tort cases. Arbitration and mediation (alternative dispute resolution) have also played a role in the reduction.

The study concludes that the time and money it takes to get to trial simply dissuades many folks from taking their cases to trial. Interestingly, the study reports that there were 1.1 million lawyers in the nation in 2002, up from 617,320 in 1982. Arbitration is taking many cases out of the courtroom and that's not good for consumers. The end result, however, is that there are fewer lawsuits that ever get to trial.

Malpractice Reform Outweighed By Concern Over Health Care Costs

A recent survey confirms what I had thought all along, and that is most Americans see health care and insurance costs as a more pressing problem than malpractice lawsuits. However, this won't slow down the Bush Administration. The tort reform movement is fueled by the big bucks of Corporate America and as a result there is a total disregard for how ordinary folks feel about the issue. The Kaiser Family Foundation, a nonprofit organization that studies health care issues, and the Harvard School of Public Health said reducing malpractice jury awards ranked 11th on a list of 12 items folks around the country believed should be health care priorities for President Bush and the Congress. Lowering the cost of health care and insurance was important to the people polled, but they didn't believe lawsuits were the culprit. Making Medicare more financially sound and increasing the number of Americans with insurance were important to people, according to the poll.

Chief Justice Rehnquist Defends Job Security For Judges

Many U.S. citizens don't believe judges should be appointed. Even fewer want federal judges appointed for life. Chief Justice William H. Rehnquist, in his annual report, defends lifetime appointments for judges. He believes this approach is necessary to insulate judges from pressures as they deal with politically sensitive issues. The Chief Justice used his year-end report to address concerns about so-called activist judges and Congress' move to strip judges of some of their authority. Chief Justice Rehnquist, who has now marked his 33rd anniversary on the High Court, said that there has been "mounting criticism" recently of judges accused of interpreting the law to fit their politics. President Bush and Republican congressional leaders have been particularly outspoken about activist judges, especially those involved in gay marriage and abortion cases. Democrats also have accused conservative judges of stretching the law. Chief Justice Rehnquist said that judges should not be punished by Congress because of their decisions and that their lifetime tenure protects their independence. The Chief Justice said that for over 200 years, the Court has "served our democracy well and ensured a commitment to the rule of law." I have to agree with his assessment when you look at the big picture.

Chief Justice Rehnquist, who says that views on activism are subjective, stated: "Federal judges were severely criticized 50 years ago for their unpopular, some might say activist, decisions in the desegregation cases, but those actions are now an admired chapter in

our national history." Concerns were raised that an already strained relationship between Congress and the federal courts has been exacerbated by criticism and suggestions of impeachment for judges "who issue decisions regarded by some as out of the mainstream." I have tremendous respect for Chief Justice Rehnquist and have to agree that our court system has generally functioned well. I believe people should have the right to vote for judges, but with strong campaign finance laws in place and in non-partisan elections. For that reason, I could never support the appointment of judges on the state level. The appointment of federal judges is another matter, however, and I do support that process.

Juror Problems In A Neighboring State

The State of Florida has had difficulty impaneling enough jurors to address complex criminal and civil cases. This problem has led Florida's Supreme Court to call on the public in an effort to improve the state's jury system. Besides examining juror shortages and trial scheduling problems, the Court wants to hear more from the public about the experiences of jurors. A sincere effort is being made to improve the conditions of jury service in Florida, and that's commendable. A public hearing, seeking input from lawyers and others about their experiences with the state's jury system, was held last month. Nationally, 40% of those summoned for jury duty show up at the courthouse. Only 30% answer the call in Florida, according to information from the state court administrator's office, and that is disturbing.

Last year, the Florida Legislature trimmed court funding for juror and witness expenses by $600,000, or about 13% from previous years. That resulted in fewer people being called for jury service. To fix the juror shortage problem, state officials are considering a number of options, including adjusting upward the number of jurors who are summoned for service every week. I have always felt that the judicial system should be sensitive to the needs of persons who are called as jurors. We should do everything—within reason—to make jury service as pleasant as possible. Without jurors, the system won't work. That is something we can't let happen in any state. Jury service is an important function of citizenship and everybody should do their duty when called.

A Look At Texas Style Tort Reform

A look at how Texas-style tort reform will affect Vioxx lawsuits in that state is greatly disturbing. The year-old tort reform law in Texas will limit the number and scope of Vioxx cases for a number of reasons. Under the Texas tort reform law, drug makers are protected from liability as long as they can prove that any warnings of harmful side effects were approved by the Food & Drug Administration. When we consider how truly bad the FDA has been, it is most evident that Texas tort reform is very bad for Merck's victims. The FDA has been pretty much an extension of the drug industry instead of being a tough and effective regulator.

To win against Merck in Texas, I believe that Vioxx plaintiffs will have to prove that the company withheld information or misrepresented it to the government. That will make this litigation very expensive and most difficult in the Lone Star State. Tort reform will make it harder and more expensive for the victims. The vast majority of negligence claims filed in Texas against Merck, either in state or federal court, will likely allege violation of Texas law. As a result, that state's tort reform laws will apply.

IV. THE NATIONAL SCENE

NHTSA Should Tell The Public When It Fines Automakers

Unlike almost every other enforcement agency in the federal government, the National Highway Traffic Safety Agency doesn't inform the public when it fines or otherwise sanctions a large corporation. NHTSA says that the agency's policy is to announce the fines at the end of the year. On December 29, 2004, NHTSA put out a news release listing $10 million in fines it assessed against automakers in 2004. Recently, Clarence Ditlow, executive director of the Center for Auto Safety, alerted reporters to the details of a $1 million fine against General Motors for failing to disclose a problem that caused windshield wipers to stop working in tens of thousands of its sport-utility vehicles. Interestingly, NHTSA had collected the fine in July 2004. NHTSA explains its failure to report major enforcement actions, by saying "that's not the way we have ever done it."

Joan Claybrook, the former NHTSA administrator under Jimmy Carter, who is now president of Public Citizen, said that when she headed the agency "we always put out a press release when we sanctioned a company. The current NHTSA doesn't want to communicate the information to the public. This is the most secretive agency that I have seen in recent years." Ditlow says NHTSA's constituency is the auto industry, not the American consumer, and that is pretty much the case in my opinion. I firmly believe that NHTSA should promptly release to the public information relating to actions taken against the auto industry. The public deserves to have this information promptly and there is no excuse for NHTSA failing to make it available in a timely fashion.

The AARP Protects People

It's become quite evident that the fight over Social Security will be on the front burner in Congress. The AARP is opposing the Bush Administration's attempt to weaken Social Security, and in my opinion the group is on the right side of this issue. There are places in a person's retirement planning for risk, but Social Security can't be one of them. The President's plan to let individuals put some of their payroll tax into individually-owned retirement accounts makes no sense. I believe that anybody who has been in the stock market over the past 10 years would tell the President to drop this ill-advised scheme. Social Security is not the place for "rolling the dice," and most Americans feel strongly on that issue. Neither is it a place where campaign contributions can be repaid. We must do all within our power to save Social Security, and I commend the AARP for its stand.

Iraq Weapons Search Is Finally Over

The search for weapons of mass destruction in Iraq was quietly concluded last month without any evidence that the banned weapons that President Bush cited as justification for going to war ever existed. It was quite significant that the White House made the announcement on January 12th with absolutely no fanfare. The Iraq Survey Group, made up of some 1,200 military and intelligence specialists and support staff, spent nearly two years searching military installations, factories and laboratories whose equipment and products might be converted quickly to making weapons. There will no longer be an active search for these weapons.

Chief U.S. weapons hunter Charles Duelfer, who was to deliver his final report on the search this month, had made preliminary findings last September. Duelfer reported then that Saddam Hussein not only had no weapons of mass destruction and had not made any since 1991, but that he had no capability of making any such weapons. President Bush still defends his decision to invade Iraq, but blames his decision on faulty intelligence. He has appointed a panel to investigate why the intelligence about Iraq's weapons was so wrong. While I fully support our troops regardless of how I feel about this war, I sincerely believe the war in Iraq will prove to be one of the worst military decisions ever made by a sitting President. Nevertheless, we are in Iraq and I fear we will be there for years to come. Hopefully and prayerfully, I will be wrong and our troops will be home soon.

Congress Gets Huge War Budget Request

The White House has requested $80 billion this year for war and related costs in Iraq and Afghanistan. This is the third and largest Iraq-related budget request from the White House so far. It will push the war's costs over $200 billion—far above initial White House estimates of $50 billion to $60 billion. According to the White House's Office of Management and Budget, the Iraq war has already cost about $130 billion. It doesn't' take a financial genius to figure out that the high war costs complicate things fiscally for the President and for Congress. Anybody who believes the President will be able to keep his pledge to cut the record $413 billion federal budget deficit in half by the end of his term is a good prospect for buying "ocean front lots" in Arizona. We are heading toward a fiscal disaster unless the current trends are reversed.

To put all of this in perspective, consider that the almost $100 billion in new money would be equal to almost one-quarter of the Pentagon's $417.5 billion 2005 budget. The proposal comes as a "supplemental" spending request, a move that will keep it out of the regular budget Bush had to submit to Congress. Members of Congress will have to fund the war in Iraq—they have little choice. We can't afford to indicate to our enemies—and that list is growing daily—that we don't back our military. But, it appears there is growing apprehension around the country about the military operations in Iraq. Many in Congress are now recognizing that the war has become most unpopular back home. I hope and pray we can get out of Iraq soon and in a manner that won't be an embarrassment to this country. I wish there was an easy solution to the Iraq problems, but there doesn't appear to be one.

V.
THE CORPORATE WORLD

The Aftermath Of Enron

It doesn't take a real smart person to realize that white-collar crime has taken a real toll on the U.S. economy. The FBI projected in a recent report that major white-collar crime will impact the U.S. economy over the next five years. As we enter the New Year, the FBI is investigating over 189 major corporate frauds. Some 18 of those have losses over $1 billion each. The erosion of public confidence in the management of public companies has had a negative impact on the stock markets and in the raising of capital. This will continue and in turn will have a negative impact that will be felt throughout the U.S. economy. It was reported that in November of 2004, top corporate insiders sold $6.6 billion worth of stock, the highest amount since August 2000. Apparently those in government have learned very little from the massive debacle known as Enron or at least have ignored what they did learn. Instead of attending to the victims and hunting down the culprits, our governmental leaders are working to protect the corporate

wrongdoers. The President and the Republican leadership in Congress also ignored anything resembling real reforms, treating them all as if they were radioactive. Instead they have set out on the tort reform road.

The federal entitles that should be leading the charge are largely underfunded. For example, despite modest increases in the SEC's overall budget, the government is still being "outgunned." With 913 employees the SEC's enforcement division remains smaller than the largest law firms that work for corporations. The SEC has a tremendous backlog of outstanding cases. Because of such a backlog, insiders say that there is no real interest in opening up new investigations. So, instead of justice, victims are being offered a corporate policy assault known as Tort Reform. White-collar crime experts say securities law "reforms" passed in the mid-1990s by the Republican-led Congress let the aiders and abetters of fraud—the accountants, bankers, lawyers, and consultants—off the hook by creating a major impediment to these lawsuits. The key statute—the Private Securities Litigation Reform Act of 1995—certainly hasn't been the answer.

While Enron was a major "scandal," it was really the logical outcome of a corporate system whose goals, including total deregulation, are a direct assault on democracy. It's no accident that the recent epidemic of accounting fraud and other abuses primarily involved companies in three sectors—banking, energy and telecommunications - because these are sectors that had been aggressively deregulated throughout the 1990s, through the repeal of Glass-Steagall, the gutting of the Public Utility's Holding Company Act (PUHCA) and the Telecommunications Act of 1996. Until we address the inherent conflicts of interest created by deregulation, the lack of checks and balances caused by tort reform, and the incentives created by outrageous executive compensation packages, we will likely see all kinds of white collar and corporate crime in the coming years. Unfortunately, the real losers will be the workingmen and women who work hard, pay their taxes, support our military and try hard to support their families.

SEC Probes J.P. Morgan Role In Canary's Improper Trades

J.P. Morgan Chase & Co. is facing scrutiny for financing hedge fund Canary Capital Partners LLC's improper trading in mutual-fund shares. This is raising questions about whether the bank should have pursued warning signs relating to what one of its largest clients was doing with their money. So far, the Securities and Exchange Commission has taken testimony from a number of employees at J.P. Morgan. The bank had extended as much as $150 million in credit to Canary, the hedge fund at the center of the year-old fund-trading scandal. The question now is should J.P. Morgan have been more diligent? The Wall Street Journal reported on a key memo from J.P. Morgan lawyers that may prove not to be real "good news" for the company's top executives. While the memo says the company didn't know about any "illegal activity," it did mention the possibility that some questionable activity was going on in violation of fund rules. The issue appears to be what did the bank know and what its duty was in connection with that acquired knowledge. If it can be shown that J.P. Morgan should have asked more questions or perhaps that it aided Canary Capitol carry out wrongful acts, then the bank is in deep trouble.

Source: *The Wall Street Journal*

Fannie Mae Fall-Out Continues

The problems continue to grow for mortgage giant Fannie Mae. The Securities and Exchange Commission has told Fannie Mae that it must make changes to its financial accounting that could wipe our $9 billion in profits. In late December, Fannie Mae's former accounting firm KPMG disclosed to the SEC that the auditing firm had notified the company of "material weaknesses" in its financial reporting internal controls and "deficiencies" in some accounting processes. Yet, Fannie Mae neglected to tell investors about these problems, which could be a violation of Sarbanes-Oxley. KPMG's notification happened just after the release of a report by the Office of Federal Housing Enterprise Oversight (OFHEO), which said that Fannie Mae engaged in "pervasive and willful" accounting violations.

Those violations included the delayed booking of $200 million in expenses in 1998, which made it possible for a number of executives, including ousted CEO Franklin Raines, to reap performance-related bonuses. Raines, who has resigned, has been roundly criticized for making off with millions of dollars in deferred compensation and pensions. Raines, who earned $20 million (including $3 million in stock options) in 2003 and $17.7 million in 2002, will continue to receive a $600,000 salary until next June. He will also receive $8.7 million in deferred compensation and a monthly pension of $114,393 for life. But that's not all—he will get 1.6 million shares of stock, options for another 386,000 shares, plus a $5 million life insurance benefit until age 60. I have to wonder what Raines would have gotten if he had done everything right!

Former Executive At Cable TV's Charter Enters Guilty Plea

James Smith III, a former Charter Communications Inc. executive, has pleaded guilty to federal fraud charges. He becomes the third former executive of the cable-television company to admit to a scheme to defraud investors

by inflating subscriber numbers. Smith was among four ex-executives indicted in July 2003. A trial had been set for the 7th of this month. Smith pleaded guilty to conspiracy to commit wire fraud. On December 16th, former Chief Operating Officer David Barford pleaded guilty to the same charge. Another former executive, David McCall, pleaded guilty to the charge in July 2003. Smith and McCall were Charter senior vice-presidents. At press time ex-Chief Financial Officer Kent Kalkwarf was scheduled to be tried this month. Kalkwarf is charged with 14 counts of mail fraud, wire fraud and conspiracy to commit wire fraud—the same charges the others faced before their plea agreements. Charter is controlled by Microsoft Corp. co-founder Paul Allen and has 6.3 million subscribers in 37 states.

Cendant Case Ends In Split Verdict

A former top executive at Cendant Corp. was convicted of fraud and other charges. Jurors couldn't reach a decision on charges against another executive in the case, which was one of the largest accounting scandals of the 1990s. E. Kirk Shelton, the company's former vice chairman, was convicted of 12 counts of conspiracy, mail fraud, wire fraud, and securities fraud. A mistrial was declared for former Chairman Walter Forbes after jurors said they couldn't reach a verdict on 16 counts. Shelton and Forbes were accused of inflating revenue by $500 million at one of Cendant's predecessor companies, CUC International Inc., to drive up the stock price. CUC, which operated discount shopping clubs, among other things, merged with HFS Inc. to form Cendant. The fraud was discovered in 1998, soon after the deal closed. Prosecutors are considering whether to seek a retrial on the 16 counts against Forbes.

Cendant is a travel and real-estate services company based in New York that owns brands including Ramada, Howard Johnson, Avis, Coldwell Banker, and Century 21. Forbes and Shelton were charged with, among other things, lying to the Securities and Exchange Commission. Forbes also was charged with insider trading for selling $11 million of Cendant stock a few weeks before the accounting scandal was made public. Forbes was chief executive of CUC during the time of the fraud. Shelton was CUC's chief operating officer. At the time, the Cendant fraud was one of the biggest in corporate history. Seven years later, it has been overtaken by larger deceptions at companies such as Enron Corp. and WorldCom, now known as MCI Inc. In 2000, Cendant paid $2.85 billion to settle shareholder lawsuits, the largest such settlement in history for a shareholder suit.

Monsanto Agrees Settles Indonesian Case

Monsanto Co. has agreed to pay $1.5 million to defer criminal prosecution and settle related civil charges of bribing an Indonesian government official and improperly classifying the payment as a consultant's fee. The payment by Monsanto includes a $1 million penalty to defer federal prosecution for three years. The Justice Department will then drop the case if Monsanto has complied with the terms of the agreement. It also includes a $500,000 civil penalty to settle Securities and Exchange Commission charges that cover additional violations involving questionable or illegal payments totaling $700,000 from 1997 to 2002. The bribery charges stem from a $50,000 payment made in 2002 to an Indonesian environmental official as Monsanto was lobbying the Indonesian government to loosen policies requiring an environmental-impact study before Monsanto could sell its genetically modified seeds in the country.

Source: *The Corporate Crime Reporter*

HealthSouth Settles Medicare Fraud Charges

HealthSouth Corporation will pay the U.S. $325 million to settle Medicare fraud charges. It was alleged in a federal lawsuit that HealthSouth, the nation's largest provider of rehabilitative medicine services, defrauded Medicare and other federal healthcare programs. The settlement resolves some of the allegations and civil lawsuits filed by whistleblowers under the False Claims Act. Peter Keisler, the assistant Attorney General who heads up the Justice Department Civil Division, stated it well when he said:

> *Healthcare fraud impacts every American citizen. When a company defrauds our nation's healthcare programs, it steals from the American taxpayers. HealthSouth's fraud on Medicare was driven both by longstanding business practices in its outpatient physical therapy business and improprieties in its inpatient rehabilitation business.*

Most Americans don't fully understand how widespread the net of corporate fraud has spread. Many corporate bosses apparently think it's fine and dandy to cheat when the victim is an agency of the federal government. It's time for folks to demand that the Justice Department get tougher and put these cheaters in jail.

Exxon Mobil Earnings Are At A Record High

Exxon Mobil Corp., the world's largest publicy-traded oil company, earned a record $8.42 billion in the fourth quarter of last year and $25.33 billion for all of 2004. Higher prices for oil and natural gas erased a slight decline in production. Exxon Mobil, the world's largest publicly traded oil company, just missed $300 billion in sales for the year. Revenue in 2004 rose to a record $298.03 billion from $247.74

billion. Revenue for the fourth quarter was $83.36 billion, compared to $65.95 billion a year ago. Exxon made more in both major ends of its business, the exploration and production of oil and gas, and the refining and selling of finished products. The higher prices for oil and gas account for the increase in profits despite a 1% decline in production of oil and a 2% drop in gas production. At a time when consumers are hurting and the economy is still sagging, there are some corporations that are doing very well and Exxon Mobil Corp. is certainly one of them.

VI. CAMPAIGN FINANCE REFORM

Lobbyists Join Corporate America In Funding Of The Bush Inauguration

Lobbyists contributed a large part of the $24.9 million collected for President Bush's inauguration. As we now know the inauguration was the most expensive in the nation's history. It should be noted that those lobbyists have hundreds of clients and work on virtually every major regulatory and legislative issue in Washington. An analysis of the latest figures reveals that corporations and their executives have contributed over $24 million, or 96%, of the $24.9 million collected to date. The average gift from the 194 contributors is more than $128,000. Bush's inaugural committee was hoping to raise $50 million to pay for the spectacular week's activities. While this inauguration was the most expensive ever, all of the previous ones in recent times have followed the same pattern.

I would like to see spending on functions such as the inauguration placed under a strong campaign finance reform law. Congress limits campaign contributions to control influence peddling, but inaugural contributions can be just as influential, if not more so. This type spending gives lobbyists access to high government officials, as if they needed more access, and I believe that should be controlled. Congress needs to establish limits that make inaugural contributions conform with existing campaign finance law, which prohibits direct corporate campaign contributions. Under law, corporations are barred from making direct contributions to presidential candidates and campaigns. However, they are under no similar restrictions in their attempts to curry favor from the Administration by financing the President's inauguration celebration, which has become one of the last political outlets for corporate "soft money."

None of the provisions that prohibit corporate contributions or limit contributions from wealthy individuals to $2,000 in federal campaigns apply to fundraising for presidential inauguration ceremonies. Federal election law exempts inaugural fundraising from all campaign finance regulations other than a requirement to disclose contributions of $200 or more and a ban on contributions by foreign nationals. Some question the large donations this time by the financial industry (the leader in inaugural contributions), considering how much they have to gain from the Administration's proposal to privatize Social Security. You can view Public Citizen's full report on the latest inaugural contributions by going to the Internet at http://www.WhiteHouseForSale.org.

Source: Public Citizen

VII. CONGRESSIONAL UPDATE

Top Lobbying Expenditures

During the first half of 2004 the U.S. Chamber of Commerce spent $30 million lobbying Congress and the Bush Administration—more than any other lobbying group—according to Political Money Line. Of that figure, $10 million came through the Chamber's Institute for Legal Reform, a leader in the fight for "tort reform." The two groups spent $34.6 million for all of 2003. Other top lobbying spenders included the American Medical Association ($9.2 million), General Electric (8.4 million), The Pharmaceutical Manufacturers of America ($8 million), Freddie Mac ($6.7 million), National Association of Realtors ($6.6 million), Altria ($6.5 million), the Asbestos Study Group ($6.2 million) and the American Hospital Assn ($6 million). All told, lobbying expenditures for the first half of 2004 reached $1.1 billion, a new record.

Political Money Line also reported that the Chamber of Commerce—for the first time—contributed to presidential politics. The Chamber contributed $4.2 million to a 527 Group called the November Fund, which in turn passed the money on to the Bush campaign. Political Money Line has also compiled data on the ten biggest corporate PACs, all of which contributed money to the Republican Party. The top ten included:

- United Parcel Service Inc. Political Action Committee—$1,505, 000;
- Wal-Mart Stores Inc. PAC for Responsible Government—$1,273,500;
- SBC Communications Inc. Employee Federal Political Action Committee (SBC EMPAC)—$1,134,933;
- Federal Express Political Action Committee—$1,029,000;
- Union Pacific Corp. Fund for Effective Government—$787,047;
- Employees of Northrop Grumman Corporation PAC—$779,450;
- AFLAC Incorporated Political Action Committee—$696,000;
- Lockheed Martin Employees' Political Action Committee—$681,646;
- Pfizer Inc. PAC—$668,858;

- General Electric Company Political Action Committee—$648,876;

For more information, you can visit Political Money Line at http://www.fecinfo.com/.

VIII. PRODUCT LIABILITY UPDATE

NHTSA Is Wrong To Subvert Public Records Law

In response to the Ford-Firestone crashes that involved defective tires, Congress passed the TREAD Act some four years ago. That law required select safety data to be gathered by the government and made available to the public. Government investigators would be able to spot potential safety defects quickly with this early warning data. It was thought that the motoring public would be alerted to potential problems associated with vehicles they own. At least, that's what was supposed to happen. At least that's what was supposed to happen. However, in putting the law into practice the National Highway Traffic Safety Administration (NHTSA) has elected to keep much of this critical data hidden from the public. The information withheld includes warranty claims, production numbers, field reports, and even consumer complaints.

Last month, Public Citizen told the U.S. District Court for the District of Columbia that NHTSA's secrecy is a stunning perversion of the Freedom of Information Act. While that Act is supposed to open records and improve government accountability, NHTSA is using it to seal records from view. In sealing the records, the agency is bowing to the wishes of the auto industry. The automakers claim that there will be potential for competitive harm resulting if the data are released. History has shown us that auto manufacturers hide safety defects to avoid the costs of recalling vehicles. For example, NHTSA just fined GM $1 million for doing that very thing.

NHTSA has a long history of being very slow in responding to safety defects. Public outrage over NHTSA's incompetence in responding to available information on the Ford/Firestone debacle is what prompted Congress passed the TREAD Act. NHTSA doesn't have the authority to hide this safety data. The public records law requires NHTSA to prove that each piece of submitted information should be withheld, rather than presuming it is secret as a category. The information in question belongs to the public because most of it was gathered from the public in the first place. Public health and welfare is at stake and must be protected. For example, members of the public have a right to know if the vehicle they are driving has potential safety flaws that could injure or kill them. That is why Public Citizen sued NHTSA last March and why the consumer group is fighting hard to make these critical data public. We need more groups that are willing to take on the auto industry and the federal government on safety issues. Public Citizen is to be commended for their persistence and courage in fighting to protect U.S. consumers. If the government would simply do their job, we wouldn't need groups such as Public Citizen.

Source: Public Citizen

Warnings Sought For Vehicles Backing Up

According to the National Highway Traffic Safety Administration (NHTSA), about 120 people are killed and more than 6,000 injured each year by vehicles that back over them. While NHTSA keeps track of these incidents, most folks are unaware of the hazard. It appears that most victims are very young or very old. Unfortunately, these accidents haven't received the attention needed and the public is largely unaware of the problem. Safety advocates want NHTSA to study the issue more closely and consider a requirement that automakers include devices to warn drivers when something comes into their path as they back up. About 20% of 2005 model year vehicles offer cameras or sensors mounted on the back bumpers. The sensors beep warnings, and the cameras transmit images to screens on the dashboard or rearview mirror. Backup aids aren't always marketed as safety devices, so they can be difficult for consumers to spot in brochures.

Most automakers offer sensors on at least some models, including Audi, BMW, Buick, Cadillac, Chevrolet, Ford, Mercedes-Benz, Nissan, Porsche, Volkswagen, and Volvo. Several companies sell cameras, which can be installed for around $1,000, and sensors, around $400 or less. You won't be surprised to learn that NHTSA is a long way from mandating cameras or sensors. An agency spokesman says the agency believes the technology remains too expensive and may not always be reliable. Safety advocates, including Public Citizen and Kids and Cars (the child advocacy group), want NHTSA to get more involved and study the issue carefully. Unfortunately, a transportation bill that would have required NHTSA to study the issue died in Congress. Safety advocates won't give up and will try again.

CPSC Will Propose Fire Safety Standard For Mattresses And Initiate Rulemaking For Bedclothes

The U.S. Consumer Product Safety Commission (CPSC) voted in December of last year to issue a proposed safety standard to reduce deaths and injuries from fires involving mattresses. The proposed standard for mattresses addresses fires ignited by an open flame. CPSC also voted to issue an advance notice of proposed rulemaking to develop a separate safety stan-

dard to address bedclothes (such as blankets, comforters, and pillows) flammability. CPSC Chairman Hal Stratton believes this is a significant step toward reducing deaths and injuries from mattress fires. This appears to be a top priority at CPSC. A final standard should be in place soon. The proposed standard should lead to mattresses that are a dramatic improvement, in terms of fire resistance and lives saved, over most mattresses currently on the market.

The proposed mattress standard will be published in the Federal Register, requesting public comment for a period of 75 days. An opportunity for oral testimony will also be scheduled. From 1995 through 1999, mattresses and bedding were reportedly the first items to ignite in an estimated 19,400 residential fires each year. These fires resulted in an estimated 440 deaths, 2,230 injuries and $273.9 million in property losses annually. CPSC staff says that most of these deaths and injuries would be addressed by the proposed standard.

Fires involving mattresses of traditional constructions can reach flashover (when the entire contents of the room ignite) in less than 5 minutes. The proposed mattress standard would limit the size of the fire and prevent or delay the time to flashover. This would allow people more time to discover and escape the fire, reducing deaths and injuries. The CPSC believes that materials are commercially available that can be used to produce comfortable, practical, and reasonably-priced mattresses with significantly improved fire performance. The CPSC rulemaking proceeding to set flammability standards for bedclothes will begin with a notice in the Federal Register requesting public comments on the fire risks and possible approaches to reducing them. Bedclothes are the first item to ignite in about 80% of mattress and bedding fires and can contribute substantially to the risks associated with mattress/ bedding fires.

Source: CPSC

Mechanic Who Lost Arm Settles Case

A New York mechanic who lost his right arm to a defective engine-cooling fan back in 1989, has accepted a $4.6 million settlement from General Motors. The mechanic, who is now unable to wear a prosthesis because of severe nerve damage he suffered, was working on the carburetor of a Cadillac when he was injured. The engine fan broke and slashed into his arm near the shoulder. There have been a number of cases caused by defective engine-flex fans. Damage to the man's arm in this case was so severe that the arm had to be amputated. The settlement was approved before a scheduled trial by a State Supreme Court Justice. This mechanic is one of more than 50 people known to have suffered serious injuries from the since-corrected design flaw in the engine-cooling fan assembly. The case had been delayed by years by lawyers representing General Motors. Finally, the carmaker had to face the music when the case was set for trial and it then settled the case.

Attorneys General Run Safety Ads

A coalition of state Attorneys General has launched an ad campaign aimed at SUV safety. The ads are funded with monies received from Ford Motor Company to settle a lawsuit that said the Ford ads were deceptive. Money for the $27 million ad campaign is part of a $51.5 million settlement Attorneys General from all 50 states reached with Ford after suing the automaker in December 2002 for ads claiming its SUVs were safe. Under the settlement agreement, money is to be used for driver education. If you are interested in the ads and the content, go to their campaign's website, www.esuvee.com.

IX. MASS TORTS UPDATE

Fixing The FDA Is Long Overdue

The U.S. Food and Drug Administration is badly broken and must be fixed. Simply put, the agency hasn't done its job and recent events have driven that message home. A prime example of how bad the FDA has been involves Vioxx. We have learned that Garret A. FitzGerald, a pharmacologist at the University of Pennsylvania, raised the first red flags about pharmaceuticals such as Vioxx, Celebrex and Bextra several years ago. He saw chemical reasons that the drugs, which all inhibit inflammation by blocking the same enzyme, might cause heart attacks. This was six long years before Vioxx was approved by the FDA. Clearly, the warning signs have been available to the FDA, as well as to Merck, for a long time. Celebrex had just been approved at the time FitzGerald made his findings. Had the FDA done its job, neither of these drugs would have made it to the market. Big holes in the approval process still exist that can allow similar safety problems to slip through in the future. Clearly the system is broken when it comes to FDA regulation of the drug industry, and it must be fixed.

Under current law, before a drug is approved, the FDA can only try to convince a company to do the right clinical trials if it wants to get approval to market the drug. Unfortunately, the agency doesn't have the authority to force companies to do clinical trials. Once a drug hits the market, the FDA's power dwindles considerably. The FDA can add warnings, but these don't always have a big effect on a drug's use and can get bogged down in negotiation. For example, after the study in 2001 showed risks of heart risk for Vioxx, it took a year for the drug's label to be changed. Even then, only a

"precaution," not a needed warning, was added. The delay has never been fully explained, but many believe that during that time the FDA was negotiating with Merck. The FDA should be given authority to require drug companies to fully test their medicines when concerns come up. Congress should fix the FDA at the earliest opportunity. Congress can't delay a fix for the FDA. Failure to act will allow hazards to exist from the agency's poor past performance. Please take time to contact your Senator and House member and let them know we are watching how they deal with this problem. Challenge them to review what has happened to lower income citizens.

FDA Should Stop All Advertising

Drug companies don't wait for a sufficient waiting period after approval of a new drug for the market before selling the product. Instead, they launch their products in the market with simultaneous multi-media, megabucks advertising campaigns. This corporate eagerness to make money has to bear a great deal of the blame for causing the serious health problems resulting from bad drugs being on the market today. It also runs up the cost of the good prescription drugs. For example, Merck & Co. spent $68.5 million to advertise Vioxx and Pfizer's ad-spend was $77.8 million on Celebrex. Bayer AG spent $42.9 million advertising Aleve, their over-the-counter painkiller formulation, which is known to the medical community as naproxen.

When Congress reconvenes, the medical community expects legislation to pass that will make the FDA better equipped, better funded and better placed to make independent clinical trials of drug safety. I hope they will also put a stop to drug company advertising. I don't believe a drug company should be allowed to advertise any prescription drug, and there should be strict restrictions on advertising over-the-counter drugs. Doctors should decide what medicines should be prescribed, and trained pharmacists must also be involved to make sure drugs prescribed don't conflict with other drugs being taken.

A Gift For Drug Makers

I am convinced that the American public is becoming aware of how weak, controlled and ineffective the Federal Drug Administration has been and continues to be. The New York Times had a very good editorial in its January 14th edition, which is right on point. Not only does it fault the FDA, the editorial points out how some in government protect the drug industry. I am including the editorial in its entirety for your consideration.

With all the problems and the bad publicity that drug companies have been facing recently, you might think that this would not be a good time for the Bush administration to toss yet another bonanza their way. But the administration is like an ardent lover in its zeal to shower the rich and powerful with every imaginable benefit. So tucked like a gleaming diamond in proposed legislation to curb malpractice lawsuits is a provision that would give an unconscionable degree of protection to firms responsible for drugs or medical devices that turn out to be harmful. The provision would go beyond caps on certain damages. It would actually prohibit punitive damages in cases in which the drug or medical device had received Food and Drug Administration approval. We know the FDA has failed time and again to ensure that unsafe drugs are kept off the market. To provide blanket legal protection against punitive damages in such cases is both unwarranted and dangerous.

We learned just last month that Celebrex, the phenomenally popular painkiller from Pfizer, more than tripled the risk of heart attacks, strokes and death among those taking high doses in a national trial. Those findings, as noted in an article in The Times, "raised new questions about how well federal drug regulators protect the public and worsened drug makers' already dismal image." Senator Chuck Grassley, an Iowa Republican who held hearings on recent FDA actions, said, "At this point, no one can say with confidence whether the worst drug safety problems are behind us or ahead of us." The Celebrex disclosure came on the heels of a decision by Merck to withdraw its arthritis drug Vioxx from the market after a study showed a link between long-term use of the drug and an increased risk of heart attacks and strokes.

Two weeks ago, an article in The British Medical Journal suggested that Eli Lilly & Company had long concealed evidence that the antidepressant Prozac could cause violent and suicidal behavior. The company denies the accusation, which the journal forwarded to the FDA. If the malpractice legislation so relentlessly touted by President Bush became law, Pfizer, Merck and Eli Lilly would be immunized against even the possibility of punitive damages arising from any harm to patients that resulted from use of these drugs - as long as the companies followed FDA rules. All three drugs were approved by the FDA. The whole idea behind punitive damages is to severely punish the most egregious offenders. Huge punitive damage awards are supposed to serve as a deterrent to extremely bad behavior. "It's an important system to have in place," said Joanne Doroshow, executive

director of the Center for Justice and Democracy, a nonprofit consumer advocacy group. "The FDA is certainly not doing its job. The legal system is a very important backup. It's really the last line of defense to ensure that the marketplace only has safe products."

If Mr. Bush has his way, that line of defense will be substantially weakened. With the possibility of punitive damages eliminated, drug companies will be even less vigilant than they are now about problems with products that pose a serious - even fatal - threat to patients. The Democratic leader in the Senate, Harry Reid of Nevada, was blunt on the matter. He said, "Congress should not be giving a free pass to big drug companies at a time when millions of Americans may have had their health put at risk by pharmaceutical giants."

The drug companies have an incredible racket going, as Marcia Angell, the former editor in chief of The New England Journal of Medicine, documents in her book "The Truth About the Drug Companies." "Now primarily a marketing machine to sell drugs of dubious benefit," she wrote, "this industry uses its wealth and power to co-opt every institution that might stand in its way, including the U.S. Congress, the Food and Drug Administration, academic medical centers, and the medical profession itself. (Most of its marketing efforts are focused on influencing doctors, since they must write the prescriptions.)" Among those co-opted is the President himself. Nothing's too good for the drug companies. If ordinary Americans got the same sweet treatment from this administration as the great pharmaceutical houses, we'd all be in a much better place.

Source: *The New York Times*

Public Citizen Petitions FDA To Take Celebrex And Bextra Off The Market

Public Citizen has petitioned the U.S. Food and Drug Administration to immediately remove Celebrex and Bextra, from the market because the drugs increase the risk of heart attacks in patients. The group also urged the FDA to cancel plans to approve two other drugs in the same class. As you know, Celebrex (known generically as celecoxib) and Bextra (valdecoxib) are among the class of drugs called COX-2 inhibitors. As has been reported, not only are their gastrointestinal benefits insignificant with these drugs, we now know they elevate the risk of heart attack. In 2004, more than 23.9 million prescriptions were filled in the United States for Celebrex and 12.9 million for Bextra.

Public Citizen stated in its petition: "If a drug offers no unique benefit compared to other drugs for treating the same problem (in this case arthritis and pain) but subjects patients to a unique risk, it must be removed from the market." Public Citizen's petition on Celebrex and Bextra, which can be viewed at www.worstpills.org, examines the results of 14 randomized control trials involving the five COX-2 inhibitors, as well as other published and unpublished scientific information. The other two COX-2 inhibitors are Prexige (lumiracoxib) and Arcoxia (etoricoxib), neither of which has been approved for sale by the FDA. The petition says that clinical studies suggest these drugs exhibit the same cardiovascular toxicity as Vioxx, Celebrex and Bextra and should not be approved. Dr. Sidney Wolfe, director of Public Citizen's Health Research Group says:

The Food and Drug Administration should immediately ban the sale of Celebrex and Bextra, which put millions of people, many of them elderly, at risk of heart attack. These drugs are not only more expensive and more dangerous than older, safer pain relievers, they are no better at protecting the gastrointestinal tract.

Public Citizen renewed its call for a ban on Celebrex and Bextra on January 31st. More evidence has linked painkiller Celebrex to increased risk of heart attacks and strokes, according to the consumer group. A study testing Celebrex for use in Alzheimer's patients found a "statistically significant difference" in cardiovascular adverse events between patients taking the drug and those taking a placebo, according to results posted on the Pharmaceutical Research and Manufacturers of America Website. Public Citizen says Celebrex raised the risk of serious cardiovascular events to 3.6 times that of a placebo. Celebrex and Bextra are the only cox-2 inhibitor painkillers left on the market. According to Dr. Sidney Wolfe, director of Public Citizen's Health Research Group, the study on the website had been revised to include the language about the statistical significance.

As we have reported, Public Citizen has a long history of identifying unsafe or ineffective drugs. Vioxx, for example, was the ninth prescription drug to be taken off the market in the past seven years that Public Citizen had previously warned consumers not to use. For four of the drugs - Vioxx, Baycol, Rezulin and Serzone - Public Citizen issued warnings more than two years before their removal from the market. Public Citizen warned patients not to use Celebrex three and half years before the government announced that a study showed increased heart risks. Public Citizen's Health Research Group recently launched a new website, www.worstpills.org, that provides consumers with comprehensive information about 538 drugs and warns them of 181 medications that should not be used because they are either unsafe or ineffective. If Public Citizen is able to spot "bad" drugs, I have to wonder why the FDA can't since the agency has access to the same information.

I suspect more and more people will be asking that very question in the coming weeks.

Source: Public Citizen

FDA Warns Pfizer About Celebrex And Bextra Ads

The Food and Drug Administration warned Pfizer Inc. that it left out risk information and made unsubstantiated effectiveness claims in advertisements for its painkillers Celebrex and Bextra. A message from the agency to Robert Clark, Pfizer Vice-President of U.S. Regulatory Affairs, was recently posted on the agency's website. The FDA has **asked** Pfizer to "immediately cease the dissemination" of the promotional materials which the FDA cited. The company was to respond to the agency on or before January 26th, describing its intent to comply with the request. The message from the FDA stated:

> *The seriousness of the violations concerning your promotion of Celebrex...would generally have warranted a Warning Letter; however, in light of your recent agreement to a voluntary suspension on all consumer promotion for Celebrex, we do not feel that is appropriate at this time. You should be aware, however, of the serious nature of the violations described above and act to avoid disseminating similarly misleading promotion for your products in the future.*

In late December, a study showed that high doses of Celebrex led to higher rates of heart attacks. Pfizer then pulled its advertising for the drug, which as we all now know falls into the same class as Merck & Co.'s Vioxx. At press time, we did not know how Merck responded to the FDA's request.

The FDA Finally Takes A Stand On Use Of Coxibs

The U.S. Food and Drug Administration has finally issued a formal public health advisory urging prescribing physicians to weigh the potential benefits of coxib therapy on a patient-by-patient basis against the potential of coxibs to cause cardiovascular events such as heart attack and stroke. Coxibs include the entire family of selective cyclooxegenase ("cox") 2 inhibitors, including Vioxx, Bextra, and Celebrex. Such selective cox 2 inhibitors have long been associated with an increased risk of heart attack and stroke, but the withdrawal of Vioxx, coupled with the release of the studies showing that Celebrex and Bextra also pose safety risks, have apparently spurred the FDA into action.

The agency in its statement also summarized its patient selection recommendations for chronic therapy using either coxibs or nonselective nonsteroidal anti-inflammatory drugs (NSAIDs) following recent revelations that not only coxibs, but also NSAIDs such as naproxen, may increase the risk of heart attack and stroke. The public health advisory is said to be an interim measure, pending further review of data that continues to be collected. The agency issued the following recommendations:

- Physicians prescribing Celebrex or Vioxx should consider the emerging cautionary data "when weighing the benefits against risks for individual patients." The most appropriate candidates for coxib therapy are patients at a high risk of GI bleeding or who have a history of intolerance to or "are not doing well" on nonselective NSAIDs;
- "Individual patient risk for cardiovascular events and other risks commonly associated with NSAIDs should be taken into account for each prescribing situation;"
- Consumers should use all over-the-counter analgesics, "including NSAIDs," strictly according to the label instructions and consult a physician if using them for longer than 10 days.

The FDA further said that it would analyze all available and forthcoming data from studies involving coxibs and nonselective NSAIDs "to determine whether additional regulatory action is needed." It will also tighten its review of all ongoing prevention studies involving Bextra and Celebrex to ensure that they proceed and that their data are reviewed with these agents' newly-identified potential risks in mind. An advisory committee meeting was planned for this month, which I hope will provide for a full discussion of these issues.

We can only hope that the advisory committee that meets this month will act more quickly than the FDA in general in respect to this well-known and massive public health problem. Indeed, for the FDA to say that these problems are only recently discovered is an absolute falsehood. For example, the results of the massive clinical trial involving Vioxx called the VIGOR trial were presented to FDA officials almost five years ago. For the FDA to sit on its hands for five years, and then represent to the public that it has been proactive in addressing this threat is patently offensive to those who understand the history of this epidemic. The FDA should move swiftly to protect the citizens of this country. It should require the formal withdrawal of all coxibs from the market. The health of a large segment of the American public depends upon it.

Vioxx May Have Caused 140,000 Heart Attacks

Merck & Co.'s Vioxx painkiller may have caused as many as 140,000 heart attacks in the U.S. before it was withdrawn September 30th, Food and Drug

Administration safety reviewer David Graham said in a study published online by the British medical journal *Lancet*. The study was based on records of 1.4 million members of Kaiser Permanente, the largest U.S. nonprofit insurer, with 6 million members in California. Researchers compared the incidence of heart attacks and sudden cardiac death for patients taking Vioxx with those on Pfizer Inc.'s similar Celebrex and over-the-counter pain medications.

The U.S. Senate's finance and health committees and the House Energy and Commerce Committee are investigating whether Merck and the FDA failed to protect U.S. consumers from Vioxx. The study was originally to be published online in Lancet November 17th, but according to Dr. Graham, FDA managers at one point threatened to fire him as associate director for science and medicine in the agency's Office of Drug Safety if he published the findings. The study found that Vioxx, given at the standard dose, increases the risk of heart attack by about 50%, compared with Pfizer's Celebrex, and more than triples the risk of heart attacks when given at high doses. The two drugs suppress the body's production of the Cox-2 enzyme, which is linked to pain and swelling. People taking Vioxx had a 34% higher chance of heart disease compared with those taking other painkillers including Celebrex, naproxen and ibuprofen, the study found. Patients taking naproxen, a generic painkiller sold as Aleve by Bayer AG, had a 14% increase in heart risk compared with some other painkillers such as ibuprofen, the study showed. Almost 18% of the 106.7 million prescriptions for Vioxx were for the highest dose, the study in Lancet said. Merck says that about 20 million people in the U.S. tried the drug since its 1999 introduction.

Dueling Letters On Vioxx

It has become very clear that Merck has no intention of giving up easily in the fight over Vioxx. The company had a "cash cow" and doesn't want to lose it. Without a doubt, Vioxx shouldn't have ever been on the market. I have found that many doctors are greatly concerned over what the withdrawal of Vioxx means for drug safety. Interestingly, the letters pages of the New England Journal of Medicine have turned into a real battleground featuring "dueling letters." A letter from Merck appeared in the December 30th issue defending the company against charges from Dr. Eric Topol, the Cleveland Clinic's top cardiologist, who as you know has said repeatedly that the company should have known far earlier that Vioxx increased the risk of heart attack. Dr. Topol wrote a response to the Merck letter, in which he publishes a new analysis of four-year-old data that he says show a "significant" increase in heart attack and stroke in patients taking Vioxx after as little as six weeks. This was also included in the Journal. The data were previously available only in briefing documents prepared by staff at the Food and Drug Administration (FDA).

It appears that this fight is more than just academic. The letter from Merck was one of the few times that Merck's scientists have publicly defended their approach to the drug since the company pulled it off the market. Dr. Topol's analysis seems to show that even if Merck wasn't aware of the possible risks to the heart posed by Vioxx, it should have been. In the Merck letter, written by Peter Kim, Merck's research chief, and Alise Reicin, who headed up much of the development of Vioxx, the company's handling of the matter was defended. They in effect call Dr. Topol a liar. Their letter stated: "Merck has been proactive and conscientious in evaluating the cardiovascular profile of rofecoxib (Vioxx). Dr. Topol's remarks to the contrary in his Perspective article (October 21st issue) are false." Merck claims that before 2000, there was little clinical evidence of a heart risk for Vioxx.

In his response, Dr. Topol looks at data from a previous study that compared 390 patients taking Vioxx to 588 patients taking a placebo. The study, called 090, showed that five, or 1.3%, of patients taking Vioxx had heart attacks or strokes, compared to one, or 0.2%, in the placebo group. Although those numbers are small, they were statistically significant, according to Dr. Topol. The data on which he based his analysis have previously been buried in FDA briefing documents. I suspect we have just seen the beginning of Merck's efforts to defend Vioxx. The profitability of the drug was such that I don't believe we will see a prompt resolution of this issue.

Merck Dismissed Earlier Vioxx Warnings

It has been revealed that Merck & Co. forced one of its researchers to remove her name from a study linking **Vioxx** to heart attacks. The company then criticized the findings before ultimately pulling the arthritis drug from the market last fall. Drs. Daniel Solomon and Jerry Avorn of Boston's Brigham and Women's Hospital wrote for the Archives of Internal Medicine in January, saying: "Even after funding and agreeing with the design of the study, Merck publicly discredited our findings." Merck spokeswoman Anita Larsen actually confirmed the company's action, but said Merck believed the study's conclusions "were not supported by the data." The incident came about six months before another study forced the drug maker to withdraw Vioxx.

The journal contains several studies about Vioxx and **Celebrex**, which are under congressional and regulatory scrutiny. A separate study suggests these drugs have been over-prescribed, frequently to patients at low risk for GI

problems. Other research supports evidence that Vioxx increases some patients' blood pressure. The Archives reports come just weeks before a FDA meeting on the safety of all **Cox-2** drugs was to be held this month.

Call To Stop Prescribing Arthritis Drug

Doctors in Great Britain have been urged to stop prescribing the new generation of arthritis drug known as cox-2 inhibitors taken by more than a million British patients after a review of its safety and effectiveness. The Drug and Therapeutics Bulletin (DTB), an influential doctors' and pharmacists' publication, made the recommendation after a review of the coxibs. The DTD concluded there were "few, if any, situations" in which coxibs should be prescribed instead of traditional painkillers such as aspirin. While Vioxx, the leading seller, was pulled from the market, Pfizer has chosen to keep Celebrex on the market. The concerns about coxibs have sent shock waves through the global pharmaceutical industry and have waked up consumers. In Great Britain, it is estimated that more than a million patients with osteo and rheumatoid arthritis are prescribed coxibs.

After the withdrawal of Vioxx, three of the drugs remain available in Britain, including Celebrex. A fourth drug has been licensed, but has yet to be launched in the UK. Regulatory bodies in both the United States and Europe will review their licensing policies on coxibs over the next two months. Analysts have been considering the possibility of the whole class of this drug being banned by the regulators, an unprecedented move. Confidence in coxibs has to be rocked even further by the DTB's recommendation. It will be interesting to see how far the regulators in the UK will go. Hopefully, they will ban all coxibs.

FDA Stops Crestor Ads

Since its approval in August of 2003, Crestor has been linked to cases of life-threatening muscle damage and renal failure. According to Public Citizen, in the first year of approval, Crestor was linked to 29 cases of kidney failure or insufficiency, which is 75 times the rate of kidney failure or insufficiency for all other similar drugs combined. The latest injury reported is the death of a patient who developed rhabdomyolysis in the latter part of 2004. You will recall that at a Senate hearing last November, Dr. David Graham, the now well-known safety official at the FDA, stated that Crestor was one of five currently marketed drugs whose safety needed "to be seriously looked at." Dr. Sandra Kweder, the Deputy Director of the FDA's Office of New Drugs, told the same panel that the FDA is in the process of evaluating Crestor's risks very, very closely. The Washington Post quoted Dr. Steven Galson, the Acting Director of the Center for Drug Evaluation and Research, as saying the FDA "has been very concerned about Crestor since the day it was approved, and we've been watching it very carefully."

After the sales of Crestor began to drop, AstraZeneca placed full-page ads in newspapers across the country claiming that Crestor "lowers bad cholesterol better than the leading medications in the class." The ads went on to say that the "FDA has confidence in the safety and efficacy of Crestor" and that the agency publicly confirmed the safety and efficacy of Crestor. In a letter from the FDA, Christine Helmer Smith of the Division of Drug Marketing, Advertising and Communications, stated: "This claim is misleading because it minimizes the risks associated with the 40mg dose of Crestor." The letter went on to state that the FDA was "not aware of substantial evidence or substantial clinical experience demonstrating that all doses of Crestor are 'just as safe' as other" cholesterol-lowering drugs." According to the FDA, the advertisements are "false and misleading" and AstraZeneca should "immediately cease the dissemination of violative promotional materials for Crestor."

AstraZeneca has strongly defended the image of Crestor. Emily Denney, a company spokesperson, was quoted in the *New York Times* as having said: "We believe that our communications have been consistent with what has been communicated to us and with what clinical trials tell us and post-marketing data tell us." But, Dr. Sidney Wolfe of Public Citizen said the ads are "misrepresenting the FDA's position, making it appear that even the FDA cleared the drug; that's a lie." Public Citizen has petitioned to have the drug banned. I agree with Public Citizen and believe that Crestor should be withdrawn from the market immediately to ensure the safety of American consumers.

New Crestor Death Reported

In the meanwhile, AstraZeneca, the manufactor of Crestor, has reported that a patient taking the cholesterol-lowering drug died in December of last year. Initial reports suggested the patient died of the muscle-damaging disease linked to Crestor and all other statins. As widely reported, the same disease, rhabdomyolysis, resulted in Baycol being taken off the market. For our new readers, I will point out that rhabdomyolysis is a condition in which muscle cells break down. This floods the blood with muscle proteins, which sometimes leads to fatal kidney failure. Some experts now believe Crestor may be more dangerous than the rest of the statin family. As stated above, Public Citizen has petitioned the FDA to ban Crestor. You will recall that Crestor is one of five FDA-approved drugs named in congressional testimony by Dr. David Graham as being unsafe. Public Citizen's Sidney Wolfe, MD, believes that Crestor is linked, not just

to rhabdomyolysis, but to direct kidney damage. He says:

> *This drug causes primary renal failure. It is the only statin that does so. Most of the cases are very low dosage. No other statin does this — it is uniquely dangerous. It is competing with Baycol in terms of a large number of cases of rhabdomyolysis shortly after the drug went on the market.*

Lawsuit Involves Children's Motrin

The parents of a seven year-old girl sued the makers of Children's Motrin and several companies that distribute the painkiller, claiming their daughter lost her eyesight and suffered other severe side effects from the medication. Motrin is manufactured by New Jersey-based healthcare company McNeil Consumer & Specialty Pharmaceutical, a subsidiary of Johnson & Johnson. In the lawsuit, the parents allege that Motrin caused their daughter to develop two disorders—Stevens Johnson Syndrome and Toxic Epidermal Necrolysis. The injured child took Children's Motrin drops on September 8, 2003 after she came home from school with a fever. The child had no known drug allergies, according to the lawsuit filed in the Los Angeles County Superior Court. The next morning, she woke up with a high fever and other symptoms, including a pink coloration in her eyes and sores in her mouth. She was hospitalized and shortly thereafter, she was blind in both eyes. Her doctors concluded that the Stevens Johnson Syndrome was caused by the Children's Motrin. Since that time the child has undergone multiple eye surgeries.

The lawsuit alleges the company knew of the connection between Motrin and Stevens Johnson Syndrome from their own clinical tests dating back to the late 1980s and included warnings of the risk of this disorder with the drug before it became available without a prescription. The current label does not warn consumers about the risk of Stevens Johnson Syndrome. The conditions associated with Stevens Johnson Syndrome are characterized by painful blistering of the skin. In many cases, these disorders are preceded with flu-like symptoms and a high fever. The disorders can become so severe that, as it evolves, the skin literally sloughs off similar to a burn victim's skin. Many severe cases can include damage to a person's eyes, including severe conjunctivitis, iritis, palpebral edema, conjunctival and corneal blisters and erosions, corneal perforation, and blindness.

The defendants are charged with negligence, breach of warranty and concealing from consumers and doctors potential health risks of taking the flu and pain medication. Specifically, the risk of developing two disorders—Stevens Johnson Syndrome and Toxic Epidermal Necrolysis, which are typically caused by an adverse reaction to a drug or virus—are the main health risks involved. A similar lawsuit was filed against Johnson & Johnson's Children's Motrin in March of 2003. In that federal lawsuit filed in San Jose, California, the parents of a nine year-old girl alleged that the medication left their daughter unable to see, speak or eat. She also was diagnosed with Stevens Johnson Syndrome. They accused Johnson & Johnson and McNeil of failing to adequately test the drug for over-the-counter use and to properly warn the public.

Documents Said To Show Prozac Risks

The British Medical Journal has sent documents to The U.S. Food and Drug Administration that appear to suggest a link between the antidepressant drug Prozac and suicidal behavior. The journal said an anonymous source had provided "missing documents" relating to clinical trials of the drug, made by Eli Lilly & Company. The documents, which apparently had been "lost" during a product liability suit in 1994. Interestingly, the "lost documents" included reviews and memos that appeared to show Eli Lilly officials were aware in the 1980s that the drug, whose generic name is fluoxetine, had "troubling side effects." In an article appearing in its January 1st issue, posted on its website at www.bmj.com, the journal said it had sent the papers to the FDA. It quoted Dr. Richard Kapit of the FDA, a clinical reviewer who approved fluoxetine, as saying that he had not been given the data highlighted in the documents, and that they were "very important." The journal said Lilly officials declined to be interviewed, but issued a statement saying the safety and usefulness of Prozac were well established.

Source: *Reuters News*

Lupron Settlement Notification Begins

Consumers, insurers and health benefit plans will share $150 million as compensation in a settlement with several drug companies. Lawsuits alleging drug companies fraudulently promoted the prescription medication Lupron were pending in a U.S. District Court in Boston. A court-ordered program to notify parties eligible for compensation under a proposed settlement was announced last month. The settlement will cover parties who paid for Lupron from January 1, 1985 through March 31st of this year. The class includes consumers who paid for any portion of the drug's cost, as well as insurers, employee welfare benefit plans and governmental employer plans.

The proposed $150 million payment would settle litigation against TAP Pharmaceutical Products Inc., Abbott Laboratories Inc., and Takeda Pharmaceutical Co. Ltd. TAP is a 50-50 venture between Abbot Laboratories, of Abbott Park, Illinois, and Japan-based Takeda. Lawsuits alleged fraud involving the marketing, sale and distribution of

Lupron that caused consumers and other parties to overpay. Lupron is an injectible drug used to treat prostate cancer in men, endometriosis and uterine fibroids in women, and precocious puberty in children. Notices informing class members of their rights will be mailed and appear in newspaper and magazine advertisements leading up to a scheduled hearing to approve the settlement on April 13th. Members can accept for a payment or ask to be excluded from the settlement. They also have the right to object to the settlement before it is approved by the court. The deadline to file claims is May 15, 2005. A toll-free number, 1-866-410-7650, has been established in the case as well as a website, www.lupronclaims.com.

Plaintiffs Win In Wyeth Trial

A jury in Pennsylvania has ruled in favor of three women who claimed Wyeth's Pondimin diet drug damaged their heart valves. The Philadelphia jury determined that Wyeth is liable for the $2.5 million in compensatory damages previously determined in the first phase of the trial. The verdicts for the three women that came at the end of the second phase of the trial were $750,000, $500,000, and $1.25 million, respectively. Pondimin, the fenfluramine half of diet drug combo fen-phen, was pulled from the market in 1997 amid evidence it caused heart-valve damage. Wyeth had paid out about $500 million in diet-drug litigation through the first nine months of 2004. The company set aside $16.6 billion in legal reserves for settlements and about $3 billion of that remains. At last count about 65,000 lawsuits had been filed against Wyeth over the diet pill.

Wyeth To Support Revision To Settlement

Wyeth will support a revision to the settlement that compensates thousands who suffered heart valve damage after taking the fen-phen diet drug combination. The company had an option to reject the change, but didn't exercise it. According to the company, nearly all of the users in the case chose to participate in a new fund. This revision will provide an additional $1.275 billion for payout. Lawrence V. Stein, Wyeth senior vice-president and general counsel, stated:

> *The proposed amendment ensures that the large majority of class members who have less serious claims will receive compensation on a streamlined basis. And it preserves funds in the existing Trust for the more serious claims. It also would help resolve much of the uncertainty that has surrounded the diet drug settlement—for both class members and for Wyeth.*

A January 18th hearing was held before U.S. District Judge Harvey Bartle III in Philadelphia, Pennsylvania. The revision will apply to about 40,000 people who suffered non-life-threatening valve damage from taking the drug combination. Some 5.8 million Americans used the compound. So many people had filed claims that the original $3.75 billion settlement fund, formed in 1999, would be exhausted before all were compensated. Wyeth, formerly known as American Home Products, made Pondimin, the fenfluramine half of fen-phen, and a chemical cousin, Redux. Pondimin and Redux were pulled from the market in September 1997 after reports surfaced that some users had heart valve damage and a few had a deadly lung condition. Fen-phen was never an FDA-approved combination. Actually, the phentermine half is still being sold. Of the nearly $17 billion that Wyeth has set aside for fen-phen payouts and legal costs, some $3 billion remains.

Bayer Settles More Than 2,900 Lawsuits

German drug maker Bayer AG announced on January 26th that it has now settled more than 2,900 suits related to Baycol, its cholesterol-lowering drug. The company paid more than $1.1 billion in out-of-court settlements. Bayer pulled Lipobay, marketed as Baycol in the United States, in 2001 after it was linked to a rare muscle-wasting syndrome and about 100 patient deaths. Bayer has now settled 2,933 cases and agreed to pay a total of $1.113 billion. According to the company, some 6,359 cases are still pending. In November, the company reported that it had reached settlements in 2,895 cases and paid about $1.1 billion in out-of-court settlements.

Pharmaceutical Industry Says It Will Offer Transparency

The American people are learning how the pharmaceutical industry has not only overcharged them for prescription drugs, but has also put dangerous drugs on the market so the industry has finally made a commitment of sorts to publish more data about clinical drug trials. The International Federation of Pharmaceutical Manufacturers and Associations, the prescription drug industry's main trade group, along with three other industry associations covering Europe, the United States and Japan, will publish a detailed registry of current and completed drug trials on the Internet. Apparently, the results of trials that have taken place—whether positive or negative—as well as information on those that are just starting will be made public. Interestingly, the registry will be voluntary. It was reported that an agreement of the major drug companies—several of which have dealt with major questions in recent months about the safety of their products—was expected to take place. The registry will be made public on July 1st, immediately including any trials initiated on

or after that date. Ongoing trials would be included in the registry by September 13th. Hopefully, this move toward transparency is not just a part of the companies' efforts to defend their past actions. If this is legitimate—and not just a public relations ploy—the public will be much better off down the road.

I suspect all of the negative publicity, and the fact that drug companies have come under fire in recent months for allegedly withholding unfavorable research findings, is responsible for the transparency announcement. The American Medical Association, as well as some members of Congress, have called for mandatory reporting of all clinical-trial results and that has to have gotten the attention of the drug industry. Under current law, drug companies are required to post information at www.clinicaltrials.gov only about trials of drugs for serious or life-threatening diseases or conditions. Billy Tauzin, the former Louisiana congressman, who was "very friendly" to the drug companies while in Congress, and now serves as CEO of the Pharmaceutical Research and Manufacturers of America (PhRMA), made the announcement, which was received by many with a "wait-and-see" attitude.

At least two congressmen have said PhRMA's voluntary plan is inadequate. Legislation to mandate making all clinical trials public will be introduced by Rep. Edward Markey (D-Mass.), who wrote legislation last year to establish a clinical-trials registry for drugs and medical devices. The drug companies hide the negative drug trials and know the public has no way—other than in lawsuits—to find out about them. To allow the companies to pick and choose what they report makes no sense and can't be justified. The drug industry should support federal legislation that would mandate and implement disclosure of all clinical research. Only pressure from the public, however, will make that happen. In October, PhRMA launched www.clinicalstudyresults.org, a website that lists information about clinical trials completed since October 1, 2002, for drugs that are on the market. The www.clinicaltrials.gov website lists ongoing trials for drugs that are not necessarily on the market yet.

X. BUSINESS LITIGATION

Verdict Against International Paper Company

A Birmingham jury returned a verdict recently against International Paper Company for $8.9 million. The verdict followed three weeks of testimony. Former University of Alabama football player Major Ogilvie and three of his associated had started Madison-Oslin Inc. in 1992. The company gave International Paper exclusive rights to a manufacturing process it had developed in 2002. The jury found that the contract between the parties had been breached but did not find that International Paper had committed fraud. This came as a surprise to many persons who had followed the trial. The agreement required about $400,000 of monthly income for Ogilvie's company. International Company had sent about 1% of the business it had promised under the agreement. Madison-Osline had been forced to close its business. It subsequently filed the lawsuit in March 2003.

Doctor Group Can't Sue Health Insurers

The Connecticut Supreme Court has said that the Connecticut State Medical Society can't sue health insurers. The court affirmed a trial court's dismissal of lawsuits filed against Oxford Health Plans Inc. and ConnectiCare Inc. alleging that the health plans unfairly denied and delayed payments to doctors. The lawsuits, which were filed by the 7,000-member medical group, alleged that the health plans violated the state's unfair trade practices law by denying, reducing, and delaying claims payments to doctors. But the Supreme Court ruled that the medical society did not have proper standing to bring the suits because "the harm allegedly suffered was derivative, indirect and too remote to be actionable." The society had sued a total of seven insurers, all alleging unfair trade practices. You may recall that a lawsuit against Aetna Inc. was settled in 2003, and one against CIGNA Corp. was settled in early 2004. The suits against Oxford and ConnectiCare were originally dismissed in 2001. Litigation is still pending against UnitedHealth Group, Anthem Health Plans Inc., and Health Net Inc.

Goodyear Settles A Pending Case For $159 Million

When you read the above title, I suspect you thought the Goodyear Tire & Rubber Company had paid out some money to plaintiffs in lawsuits. However, the company had actually filed suit and will receive approximately $159 million from certain insurance companies in settlement of the case. The tiremaker will receive the settlement amount in installments over the next 15 months. While the specific terms of the December 28, 2004 settlement are confidential, it provides for the payments to Goodyear in exchange for the company's releasing the insurers from certain past, present and future environmental claims. Goodyear filed a Current Report on Form 8-K with the U.S. Securities and Exchange Commission regarding this settlement. The lawsuit, filed by Goodyear in 1993, sought to have the insurers honor their policies to pay the company's liability and defense costs in regard to certain environmental claims. This appears to be a good result for the tire company. It is good to know that Corporate America is still using the courts on a

regular basis. However, they sing a different tune when it comes to lawsuits filed by consumers.

The insurance companies had failed to pay costs for environmental cleanups dating back decades. The insurance companies, sued by Goodyear in 1993, were not named in the filing. Goodyear maintained for more than a decade that policies it had with several insurers should cover the cost of government-ordered cleanups at facilities it operated. A 2002 ruling by Ohio's Supreme Court in favor of Goodyear named Aetna Casualty and Surety Company as one company involved in the lawsuit.

Bank Of America To Pay $284 Million

A judge has ruled that Bank of America Corp., the third-largest U.S. bank, will have to pay $284 million to customers who were charged overdraft fees on accounts containing customer Social Security deposits. Bank of America intends to appeal the decision, which was confirmation of a tentative December 8th court ruling. In addition to the $284 million, the decision calls on the bank to give each affected customer $1,000. As many as 1.3 million customers may qualify. If all of them take part, it would eventually increase the award to $1.6 billion. The judge's decision confirms a jury's verdict that the bank's conduct was wrongful and provides for an ultimate remedy for all victims.

The lawsuit arose from complaints by a man who said the bank took bounced check fees from an account in which his Social Security benefits were automatically deposited. The bank notifies customers in writing that such fees can be automatically deducted from their accounts. The court ruled that customers were never told the fees could be applied to their Social Security money. Bank of America collects between $3 million and $4 million each month in bounced check fees from the accounts of California customers who have their monthly Social Security benefits electronically deposited. Bank of America is trying to have the class of 1.3 million customers decertified.

McKesson Settles Class Action Lawsuits

McKesson Corp. has agreed to pay $960 million to end pending litigation that was pending in federal court. This is one of the largest securities class action settlements ever. Institutional investors, with The New York State Common Retirement Fund as the lead plaintiff, filed the federal suits in 1999 after McKesson merged with HBO & Co. Following the merger, McKesson revealed accounting irregularities that triggered a $9 billion drop in the value of the health care giant's stock in a single day. A U.S. District Judge will have to approve the settlement agreement. However, the settlement doesn't mean McKesson is completely off the hook for what remains one of the largest stock market meltdowns in history.

The company still faces individual suits in California state courts as well as cases in other states. McKesson has set aside $240 million to resolve the other litigation. The state court plaintiffs had to wait to go to trial until the class action was resolved. McKesson had been negotiating with the federal plaintiffs for about five years before reaching the settlement. The settlement followed another battle in federal court over an internal report McKesson ordered after the allegations of corporate wrongdoing surfaced. The report was turned over to federal prosecutors in a successful bid for leniency. Although the government charged several executives with conspiracy and securities fraud, the company never faced criminal charges. That is somewhat surprising and has caused some to wonder why no criminal charges were brought.

High Court Declines To Hear WorldCom Lawsuit

The U.S. Supreme Court has let stand a lower ruling that said the California Public Employees' Retirement System must proceed with its securities fraud lawsuit on behalf of WorldCom bondholders in federal, rather than state, court. At issue were two federal statutes, which disagreed on which court should hear the litigation after the telecom giant announced major accounting problems in 2002. The U.S. Court of Appeals for the Second Circuit ruled that the lawsuit belongs in federal court to the extent it is "related to" a bankruptcy case. As a result, the CalPERS suit was consolidated with separate class action filings in federal court in New York against WorldCom, its officers, bond underwriters, directors, accountants, and research analysts by investors who lost billions when WorldCom went under in a multibillion-dollar accounting scandal.

The Supreme Court's move is a defeat for CalPERS, although the pension fund may still seek to argue that its claims aren't related to bankruptcy. CalPERS wants to pursue bondholder-loss claims in state courts. It should be noted that 10 former WorldCom board members have agreed to pay $54 million—$18 million out of their own pocket—to settle their portion of a lawsuit brought over the company's collapse. WorldCom is now known as MCI.

HMOs Facing Class Action

Six health-maintenance organizations now face a class action lawsuit brought by more than 600,000 doctors who claim the companies systematically underpaid them for medical services. An appeal by the HMOs was rejected by the U.S. Supreme Court recently. In the HMO case, UnitedHealth Group Inc., of Minnetonka, Minnesota, Humana Inc., of Louisville, Kentucky, and four other companies had chal-

lenged the legality of the class of doctors certified by a federal court to sue them. The doctors claim the HMOs used automated claims-processing systems to deny them payments for medical services provided to patients. A related case reached the High Court last year in which the justices rejected an effort by some of the involved companies to force the lawsuit into arbitration.

The High Court's refusal to hear the case clears the lawsuit for a trial in federal court in Miami. The doctors filed their lawsuit under civil provisions of the Racketeer Influence and Corrupt Organizations Act. The HMOs asked the U.S. Supreme Court to look at whether a federal trial judge properly weighed evidence when deciding whether the case deserved class action status. The HMOs, in a legal brief, said the standard being used by some federal court circuits creates a "grave potential for the filing of weak or frivolous claims" as class actions. Lawyers for the doctors urged the justices to reject the appeal and allow litigation to continue in the case, arguing the class action lawsuit was allowed "based on a determination that the cases involved common questions of fact."

A federal trial judge first approved the doctors' lawsuit in 2002. On appeal, the U.S. Court of Appeals for the Eleventh Circuit, based in Atlanta, affirmed that decision in September. Other companies involved in the case are Health Net Inc., of Woodland Hills, California; PacifiCare Health Systems Inc., of Cypress, California; Prudential Insurance Co., a unit of Prudential Financial Inc., of Newark, New Jersey; and WellPoint Health Networks Inc., a unit of WellPoint Inc. of Indianapolis. The medical community all over the U.S. in watching this case closely. People everywhere who have an interest in good healthcare should be pulling for the doctors.

PricewaterhouseCoopers Pays Settlement Of $87.5 Million

PricewaterhouseCoopers has paid $87.5 million to settle a negligent misrepresentation claim involving more than $1 billion in loan losses. The settlement with an international syndicate of 90 lenders was confidential, but details were revealed in a recent Fulton County State Court filing. The banks sued the Big Four firm in 2000, alleging the accounting giant did not fulfill its responsibility as an auditor, and as a result, the banks lost millions of dollars on bad loans. The case settled on the eve of trial last October. The syndicate of lenders, led by Toronto Dominion Bank, provided $2.1 billion to Columbia, South Carolina-based Laidlaw Environmental Services to fund the takeover of another environmental services firm, Elgin, Illinois-based Safety-Kleen Corp., and to refinance $650 million in senior secured debt from an earlier acquisition. Subsequently, the banks advanced the newly formed company another $280 million. The banks alleged that the loans—used in part to help finance the hostile takeover of Safety-Kleen in 1998—wouldn't have been made if PricewaterhouseCoopers had not provided audit reports indicating the target company was financially healthy. The business later filed for bankruptcy protection.

Wal-Mart Settles California Gun Sale Violations

Wal-Mart Stores, Inc. has agreed to pay $14.5 million in fines and other costs to settle a lawsuit involving thousands of gun sales violations at California stores between 2000 and 2003. The nation's largest retailer had been accused of a host of gun law violations. The settlement, the largest of its kind since California Attorney General Bill Lockyer's office established a firearms division in 1999, requires Wal-Mart to pay $5 million in fines. Wal-Mart, which agreed last year to halt gun sales across California, will have to reform its practices should it ever resume firearm sales in the state. Wal-Mart had been the largest gun seller in California. Attorney General Lockyer says the company put the lives of all Californians at risk by placing guns in the hands of criminals.

Wal-Mart also will pay at least $6.5 million on company and state efforts to ensure the retail giant is complying with gun laws. Wal-Mart agreed in April 2003 to suspend gun sales at its more than 110 California stores that sold guns after the state documented hundreds of violations at six of the stores. A subsequent investigation by the California Department of Justice found 2,891 more violations between 2000 and 2003. The stores apparently sold guns to 23 people who were not allowed to possess them and delivered 36 more to customers who bought them for people not allowed to own guns. Other offenses included gun sales without background checks and failing to identify buyers through thumbprints and drivers license scans. At least three dozen people made "straw purchases," or bought guns on behalf of people barred from owning them, resulting in the filing of charges against 20 people.

California firearms agents began inspecting gun sales at Wal-Mart in 1999, uncovering numerous alleged violations of state gun laws. The state set up a special training program for Wal-Mart employees to help them comply with state laws. Under terms of the settlement, the company will reimburse the state for $2 million in investigative and monitoring costs. The settlement doesn't prevent Wal-Mart from selling guns in California. But, the retailer had not decided whether it will resume gun sales there at press time. Currently, Wal-Mart sells guns in every state but California, Hawaii, and New Jersey.

Source: *USA Today*

XI. INSURANCE AND FINANCE UPDATE

Marsh Reaches $850 Million Settlement

Marsh & McLennan Companies, Inc. (MMC) has confirmed an agreement with the New York Attorney General and the Superintendent of the New York State Insurance Department that settles the actions that were commenced against MMC and Marsh Inc. over questionable brokerage compensation and account placement practices. As a result of this agreement, the company will enact reforms to lead the industry in transparency and service to clients and establish an $850 million fund to compensate clients. Under the settlement agreement, MMC will establish an $850 million fund to compensate clients nationwide. Interestingly, no portion of this fund represents a fine or penalty.

The fund will compensate U.S. policyholder clients who retained Marsh to place insurance with inception dates between January 1, 2001 and December 31, 2004, where such placements resulted in contingent commissions or overrides recorded by Marsh between January 1, 2001 and December 31, 2004. These clients will be eligible to receive a pro rata portion of the fund based on the premium and the amount of estimated Market Service Agreement revenue recorded by Marsh between January 1, 2001 and December 31, 2004. They won't have to prove fault, harm, or wrongdoing in order to receive a payment. MMC will pay the total amount of the fund in four annual installments beginning on June 1, 2005 and ending in 2008. As part of the agreement, the company has established the following reforms in its U.S. brokerage business:

- MMC has discontinued the practice of receiving contingent compensation from insurance carriers. The company adopted this new policy effective October 1, 2004.
- The company will provide clients with a comprehensive disclosure of all forms of compensation received from insurers.
- The company will adopt and implement company-wide, written standards of conduct for the placement of insurance.
- The company will provide all quotes and terms as received from insurance companies to enable clients to make informed insurance coverage decisions.
- MMC will establish a Compliance Committee of the MMC Board of Directors and has appointed a chief compliance officer.

In addition, since the filing of the Attorney General's complaint in October 2004, MMC has restructured its board of directors so that the board now consists of ten outside directors, in addition to its newly appointed president and CEO, who serves as the single management director.

Source: *The Insurance Journal*

Consumer Group Hits Payment Of Contingent Commissions In Personal Insurance

The Consumer Federation of America, a national consumer organization, claims that contingent fee arrangements "similar" to those being investigated by the New York Attorney General in commercial insurance brokerage are "quite common" in the sale of personal lines insurance to individual consumers. The new report concludes that commissions given for steering business to particular insurers could lead to higher rates for many consumers and that profit-related commissions "are of even greater concern as they may entice agents or brokers to delay or discourage legitimate claims." The CFA report, issued by J. Robert Hunter, CFA's director of insurance, maintains that contingent commissions tied to placements and profits are most likely found between independent agents and their companies. It says that captive and direct writing insurers do not pay them.

For 2003, total commissions paid to agents and brokers ranged from 0 to 30%, according to the report. Overall commission income for agents was 90% regular commissions and 10% contingent commissions. The report states that the five companies among the top-selling insurers that paid the highest contingent commissions are:

- Federal Insurance 2.31% of premium;
- Travelers C&S 2.18% of premium;
- Zurich American 1.94% of premium;
- Allstate 1.74% of premium; and
- Hartford Fire 1.67% of premium.

The study looked beyond the top 20 insurers in personal lines and found that among the insurers paying contingent commissions in personal lines are Allstate, Auto-Owners, GEICO, California State Auto, Chubb, Hartford, Nationwide, Ohio Casualty, Safeco and Travelers. The authors of the report recognize the large role played by independent agents in the sale of automobile and homeowners insurance, but are concerned that the use of such contingency payments results in higher prices for consumers. The report states:

> *The complexity of the insurance marketplace and the reliance of many consumers on agents or brokers as a result leaves millions vulnerable to sharp sales tactics and hidden commission arrangements that may entice agents to select the wrong insurers for consumers. Many high-priced policies are sold, even when cheaper alternatives are available.*

The report also states: "Many consumers have been misled into thinking

that independent agents represent their interests and not those of the insurance company. Insurers and agents aggressively promote this inaccurate perception in their advertising, often not making it clear that the agent actually represent the insurer." The report gives two scenarios to show how consumers may be harmed.

- Regarding contingencies paid to reward placement or so-called steering, the report says insurers defend this type of payment because it "encourages agents to make sure that consumers take steps to reduce their risks of filing a claim." But, the report says, that is not how these commissions work in personal lines. "Offering additional compensation to agents who conduct safety assessments of clients' homes or driver safety courses would be a proper way to encourage upfront loss mitigation. However, by offering additional compensation for lower losses without any evidence of mitigation effort, insurers are encouraging improper forms of loss mitigation, such as dishonest claims procedures designed to delay or eliminate certain legitimate losses."
- Regarding profit-based contingencies, the CFA report claims that agents can maximize profit by placing a consumer with a higher priced insurer with a higher priced commission and that some insurers compete for this business by offering brokers higher commissions, with high rates paid by the consumer.

The report concludes that Attorney General Spitzer's investigation of commercial lines is proof of an "anti-competitive culture" in the commercial insurance industry. It suggests that similar problems also exist in personal lines. The CFA report stated: "If the industry is not competitive for sophisticated, knowledgeable commercial clients, it is very likely that it is not competitive at the retail consumer level." The consumer group promised to report in the future on the impact of all commissions—not just contingent—in automobile and homeowners insurance to see how they affect rates and consumer satisfaction. The insurance industry was quick to label the CFA report as faulty. We will see who is correct as this plot thickens.

Sources: *The Insurance Journal* and The CFA

Insurance Industry Should Take A Long Look At Corruption Allegations

The insurance industry will have to take stock of how it operates in view of the recent allegations of bid-rigging against Marsh McLennan. Bid manipulation on insurance contracts can't be tolerated. If insurance middlemen are accepting kickbacks in the form of "contingent commissions" from other insurers in exchange for what appears to be a most lucrative business, it must be stopped. It is most significant that guilty pleas have already been entered by top insurance executives. It is believed that the Marsh settlement may serve as a blueprint for further settlements throughout the industry as the net widens to bring in, among others, AIG, Hartford, Ace Insurance, and Munich American Risk Partners. The insurance industry must clean up its act and do so promptly.

Jury Finds Alfa Guilty Of Fraud

A jury in Escambia County, Alabama, returned a $500,000 verdict last month against Alfa Mutual Insurance Company, finding the company guilty of fraud. Our clients sued Alfa and one of its agents for misrepresenting information contained on their application for a farmowners/homeowners insurance policy. The misrepresentation was later used by Alfa to deny a total loss fire claim on our clients' home. The fire was believed to have been caused by lightning. One of our clients had been convicted of a crime over thirty years ago. This was disclosed to the Alfa agent in response to the agent's inquiry "have you ever been arrested," on the homeowners' policy application. The agent told our client that the arrest was "too long ago" and "really did not matter." The agent then marked the application "no" as the response for that question. There were approximately seven other mistakes contained on the very same application by the agent.

Approximately a year after the Alfa homeowners insurance was purchased, our clients experienced a total fire loss of their home. Alfa denied the claim and accused our client of lying on his application about his thirty-year-old arrest. In April 2001, Alfa filed suit, asking for the Court to declare that the policy was rescinded and that the insurance company would have no obligation to pay any claim. In response, we filed a counter-claim alleging fraud against Alfa because its agent had committee fraud. Since November 2001, our clients have been forced to live in a "converted barn" that was located next to the home that had burned to the ground.

During the three day trial, several witnesses were called by the plaintiffs who testified that their Alfa agent had also failed to either ask the same "arrest" question on the application or that Alfa provided them coverage despite their previous arrests. Two witnesses had convictions that were over twenty-five years old. We proved to the jury that Alfa has a flawed system of underwriting that allows agents to abuse the application process. Unfortunately, those same abuses are being used to deny valid claims at a later date. The jury deliberated approximately two hours before returning a $500,000 verdict against the defendants. I hope the jury's verdict will help to put a stop to abuses by Alfa and other insurance companies in the denial of valid property and casualty claims. Dee Miles and Chris Sanspree from our firm, along with Charles Godwin of Atmore, Alabama, handled

this case. Escambia County courthouse officials tell us that the verdict against Alfa is the largest consumer fraud verdict in the county's history.

Beware Of Quick Tax Refund Loans And Scams

It is about that time of the year when our firm begins to get a large number of calls from people who have entered into high interest rate loans in anticipation of their tax refund. Many have been the victims of a fraudulent scheme that leaves them with little or no money from their tax refund. A "refund anticipation loan" allows a person to obtain a loan in the amount of their tax refund, minus the high fees charged for this service. The thing that attracts most people is that a person can usually get his or her money in just one or two days. Unfortunately, the folks who are most often victimized by these types of loans are the working poor who are already living paycheck to paycheck. According to the National Consumer Law Center and Consumer Federation of America, typical fees on these types of loans include $120 to prepare the actual tax return, with another $130 fee tacked on to process the loan. In some areas, various state agencies and credit unions are joining together to inform the public that there are alternatives to these refund anticipation loans. Therefore, if you are thinking about getting one of these high cost loans, please call a local credit union to see if there is a cheaper alternative. Chances are you will find a better deal, so it's well worth taking the time to shop around.

Blue Cross Settles Class Action Suits For $17.5 Million

Blue Cross & Blue Shield of Rhode Island has settled two class action suits for $17.5 million in connection with claims processing practices that allegedly reduced subscribers' benefits and increased their out-of-pocket expenses for several years. In the settlement, Blue Cross does not admit fault, but does accept a permanent ban on those practices, which "are no longer in place," according to a company news release. UnitedHealthcare of New England settled a smaller but similar case in 2002 for $4.4 million.

The bulk of the payout will go to an estimated 115,000 former and current subscribers, who will get $10 to $2,500 each. It will be an average of about $95 to each person. Blue Cross, the state's leading health insurer for 66 years, now covers over 680,000 people. The process of locating and contacting all the people eligible for payment started after court approval of the settlement. Each will get a letter. There will also be ads in the local press, a website and a toll-free number. The lawsuits were filed in 1996 in U.S. District Court in Providence, and also in state court. All of these cases were consolidated in July 2003.

Morris Brown College Sued For Fraud

A former student at Morris Brown College is suing the school for allegedly defrauding her and other students out of thousands of dollars in financial aid. As a freshman at Morris Brown, the student in question applied for a student loan. But, she received neither the loan, nor a reply from the financial aid department at Morris Brown. After transferring to another college, the student learned that she owed Morris Brown $1,000 for financial aid she never received. Last month, in a shocking development, Morris Brown's former president and financial aid director were indicted on 34 counts of criminal fraud. Federal prosecutors allege that once the president increased Morris Brown's rising debt with excessive spending, she then conspired with the financial aid director to use financial aid awards to ineligible students to pay the college's debt. In the wake of the federal criminal charges, the student filed a civil action in federal court.

This lawsuit seeks class action status on behalf of all Morris Brown students who were allegedly defrauded of financial aid during the indicted pair's tenure as president and financial aid director. The lawsuit alleges that the two committed wire and mail fraud by obtaining grants and loans for students who shouldn't have received them. The lawsuit further alleges that Morris Brown's board of trustees knew, or should have known about the alleged scheme to cheat students out of student loan money. Once obtained, the loans would go into default status and adversely affect students' and their parents' credit rating and ability to obtain credit. At press time, Morris Brown College had not formerly responded to the newly filed lawsuit. However, both the individuals indicted have maintained their innocence with respect to the similarly filed criminal indictments.

Fraud Found In The Sale Of Viaticals

The Securities and Exchange Commission, along with various U.S. Attorneys, have been prosecuting viatical settlement providers. A viatical or life settlement is the sale of a life insurance policy by a terminally ill person or senior citizen—the viator—at a discounted price from the face value of the policy. Investors pay the premiums and receive the face value of the life insurance policy when the insured viator dies. The viator, in turn, receives in a lump sum a portion of the proceeds of his or her life insurance policy. Although the sale of viaticals is not illegal, the process lends itself to fraud by the viatical settlement providers. Providers are responsible for locating policies, evaluating viators' life expectancies, bidding on policies, and negotiating the purchase price of policies. The profitability of investments in

viatical settlements is wholly determined by the providers ability to evaluate life expectancies.

Quite often, viatical settlement providers promise investors fixed rates of returns depending upon the term of the investment. Life expectancy is the key factor in determining the maturity date of the investment, the rate of return to investors, and the amount of funds, which need to be escrowed for payment of future premiums on the policies. Prosecutors are finding viatical settlement providers falsely represent to investors that the life expectancy figures were the product of an independent physician review, when in fact no physician review was done. In many instances, a viator had already surpassed his or her life expectancy when the policy on his or her life was assigned. The United States District court for the Southern District of Florida has recently ruled that viaticals are "investment contracts" and are "securities," which gives the SEC jurisdiction over viatical sales. Hopefully closer scrutiny by the SEC will improve the quality of these investments. In the meantime, investors should be cautious when considering viatical investments.

XII. PREMISES LIABILITY UPDATE

Pool Death Award In Florida Thrown Out

In the summer of 2000, 14-year-old Lorenzo Peterson went swimming with a friend in the pool of the Village Apartments, in North Miami, Florida, where his mother lived. His friend removed a loose protective grate in the bottom, and Peterson was sucked into a drain with such force that he could not be extricated until rescuers broke into a shed to turn off the pump's electric power. During the 12 minutes it took, the boy had suffered brain damage that left him in a permanent vegetative state. His representatives brought claims against the owner of the Village Apartments; All Florida Distributors (the firm hired to maintain and operate the pool); and Sta-Rite (the Wisconsin-based manufacturer of the pump and drain). The first two defendants settled for $4 million and $3 million respectively. In a 2003 trial, the jury found that Sta-Rite was liable on two grounds: (1) the design of both the drain and pump was defective; and (2) the company failed to give reasonable warning to users of the dangers of the equipment.

In December, a unanimous three-judge panel of the Florida District Court of Appeal for the Third Circuit said the jury was correct in finding that Sta-Rite was liable. Nevertheless, the panel reversed both the verdict and the $104 million judgment. The judges called the amount of the verdict "shockingly excessive," which I find hard to reconcile considering the facts of the case. The decision says there was a "fundamental error concerning the apportionment of liability between and among Sta-Rite, the pool owner and the maintenance company." At trial, the plaintiff's theory was that the boy's injuries were caused by two accidents—one when his arm was caught in the drain, and the second when the suction was not released because of the faulty design of the pump. This led the jurors to assign 80% of the liability to Sta-Rite, 20% to the Village Apartments and no liability to the maintenance company—even though the drain grate was fastened with loose, rusty screws.

The appellate panel ruled that the two-accident theory didn't apply to the case. The court stated: "Neither logic nor common sense would permit an artificial division of the causation of the plaintiff's damages into separate seconds-long intervals during all of which he remained in the same dangerous position. No rational person could find, as the jury was told it must, that the failures of Segal and All Florida to secure the grate or to provide ready access to an available means to turn off the pump had nothing to do with Lorenzo's ultimate condition." The case was remanded with instructions that in any retrial, the jury will not be limited in determining the degree of negligence and liability on the part of all of the defendants. Both Segal and All Florida must be considered on the same basis as that of Sta-Rite and damages apportioned accordingly. The appeals panel found that amount was based on "equivocal and uncertain testimony" that the boy would live for another 40 years and on "almost entirely speculative testimony" that for all of that time he would suffer excruciating "conscious" pain in spite of his vegetative state. It should be noted that the boy died while the appeal was still pending and before the appellate court ruled. The court raised the question as to whether the personal injury case would have to be abated and the suit refiled as a wrongful death suit.

Settlement Reached In Suits Over Law School Shooting Rampage

A Virginia law school has agreed to pay $1 million to settle four lawsuits arising out of a deadly shooting rampage by a struggling student. The lawsuits accused the Appalachian School of Law in Grundy, Virginia, of ignoring repeated warnings of its students that Peter Odighizuwa was a threat before he opened fire in 2002, killing the dean, a professor, and a student. Three other students were wounded in the incident. The student pleaded guilty earlier this year and is now serving six life sentences. The settlement involves the three wounded students and the 10-year-old daughter of the slain student.

The plaintiffs had argued that the school should have foreseen the violence because the 46-year-old Odighizuwa—who has been diagnosed

with paranoid schizophrenia—had a history of outbursts, threats and other disruptive behavior. Odighizuwa, who had flunked out but was later readmitted before the shooting, said he opened fire out of frustration and anger as he struggled to become a lawyer.

Aamark Loses Drunk Driver Lawsuit

A New Jersey jury has ordered Aramark Corp., the Philadelphia-based operator of sports concession stands, to pay $75 million in punitive damages for serving beer to a drunken football fan whose car crash crippled a small child. Jurors found that the company "willfully and wantonly" disregarded safety in serving a fan at a New York Giants football game in 1999. After leaving Giants Stadium in East Rutherford, New Jersey, the drunken fan was involved in an accident that left a child who is now 7-years-old, a quadriplegic. Jurors ruled that Aramark and the drunk driver owed more than $30 million each in compensatory damages. The jury was urged at trial to punish Aramark for creating a "culture of intoxication" at Giants Stadium and the jurors responded. Aramark intends to appeal.

Aramark provides food services at dozens of arenas, stadiums and other facilities nationwide. The company had net income of $263 million in 2004 on sales of $10.2 billion. The jury was sending a message to Aramark that "their policies and procedures on alcohol awareness are not acceptable." The jurors wanted to make sure drunk people don't leave a football stadium and then get into auto accidents with innocent people. I hope that this defendant and others around the country **understand** this message.

Jurors ordered Aramark to pay $65 million in punitive damages for the child and $10 million for her mother, who was also seriously injured in the crash on October 24, 1999. Aramark admitted that the company was "not perfect" in enforcing alcohol-control policies and may have been negligent, but urged the urged jurors not to award punitive damages. Aramark produced records of disciplining only 10 employees in 15 years for violating its alcohol policies. Based on trial testimony, the company claimed to have lost or destroyed other records. At the time of the accident, the drunk driver had a blood alcohol content level of 0.266, or more than three times New Jersey's current legal limit. Witnesses said the fan had the equivalent of 16 12-ounce beers before and during the game. The child, who was 2 years old at the time of the crash, and her family were returning from pumpkin picking when the drunk driver's car struck her family's car in a New Jersey community.

XIII. WORKPLACE HAZARDS

OSHA Cites Alabama Company For Safety Hazards

The U.S. Labor Department's Occupational Safety and Health Administration (OSHA) has cited A.R. Butler Construction Company Inc. for reportedly exposing workers to trenching hazards at a worksite in Center Point, Alabama. OSHA's regional administrator in Atlanta stated: "For worker injuries and fatalities to decline in this industry, we must make sure that employers protect employees from trenching hazards. The significant penalty of $112,000 in this case demonstrates our commitment to protecting the health and safety of America's workers." OSHA began an inspection on July 16th after being notified that a 13-foot-deep trench had collapsed, trapping a worker who was rescued by co-workers. Investigators reportedly found that the Birmingham-based company had allowed employees to work in a 10-foot-deep vertical trench, which had an eight-inch, fully-charged water main running through it. Additionally, employees were allowed to re-enter the trench after the collapse, again exposing them to cave-in and drowning hazards.

A.R. Butler received two willful citations, with proposed penalties totaling $112,000, for failing to provide a protective system for the trench, such as a trench box or proper shoring or sloping, and failing to properly support the water main. OSHA issues a willful citation when a company has shown intentional disregard of, or plain indifference to, the requirements of the Occupational Safety and Health Act and regulations. The company reportedly failed to heed concerns about the unsafe condition of the trench and to follow requirements of its own trench safety program. The company can contest the citations and proposed penalties before the independent Occupational Safety and Health Review Commission. It has 15 days in which to do so.

McDonald's Worker Dies After Carbon Dioxide Leak

A McDonald's worker, who was 18 years old, died a day after a truck driver suffocated when carbon dioxide leaked while they tried to refill a tank at a central Florida fast-food restaurant. Both men died of carbon-dioxide poisoning that occurred in the restaurant's storage room. The men were found unconscious in a storage room where the restaurant kept the tank. This tank was used to store gas used to carbonate soft drinks. Investigators believe that the truck driver climbed in to help the younger man, who was locked in the room, and was quickly overcome. At press time, OSHA was investigating the incident. Sanford is located 19 miles north of Orlando, Florida.

Wal-Mart Lawsuit May Grow

A federal judge in New Jersey has opened the door to a possible expan-

sion of a lawsuit against Wal-Mart Stores Inc. filed by illegal immigrant janitors who claim the retail giant violated labor laws. The judge denied a motion by Wal-Mart to dismiss the suit and instead approved the sending of court-approved notices to potential plaintiffs. The court found merit in the claim that illegal immigrant workers have minimum-wage and overtime pay rights under the federal Fair Labor Standards Act. The suit was filed by 17 janitors from Mexico and eastern Europe who worked for contractors. Many of them were among the 250 people arrested in an October 23rd federal raid on 60 Wal-Mart stores in 21 states. Since the lawsuit was filed, it now appears that more than 200 other former Wal-Mart contract janitors, many from eastern Europe, are illegal immigrants. The court ruled that Wal-Mart must furnish plaintiffs the names of all contract janitors who had worked since 2000.

Rights Group Condemns Meatpackers On Job Safety

Human Rights Watch has issued a report that harshly criticizes the meatpacking industry. This is the first time the group has singled out a single industry in the United States. They concluded that working conditions among the nation's meatpackers and slaughterhouses are so bad that they violate basic human rights. The report, released last month, that jobs in many beef, pork, and poultry plants are sufficiently dangerous to breach international agreements promising a safe workplace. The report notes that the injury rate for meatpackers is more than three times that of American private industry overall. The report describes some very bad working conditions. The report's author, Lance Compa, who teaches industrial and labor relations at Cornell and is a former union organizer and negotiator, stated: "Meatpacking is the most dangerous factory job in America. Dangerous conditions are cheaper for companies, and the government does next to nothing."

In issuing the report, Human Rights Watch called on federal safety officials to increase enforcement and slow the line speed in packing plants, urged state officials to enforce workers' compensation laws more vigorously, and sought strengthened enforcement against companies' firing and intimidating workers who want to unionize.

Source: *The New York Times*

XIV. TRANSPORTATION

South Carolina Train Crash Kills Nine Persons

A freight train carrying chlorine gas struck a parked train in South Carolina recently, killing nine people and injuring more than 240 others. Authorities ordered all 5,400 people within a mile of the crash to evacuate during the afternoon of the incident because chlorine was continuing to leak and the gas was settling near the ground as temperatures dropped. At the time, authorities were unsure when the gas leak might be sealed. The accident happened at Avondale Mill, a textile plant, and was one that should never have happened. The wreck of the Norfolk Southern trains, in which 16 cars derailed, created a very bad situation. All of the deaths are said to have been caused by inhaling chlorine fumes, except for the engineer of the moving train, who died in the crash. One person was found dead in a home, and another was found in a vehicle. While most of the injured were treated for respiratory ailments and released, at least 45 people were admitted to hospitals.

The potentially fatal gas can damage the respiratory and central nervous systems, and the throat, nose, and eyes. Those who were exposed were told to report to decontamination units at two schools. Three of the 42 cars on the moving train were carrying chlorine. No one was aboard the parked train. Before the evacuation, nearby residents were told to stay inside their homes. Textile plants and schools in the area closed, and a 6 p.m.-to-7 a.m. curfew was imposed on Graniteville, Georgia, which is located about 15 miles northeast of Augusta, Georgia. Two other hazardous materials, cresol and sodium hydroxide, were being carried on the train in liquid form, but were a less immediate concern because they are corrosive only on direct contact. The National Transportation Safety Board and Federal Railroad Administration sent investigators to the accident scene.

Deadly Leak Underscores Concerns About Rail Safety

Last year, government safety officials warned that more than half of the nation's 60,000 pressurized rail tank cars did not meet industry standards. The officials also raised questions about the safety of the rest of the fleet as well. Their worry was that the steel tanks could rupture too easily in an accident. The South Carolina train crash mentioned above is a good example of what can happen. Tank cars have become an increasing concern, not just to safety investigators, but also to domestic security officials worried that terrorists could turn tank cars into lethal weapons.

Federal authorities have been working with railroads and the chemical industry to improve security for trains. But there is still much to be done, particularly given the structural weaknesses of many tank cars. Cars that were built before 1989 used steel that did not - as it does now - undergo a special heat treatment to make it stronger and less brittle. Tank cars built after 1989 use this specially treated steel. The safety board has warned that

of the 60,000 pressurized tank cars in operation, more than half were older cars that were not built according to current industry standards, leaving them susceptible to rupture. Because these cars may remain in service for up to 50 years, some older ones could still be hauling hazardous materials until 2039.

Among the hazardous materials carried by the tank cars are liquefied ammonia, chlorine, propane and vinyl chloride. In most cases, the cars are owned by chemical or leasing companies, not the railroads. Although the rail industry now requires that tank shells be made with the special heat-treated steel, the safety board says that treatment alone "does not guarantee" enough protection against impact. According to the board, other manufacturing techniques should also be explored. It appears that the industry and the railroad administration "haven't established adequate testing standards to measure the impact resistance for steels and other materials used in the construction of pressure tank cars. Since the tank cars will be hauling dangerous materials, all steps necessary to assure safety should be taken. The federal government must see that the public is protected and should take prompt action to make that happen.

Source: *The New York Times*

Questions Raised On Signals At Rail Crossings

A New York Times computer analysis of government records has found that from 1999 through 2003, there were at least 400 grade-crossing accidents in this country in which signals either did not activate or were alleged to have malfunctioned. At least 45 people were killed and 130 injured in those accidents, according to the records. Even though in many of the cases the role of signal malfunctions was unclear, there is still reason for concern. Federal rules require that railroads maintain signals on tracks they own. The accident reports, all prepared by the railroads, raise questions in many cases about whether unsafe behavior by drivers contributed to the accidents. That shouldn't come as a big surprise. Since 2000, railroads have filed about 2,300 reports of the most serious types of signal malfunctions, which are short signals or no signals at all. However, most of these malfunctions did not involve accidents. Interestingly, James E. Hall, a former chairman of the National Transportation Safety Board told the Times: "If we had that type of record in aviation, it would be unacceptable."

Warning signals are triggered when an approaching train causes an electrical current to pass from one rail to the other. The frequency of signal malfunctions is difficult to assess, because railroads don't have to report all malfunctions and because proving that an error occurred is often difficult after an incident. Currently, Texas has the only statewide government hot line for problems at grade crossings. According to government data, some 9,500 calls about signals were lodged in 2003 in Texas.

Chronic signal malfunctions are not only hazardous, but also burdensome for police departments, especially smaller ones, because they must often send officers to safeguard motorists at problem crossings. A signal malfunction at a grade crossing can certainly pose a safety hazard for motorists. Federal rules define signal malfunctions as those that give drivers a warning of less than 20 seconds, or that activate when no train is approaching. The latter, called a false activation, is potentially dangerous because drivers may be led to ignore signals that they believe are not working. I understand that false activations are the most common signal problem. After accidents, the Federal Railroad Administration requires railroads to report any possible or confirmed signal that lasts more than 60 seconds without a train entering the crossing. It is possible to determine what happened at the time of an accident if the signals are equipped with devices to record when a warning is activated and the position of the gates when the crash occurred. Unfortunately, however, most signals lack such devices. More often, the determination comes down to what witnesses say about what happened and if signals were working.

Even when no accident occurs, the Federal Railroad Administration requires railroads to report to a separate database when signals fail to give drivers a sufficient warning. The required 20 seconds are necessary because gates do not descend instantly. They typically begin to lower four to five seconds after signal activation and take about five seconds to be fully deployed. The reports in this federal database, however, often provide few or no details on the signal malfunctions. This database does not reflect every signal that fails to operate properly. The most common problems, false activations, are not included. Finally, the federal government should do more to protect motorists and less to protect the railroad companies. Presently, the deck is stacked heavily in favor of the industry and Congress has done little to protect the driving public.

Source: *The New York Times*

Family Sues State And Contractors Over Crash

The family of a Yale University student who was killed in a 2003 crash on an interstate highway is suing the state of New York and two construction companies, claiming their actions contributed to the accident. The suit alleges that the New York Department of Transportation failed to warn motorists that an earlier accident created hazardous conditions on the highway. The lawsuit also claims that a crew from two construction companies caused an outage of highway lighting at the scene of the fatal crash when they knocked down a light pole. A sport utility

vehicle carrying nine Yale students back from a fraternity event in New York City hit a tractor-trailer that had been involved in an accident in the northbound lanes of the interstate highway in the early morning hours of January 17, 2003. Four of the students were killed. Most of the victims were members of a social fraternity who had escorted pledges to New York. The driver of the SUV had been awake for nearly 20 hours before the crash. A report by the National Transportation Safety Board revealed that highway lights were out at 5 a.m., the time of the crash, and that no driver was under the influence of drugs or alcohol. Several witnesses have reported that the road was very slick from ice and snow.

Surviving Fisherman Files Suit

The lone survivor of a scallop boat accident that took the lives of five commercial fishermen in frigid seas off the Massachusetts coastline has sued the vessel's owner. It is contended that the Northern Edge was unseaworthy and that survival suits on the boat were stowed out of reach. The surviving fisherman claims that waves ranging from 11 to 15 feet should not have capsized and sunk the 75-foot scalloper owned by K&R Fishing Enterprises Inc. The contention is that the vessel should have been able to withstand those seas and that it was unstable. It also was contended that K&R improperly stored the suits, which are insulated to keep one alive in cold water, in the engine room. That was a place where the crew couldn't get to them when the vessel capsized.

The vast majority of lawsuits that stem from accidents at sea are settled out of court. Interestingly, the 1920 federal Death on the High Seas Act actually favors survivors over the families of seamen who are killed. The federal law provides no damages for loss of companionship to families of seamen killed, as is customary in wrongful-death lawsuits in most all states. Of course in Alabama, the only damages recoverable in a wrongful death action are punitive. No compensatory damages are allowed in death cases in Alabama. In cases under this Act, families can only recover the wages they would have received if the seamen had lived. On the other hand, the federal Act does allow survivors to recover damages for injuries, emotional and physical suffering and lost income.

K&R has filed a petition in federal court which asks that the company be absolved of having to pay any damages or that the amount be sharply limited. The petition, which is routinely filed by the owners of boats lost at sea, insisted that the Northern Edge was "in all respects seaworthy and fit for service." K&R could derail the personal injury suit if it proved at trial that the Northern Edge was seaworthy or that the company could not have foreseen the disaster. In this case, the seaman survived by clinging to a lifeboat and was rescued by crew members from another fishing boat. All other members of the boat's crew were lost.

U.S. Airlines Have 34 Deaths In 3 Years

Over the past four years, thirty-four people have died in U.S. commercial airline crashes. Those numbers make it one of the safest periods in aviation history, considering that more Americans than ever traveled by air during that time frame. The only fatalities aboard U.S. scheduled airlines last year came on October 20, 2004 when a Corporate Airlines twin-engine turboprop crashed into the woods on approach to the Kirksville Regional Airport in Missouri, killing 13 people. In comparison, some 42,000 people die every year on the roads in the U.S. The last U.S. crash of a jumbo jet was November 12, 2001, when American Airlines Flight 587 lost part of its tail and plummeted into a New York City neighborhood, killing 265 people. Safety investigators concluded that the crash of Flight 587 was caused by the pilot moving the rudder back and forth too aggressively, which put more pressure on the tail than it could bear. It is believed that new technology has improved safety. For example, many planes now have systems that warn pilots if they're about to fly too close to the ground. Jets and turboprops manufactured after March 29, 2003, are required by federal regulations to have a so-called Terrain Awareness and Warning System. All other planes with more than six seats must be retrofitted with the devices by March 29, 2005.

As we pointed out in an earlier issue, the plane that crashed in Missouri in October was months away from being outfitted with a terrain-warning system that might have prevented the accident. On the ground, 34 major airports have been equipped with systems that warn air traffic controllers of a potential collision on runways. You may recall one of the worst aviation disasters in history involved two jumbo jets that ran into each other on a runway in Tenerife in the Canary Islands in 1977, killing 582 people. That shouldn't happen with the availability of those warning systems. Weather radar and wind shear alert systems also have helped eliminate accidents caused when planes encounter concentrated downward bursts of wind on approach to the airport.

Safety experts agree that better training and awareness of safety issues have played a big part in making U.S. skies safer. The FAA's formation in 1997 of the Commercial Aviation Safety Team (CAST), which set the goal of reducing fatal aviation accident rates by 80% by 2007, appears to have been a good move. The accident rate has fallen 50% since that time. As part of the CAST project, airline unions and management, along with federal agencies and manufacturers, are collaborating on identifying safety problems and solving them. Among the 85 safety improvements CAST is working on include:

- Teaching pilots how to recover from unusual flight conditions that could be dangerous;
- Developing tougher standards for icing-prevention technology on new planes; and
- Establishing new procedures for air traffic controllers to prevent collisions on runways.

A change in federal regulations, which took effect December 14, 1995, is believed to be a key development for aviation safety. On that day, all commercial air carriers — from commuter planes with 10 or more passenger seats to jumbo jets — were required to follow the same safety rules for operating. Prior to that time, planes with 30 or fewer seats fell under less stringent regulations than larger aircraft. Although from a statistical perspective, the past few years have been "safer," there is still much work to be done. It's no time for those responsible for safety to get complacent.

Source: *The Associated Press*

Airlines Outsource Crucial Safety Tasks

From a safety perspective, it makes absolutely no sense for U.S. airlines to be allowed to outsource maintenance of its airplanes to foreign countries. Safety should be a top priority for the airlines and that's why I strongly oppose outsourcing in this arena. For example, one major airline is now sending some of its planes to El Salvador for checkups required by the U.S. Federal Aviation Administration. Northwest Airlines flies wide-body jets to Singapore and Hong Kong for service by outside contractors. It appears that U.S. airlines, in an effort to cut costs, are outsourcing jobs that are crucial to passenger safety, including long-term maintenance. While airlines continue to use their own mechanics for lighter maintenance between flights to ensure punctuality, half of U.S. carriers' heavy-overhaul work is now performed by outside vendors in the U.S. and overseas. According to a report in the *Wall Street Journal*, that's up from less than a third in 1990. The worldwide aircraft maintenance market is worth an estimated $37 billion annually.

The major U.S. airlines have been furloughing veteran mechanics. Last year, the National Transportation Safety Board found that deficient maintenance by an outside vendor and lack of regulatory oversight contributed to a 2003 crash of a commuter flight in Charlotte, North Carolina that killed 21 people. In a 2003 report, the federal Department of Transportation's inspector-general faulted the FAA for inadequate oversight of outside contractors. Despite the increase in outsourcing, the FAA "has continued to concentrate its resources on oversight of air carriers' in-house maintenance operations," the report said. According to the report, one airline outsourced 44% of its maintenance budget in 2002. The FAA did 400 inspections of that airline's own maintenance facilities, but only seven at the outside shops. The FAA concurred with the report's recommendations for tighter scrutiny of contractors. It is now phasing in rules requiring better record keeping and training at contractors and raising the requirements for supervisors' experience.

All U.S. and foreign repair services that work on U.S. planes and parts must be authorized by the FAA and adhere to the same safety standards. James Ballough, the FAA's director of flight standards, told the Journal that his branch inspects 4,500 domestic and 650 foreign repair stations. Nearly 700 inspectors are assigned to these outside servicers, while 220 inspectors look after U.S. airlines' in-house overhaul activities. At one time all airlines hired unionized employee mechanics to do most of their maintenance work. The jobs usually required each employee to have an FAA "airframe and power plant" license.

Some experts on airline safety are concerned that the shifting of work to third parties, especially when outsourcing to foreign counties is involved, could result in weaker regulatory scrutiny. Only supervisors at the outside repair stations—not individual mechanics—must be licensed by the FAA. In my opinion, all maintenance workers should be well trained and competent. The latest outsourcing push involves outsourcing heavy inspections including those that take a few days and others, lasting as long as a month, in which planes are torn apart, inspected for cracks and wear, and then rebuilt. If outsourcing of the sort described above is permitted, the inspection of U.S. regulators must be more than just adequate—it must be as through as possible.

Source: *The Wall Street Journal*

Bacteria A Problem For Airline water

Bacteria are still showing up in the running water aboard the nation's airliners. Carriers had promised to flush and disinfect their water systems every few months. Instead, things seem to be getting worse. The U.S. Environmental Protection Agency says that coliform showed up in 17.2% of 169 passenger aircraft, randomly tested in January, up from 12.7% of 158 planes in August and September. The EPA cautioned passengers with compromised immune systems to drink only canned or bottled beverages when they fly. Travelers should also stay away from tea or coffee, unless they're made with bottled water. Thus far, there have been no results of mass illnesses or any kind of an outbreak, according to the EPA. The results of recent testing confirm the presence of bacteria at levels warranting continued EPA scrutiny. The tests were done on water from galley water taps and lavatory faucets on planes at 12 U.S. airports. Total coliform indicates that other disease-causing pathogens may be present in the water, according to the

EPA. Healthy people probably won't get sick from coliform bacteria, but they shouldn't ingest it. But, the water is contaminated and that's a potential hazard. This containment comes from the intestines of people and animals.

A dozen major U.S. carriers agreed in November to a program to improve sanitation in water systems after tests reported in late September showed one of every eight airliners failing EPA standards. Under the agreement, planes would be disinfected within 24 hours if coliform bacteria were discovered, unless the agency granted an extension because the plane was outside the United States. The airlines also promised to flush the drinking water systems on their planes every three months. Because the agreement was reached late last year, carriers didn't have much time before the latest round of testing. Most U.S. airlines serve bottled water, but that isn't guaranteed.

Suit Over Guardsmen Killed In Crash Settled

Families of five National Guardsmen, who were killed when their plane crashed in Georgia four years ago, have settled their lawsuit against the aircraft's manufacturers for $3.75 million. The money will be paid by the companies that made and maintained the C-23 Sherpa cargo plane and its parts. The companies are: Montreal-based Bombardier Inc. and its subsidiary, plane maker Short Brothers PLC; Duncan Aviation Inc. of Lincoln, Nebraska; Rockwell International of Milwaukee and its former subsidiary Rockwell Collins Inc. of Cedar Rapids, Iowa.

Twenty-one Guardsmen died when the plane crashed near Macon, Georgia, on a flight from north Florida to Virginia in March 2001. A three-member crew from the Florida Army National Guard was flying 18 members of the Virginia Air National Guard home after a two-week training mission in Florida. Military investigators blamed the crash on the crew for improper loading, but the general who ordered the probe later blamed bad weather and equipment malfunctions. The plane was made in Northern Ireland by Short and then converted for military use by Bombardier. The lawsuit claimed the plane's new configuration had not been tested, and that the weather radar was not working properly. These modifications had a substantial effect on the stability of the aircraft, yet the design was never fully tested and the National Guard was never warned of the potentially catastrophic problems. The suits by the families of the 16 other victims have been consolidated and an April trial has been scheduled in Tampa, Florida.

Source: *The Associated Press*

Wrongful-Death Lawsuit Against Utility Reinstated

A lawsuit on behalf of a teenager fatally injured in a 1998 collision with a utility pole has been reinstated by an appellate court in Missouri. It was claimed that the utility was at fault for not quickly telling emergency crews that a downed power line on the wreckage was dead. A dissenting judge in the 2-1 ruling by the Missouri Court of Appeals called the majority's opinion "clearly against public policy," with "potentially dire consequences." The ruling sided with the teenagers' parents, who argued that emergency responders, mistakenly believing the downed line was energized, were kept from getting to and treating the trapped 19-year-old victim for 30 minutes. That delay was said to have cost their daughter her life. Two other teenagers in the car died at the scene of the September 1998 crash. A St. Louis judge had dismissed the family's wrongful-death lawsuit against AmerenUE. The appellate court reversed, finding that AmerenUE was aware the downed line was inactive and had a duty to notify rescue workers.

AmerenUE claimed that it had no duty to encourage emergency workers to take a risk that its own employees would not take, or to provide rescue workers information from which they could decide whether to take such risks. The majority decision of the appellate court held that the utility had a duty to convey information that only it had. Without conveying that information, rescue personnel at the scene were unable to do anything for a half hour. Those minutes were critical to the teenager's survival. The car in which the teenager was riding, jumped railroad tracks and went airborne before hitting the ground and a guardrail. It then slammed into the utility pole and overturned. An electric line fell onto the car's exposed undercarriage, igniting the vehicle. Within minutes the power line was de-energized. A utility worker eventually arrived and used a fiberglass stick from firefighters to remove the downed line. Rescue crews then freed the car's occupants. The teenager, who sustained electrical burns and pulmonary injuries from the inhalation of toxic fumes, died nearly a month later. In December 1998, her parents settled their claims related to their daughter's death with insurers of the driver of the car.

Source: The Associated Press

XV. ARBITRATION UPDATE

Arbitration Working Just Fine For Big Business

In a long running dispute between a brokerage firm and the stockbroker that it allegedly improperly fired, the New York Supreme Court late last year concluded that unfortunately it was not empowered to order a reduction of a punitive damage award and that "a costly new arbitration" was the only choice it had. Let me give you a little

background so that you can understand how it came to the point where the plaintiff was asking for a reduction in damages and the court would not allow it.

In 2001, a broker who challenged his termination from Waddell & Reed, Inc. was awarded $25 million dollars in punitive damages in an arbitration hearing. At the time, that punitive damage award was one of the largest in a securities arbitration case. The award, however, was appealed and in 2003, an appellate court vacated the punitive damage award and remanded the matter to the original panel of arbitrators for reconsideration of the punitive damages issue. The panel heard arguments a second time, and again issued an award in the broker's favor for $25 million dollars in punitive damages. The brokerage firm again appealed, and the court vacated the second arbitration award and ordered that the matter be submitted to a different arbitration panel.

At this point, the broker had legal fees that exceeded $700,000 and the original transcript of the arbitration hearing produced a transcript of more than 10,000 pages. Having filed his original claim for arbitration more than seven years ago, the broker asked the appellate court to conditionally remit or lower the award so that he would not have to go through a third arbitration hearing before a new panel and expend more money for legal fees and other expenses. The court denied his request. The court said: "A new arbitration before a new panel is likely to be as expensive and time-consuming as the first. The history of this arbitration, undermines the very purpose of arbitration: To provide a manner of dispute resolution more swift and economical than litigation in court."

This is a perfect example of the difficulty, expense and time that can be consumed when one has a clearly valid claim with the sole question at issue being the amount of punitive damages to be awarded. Thus far, it has cost this broker more than seven years and almost $1 million dollars to find out how the defendants should be "punished." It appears that the only person or entity being punished in this arbitration is this broker under the current arbitration system.

XVI. NURSING HOME UPDATE

Florida Supreme Court Limits Right To Sue For Nursing Home Deaths

The Florida Supreme Court has limited the right of some survivors of deceased nursing home patients to recover damages for alleged abuse and neglect under the state's Nursing Home Resident's Bill of Rights. The majority opinion in the case which is styled Knowles v. Beverly Enterprises stated that the language in the 1976 Nursing Home Resident's Bill of Rights statute in Florida was clear on the issue. It is interesting to note that it took almost 30 years for that legislation to be interpreted in this fashion. A strong dissent in the case was written by Justice R. Fred Lewis, who wrote that the Legislature's obvious intent in crafting the Nursing Home Resident's Bill of Rights was to offer patients broad protection. Justice Lewis said the opinion of the majority in the case is "wholly contrary to the [statute's] very purpose - resulting, ironically, in an evisceration of such resident's legal rights." Justice Lewis also pointed to the fact that since 1828, Florida has had a law that no cause of action an individual may have against another dies when that person dies. Justice Lewis complained that the majority completely ignored this law.

It is believed that the ruling will apply to only to an estimated 600 to 1,500 cases filed before May 15, 2001. That's when the law was changed to explicitly permit survivors to sue for damages even if the alleged failures in patient care did not directly result in the patient's death. The majority held that the 2001 statutory change was "of no moment" in considering cases filed before that provision took effect. The majority cited precedent from a number of other cases in determining that a thorough study of legislative intent was not required to discern the intent of the lawmakers in adopting the statute.

Florida's "survival statute," on the books since 1828, states, "No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person." It has been estimated that the ruling would kill off 20% to 50% of the estimated 3,000 nursing home abuse and neglect cases in existence in 2001 when the law was changed to permit such suits. In a friend of the court brief supporting the claim of a patient's survivors, it was said the ruling guts the state's landmark nursing home residents' bill of rights and eliminates the right of many families to sue for gross mistreatment of their loved ones. Because of the court's ruling, there is now less incentive for nursing homes to give patients who are near death adequate care.

The decision arose from a case involving a resident who died of heart disease in 1995 at age 72 after a 67-day stay at Washington Manor Nursing Home and Rehabilitation Center in Hollywood. That facility was owned by Arkansas-based Beverly Enterprises, a national chain of nursing homes. The resident was placed in the nursing home following a hip replacement. The descendant's wife sued the facility, alleging that her husband had suffered neglect resulting in pressure sores, permanently locked limbs and dehydration. She sued under the Florida nursing home Residents' Bill of Rights, which allowed suits by survivors of patients who died as a result of nursing home neglect or abuse. The nursing home contends that the statutory claim was invalid because the resident died of heart disease and not from the pur-

ported neglect. They contended that a 1986 amendment to the nursing home statute permits survivors to sue only when the patient's death is a direct result of the alleged neglect or abuse.

Substandard Homes Allowed To Operate

State and federal officials who monitor the quality of care in nursing homes have agreed that poor-quality homes are often allowed to continue operation after temporarily fixing problems, only to experience the same problems a short while later, according to recent reports by the Boston Globe. The Government Accountability Office reported last year that there was a "unacceptably high" number of poor-quality nursing homes remaining in the United States, while another report found that the nursing home enforcement system in this country is not "ridding the industry of chronically poor-performing" homes. The reports indicated that often a nursing home owner would close one of their homes that are found to be substandard by an enforcement agency, only to open another home in another area.

The problem cited by the reports included the lack of a "death penalty" for such nursing home owners. The reports also found that there were not enough inspectors to find the problems that exist in nursing homes, and that the fines levied against nursing homes for substandard care are not large enough to be a deterrent. The government is investigating why enforcement in nursing homes has not been successful, and there are plans to make changes in enforcement techniques by next October. One goal is to provide for faster investigation of reported problems, while another goal is to possibly link the size of payments to nursing homes to quality.

Source: *The Boston Globe*

XVII. HEALTHCARE ISSUES

Public Citizen Launches A Comprehensive Online Database That Lists Dangerous Prescription Drugs

Public Citizen has launched a new website, www.WorstPills.org, that provides consumers with comprehensive information about 538 prescription drugs and warns them of 181 drugs that are unsafe or ineffective. The searchable, online database also provides information about drug pricing, outlines 10 rules for safer drug use, has monthly issues of Public Citizen's Worst Pills, Best Pills newsletter, and enables users to sign up for e-alerts about newly discovered drug dangers. People looking for information on the site can search by drug, medical condition, or drug-induced disease. The website contains the entire contents of the just-published edition of the book, "Worst Pills, Best Pills," including a new chapter on dietary supplements.

The site is particularly valuable to consumers because Public Citizen has a strong track record of identifying dangerous drugs well before federal regulators take action to ban or put warnings on these drugs. For example, in April 2001, as we have previously reported, Public Citizen warned consumers against taking Vioxx because it increases the risk of heart attack. The FDA took no action, and it wasn't until this fall that Merck pulled the drug from the market. Vioxx was the ninth prescription drug to be taken off the market in the past seven years that Public Citizen had previously warned consumers not to use. For four of the drugs - Vioxx, Baycol, Rezulin and Serzone - Public Citizen issued warnings more than two years before their removal from the market. Similarly, Public Citizen warned patients not to use Celebrex three and a half years before the government announced that a study showed it increased heart risks. Dr. Sidney Wolfe, director of Public Citizen's Health Research Group says "As recent events have shown, the U.S. Food and Drug Administration, which receives well over $100 million a year in funding from the drug industry largely to review drugs more rapidly, doesn't do a good job of protecting people from medications that can seriously harm or kill them. We provide consumers with indispensable and potentially life-saving information that they can't get anywhere else—certainly not from the federal government or drug industry."

While WorstPills.org has existed since January 2003 in a less comprehensive form, the revamped site has been redesigned and updated. As noted above, all of the data in Public Citizen's newly released edition of "Worst Pills, Best Pills," a book that has sold more than 2.2 million copies since first being issued in 1988, is now included. The updated book, just published by Simon & Schuster, is now available in bookstores. Public Citizen obtains information by gathering and analyzing all available records about prescription drugs—sometimes even suing the federal government to obtain them. While others have created sites about prescription drugs, Public Citizen's is exceptionally comprehensive. They are the only group to warn consumers against using certain drugs. Public Citizen doesn't take government or corporate money. Therefore, it is a completely independent, unbiased source of information. Public Citizen President Joan Claybrook, who in my opinion is a great American, states:

> *The major drug manufacturers have bombarded consumers with misleading TV and print advertising about prescription drugs, so consumers have a compelling need for unbiased information about safety and effectiveness. This effort is part of Public Citizen's decades-long commitment to protecting*

consumers from products that can harm them.

Prescription drug safety is becoming more relevant as people take more medications. An estimated 100,000 people in the United States die annually from adverse drug reactions, and nearly 1.5 million people are injured so seriously by adverse drug reactions that they require hospitalization. Because regulators and drug companies are slow to recognize and react to drug dangers, Public Citizen created a "do not use" list of drug consumers shouldn't take. Big-selling drugs still on the market but listed as "do not use" on WorstPills.org include: Crestor, Darvon, Bextra and Ultracet, Yasmin, Desogen and Orthocept, and Meridia. A year subscription to the website, www.WorstPills.org, costs $15, which includes a monthly e-newsletter and electronic updates about dangerous prescription drugs. People who purchase the book can obtain a free six-month subscription to WorstPills.org. The "Worst Pills, Best Pills" book can be purchased in bookstores or through Public Citizen for $19.95. All persons who wants to protect themselves and their families should take advantage of all that Public Citizen has to offer.

Source: Public Citizen

Doctors Told To Be More Vigilant

Some interesting recommendations on healthcare came from a medical conference held recently. In an effort to reduce medical errors, it was said that hospitals should use computers to order drugs for patients, work harder at coordinating treatment, and educate patients to help care for themselves. Doctors who treat disorders of the hormone systems—such as diabetes—issued the proposals after a two-day conference. The Institute of Medicine reported five years ago that medical errors kill between 44,000 and 98,000 Americans annually. It is disturbing that fear of medical mistakes still remains a major concern for the public. Dr. Richard Hellman of the American College of Endocrinology reported that an estimated 50% of people with a chronic condition at some time experience a medical error in their care or that of a family member. Dr. Hellman says that the medical community needs "to collectively value safety." He called for better information, education and more coherent care.

Dr. Hellman said his group and the American Association of Clinical Endocrinologists are working with state patient safety organizations in an effort to get their recommendations into use in local hospitals. The recommendations from the conference included:

- Create a culture of safety in which people work together, communicate, do backup checks and share information;
- Implement electronic patient records and information-sharing systems;
- Reduce medication errors through use of computerized physician order entry;
- Improve coordination of care, focusing on teamwork among health professionals and other caregivers; and
- Improve patient self-care through information and education.

Study Links Fatal Errors To Pharmacists' Workload

A surge in pharmacist workloads at the beginning of every month may have led to fatal medication errors that have killed more than 6,000 people a year, a study of more than 47 million death certificates found. That surprising finding is prompting recommendations by researchers for government agencies to consider spreading out social service payments, for pharmacies to increase staffing at the first of the month, and for consumers to exercise special care in checking their prescriptions. At the beginning of the month, there is a sharp increase in government payments to the elderly, sick and poor. This results in higher traffic at retail pharmacies as lower-income patients fill their prescriptions, according to research published in the January issue of Pharmacotherapy, the Journal of the American College of Clinical Pharmacy. Pharmacists must have adequate time to fill prescriptions and must be rested and alert. It's documented that pharmacists make more errors when they're busy. Dr. David Phillips, a professor of sociology at the University of California, stated: "The two things together prompted us to predict there would be this spike in deaths from medication errors. And indeed, that turned out to be the case." The study didn't address how the errors occur or precisely who may be committing them. David Hayes, a professor at the University of Houston's College of Pharmacy, who is a pharmacist and who works several times a month at a grocery's pharmacies, said the link sounds plausible, particularly in lower-income neighborhoods with larger Medicaid populations. He says: "The first of the month is not a pleasant experience. It's very busy. If you're a pharmacist, you worry more at the end of the day about the things you did during the day at the first of the month, if you're in those areas."

To investigate their theory, lead author Phillips and his colleagues looked at 47.7 million computerized death certificates on a database maintained by the National Center for Health Statistics. They started with 1979 because that's when statisticians began using a special coding system to categorize causes of death, and ended with 2000, the year of the most recent data. Researchers examined death data, including date, cause, location of death, age, gender, years of education, and substance abuse status. They used years of education to measure socioeconomic status because a positive correlation has been established between the two. The study focused on deaths resulting from poisoning accidents

from drugs. One category, "accidental overdose of drug, wrong drug given or taken in error, and drug taken inadvertently," accounted for nearly all of the deaths. The researchers found that between 1979 and 2000, fatal medication errors dipped sharply at the end of the month — when people may be out of money and can't buy medicine. At the beginning of the month — when social service payments come in — fatal errors soared, showing a spike of as much as 25% above normal at the beginning of the month, leading to 125,000 deaths in the time frame studied. The increase in fatal medication errors didn't vary by socioeconomic status and wasn't larger for substance abusers than for others. Identification of the death spike and the search for causes can potentially reduce the number of deaths from medication errors, the researchers said.

My brother Billy Beasley, a pharmacist who operates three drug stores in Barbour County, is very much aware of the problems that face his profession. There is a shortage of pharmacists and many of those now working are having to spend long hours on the job. Unfortunately, many of the chain drug stores are utilizing non-professionals to fill prescriptions, ostensibly under the supervision of a registered pharmacist, and that is not good. I am convinced that this type operation is causing problems for consumers. Folks shouldn't have to worry that their prescriptions could be misfilled. My recommendation is to use a store where you know and trust the pharmacist. That's the safety tip of the month!

Rule To Permit Higher Doses Of Food Irradiation Is Flawed

A recent U.S. Food and Drug Administration decision will increase by 50% the maximum radiation dose that can be used to irradiate food. This raises questions about the health effects of consuming such food. Public Citizen believes the FDA should reconsider the decision and wrote the agency a letter to that effect. Public Citizen believes the rule should be revoked and is requesting a public hearing. The rule, on which final comments were due on January 25th, would significantly boost the dose of X-rays that could be used to irradiate fruit, vegetables, beef, poultry, pork, eggs, and spices from 5 million electron volts to 7.5 million electron volts. The higher doses will allow large portions of food, such as shipping containers from overseas, to be irradiated in one blast.

The rule may result in some radioactivity in food depending on the energy applied, the type of food, and how soon it is eaten after it is irradiated. While the radioactivity is likely to be temporary, questions about its effect on food and consumers remain. The FDA was reckless to not assess cancer risks associated with the new rule, the letter said. The FDA has a long history of ignoring questions about the long-term effects of eating irradiated food. Numerous health problems have been observed in lab animals fed irradiated foods, including premature death, stillbirths, mutations, tumors, organ damage, and stunted growth. Chemicals formed in irradiated foods called 2-alkylcyclobutanones have been linked to colon cancer in rats and genetic damage in human cells. There is evidence to suggest that irradiation's byproducts may be dangerous for our health. The FDA's first priority should be the health and safety of American consumers. Unfortunately, this ruling is designed to benefit industry. Before issuing a rule of this magnitude, the FDA should conduct safety studies on how this increased dosage will affect consumers. At present, this isn't being done.

Source: Public Citizen

XVIII. ENVIRONMENTAL CONCERNS

Shell Settles Orange County Lawsuit Over MTBE Contamination

The Shell Oil Co. has become the last of three gas and oil companies to settle a six-year-old lawsuit by Orange County over soil and groundwater contamination caused by underground storage tanks. Under the settlement, Shell will pay $14.5 million to conduct tests to determine the amount of methyl tertiary-butyl ether (MTBE) in the ground at 173 stations. Another $4 million will fund consumer and environmental prosecutions, the county Health Care Agency, and some local fire departments. Shell also is required to pay whatever it costs to clean up the ground at gas stations where the leaks occurred.

MTBE is a gasoline additive that studies have shown could cause cancer. It is banned in some states. The chemical entered the groundwater in the county, but not the deep aquifers from which drinking water comes. The county sued Shell, Atlantic Richfield Co. and Thrifty Oil Co. in 1999, alleging MTBE leaked from underground storage tanks at their gas stations. BP paid $8 million in 2002 to settle the lawsuit over leaks from 122 ARCO stations, and $1.6 million in 2003 for leaks at 43 Thrifty Oil Co. stations.

EPA Finds Potential Teflon Chemical Risks

The Environmental Protection Agency is considering whether there is "a potential risk of developmental and other adverse effects" from exposure to low levels of a chemical used in making the nonstick substance Teflon. The agency's draft assessment of the potential risks of perfluorooctanoic acid and its salts, known as PFOA, or C-8, is preliminary. The report, based

on animal studies, is being sent to outside experts for helping in resolving scientific issues in order to determine the potential risks. The report is not meant to be definitive until more information is gathered and the peer review is done. The EPA made it clear that no conclusions from the study are to be reached. The science advisory board is being asked to assist in making the kinds of scientific judgments required.

The initial report by EPA suggests that PFOA could be carcinogenic in rats, but the cancer hazard for people is less certain. It indicates the chemical targets the liver and is present in the breast milk of rats. It also says there could be an effect on cholesterol and triglyceride levels in people—similar to results from chemical maker DuPont Co.'s publicly released report. DuPont said its study found no overall health problems. In a statement, EPA officials said that while the agency "has concerns with respect to the potential nationwide presence of PFOA in blood and with the potential for developmental and other effects suggested by animal studies, there are significant uncertainties in the agency's quantitative assessment of the risks of PFOA." While PFOA is used to make Teflon, it is not present in Teflon itself, which is applied to cookware, clothing, car parts, and flooring. PFOA also is used to produce materials used in fire-fighting foam, phone cables, and computer chips.

The Environmental Working Group, an advocacy organization that brought DuPont's record on PFOA to EPA's attention, believes that, based on other studies of PFOA, the potential cancer and heart disease risks from the chemical are being played down too much. The group feels there is a more serious risk than what EPA is discussing at present. DuPont's study was released to the EPA and to its workers, who were exposed to PFOA at its plant in Parkersburg, West Virginia. The company's study was reviewed by experts from five universities. I understand DuPont has more follow-up research in the works.

In its study, DuPont reported there were "no human health effects known to be caused" by PFOA. The company said its study was based on 62 blood and urine tests among 1,000 employees at DuPont's Washington Works plant on the Ohio River. DuPont said it found elevated levels of total cholesterol and fats called triglycerides among workers exposed to PFOA, but noted that the study data "did not indicate that PFOA was or was not the cause of the increases in serum cholesterol and triglycerides." DuPont also said its study found no association between elevated PFOA blood levels and liver function, blood counts, prostate cancer, leukemia or multiple myeloma. The company is battling charges by EPA that it did not fulfill its legal obligations to share lab results about the potential harm from the unregulated chemical, known as PFOA or C-8, on several occasions. An administrative court hearing on those charges was held in December.

The company maintains that it did fulfill its obligations and that PFOA is harmless. But, DuPont will pay as much as $343 million to settle charges it contaminated drinking water in West Virginia and Ohio with PFOA over the past 50 years. As many as 60,000 residents around the plant sued over their exposure to the chemical. The settlement will not become final until after a public hearing later this month.

Source: *Associated Press*

Chlorine Factories Cited As Big Source Of Mercury Pollution

It has been reported that nine chlorine plants in the South and East pour at least eight tons of mercury into the environment each year — a situation that demands federal action to force companies to convert to cleaner technology. Environmentalists believe the amount of mercury emitted by the plants may be even greater. While the industry acknowledges that tons of the toxic metal are unaccounted for each year, they say that mercury isn't dumped into the environment. Chlorine at the plants is made by pumping electrically-charged salty water through a vat of mercury. This is a process that was devised more than 100 years ago. Environmentalists say these plants are a largely ignored and unchecked source of mercury pollution. Mercury settles in waterways and accumulates in fish. In humans who eat those fish, the metal can cause neurological and developmental problems, particularly in fetuses and children.

The Washington, D.C.-based environmental group Oceana has called on the Environmental Protection Agency to require all the plants to convert to mercury-free technology by 2008. The calculations of how much mercury is dispersed into the environment are in dispute. It is pretty clear though that chlorine factories as a "major global source of mercury." The industry, in reports to the EPA, says eight tons were emitted in 2003. A plant in Muscle Shoals, Alabama, emitted 1,757 pounds of mercury in 2003.

While total mercury emissions in the United States have fallen substantially since 1990, power plants remain the largest remaining human-caused source. They released 90,370 pounds of mercury into the air in 2002, the most recent year for which EPA data are available. Federal guidelines released last February place strict limits on the amount of mercury that power plants can release. They place no similar caps on chlorine plants, but do require more frequent emission measurements and equipment inspections. Last year, three environmental groups—Earthjustice, Natural Resources Defense Council, and Sierra Club — sued the EPA and began using other legal channels to get power plant emission limits extended to chlorine plants.

Source: *Associated Press*

XIX. TOBACCO LITIGATION UPDATE

U.S. Seeks $280 Billion In Tobacco Suit

The Justice Department's lawsuit against the tobacco industry is awaiting a crucial ruling that could come at any time. The federal government is seeking $280 billion in disgorgement of profits—the largest amount ever sought against cigarette makers, and one of the highest awards sought in any lawsuit. But its attempt to recover that sum could be thrown out by an appellate court, leaving the case to be settled for a few new marketing restrictions and other marginal remedies. If the appeals court sides with the U.S., however, government lawyers will try to show at trial that the U.S. deserves as much as $280 billion. If the judge agrees, the industry may have to post a multibillion-dollar "appeal bond" as it awaits further court action. Credit ratings could be slashed, along with dividends to parent companies. Bankruptcy filings could ensue. So as investors and cigarette manufacturers hold their breath, the question arises: How did the Justice Department get to that number?

In the trial in federal district court in Washington, D.C., lawyers for the Justice Department are arguing that tobacco companies violated the Racketeer Influenced and Corrupt Organizations Act, also known as RICO, by conspiring to mislead the public about the dangers of cigarettes. The trial judge dismissed claims by the U.S. government that it should be able to recoup money spent by the government to treat ill smokers through Medicare and other health-care programs. Medicare spends about $20 billion a year treating smokers. The tobacco companies had earlier sought to persuade District Judge Gladys Kessler to dismiss the government's claim to $280 billion. But after she rejected their argument that the potential sanctions are severely restricted by past legal precedents, the companies asked the appeals court to weigh in on whether disgorgement of profits is an appropriate remedy—and if so, to what extent. Now, government lawyers are contending that the major tobacco companies committed fraud and should have to forfeit all past proceeds from their wrongdoing—that is, $280 billion. The sum technically isn't "damages," because the lawsuit isn't a private action, but rather a RICO case, allowing equitable relief.

Test Scores Linked To Secondhand Smoke

Children exposed to second-hand smoke have lower test scores in reading, math and problem solving, according to research published in the January issue of *Environmental Health Perspectives*. The findings confirm earlier studies showing that tobacco exposure hurts children's intellectual development. This study, which included about 4,400 children, is said to be even more persuasive because of its size and the fact that researchers did not rely on parents to recall how much they smoked. Researchers found that children subjected to the least amount of smoke scored an average of 7 points higher in standardized math and reading tests, compared with children exposed to high levels. Children with the lowest exposure also fared better on two kinds of widely used reasoning tests. It is believed that about 33 million children are at risk for reading problems caused by "environmental tobacco." Exposure to secondhand smoke was measured by testing for cotinine, a byproduct of nicotine in the blood.

The American Lung Association says that second-hand smoke contains 200 poisons, including 69 that cause cancer. Most smokers know by now that smoking is bad for them. Unfortunately, however, parents who smoke don't really know that smoking is also bad for their children. The findings from this study give cities and states another reason to ban tobacco in public places and for insurers to pay for programs that help smokers quit. Tobacco is now believed by medical experts to be as harmful to children's brains as lead. Fetuses exposed to tobacco in the womb are more likely to be born small or suffer other problems. No child in this country should be exposed to second-hand smoke. In fact, neither should adult non-smokers.

Source: *USA Today*

Tobacco Companies Go After Young Folks

The tobacco industry simply won't give up. They are still trying to hook young people and cause them to become addicted. A new kind of social event, tobacco-industry-sponsored parties on college campuses, complete with complimentary cigarettes, are one of the latest tools used. The results of a new study published in USA Today suggest these parties are a powerful marketing tool that encourages young people to start smoking. Nearly one in 10 college students have gone to an industry-sponsored party, according to an article in the January edition of the American Journal of Public Health. Students at all but one of 119 colleges surveyed have attended the parties. The percentage of students at the schools is pretty high. At one school, 27% of students have attended these tobacco bashes, which often include live music and freebies such as T-shirts. Students who did not smoke before college were almost twice as likely to start if they attended industry-backed parties that included free cigarettes, the USA article said.

The article was based on results from the Harvard School of Public Health College Alcohol Survey, for which

nearly 11,000 students were interviewed in 2001. Many believe the findings put college administrators on notice. Tobacco-sponsored events aim to link smoking with alcohol, music, and socializing. The study found that binge drinkers and marijuana users were more likely to attend these parties. The rate of cigarette smoking declined from 1993 to 2000 among all adults, except those ages 18 to 24, according to the study. Researchers note that college students are the youngest legal target for tobacco marketing.

In the national tobacco settlement in 1998, tobacco companies agreed not to market to anyone under 18. Tobacco companies have since shifted their marketing efforts toward brand-centered social events, says Nancy Rigotti, director of the Tobacco Research and Treatment Center of Massachusetts General Hospital. Clearly, the tobacco industry is marketing to young adults as replacement smokers to replace the ones who die. That has always been their mode of operation. The American College Health Association suggests that colleges should not permit companies to give away tobacco products, such as cigarettes or smokeless tobacco, or to sponsor events on campus.

Source: *USA Today*

Flavored Cigarettes And Colorful Wrappers

The tobacco companies are not just targeting the college crowd. The industry is also using flavored cigarettes that are designed to lure very young children into lighting up. A report released by the American Lung Association criticizes so-called candy-flavored cigarettes. The packages are designed to attract children. Clearly, the tobacco companies are finding new ways to addict young folks. Some examples are:

- Kool's "smooth fusion" cigarettes come in "midnight berry" and "mocha taboo;"
- Camel offers flavored cigarettes year-round, as well as seasonal products, such as pineapple coconut in the summer and toffee in the winter;
- Skoal chewing tobacco varieties include apple and berry; and
- Lesser-known brands of cigarettes called Sweet Dreams and California Dreams, made by California-based Kretek International, come in bright or pastel wrappers.

Although the 1998 tobacco settlement forbids targeting children with cartoon characters such as Joe Camel, critics note that flavored cigarettes often are marketed with drawings. It should be noted that anti-tobacco groups also contend that sugary flavors may soften the experience of smoking for the first time. In any event, this tactic is a prime example of how the tobacco companies are going after young people in order to maintain their market. If they don't get to the children, the market will eventually be lost.

Source: *USA Today*

XX. THE CONSUMER CORNER

A Hole In Auto Regulation

Most folks don't realize that there is a huge gap in auto-industry regulation that deals with vehicles adapted for disabled drivers. Presently, there are almost no rules specifically written for those vehicles. Some believe that hole exists, in large part, because the people it would benefit don't want anything to encumber their freedom to drive. That's not too hard to figure out, but that doesn't excuse the oversight. Modified vehicles should have an engine kill-switch within easy reach of a driver and a Global Positioning System device to broadcast their location in an emergency. That is a fairly simple thing to do from a design perspective. The federal Department of Transportation estimates there are as many as 2.3 million modified vehicles on the road that are designed for drivers or passengers who have lost mobility because of injured limbs or spinal-cord injuries.

Regulatory agencies closely track the car industry, but they have paid very little attention to this important area. The National Highway Traffic Safety Administration has written just one safety rule that deals with this area of concern. It relates to a device that lifts wheelchairs into vehicles. No one knows how many modified vehicles malfunction or crash because regular police records don't contain such detailed information. What little oversight exists comes from veterans' groups and state-based rehabilitation programs that pay for customization work. Unfortunately, that is very little insofar as safety is concerned.

Forms completed by local law-enforcement officials don't indicate whether crashed vehicles were equipped with special controls for disabled drivers. Another source of information is a national database based on randomly sampled reports from accidents in which vehicles were towed. From that data, NHTSA estimates that between 1997 and 2003, an annual average of 3,200 adapted vehicles crashed and were towed, or 0.14% of adapted vehicles in circulation. By comparison, about 3.3 million regular vehicles, which are more heavily regulated—or 1.6% of the total—suffered a similar fate. It's still hard to know how many adapted-vehicle crashes were caused by mechanical malfunctions. To date, NHTSA rulemakers haven't proposed new regulations for adapted vehicles. The agency's report listing rules likely to be proposed or finalized in the coming year contains no reference to them. Hopefully, NHTSA will take a closer look at this situation and take some action.

Source: *The Wall Street Journal*

Class Action Suit Against H&R Block Survives

H&R Block has lost a U.S. Supreme Court bid to break up a class action suit that accuses the tax-preparation service of gouging as many as 17 million customers on refund loans. The suit contends many consumers paid interest rates of more than 100% and were not told Block profited from the loans, which provided advances on anticipated refunds. At one time Block and banking partner Household International tried to settle the case for $25 million. However, a federal appeals court overturned that bid in 2002, saying the settlement wasn't in the best interest of customers. Now the lawsuit will proceed as a class action.

Advertising Claims Should Tell The Truth

The maker of Listerine mouthwash will have to spend $2 million to replace what a judge called misleading advertising suggesting the product is as effective as flossing at fighting plaque and gingivitis. Stickers will have to be placed over the claim on Listerine bottles nationwide. Advertisements that hang on bottlenecks will also have to be removed. Television, print, and medical-journal ads using the campaign are also being pulled. The as-effective-as-floss campaign has been removed from the Listerine website. A U.S. District Judge ruled that the advertising poses a public health risk and could undermine the message of dental professionals. The lawsuit was filed by a Johnson & Johnson company that makes dental floss.

The judge said dentists have been urging patients to floss for decades because the benefits "are real — they are not a myth." McNeil-PPC Inc., a subsidiary of Johnson & Johnson, sued Pfizer over the campaign, which began in June, saying it posed an unfair threat to its sales of dental floss. Pfizer is considering an appeal of the injunction. According to the company, several million bottles will be affected by the ruling. Pfizer's advertising campaign featured a TV ad titled "The Big Bang" that asserts Listerine is clinically proven to be as effective as floss. The ads did caution, however, that there is no substitute for flossing. However, most folks would likely believe that Listerine was a substitute for flossing, because of the ads. Pfizer said it disagreed with the court's ruling, but that the company intended to comply with it.

Car Dealer Settles Deceptive Ad Complaint

Bill Heard Enterprises, a Columbus, Georgia-based auto dealer, has agreed to a 188,000 dollar settlement after the investigation of deceptive advertising practices by the Georgia governor's Office of Consumer Affairs. The settlement involves four metro Atlanta dealerships—Bill Heard Chevrolet at Town Center, Buford and Union City, and the Tom Jumper dealership in Roswell. The practices cited by the State of Georgia include:

- Telling customers they were pre-approved for a loan when they were not.
- Claims that vehicles were available for sale when they were not.
- Claims that all vehicles came with limited warranty when they did not.
- Claims that cars were available in repossession sales when most of the vehicles were not repossessed.

The dealer says that changes are under way and that comprehensive training to its managers will be provided as part of the agreement. Bill Heard Enterprises employs more than 3,500 people at 15 dealerships in Georgia, Alabama, Florida, Tennessee, Texas, Nevada and Arizona. I hope this settlement will result in consumers being treated fairly in the future.

Kerosene Heaters Cause Serious Problems

The latest statistics from The National Fire Protection Association (NFPA) show two out of three reported home heating fires, leading to injuries and deaths, involved portable and fixed space heaters. In cold weather many folks turn to portable heaters for a little extra warmth. Out of all the types of heaters, the NFPA says portable kerosene heaters have the highest risk of fire death, and they're actually illegal in some states. Fire officials discourage people from using a flammable liquid as a fuel. If they must be used, there are several safeguards that should be followed:

- Make sure the kerosene is K-1 clear type;
- Never refill the heater inside or when it's hot;
- Keep the heater at least three feet away from flammable materials; and
- Don't let children go near it.

Fire officials say there are plenty of safer heaters out there. You should use an electrical device with ceramic type heating element. No open flame should be used with oil filled radiators. Portable kerosene heaters can't be used in public places like stores, restaurants, or nightclubs.

XXI. RECALLS UPDATE

Ford Recalls 262,113 Escape SUVs

Ford Motor Co. has recalled 262,113 Ford Escape sport utility vehicles to repair a defect in the rear gate. The recall, the second for the vehicles during December, covers 2001-2005 models whose rear lift gate could open during a crash. The National Highway Traffic Safety Administration reported the recall on its website. In addition,

49,800 of Mazda Motor Corp.'s Tribute SUVs, similar to the Escape, were recalled for the same problem. Ford had earlier recalled 470,245 SUVs from the 2002-2004 model years because of a possible accelerator problem that could result in elevated engine speeds.

Ford To Recall 792,000 SUVs, Trucks

The Ford Motor Company will recall 792,000 Ford vehicles because of fires caused by faulty cruise control systems. The entire 2000 model year of the Navigator, Expedition and F-150 truck will be recalled along, with a limited number of 2001 F-150 Super Cabs. The National Highway Traffic Safety Administration opened an investigation into the problem in November, having looked at 39 incidents in which fires occurred. At the time, Ford officials said they were cooperating with the agency's investigation. All of the fires occurred when the vehicle was already parked and with the engine turned off, according to the NHTSA. In some of the incidents, garages and a house have burned down. There have been no reports of fatalities or injuries.

Ford does not have enough new cruise control systems in stock to make the changes to the vehicles. People who bring their sport utility vehicle or truck back to a dealer will have their cruise control systems deactivated, but they won't be replaced. The recall is not expected to bring an end to the NHTSA investigation because investigators are not convinced that other model years don't have the same problem. In November, ConsumerAffairs.Com reported receiving numerous complaints about similar problems with Ford trucks and SUVs from the 1997 model year. In 1999, Ford had to recall 279,000 Lincoln Town Cars, Mercury Grand Marquis, and Ford Crown Victorias from the 1992 model year because of the same problem.

GM Recalls Over 98,000 Trucks

General Motors Corp. is recalling more than 98,000 pickups, vans and sport utility vehicles because of a potential problem with their power steering and braking systems. An advisory on the website of the National Highway Traffic Safety Administration said the problem, which can hamper but not eliminate the ability to stop or steer the vehicles, stems from fractures in their hydraulic pump driveshafts. Vehicles affected by the recall are from the 2000 model year and include Chevrolet C/K and Silverado pickups and Suburban SUVs. GMC Savana vans are also affected, along with GMC Sierra pickups and Yukon XL SUVs. GM was hit with numerous vehicle safety recalls last year. The latest announcement is another blow to the automaker's claims of improved quality. The timing was not good because GM was playing host in Detroit to the North American International Auto Show.

Push And Electronic Toys Recalled

The U.S. Consumer Product Safety Commission is recalling about 5,200 push and electronic toys imported by Los Angeles-based AA Importer Inc. The CPSC says the toys can easily break apart, exposing small parts that pose a choking hazard to young children. Thus far no injuries have been reported. The recall includes three toys: Push Along Frogs, Animal Organs, and Rock & Roll Kids Guitars. The Push Along Frog toy has a green plastic frog attached to a red plastic handle. The electronic Animal Organ comes in four different styles, all about 11 inches long. The style number, written on the back of the toy, begins with "666." The electronic guitars are about 14 inches long and have various colored buttons. The recalled toys were sold from July 2003 through October 2004 for about $3. Consumers can call (866) 879-4667 for information on returning the toys to the importer for a refund and postage reimbursement.

XXII. SPECIAL PROJECTS

Crashsafety.com Website

There is a new resource relating to automobile safety and information that our readers should know about. A team of developers set out to put together a website like no other website on the Internet. Their dreams came true on January 10, 2005, with the launch of CrashSafety.com. This site, or "CS" as the developers call it, is filled with crash safety data, technical service bulletins, recall information, legal resources and a host of other information related to vehicles. The information is pulled from a variety of credible sources including the National Highway Traffic Safety Administration, Office of Defective Products, Insurance Institute of Highway Safety, as well as many other safety groups and organizations.

Recalls and Safety ratings can be searched based on the year, make, and model of the vehicle. Under the Personal Injury section, visitors can read about common injuries sustained from defective products. If the visitor deems their injuries to be such that a lawsuit may be necessary, they can get a quick idea of what their lawsuit might be worth by checking out the "Lawsuit Calculator." Although this information is strictly hypothetical, it is based on the formula used by many insurance companies to determine legal liability. Finally, if a lawyer is needed, the visitor can contact a person who practices law in their area by clicking on the "Contact a Lawyer" link on the CS home page.

As an added resource, information about purchasing a vehicle, insuring a vehicle, or selling a vehicle can all be found at CS. If a person wants to see

how the gas prices in their area compare to the rest of the country, that can be found on this site. To top off the vast compilation of resources, the CS team updates the site around the clock with news related to automobiles and automobile safety. I recommend that our readers take a moment to visit CrashSafety.com—there just might be something there concerning the vehicle that you drive everyday. In fact, you might even find that your car, truck or SUV has been recalled.

Kate's Closet Helps Former Inmates

There is a special project at the church where my wife Sara and I attend that I believe deserves special mention. One of our members, Kim Bullard, is founder of a clothing ministry known as Kate's Closet at St. James United Methodist Church. This ministry provides business attire to women incarcerated at Tutwiler Prison who are nearing parole. Kim says: "We don't care why they were there. That is not discussed. Our goal is to show the love of Jesus to every woman that walks through that door and to provide them with a special experience." Kim and volunteers from the church run the boutique in the "Rock House," which is on the church property on Vaughn Road. The ladies are given a Bible, six outfits, a pair of shoes, a purse, matching accessories and a basket filled with such toiletries as soap, shampoo, and toothpaste—all at no cost. The women come to Kate's Closet as part of the Life Tech program, which provides character training, job interviewing skills, and tips for creating a resume. The items they get from Kate's Closet help them as they prepare for a fresh start in life.

Kim got the idea to start Kate's Closet after hearing the story of Kate Richardson of Aid to Inmate Mothers. Ms. Richardson, who spent time in prison, talked to a mission group at St. James about some of the challenges incarcerated women face after they are released from prison. Inspired by her speech, the church group began offering the baskets to the women when they got out of Tutwiler. But Kim, a graduate of Huntingdon College in Montgomery, was moved to do more. In 2002, Kate's Closet was born. The place is really nice and could pass for an upscale ladies store. Warm recessed lighting reflects off the soft pink walls lined with baby blue trim. Beads and broaches help accent the three rooms with washed and pressed racks of colorful clothing, divided by size. At first glance, it looks like an upscale boutique. But those who work and come there say it's so much more. To date, Kim and the store's team of "personal shoppers" have outfitted about 275 women. The St. James ladies who run Kate's Closet believe their "customers" deserve a second chance and are helping to make that a reality.

Kim, Judy Dunn, Rhonda Webb, and Lynn Reese are a few of the ladies at St. James who help out at Kate's Closet. They say that the women they've touched in turn have touched their lives. They say when the women come in, they are apprehensive at first. But once they put on their new outfits and a little makeup, smiles appear and tears begin to flow. The comment they hear the most: "Is that really me?" They are starting a new life, a positive life. When they come to Kate's Closet, some of them are getting things they have never had. The ladies at St. James are fortunate to be blessed and to pass those blessings along to others. The word about Kate's Closet has spread. The project has been featured in several Christian women's magazines, a segment on public education television, and in a great article in the Montgomery Advertiser. Presentations have been made about the project at area churches. More women are using the program, and our ladies are touched by the response they are receiving. Kim says: "When the ladies walk though our door, it's hard for them to believe that somebody who never met them loves them, but we do. We never forget them."

Sam And Kristy Williams Are Special Folks

Sam and Kristy Williams have started a most unusual ministry. The husband and wife team have a traveling petting zoo with all sorts of exotic animals as well as the normal kind (donkeys, horses, cows, a camel, foxes, etc.). Sam and Kristy love children and believe this is a good way to spread and share the love of Jesus Christ to young children and their parents. This is a great evangelistic tool in my opinion. Sam and Kristy will travel anywhere in Alabama and will go out of state on request. They have been on the road for the past several months pretty much full-time. Sam gave up a good job as a game warden to make this ministry a full-time affair. Sam is from Clayton, which is my hometown, and is a good person. He is the son of a good friend of mine—Sammy Williams—who was an all state football and basketball player at Clayton High School, where we both graduated. I am very proud of Sam and Kristy and just wanted our readers to know that some good things are still happening in this world. If you want to learn more—write Sam or Kristy—1233 County Rd 6628—Banks, Alabama, 36005 or call them at (334) 343-5407.

XXIII. FIRM ACTIVITIES

Employee Spotlights

Leigh O'Dell

Leigh O'Dell will be returning to the firm in April. Leigh was a lawyer with us from 1994 through 1998. She left in 1998 to take a position with Focus on the Family. Under the leadership of Dr. James C. Dobson, Leigh served Focus on the Family as Director of Women's

Ministries. In that capacity, Leigh was responsible for Renewing the Heart, a nation-wide series of one-day arena events designed to encourage and refresh women through worship and the Word of God. Leigh came back to us in 2000 for a short time before joining AnGeL Ministries, the ministry of Anne Graham Lotz, daughter of Dr. Billy Graham. As Director of Events, Leigh was responsible for the development and execution of Just Give Me Jesus, a nation-wide series of two-day arena events devoted to the exaltation of Jesus Christ and designed to revive the Church. Leigh will stay with Anne until she completes some pending matters. We are most fortunate to have Leigh coming back to the firm. She is a very good lawyer and more importantly a fine person in every respect. Leigh will be working in our Mass Torts Section.

Deborah Hochhalter

Deborah Hochhalter, who has been with our firm for 7 years, currently serves as Julia Beasley's legal assistant. In this position, Deborah, who is a valuable member of the litigation team in her section, assists with all phases of trial preparation. She also participates in the trials. Deborah attended Huntington College and received a Paralegal Degree from Jones Law School. Deborah's husband, Dana, is employed by Steris Corporation. Her son Shawn and his wife Kristen are expecting their first child in May. The baby boy will be Deborah's first grandchild. We are pleased to have Deborah, who does excellent work, with the firm.

XXIV. SOME PARTING WORDS

President Bush and the powerful corporate lobby in Washington are mounting an attack on the civil justice system that is unparalleled in my lifetime. I don't believe their well-financed and carefully planned attack will be successful, however, because the entire effort has been based on a false premise condemning what they describe as "frivolous lawsuits." The truth is that the tort reformers consider all lawsuits as frivolous. It is extremely troubling that the Bush White House has such little regard for ordinary people. The control that Corporate America had over the first Bush Administration seems to have intensified. I hope and pray that President Bush will eventually realize that he is the President of all Americans and not just the rich and powerful. There are so many problems facing our nation that we can't afford to be further divided. A divided nation can't maintain a position of leadership on the world stage and that is as certain in today's world as death and taxes. I believe that unifying our people should be a primary goal of this President. If he will do that our nation will be much better off at home and certainly much stronger around the world. I will continue to pray for President Bush and encourage all of our readers to do so.

On the national political scene, I have two small pieces of advice for my Democratic friends. The first is that somebody needs to tell John Kerry his campaign is over and he lost a winnable race. The second is that we don't need Howard Dean to head up the National Democratic Party. We lost the election because those in charge ran a very poor campaign. We can assume more losses in the future if we turn the helm of the party over to Dean. Hopefully, there is a man or woman somewhere in this country with some good common sense and a sense of what's right and wrong who can head up the party and help us right a "leaking" ship. If we don't wake up—it will soon be a "sinking" ship.

I have had several folks tell me that they have become discouraged and don't know where to turn because of all the monumental problems facing us today. We have all read Thomas Paine's words of two hundred thirty years ago and probably never really paid much attention to what this patriot was really saying. He was calling to arms a people who were largely oblivious to what was going on around them. Paine's words apply today in this country as much as they applied to the colonists of 1777.

> *These are times that try men's souls. The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of their country; but he that stands now, deserves the love and thanks of man and woman.*
>
> Thomas Paine
> 1777

We can certainly take a lesson from those powerful words. Standing up for the rights of ordinary people is not out-of-style and is something those of us in my profession should do at every opportunity. Personally, I will fight for people so as long as I have breath in me. God has greatly blessed me and my family and I sincerely believe that I am obligated to work diligently for those who are less fortunate and for those whose rights and liberties are being trampled upon. We can also all take a lesson from Jesus who tells us how we should treat other people. When on this earth, He told the Pharisees—when asked—that the greatest commandment was:

> *You shall love the Lord your God with all our heart, with all your soul, and with all your mind. This is the first and great commandment. And the second is like it: You shall love your neighbor as yourself. On these two commandments hang all the Law and the Prophets.*
>
> *Matthew 22:37-40*

Jesus further instructed His own disciples on how to deal with people and the world's problems by teaching them as follows:

And seeing the multitudes, He went up on a mountain, and when He was seated His disciples came to Him. Then He opened His mouth and taught them, saying: Blessed are the poor in spirit, For theirs is the kingdom of heaven. Blessed are those who mourn, For they shall be comforted. Blessed are the meek, For they shall inherit the earth. Blessed are those who hunger and thirst for righteousness, For they shall be filled. Blessed are the merciful, For they shall obtain mercy. Blessed are the pure in heart, For they shall see God. Blessed are the peacemakers, For they shall be called sons of God. Blessed are those who are persecuted for righteousness' sake, For theirs is the kingdom of heaven. Blessed are you when they revile and persecute you, and say all kinds of evil against you falsely for My sake. Rejoice and be exceedingly glad, for great is your reward in heaven, for so they persecuted the prophets who were before you.

Matthew 5:1-12

We would all do well to retool our personal walk through this life to follow as fully as possible the teachings of our Lord and Savior. If we did this, this country would become a much better place for all of us. In fact, it would be a place where the "servants" were truly **above** their "masters" in every way and where the rights and dignity of our fellow man were really respected. Jesus was very clear in telling us to be concerned with the needs of the "least of us" and that, I am afraid, all of us ignore too much of the time. I know that I have lots of work to do in my personal life in this respect. I suspect there are others who may also have the same need. I suggest we all read Matthew 25: 31-46. There is a great message there for us!

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